TERMINATION OF EMPLOYMENT CONTRACT BY OPERATION OF LAW IN THE EDUCATION SECTOR: THE CONSTITUTIONALITY AND VALIDITY OF THE DEEMING PROVISIONS

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TABLE OF CONTENTS

SUMMARY

Fundamental to any contract of employment is the obligation that rests on an employee not to be absent from work without justification. Under the common law, if an employee did that, the employer would be entitled to dismiss him or her on notice.

The International Labour Organization Convention (ILO) 158 of 1982 provides that the employer must have a reason for a dismissal and sets out broad categories or reasons for dismissals .

Section 23 of the Constitution of the Republic of South Africa, 1996(Act 108 of 1998) provides that "*Everyone has the right to fair labour practices*". Section 33 of the Constitution provides that *"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is designed to give effect to just administrative action.

Section 1 and 3 of the Labour Relations Act,1995(Act 66 of 1995)(LRA) require compliance with Article 7 and 8 of the ILO Convention 158 of 1982, when the employment of a worker has been terminated by his or her employer. The LRA protects employees against unfair dismissal.

In the Department of Education, Section 14(1)(a) of the Employment of Educators Act, 1998 provides for the discharge of an educator in the event that he or she absents himself or herself from work for a period exceeding 14 consecutive days without the permission of the employer. A similar provision, Section 17(5)(a)(i) of the Public Service Act, 1994 provides for the discharge of an officer other than an educator who absents himself or herself from his or her official duties without the permission of the Head of Department for a period exceeding one calendar month. Section 14(2) of the Employment of Educators Act, 1998 and 17(5)(b) of the Public Service Act,1994 afford an employee who has been deemed discharged to show good cause why he or she should be reinstated. Against this background, the critical legal question is the constitutionality of the deeming provisions. The study will examine the validity of these provisions in relation to the ILO Conventions, Constitution, LRA and PAJA.

CHAPTER 1
INTRODUCTION

The Department of Education as the employer has two categories of employees. These are educators employed in terms of the Employment of Educators Act[1] and non-teaching staff employed in terms of the Public Service Act[2]. Section 14(1)(a)[3] provides for the discharge of an educator in the event that he absents himself from work for a period exceeding 14 consecutive days without the permission of the employer. A similar provision, section 17(5)(a)[4] provides for the discharge of an officer other than an educator who absents himself or herself from his or her official duties without the permission of the Head of Department for a period exceeding one calendar month.

This is an issue that has been a nightmare for the employer, employees, unions and arbitrators. It is not always easy to detect the real reason for the absence and when it constitutes the abuse of time and sick leave. Sometimes it is caused by personal circumstances of the employee which are unforeseen. Because of this uncertainty arbitrators often find that Bargaining Councils have no jurisdiction to entertain these disputes since these provisions are peremptory.

Against this background, the legal question in this piece of work is the constitutionality of the deeming provisions and whether they fulfill the constitutional imperatives to promote the realization of every one's rights to fair labour practices and just administrative actions. The study will examine the legality and validity of these provisions in relation to the Constitution[5] of the Republic of South Africa (hereinafter referred to as "the Constitution"), the Labour

[1] 76 of 1998.
[2] 103 of 1994.
[3] Employment of Educators Act.
[4] Public Service Act.
[5] 108 of 1996.

Relations Act[6] (hereinafter referred to as the "LRA") and the Promotions of Administrative Justice Act[7] (hereinafter referred to as the "PAJA").

The questions that need to be answered are whether the deeming provisions as contained in Sections 14(1)(a)[8] and 17 (5)(a)(i)[9] are:

(1) in conflict with the Constitution

(2) in conflict with the LRA

(3) administrative actions

It is submitted that when determining whether an employee was dismissed a distinction is to be drawn between abscondment, desertion and absenteeism. Abscondment is deemed to have occurred when an employee has been absent from work for a time that warrants the inference that the employee no longer intends to resume work. Desertion is deemed to take place when an employee expressly intimates that he will not resume work. In all other cases, the onus rests on the employee to explain the absence. These distinctions will also form part of this study.

For the purpose of this treatise it becomes necessary to have a vivid picture of what the labour relations entail in the context of the Constitution. It should be mentioned that the Constitution is the supreme law of the Republic[10].For the purpose of labour law and this study, the Bill of rights is of primary importance. In the years since the Constitution has come into force, our courts and our legal system have had to consider the impact of these fundamental and protected rights- some of which impact directly on labour law[11]. Section 23 of the Constitution is titled 'Labour Relations'. According to Basson *et al,* this section protects a number of pivotal labour rights such as everyone's right to fair practices, the right to freedom of association, and the right to bargain collectively. Section 23 of the Constitution also provides for the enactment

[6] 66 of 1995.
[7] 3 of 2000.
[8] Employment of Educators Act,1998.
[9] Public Service Act, 1994.
[10] South Africa.
[11] Basson,Christianson,Garbers,le Roux,Mischke,Strydom *Essential Labour Law (*2009) 1-15

of national legislation to give effect to these rights. Furthermore section 33 of the Constitution provides for fair administrative action.

It is also necessary to consider recent developments in our law as regards employment contracts- a number of recent decisions of our courts have dealt with the interaction between the employment contract, labour legislation and, importantly, the effect of the fundamental rights protected in chapter II of the Constitution[12]. It is clear from these cases that the employment contract remains an important source of duties and legal remedies in our law.

It should be mentioned that the International Labour Organization (hereinafter referred to as "ILO") of which South Africa is a member country, is an important source of labour standards across countries. Through its Conventions and Recommendations the ILO has built up a set of principles which regulate a wide range of labour matters. Over the years, international labour standards in the form of ILO Conventions have played a formative role in the development of South African labour law.

In summary, fundamental to any contract of employment is the obligation that rests on an employee not to be absent from work without justification. Under the common law, if an employee was to do so, the employer would be entitled to dismiss the employee on notice. However, in modern labour law an employer would not be entitled to dismiss an employee for minor absence which caused little or no prejudice to the employer.

Chapter 2 of this study contains the general principles of employment contract and an overview of termination of employment by operation of law. Chapter 3 will focus on the constitutionality and validity of the deeming provisions and whether they fulfill the constitutional imperatives to promote everyone's rights to fair labour practices. In Chapter 4 focus will be on section 1 read with section 3 of the LRA which requires compliance with Article 7 and 8 of the ILO Convention 158 of 1982, when the employment of a worker has been terminated by his or her employer.

[12] Bill of Rights.

Section 34 of the Constitution emphasizes this compliance with the procedural provisions contained in that section as well as the procedural requirements of the rule of law and also procedural requirements of Convention 158. This Chapter will then examine whether the deeming provisions are in conflict with those of section 188 of the LRA, which decree that 'a dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity and that the dismissal was effected in accordance with a fair procedure. Chapter 5 includes the discussion of administrative action with specific reference to PAJA. The discussion is concluded in Chapter 6.

CHAPTER 2

THE CONTRACT OF EMPLOYMENT

2.1 BASIC PRINCIPLES OF THE CONTRACT OF EMPLOYMENT

The contract of employment is the foundation of the relationship between an employee and an employer. According to Grogan[13] unless the parties have concluded an agreement that satisfies the requirements of a contract of employment, no employment relationship comes into existence, and the parties do not fall within the scope of the labour legislation discussed elsewhere in this piece of work. A number of issues and principles have to be borne in mind when considering the employment contract as a whole. It is for example, always necessary to bear in mind that the employment relationship is not one of equality, the employer, as a rule, will have considerably more economic power than the employee. This will mean, in practice, that it is the employer who can dictate the terms and conditions of employment to the employee.[14]

In *Member of Executive Commitee , Department of Health , Eastern Cape v Odendaal & others*[15] the court held that the contract of employment (whether verbally or in writing) constitutes the basis or *sine qua non* for existence of the employment relationship between an employer and an employee. Historically at least it has been accepted that the contract of employment signaled the commencement of the employment relationship between the employer and employee. Once the two contracting parties have agreed on the core elements of the employment contract which is an agreement that the employee will place his or her labour at the disposal of and under the control of the employer in exchange for remuneration, then an employment relationship will be created.

The fact that the contract of employment is important also appears from the decision in *Member of Executive Committee, Department of Roads & Transport, Limpompo Province &*

[13] Grogan *Employment Rights* (2010) 43.
[14] Basson *et al Essential Labour Law* (2009) 21.
[15] (2009) 30 *ILJ* 2093 LC.

Another v Mahango[16] where the court pointed out that the common law of contract of employment should be developed in such a way that it conforms with the constitutional right to fair labour practices. The contract of employment (although influenced by labour legislation, collective bargaining and constitutional imperatives of fair labour practices) remains the basis of the employment relationship. Put differently, an employment relationship cannot exist without the conclusion of a contract of service. Although a dismissed employee after the decision of the Constitutional Court in *Transnet Ltd & others v Chirwa*[17] no longer has the option of proceedings with a common law remedy for contractual damages based on a breach of contract with the result that the dismissed employee is obliged to follow the dispute procedures as set out in the LRA. The Constitutional Court has nonetheless made an important statement regarding the importance of the employment contract as the source of the power to terminate the contract of employment.

2.2 THE DEFINITION OF THE EMPLOYMENT CONTRACT

Grogan[18] defines a contract of employment as an agreement between two parties in terms of which one of the parties (employee) undertakes to place his or her personal services at the disposal of the other party (employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them.

From the above it can be deduced that a contract of employment is:

- Voluntary;
- Between two parties
- The employee agreeing to perform certain specified and/or implied duties for The employer;
- For an indefinite or specified period;
- In return for payment of a fixed or ascertainable remuneration to the employee;
- Giving the employer a right to direct the employee as to the manner in which his

[16] (2008)29 ILJ 272 (E).
[17] (2008) 2 BLLR 97(CC).
[18] *Supra.*

or her duties are carried out.

2.3 THE DEFINITION OF AN EMPLOYEE

In terms of Section 213 of the Labour Relations Act[19]an employee is

(a) any person, excluding an independent contractor who works for another person or for the State and who receives or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

Basson[20] shows that for the first time, the LRA included employees in the public service and in the education sector. Before 1993, people working for the State were excluded from the ambit of labour legislation. During 1993, two pieces of legislation (the Public Service Relations Act 102 of 1993 and Education Labour Relations Act 146 of 1993) came into force, giving employees in these sectors the right to belong to a trade union and to bargain collectively. But now, in terms of the LRA, these employees also fall within the ambit of labour legislation and the State, in respect of the public sector and educators, is now regarded as an employer.

It becomes important to mention the fact that in this piece of work focus will be on these types of employees employed in the public service and/ or in the education sector.

2.4 TERMINATION OF THE EMPLOYMENT CONTRACT

According to Grogan[21] as in the case of all contracts, the contract of employment may end in various ways', some consensual, others unilateral. The methods of termination of employment contracts are as follows:

- On expiration of the agreed period
- On completion of the specified tasks
- By notice
- By summary termination

[19] 66 of 1995.
[20] *Supra.*
[21]Grogan *Workplace law*(2008) 80-86.

- By repudiation
- By mutual agreement
- By death of either party
- By insolvency
- By supervening impossibility of performance
- By state action
- And by operation of law

The impact of the current Labour Relations Act on the common law employment contract is particularly significant in circumstances where the employer wishes to terminate the employment contract through dismissal. Although it is in terms of contractual principles lawful to terminate a contract of employment by giving the other party the required contractual notice, it is, however, trite in the labour law context that the *lawful* termination of the contract does not necessarily mean that the termination of the employment contract is also *fair.* In *Member of Executive Committee, Department of Health, Eastern Cape v Odendaal & others*[22] , the court held that labour legislation has therefore supplemented the common law principles regulating the termination of a contract of employment with the import of the requirement of fairnes. The requirement of a "*fair"* termination does not, however, imply that employers need not adhere to the requirement in respect of the *lawful* termination of the contract of employment. From the aforegoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have softened the harsh effects of a mere lawful termination of the contract may have. In *Amazulu Football Club v Hellenic Football Club*[23]*,* it was held that it does seem that it may safely be stated that the fairness requirements embodied in the LRA operate-at least in respect of the termination of the

[22] *(*2009) 30 *ILJ* 2093(LC).
[23] (2002) *ILJ* 2357(ARB) at 2364 G-H.

employment contract- alongside the contractual principles regulating the termination of the contract of employment.

For the purpose of this chapter, our discussion will be limited on repudiation of the employment contract and a brief overview of termination of the employment contract by operation of law.

2.4.1 The repudiation of the employment contract

Since the life of the contract depends on continuing performance by both parties of their respective obligation, repudiation by either party, whether express or implied, gives the other party the right to terminate or to claim damages or specific performance[24]. Grogan further shows that repudiation in the narrow sense occurs when the repudiating party evinces a clear and unambiguous intention not to go on with his contract of employment. Repudiation in the wide sense takes the form of a material breach of contract that entitles the other party to cancel it. It seems that on this view any form of serious and continuing misconduct constitutes 'repudiation in the wide sense' by the employee or employer. In either case, the continued employment relationship is rendered intolerable.

In *Toerien v Stellenbosch University* [25]the court held that once an employer and an employee conclude a contract of employment, the employer must accept the employee into employment and provide him or her with contractually agreed work. An employer is therefore obliged to allow the employee to perform his or her services in accordance to the agreed contract of service. Where an employee, however, refuses to tender his or her services in terms of the contract of employment, it follows that the employer will have no reciprocal duty to remunerate the employee. Suffice to point out that the repudiation of a contract entitles the innocent party to either terminate the contract or to enforce it.

[24] Grogan, *Workplace Law* 84.
[25] (1996) *ILJ* 56 (C) at 60C-D.

In *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others*[26] the court held that a repudiation or breach of a contract will arise where a party to a contract renounces his intention to perform the contract or repudiate it before the time for performance.

The court in *Nash v Golden Dumps(Pty) Ltd*[27] noted

> 'Where one party to a contract, without lawful grounds, indicates to the other in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract… Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated…"

Although the impression may be gained from this quotation that the guilty party repudiates the contract intentionally, the courts, in numerous cases, have stated that the test for repudiation is not subjective but objective.

In *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* [28] the court pointed out that the test to determine whether there has been repudiation is not subjective but objective:

"The question is therefore: has the appellant acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part of the contract?

A person who repudiates the contract breaches the contract. In this regard the Supreme Court of Appeal in *Datacolor International (Pty) Ltd v Intamarket (Pty)Ltd* [29]accepted that a repudiation of a contract is a breach in itself. The court further accepted that the "intention" need not be deliberate or subjective but is simply *"descriptive of conduct heralding non-or*

[26] (2009) 30 *ILJ* 2093 (LC).
[27] (1985) (3) SA 1(A) at 22D-F.
[28] (1980) (1) SA 645(A) at 653).
[29] (2001) 2 SA (SCA) at 187.

malperformance on the part of the repudiator". The innocent party to the breach therefore has the right to terminate or to cancel the agreement but until he or she exercises the election and communicates the election to do so the guilty, the contract will remain in force.

2.4.2 Termination of employment contract by operation of law

Fundamental to any contract of employment is the obligation that rests on an employee not to be absent from work without justification. Under the common law, if employees were to do so, the employer would be entitled to dismiss the employee on notice. However, in modern labour law an employer would not be entitled to dismiss an employee for minor absence which caused little or no prejudice to the employer.

It should be mentioned that abscondment occurs when an employee has expressly or impliedly intimated that he does not intend to return to work. This constitutes a breach of a fundamental term of the contract and the employee is regarded as having repudiated the employment contract. If and when an employee absents himself from duty the absence may be regarded as without authorization and deserving of disciplinary action unless any of the legally recognized exceptions apply. Mere absence is not in itself conclusive evidence of desertion. Up to the point when the intention not to return is established, the absent employee is simply absent without leave. Establishing the existence or otherwise of that intention is therefore critical.

If an employee absconds or deserts his or her employment the question arises as who terminates the employment contract. Does the employee, by leaving his or her employment without explanation or reason, terminate the employment contract or does the employer terminate the contract by accepting the repudiation of the contract? The answer to this question may impact on whether or not there has been dismissal[30]. In *South African Broadcasting Corporation v CCMA and others*[31] the Labour Court distinguished between desertion and absence from work and held that although a desertion constituted a breach of contract this by itself did not necessary bring the contract of employment to an end. Only when

[30] Basson *et al, Essential Labour Law* 30
[31] (2001) 4 BLLR 449(LC).

the employer accepted the employee's repudiation of the contract could it be said that there was no dismissal.

In *SACWU v Dyasi*[32], the Labour Appeal Court held that if the employee cannot be traced, the employer may have no other option but to accept the employee's breach of contract. In such a case, the Court said, it could be argued that the employee terminated the contract, not the employer. But if the employer has a choice, as in this case, and the employer chooses to terminate the contract, it would constitute a dismissal.

Absenteeism must be treated as misconduct under the applicable disciplinary code. Employees will be deemed to have deserted only when evidence warrants the conclusion that they have formed a clear and unequivocal intention to abandon the employment. It is the employer's duty to establish whether this is the case. The Labour and Labour Appeal Courts respectively have held that a dismissal of a deserting employee occurs when the employer accepts the employee's repudiation of the contract[33].

Where a statute provides that an employee is deemed to have been dismissed after a certain period of an unauthorized absence, absence beyond that period is said to constitute termination by operation of law, which does not constitute a dismissal for the purpose of the LRA. According to Grogan[34]some legislation, notably in the Public Service provides that employees shall be deemed discharged if they are absent from work without permission of a given period. There is a strong line of authority to the effect that termination of an employment relationship as a consequence of such provisions is not a dismissal for the purposes of the LRA , but is said to constitute rather termination of the relationship 'by operation of law'. Grogan [35]further showed that although, the Labour Court has warned that statutory employers are entitled to rely on such provisions only on exceptional circumstances , such deeming

[32] (2001) 7 BLLR 731 (LAC).
[33] *SABC V CCMA & Others(supra) and SACWU V Dyasi(supra)*
[34] Grogan *Workplace Law* 86.
[35] *Supra.*

provisions have now been upheld by the Supreme Court of Appeal and may only be attacked on the basis that the employee was not in fact absent.

Section 14(1) of the Act[36] provides:

"14. Certain educators deemed to be discharged-

(1) An educator appointed in a permanent capacity who-

(a) is absent from work for a period exceeding 14 consecutive days without the permission of the employer;

(b) while the educator is absent from work without permission of the employer; assumes employment in another position;

(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or

(d) while disciplinary steps taken against the educator have not been disposed of, resigns or without permission of the employer, assumes employment in another position;

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the *educator was present at work; or*

(ii) paragraph (e) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.

[36] Employment of Educators Act (Act 76 of 1998).

(2) If in an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may on good cause shown and notwithstanding anything to the contrary contained in this Act, approve reinstatement of the educator in the educator's former post or any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine"

A similar provision provides for the discharge of an officer other than an educator who absents himself from his official duties without permission of the Head of Department.

Section 17(5) of the Act [37] provides:

"*Section 17(5)(a)-*

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

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

(b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraphs (a), the relevant executing authority may, on good cause shown and notwithstanding anything

[37] Public Service Act,1994(Act 103 of 1994). Also please take note that this Section has been amended as Section 17(3) of the Act.

contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine .

According to Cohen[38]the effect of these statutory provisions is that, provided the stipulated requirements are satisfied, the employment contract terminates by operation of law. It is said that an employer's decision not to reinstate the employee whose employment has been terminated by operation of law is not a dismissal, as the contract remains terminated by law as opposed to being terminated by an act of the employer.

In *Nkopo v Public Health and Welfare Bargaining Council*[39] the Labour Court held that the applicant had not been dismissed in terms of the LRA as the discharge took place by operation of law. In *MEC, Public Works, Northern Province v CCMA*[40] the Court held that if section 17(5) applies there is no dismissal and the decision not to reinstate does not constitute a dismissal, as the contract remains terminated by operation of law and not the decision of the employer.

2.5 CONCLUSION

From the above it can be deduced that there must at the time of contracting have been consensus between the parties in the sense that they both had the serious intention to create mutual rights and duties which they would be legally bound, and they must have been aware that the other had intention. Therefore, whether the agreement of the parties gives rise to a binding contract of service is determined according to the general principles of the law of contract.

[38] *Termination of employment by operation of law-bypassing the unfair dismissal provisions of the Labour Relations Act*, Faculty of law, University of Kwazulu-Natal.
[39] (2002) 23 *ILJ* 520 (LC).
[40] (2003) 10 BLLR 1027 (LC).

It has also been shown that under certain circumstances termination of employment is triggered by the occurrence of an event and is not based on an employer's decision, there is no dismissal as contemplated by section 186 of the LRA. The employment contract is terminated by operation of law.

In the Chapter that follows the constitutionality and validity of these provisions, as to whether they fulfill the constitutional right to fair labour practice, will be looked at.

CHAPTER 3

THE CONSTITUTIONALITY AND VALIDITY OF THE DEEMING PROVISIONS

3.1 INTRODUCTION

It is submitted that the Constitution, enacted in 1996, is the highest law in the Republic. Its adoption caused far-reaching changes to the South African legal system, not the least was to subordinate all legislation to its provisions and to restrain the legislature from unreasonably encroaching on the individual rights entrenched in Chapter 2[41]. It should also be mentioned that the Constitution also deals specifically with labour and employment rights. Section 23 of the Constitution confers on 'everyone' the right to fair labour practices, an expression taken to mean that both employers and employees are protected under this particular provision.

In this chapter focus will be on the employment contract and the constitution, case law developed in recent years on the constitutional right to fair labour practices will be analyzed and the jurisprudence pertaining to the constitutionality and validity of the deeming provisions will also be the subject of the discussion.

3.2 THE CONTRACT OF EMPLOYMENT AND THE CONSTITUTION

It is submitted that there can be little doubt that the right to fair labour practices is having a deep and profound impact on the contract of employment. Section 23(1) of the Constitution stipulates that 'everyone has the right to fair labour practices'. A central question is whether there is a strict correlation between the constitutional right and the unfair labour practice provision in the LRA[42], particularly as one of the purposes of the Act is to give effect to the labour rights enshrined in the Constitution[43].

[41] Grogan, *Employment Rights(* 2010)3.
[42] S 186.
[43] S 1(a) of the LRA.

Less clear are the circumstances under which an applicant may rely directly on the Constitution where legislative provisions offer no protection against a practice which may be unfair, for instance, dismissing an employee without a fair procedure and for a fair reason. The Constitution is the supreme law, and all law, including the common law, derives its force from the Constitution. It is submitted that our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution.

The following paragraphs will examine the case law developed over the years in an endeavour to qualify the above.

3.3 CASE LAW

3.3.1 *NEHAWU V University of Cape Town& others*[44]

The *NEHAWU* case concerned a decision taken by the University of Cape Town to outsource certain of its activities to be performed by a number of private companies. These activities were mainly cleaning, gardening and sports ground maintenance services. This would have resulted in the termination of services of 267 university staff members. The university gave these employees the choice between applying for a limited number of vacancies on its staff and applying for jobs with the contracting companies.

The Constitutional Court held that the right to fair labour practices is not defined by the Constitution and is left to gather meaning primary from legislation and through the decisions of the Courts.

The Constitutional Court noted that the relevant provision is section 23(1) of the Constitution which provides that:

> *" Everyone has the right to fair labour practices"*

[44] (2003) 24 *ILJ* 95 (CC).

The Court held that

> "Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension that is inherent in labour relation between the interests of the workers and those of the employers. Indeed what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define the concept"[45].

The Court further held that

> "The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the Labour Appeal Court and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to section 23(1) of the Constitution. In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Convention and Recommendation of the International Labour Organization"[46].

In the circumstances of this case the Court held that the right to fair labour practices applies to both employers and employees and it cannot be said that fairness is of particular importance to employees because of their vulnerability and unequal power to relations in the workplace.

[45] para 33.
[46] para 34

Thus, without the constitutional duty to act fairly, there is no guarantee that employers will act fairly to employees in the workplace. Thus, again it is clear that the right to fair labour practices is an important guard against the abuse of the employers powers and guarantees that employers act fairly towards employees.

3.3.2 *Fedlife Assurance Ltd v Wolfaardt* [47]

The employee was employed on a five year fixed- term contract. During this fixed period the employer terminated the employee's services and the employee approached the High Court on the basis of breach of contract. The employee accepted the employer's repudiation of the contract and claimed for damages.

The employer in the matter contended that Chapter VIII of the LRA codifies the rights and remedies that are available to all employees in our law arising from the termination from their employment. The Chapter is thus said to be comprehensive and exhaustive in so far as it provides for remedies upon dismissal. It was further argued that the common right to enforce a fixed term contract of employment has been abolished by the LRA.[48]

The clear purpose of the legislature when it introduced a remedy against unfair dismissal was to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of the employer. It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair[49].

That position was perhaps ameliorated with the adoption of the Interim Constitution in 1994 which guaranteed to every person the right to fair labour practices in section 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). Thus, it might be held that an implied right not to be unfairly dismissed was

[47] (2001) 12 BLLR 1301(SCA).
[48] paras 11-12.
[49] para 13.

imported into the common law employment relationship by section 27 of the Interim Constitution[50].

There was never a suggestion that the constitutional dispensation deprived employees of the common law right to enforce the terms of a fixed-term contract of employment. However, the question was whether the LRA simultaneously deprived employees of their pre-existing common law right to enforce such contracts, thereby confining them to the remedies for "unlawful dismissal" as provided for in the LRA[51].

The court held that it should be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and not to deprive parties of existing remedies for wrongs done to them. The continued existence of the common law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

Froneman AJA, reiterated this position when he said that the Constitution has a material impact on that particular conceptual distinction between the proper domain of contract and that of the statute, namely that the former has little to do with fairness, whilst only the latter has. Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. It seems almost incontestable that one of the most important manifestations of the right to fair labour practice that developed in labour relations in this country was the right not to be unfairly dismissed[52].

[50] para 14.
[51] para 15.
[52] para 4 p28.

3.3.3 *Denel (Pty)Ltd v Vorster*[53]

The employee was employed by the employer for a number of years. The provisions of the employer's disciplinary code were incorporated into the employee's terms and conditions of employment. This matter concerned an appeal which was confined to a claim for damages for breach of contract.

The employer did not follow the procedure contained in the disciplinary code. The employer undertook to follow a prescribed procedure before it terminated the employee's employment contract and it was not open to the employer unilaterally to do otherwise.

In considering the appeal the Court held that there was no dispute that the employer had proper substantive grounds for summarily terminating the employee's employment. The employee's complaint was confined to the process that was adopted. The procedures that had to be followed when disciplinary action was taken against an employee, and the identities of the persons who were authorized to take such disciplinary action, were circumscribed in the employer's disciplinary code. The terms of the disciplinary code were expressly incorporated in the conditions of employment of each employee with the results that they assumed contractual effect.

The employer contended that section 27(1) of the Interim Constitution which was in force at the time is relevant to this appeal. It guaranteed to everyone the right to fair labour practices and that has been perpetuated by section 23(1) of the present Constitution. Moreover, section 39(2) of the present Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. In the employer's heads of argument it was submitted that the procedure that was adopted by the employer was one that respected the employee's constitutional right to fair labour practices with the result that it would be an infringement of the appellant's rights to fair labour practices if the dismissal were to be regarded as unlawful. The effect of that submission, as it was developed in argument, and

[53] (2004) 25 *ILJ* 659 (SCA).

as the court understood it, was that the relationship between employer and employee is governed by only a reciprocal duty upon the parties to act fairly towards one another, with the result that the contractual terms requiring anything more must necessarily give way. The court said that was incorrect and it is also in conflict with what was said by the court in *Fedlife Assurance Ltd v Wolfaardt*[54] . If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect. The procedure provided for in the disciplinary code was clearly a fair one- it would hardly be open to the employer to suggest that it was not- and the employee was entitled to insist that the employer abide by its contractual undertaking to apply it. It is no answer to say that alternative procedure adopted by the employer was just as good[55].

3.3.4 *Murray v Minister of Defence* [56]

In this matter the employee was in the employment of the employer being the navy since 1984. The employee was the officer in charge of the Simonstown military police station. It happened that the employee came into bitter conflict with members of his unit whose accusations against him led to a series of investigations and courts-martial. However, none of the allegations culminated in any serious adverse finding. The employer decided to remove him from his post at Simonstown and declined to reinstate him. After more than two years in a supernumerary position at naval staff college in Muizenburg, and despite the navy offering him a senior staff officer's position in Pretoria, he resigned[57].

[54] *Supra.*
[55] Paras 4-16.
[56] (2008) 6 BLLR 513(SCA).
[57] Para 1-3.

In the High Court before Yekiso J, the court found that the employment relationship had not broken down irretrievably. He further held that none of them rendered the employee's position intolerable, or caused him to resign.

During the appeal, the parties agreed on the legal framework as there was no direct applicable statute. This was due to the LRA expressly excluding members of the South African National Defence Force from its operation[58].The parties agreed that the employee could rely directly on section 23(1) of the Constitution which provides that 'Everyone has the right to fair labour practices'. The parties further agreed that the employee was also entitled to rely on the right to dignity[59], which is a close associate of the right to fair labour practices[60].

The court held that the impact of these rights in this case could be best understood through the Constitutional development of the common law contract of employment. The contract of employment has always imposed mutual obligations of confidence and trust between the employer and employee. Developed as it must promote the spirit, purport and objects of the Bill of rights, that the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees, even those the LRA does not cover[61].

The court held that this case involved the particular application of that duty where the employee terminates the contract of service formally; the employee was not dismissed but rather be considered to have resigned. The court further held that the form in which the termination of service was clad cannot deprive him of his cause of action. That is the position under the LRA, the position under the common law as constitutionally developed can be no difference. The reasons were that LRA recognizes the right not to be unfairly dismissed and [62] defines 'dismissal' to include the situation where an employee terminated a contract of employment with or without notice because the employer made continued employment

[58] S 2 of the LRA.
[59] S 10 of the Constitution.
[60] Para 5.
[61] Para 5.
[62] S 185.

intolerable for the employee[63]. This provision made statutorily explicit what the jurisprudence of the Industrial Court and the Labour Appeal Court had already achieved under the unfair labour practice dispensation. The court held that unjustified conduct on the part of an employer that drives an employee to leave should be treated as dismissal, even where, in form, it is the employee who resigns[64].

3.3.5 *Old Mutual Assurance Co SA v Gumbi* [65]

The matter concerned Old Mutual, the employer, who dismissed the respondent, the employee, following a disciplinary hearing in respect of which the employee was found guilty of misconduct and dismissed. The employee instituted an application in the Transkei High Court challenging the dismissal on the basis that the enquiry was conducted in his absence and he was not afforded an opportunity to be heard before the decision to dismiss him was taken. The court dismissed the application citing reasons that the employee had "wilfully and voluntary excluded himself from the disciplinary hearing because he failed to return to it after a short adjournment. The employee appealed the decision to the full court.

The court reversed the decision of the court of first instance and held that the employee's absence from the disciplinary hearing was neither wilfull nor voluntary, and that the medical certificate handed to the disciplinary tribunal by his representative, could not be rejected when its authenticity and correctness had not been disputed at the hearing. In dissenting judgment of Somyalo JP, the learned judge found that the employee's absence from the hearing was wilfull and voluntary.

The central issue in this appeal was whether the termination of the employee's employment by the employer was procedurally fair. The sole focus of this appeal was the employee's right to pre-dismissal hearing under the common law.

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[63] S 186.
[64] Para 7.
[65] (2007) 8 BLLR 699(SCA).

The court held that an employee's entitlement to pre-dismissal hearing is well recognized in our law. Such right having its source, among other things the common law or statute which applies to the employment relationship between parties.

The court noted that it is within this premise that the employer who holds a disciplinary enquiry to determine its form and the procedures to be adopted, provided that they must fair. Fairness requires, inter alia, that the employee should be given an opportunity of meeting the case against him in that the employer must obey the injunction *audi alteram partem.*

In recognizing a right to a hearing the court held that our law is consistent with international law relating to pre-dismissal hearing as set out in Article 7 of the International Labour Organization (ILO) Convention on Termination of Employment 158 of 1982.

The court further held that by extending requirements of the *audi alteram partem* rule to the employment relationship, South African law promotes justice and fairness in the workplace and promotes the primary objectives of the LRA. In this context, the court held that fairness must benefit both the employer and the employee. The right to pre-dismissal hearing imposes on employers an obligation to afford employees an opportunity of being heard before their employment is terminated by means of dismissal. However, should employees fail to take this opportunity offered, in a case where he or she aught to have, the employers decision to dismiss cannot be challenged on the basis of procedural fairness.

3.3.6 SUMMARY OF CASE LAW

It is submitted that until these judgments, the common law never recognized an employee's right to pre-dismissal processes. These developments show, however, the force and effect of the Constitution: that the common law principles extended and developed by the courts in the light of the fundamental principles of our constitutional order.

3.4 AUTOMATIC TERMINATIONS OF EMPLOYMENT IN THE PUBLIC SECTOR

A number of statutes, including the Public Service Act, 1994[66] provide that employees are deemed to have been discharged if they are absent from work without permission for longer than stipulated period. The courts have consistently held that employees whose services are terminated under these provisions are not dismissed, but have rather been discharged by operation of law.

According to Cohen[67] not every termination of an employment contract constitutes a dismissal and a number of scenarios exist where an employment contract terminates by operation of law. Automatic termination in terms of the Public Service Act, Employment of Educators Act all constitute terminations that do not necessarily constitutes dismissal.

Section 17(5)(a) of the Public Service Act provides that an officer who absents himself or herself from his or herself from his or her official duties without the permission of his or her head of department, office or institution for a period exceeding one calendar month shall be deemed to have been discharged from the public service on account of misconduct, with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty[68]. If an officer who is deemed to have been so discharged, reports for duty any time after the expiry of the specified period, the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former position or any other post or position.

Cohen further shows that in a virtually identically worded provision section 14 of the Educators Act 76 of 1998 provides that an educator appointed in a permanent capacity who is absent from work for a period exceeding 14 consecutive days without the permission of the employer shall, unless the employer directs otherwise, be deemed to have been discharged from service

[66] S 17(5)(a)(i).
[67] *Termination by operation of law-bypassing the unfair dismissal provisions of the Labour Relations Act,* Faculty of Law, University of Kwa-Zulu Natal.
[68] S 17(5)(a)(i).

on account of misconduct[69]. If an educator who is deemed to have been discharged at any time reports for duty, the employer may, on good cause shown approve the re-instatement of the educator in the educator's former post or any other post on such conditions relating to the educator's absence from duty or otherwise as the employer may determine.

It is further submitted that the effect of these statutory provisions is that, provided the stipulated requirements are satisfied, employment contract terminates by operation of law. As this termination is triggered by the occurrence of an event and is not based on onerous burden of proof on the employee to prove entitlement to reverse a discharge an employer's decision, there is no dismissal as contemplated by section 186 of the LRA. Whether the requirements of the statutory provision are satisfied is objectively determinable and should a factual dispute arise in this regard, such as the reasons for the employee's absence, such dispute is justiciable by a court. An employer's decision not reinstate the employee whose employment has been terminated by operation of law is not a dismissal as the contract remains terminated by law as opposed to being terminated by an act of the employer. While employees discharged in accordance with these provisions are not left remediless as they are entitled to refer the matter to the relevant head of department's decision.

3.5 CASE LAW

Jurisprudence pertaining to the constitutionality and validity of the deeming provisions will be examined.

3.5.1 *Phenithi v Minister of Education & others* [70]

This matter concerned the termination of employment of the employee by the Free State Province Department of Education. The employee was notified by the employer that her

[69] S 14(1).

[70] (2006) 27 *ILJ* 477 (SCA).

services had been terminated in terms of the Employment of Educators Act 76 of 1998[71]which provides that an educator is deemed to be discharged if she or he absents herself or himself from work for a period exceeding fourteen consecutive days without the permission of the employer. Subsequent to that the employee referred the dispute to the Education Labour Relations Council in terms of its constitution[72]. When conciliation failed, the arbitrator found that the Council does not have jurisdiction to entertain the dispute since section 14(1)(a) of the Act is peremptory. The employee was accordingly advised to approach the High Court or Constitutional Court as the section seems to be unconstitutional. The employee approached the Constitutional Court directly to set aside the provisions of section 14 of the Act. In the Constitutional Court the application was turned down and the employee referred the matter to the Orange Free State Division of the High Court. The High Court dismissed the application but granted leave to appeal to the Supreme Court of Appeal.

The legal question in the appeal was whether the discharge of the employee from duty constitutes administrative action and whether section 14(1)(a) of the Act is constitutional.

In her Founding Affidavit the employee prayed for an order declaring the provisions of section 14 of the Employment of Educators Act, 1998 to be unconstitutional and invalid. The employee contended that the provisions of section 14(1)(a) read together with subsection (2) of the Act violate the fundamental rights to fair labour practices as contemplated in section 23(1) of the Constitution. Accordingly, it allows the employer to terminate services without considering the substantive and procedural aspects of the case. The employee further argued that the provision violates the fundamental rights to fair administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution as the employer is not obliged to hear the other party and provide reasons for the decision taken.

[71] S 14(1)(a).
[72] Collective Agreement No 1 of 2006.

The court held that as to the ground that section 14(1)(a) read together with section 14(2) violate the employee's fundamental right to fair labour practices in terms of section 23(1) of the Constitution, the employer takes no decision to terminate an educator's services under section 14(1)(a) of the Act. The discharge is by operation of law. Accordingly, the provision creates an essential and reasonable mechanism for the employer to infer desertion when the statutory requirements are fulfilled.

The court further held that the fact that the provision does not compel the employer to institute a disciplinary hearing before its provision came into operation does not necessarily make it unconstitutional. The section does not totally exclude a hearing. The employee may invoke the provisions of section 14(2) of the Act to show good cause why she should be reinstated. Accordingly, section 14(2) of the Act affords an employee a reasonable opportunity to be heard and to be reinstated. The fact that section 14(2) provides for a hearing only after an educator has been deemed to be discharged in terms of section 14(1)(a) does not mean that the latter subsection is in conflict with the Constitution.

3.5.2 *Free State Provincial Government (Dept of Agriculture) v Makae & others* [73]

This matter concerned a review application of an arbitration award made by a CCMA commissioner. The employee was employed by the Free State Department of Agriculture in 1995 in terms of the Public Service Act, 1994[74]. On or about the period 1997 while on duty the employee became ill as a consequence she consulted a medical doctor. The doctor booked the employee off sick, however, medical certificates were forwarded to the employer. It appeared to be common cause that the employee was suffering from gynaecological and pregnancy problems. After being booked off by medical doctors for several months, the employee received a letter from the employer informing her that her services had been terminated. Subsequent to that the employee referred the matter to the CCMA. The CCMA commissioner

[73] (2006) 11 BLLR 1090(LC).
[74] 103 of 1994.

found that the employer was at all material times aware of the reasons for the employee's absence and ruled that her dismissal was substantively unfair and ordered reinstatement. The employer launched a review application.

In the review application, the employer raised several grounds for review which *inter alia* include the jurisdiction of the commissioner to entertain the dispute. The employer further contended that it was still premature for the employee to declare a dispute without first exhausting the internal processes. Accordingly, in terms of the Public Service Act[75] an employee who is deemed to be discharged from the public service may submit representation to the head of department concerned to show good cause why she should be reinstated. The employer contended *inter alia* that the employee had not been dismissed, but that her employment had terminated due to the operation of law.

It was the employee's contention that section 17(5)(a)(i) of the Act was unconstitutional. The court held that in the light of *Phenithi v Minister of Education & others*[76] it was not open to the employee to challenge the constitutionality of section 17(5)(a)(i) of the Act. The court noted that the section 17(5)(a)(i) of the Public Service Act, an employee is deemed to be discharged on account of misconduct if he or she absents himself or herself from work without the permission of the employer for a period exceeding one calendar month.

The court also found that the section was not in conflict with the provision of section 188 of the LRA and that it does not offend against the Constitution of the Republic of South Africa, 1996[77]. The court accordingly held that the views expressed by the Supreme Court of Appeal in the *Phenithi* case relating to the provisions of section 14(1)(a) of the Employment of Educators Act, 1998, applies equally to the provisions of section 17(5)(a)(i) of the Public Service Act, 1994.

[75] S 17(5)(b).
[76] *Supra.*
[77] 108 of 1996.

The court qualified its reasoning by stating that there are four requirements that need to be satisfied before the deeming provisions can come into operation. The requirements are:

- the employee must be an officer;
- the employee must be absent from official duties;
- the absence must be without permission and
- the absence must have exceeded the period of one calendar month.

If one of the requirements have not been met, the deeming provisions do not come into operation.

The court held that the only question that needed to be answered was whether the employee obtained permission to be absent from work. It was clear from the record and affidavits filed by the employee or on her behalf that nowhere did she state that she had sought permission from the head of her department to be absent from work. All that the employee states was that she had been booked off from work on medical grounds and that she had notified some employees of the employer of her absence. In the circumstances, the court held that the fact that the employee had informed employees of the employer of her medical condition did not indicate that she had obtained permission to be absent from work.

The court held that the employee's termination of employment was by operation of law.

In my view, the court has erred in its judgment. It becomes important to note the fact that the deeming provisions may only be invoked when the employee has disappeared without trace. It is further submitted that the deeming provisions may be called upon in circumstances when an employee has indicated that she/he does not intend to return to work. Termination of employment by operation of law may only be effected when it is impossible to hold a disciplinary hearing in terms of the Disciplinary Codes and Procedures applicable to that particular category of employees. For fair employment practices, should the employee's

whereabouts became known to the employer, the employer is obliged to change the stance that he has adopted and invite the employee to the disciplinary hearing[78].

3.5.3 *Nkopo v Public Health & Welfare Bargaining Council & Others*[79]

In this matter the employee was employed by the Department of Health, as the chief hospital administrator at Umzukhulu Hospital. During the course of his employment threats were made against his life following a decision to discontinue the employment of persons engaged in terms of a special employment creation programme. Subsequent to that it appeared to be common cause that it would be dangerous for the employee to attend his place of work. The Regional Director also advised the employee to stay at home for a few days. The employee continued not to attend at the hospital because he believed that his life was in danger.

At some stage the employer invoked the provisions of section 17(5)(a) of the Public Service Act which provides that an officer who absents himself from work without the permission of the Head of Department for a period exceeding one calendar month is deemed to have been discharged from the public service on account of misconduct.

The employee referred the matter to conciliation and arbitration before the Public Health & Welfare Bargaining Council. The arbitrator found that the employee had been absent from work for a period exceeding one calendar month, therefore his dismissal was both procedurally and substantively unfair.

The employee sought to set aside on review the finding of the arbitrator that the dismissal was fair. The Labour Court held that the employee had not been dismissed in the sense relied on in the LRA as the discharge took place by operation of law. As the dismissal is automatic, there is no decision of the employer to dismiss and accordingly no dismissal that could be found to be unfair. The arbitrator was not entitled to award any relief and the review accordingly failed.

[78] See also *HOSPERSA V MEC for Health* (2003) 12 BLLR 1242(LC).
[79] (2002) 23 ILJ 520(LC).

3.5.4 *Rikhotso v MEC for Education (Gauteng)*[80]

This matter concerned the discharge of the employee by the Gauteng Department of Education. The employee was employed in terms of the Employment of Educators Act, 1998[81]. On or about the period 2000 the employee applied for sick leave of which it was granted. He further applied for another sick leave of which it was also approved by the Department. Subsequent to that the employee submitted application forms for medical boarding. That application was also approved subject to the employee being absent until 31 March 2001. A further application for medical boarding was submitted with the necessary medical reports from his clinical psychologist and psychiatrist. That application was forwarded to the panel of medical doctors appointed by the Department of Health. The employee's authorized sick leave expired on 31 March 2001 and the employee did not submit any sick leave forms. Consequently, the employer decided to freeze the employee's salary as he was not rendering any services as it was required by his employment contract. Subsequent to that the employer received a medical report from the panel of medical doctors declining the employee's application for medical boarding. The employee was informed accordingly and advised to report for duty in terms of his employment contract. The employee failed to report for duty.

The employer further wrote a letter to the employee notifying him of his possibly abscondment should he failed to report for duty on the date stipulated. The employee again failed to report for duty. The employer invoked section 14(1)(a) of the Employment of Educators Act which provides that an educator who absents himself from work for a period exceeding fourteen consecutive days without the permission of the employer is deemed to have been discharged from the public service on account of misconduct.

The court noted that in terms of section 14(1)(a) of the Employment of Educators Act an employee who has been absent from work for a period exceeding 14 consecutive days without permission from the employer is deemed to have been discharged for misconduct. The Court

[80](2005) 3 BLLR 278 (LC).
[81] 76 of 1998.

was satisfied that as the applicant's leave of absence was unauthorized for a period in excess of the stipulated period, section 14 became operational. The court further held that there was no good cause shown by the employee to enable the employer to reinstate him in his former post or any other post as allowed by section 14(2) of the Act.

3.5.5 *HOSPERSA v MEC for Health* [82]

In this matter the employee was employed by the Department of Health. A collective agreement was concluded between the union and the employer whereby the employee had been seconded as president of the employee's trade union in terms of the secondment agreement. The employer ultimately withdrew from the agreement, and insisted that the employee resume his normal duties. The employee refused to do so.

The employee's absence from work arose from the secondment of the employee to the union for a period of time. Following a dispute over whether the secondment had terminated and whether the employee should return to work, the employee was discharged in accordance with section 17(5) of the Public Service Act. The matter was referred to arbitration and later the employee's union approached the Labour Court for an order setting aside the employee's termination of employment. The court held that, apart from the requirement that the employee must indeed have been absent for the stipulated period, section 17(5)(a)(i) can be invoked only if it is impossible to take the disciplinary action against the employee. Despite this, the court went further and in an *obiter dictum* held that section 17(5) was a 'draconian procedure' that should be used sparingly and only when the Code cannot be invoked when the employer has no other alternative for example where the employee's whereabouts are unknown or the employee has indicated an intention not to return to work. Reliance on the employer's disciplinary code was held by the court to be a less restrictive means of achieving the same objective of enquiring into and remedying an employee's absence from work. It enables employees to invoke the rights to fair labour practices and administrative action. In

[82] (2003) 12 BLLR 1242(LC).

reaching this conclusion, the court reasoned that, all employees deemed discharged in terms of that provision would lose the right to protection afforded by the LRA.

3.5.6 *MEC, Public Works, Northen Province v CCMA*[83]

In this matter the respondent employee was deemed to have been discharged in terms of section 17(5) of the Public Service Act after having been absent from work for a period of 9 weeks. The employee was however granted an opportunity to present his case at a disciplinary enquiry, where it was recommended that the employee not be reinstated. The employee then referred a dispute concerning an unfair dismissal to the CCMA. The CCMA then ruled that the dismissal was substantively unfair. The employer then approached the Labour Court for a review of the CCMA award. In considering the application for review to the Labour Court Freund AJ held that if section 17(5) applies there is no dismissal as contemplated by section 186 of the LRA and the decision not to reinstate is not a dismissal, as the contract remains terminated by operation of law and not the decision of the employer.

3.6 CONCLUSION

From the above it can be deduced that the automatic termination of a contract of employment means that the employment contract lapses by operation of law and not by an act of the employer. Such terminations will not constitute a dismissal within the meaning of section 186 of the LRA and the terminated employee will not be able to challenge the termination through the structures and protections afforded by the LRA. Such deprivation of the protection afforded by the LRA against unfair dismissal may breach the employee's constitutional rights to fair labour practices if it cannot be justified in accordance with the constitutional limitation clause. In order to avoid such conflict and offer the intended protection to a discharged employee it is submitted that a purposive approach should be adopted in interpreting these statutory and contractual provisions. The purpose of section 17(5) of the Public Service Act and section 14 of

[83] (2003) 10 BLLR 1027 (LC).

the Employment of Educators Act is to enable public service employers to discharge deserting employees that cannot be located[84]

[84] Cohen *Termination of Employment by operation of law-bypassing the unfair dismissal provisions of the Labour Relations Act,* Faculty of Law, University of Zululand.

CHAPTER 4

PROCEDURAL REQUIREMENTS ON TERMINATION OF EMPLOYMENT CONTRACT

4.1 INTRODUCTION

According to Cohen[85], the Labour Relations Act of 1995 protects employees against unfair dismissals. In terms of section 186(1)(a) dismissal means that an employer terminated a contract of employment with or without notice. In order to fall within the ambit of this provision and benefit from the protections afforded by the LRA, an employee must prove that an overt act on the part of the employer has resulted in the termination of the employment contract. The onus then shifts to the employer to prove that the dismissal is both substantively and procedurally fair, failing which the employee will be entitled to the remedies afforded by section 193 of the LRA.

In this Chapter focus will be on section 1 read with section 3 of the LRA which requires compliance with Article 7 and 8 of the ILO Convention 158 of 1982, when the employment of a worker has been terminated by his or her employer. Section 34 of the Constitution emphasizes this compliance with the procedural provisions contained in that section as well as the procedural requirements of the rule of law and also procedural requirements of Convention 158. This Chapter will thus examine whether the deeming provisions are in conflict with those of section 188 of the LRA, which decree that a dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity and that the dismissal was effected in accordance with a fair procedure.

4.2 COMPLIANCE STANDARDS OF THE LRA

Chapter 1 of the LRA provides:

[85] *Termination of Employment Contract by operation of Law-bypassing the unfair labour practice provisions of the Labour Relations Act,* Faculty of Law, University of Kwazulu Natal, p 1

The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution[86];

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, and employers' organization can…….

Section 3 of the Act provides:

Any person applying this Act must interpret its provisions-

(a) to give effect to the primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic.

From the above it can be deduced that section 1 and 3 of the LRA requires compliance with the International Labour Organisation Conventions when applying and interpreting the Act. ILO has adopted a series of Conventions and Recommendations which forms basis of the principles governing the right to fair labour practices.

[86] S 27, which is in the Chapter on Fundamental rights in the Constitution entrenches the following rights:
(1)every person shall have the right to fair labour practices.
(2)Workers shall have the right to form and join trade unions, and employers shall have the right to form and Join employers organizations.
(3) Workers and employers shall have the right to organise and bargain collectively.
(4)Workers shall have the right to strike for the purpose of collective bargaining .
(5)Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to Section 33(1).

4.3 BACKGROUND ON INTERNATIONAL LABOUR ORGANIZATION

The ILO is the international organization responsible for drawing up and overseeing international labour standards. It is the only 'tripartite' United Nations agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting Decent Work for all. This unique arrangement gives the ILO an edge in incorporating 'real world' knowledge about employment and work.

The unique tripartite structure of the ILO gives an equal voice to workers, employers and governments to ensure that the views of the social partners are closely reflected in labour standards and in shaping policies and programmes.

The aims of the ILO are to promote the rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work related issues.

4.4 ILO STANDARDS ON TERMINATION OF EMPLOYMENT CONTRACT.

The most important function of the ILO has been its standard-setting role. The international Labour Conference of the ILO has adopted some 185 Conventions and 195 Recommendations giving effect to a wide variety of fundamental employment rights, including freedom of association, elimination of discrimination, social security, prohibition of forced labour and the protection of young persons and children[87]. It should be mentioned that a convention creates international obligations on member states that ratify it, but is only binding in that member state if it forms part of international customary law or if the member state has promulgated legislation to bring the relevant instrument into effect by incorporating into national law. The Republic of South Africa is a member of the International Labour Organization and has ratified a number of its conventions.

[87] du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch, Rossouw *Labour Relations Law(*2008*)* 67.

Noting the existing international standards contained in the Termination of Employment Recommendation,[88] significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation. Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from economic difficulties and technological changes experienced in recent years in many countries, the General Conference of the ILO adopted the Termination of Employment Convention[89].

4.4.1 Termination of Employment Convention

According to the Termination of Employment Convention the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service[90]. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination[91].

Article 7 of the Convention provides that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide that opportunity.

Article 8 of the Convention provides that a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

[88] The General Conference of the International Labour Organization, 1963
[89] C158,1982.
[90] Article 4, C 158, 1982.
[91] Article 6,C 158, 1982.

4.5 SUBSTANTIVE AND PROCEDURAL FAIRNESS

According to Grogan[92] to be fair, a dismissal for misconduct must not only be justified; the employer must also follow a fair procedure before taking the decision to dismiss the employee. Procedural fairness is the yardstick by which employers' pre-dismissal actions are measured. The two requirements of fairness are generally regarded as distinct: a substantively fair dismissal may be unfair because the employer failed to follow a fair procedure. The LRA confirms that procedural and substantive fairness are independent requirements for a fair dismissal[93]. However, the courts appreciate that it is not possible in all cases to draw a rigid line between the requirements of procedural and substantive fairness. In some cases a failure of natural justice may be sufficiently gross to render the dismissal substantively unfair. But as rule of thumb, it can be said that substantive fairness relates to the reason for the dismissal and appropriateness of the sanction; procedural fairness relates to the *manner in which* the employer arrived at the decision to impose the sanction.

Grogan[94] further shows that the requirements of procedural fairness were developed by the courts from the rules of natural justice of the common law, adapted to suit the employment arena. In developing the requirements of procedural fairness, the labour courts were influenced by the relevant provisions of the instruments of the International Labour Organisation and the relevant principles of English law.

4.6 THE GENERAL REQUIREMENTS OF FAIR PROCEDURE

Section 188 of the LRA provides that, to be fair, a dismissal that is not automatically unfair must be for a fair reason and in accordance with a fair procedure. The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct as follows[95]:

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[92] *Dismissal* 214-215.
[93] S 188
[94] *Supra.*
[95] Item 4(1).

Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

The most recent and potentially influential contribution to the debate on the requirements of the notion of procedural fairness is to be found in the judgment in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*[96]. In that case, an employee had been captured on a videotape talking to a colleague while the colleague stuffed donations to the home into a plastic packet, preparatory to stealing them. The employee was dismissed for complicity in the theft. A CCMA commissioner held that the employer had not proved that the employee was involved in the theft and that the dismissal was procedurally unfair because the presiding officer at the disciplinary hearing was junior to the initiator. This, said the commissioner, gave rise to a reasonable suspicion of bias. On review, the court disagreed with both findings, holding that the commissioner had confused his role with that of a magistrate presiding over a criminal trial. The court noted that the authorities on bias cited by the commissioner all predated the promulgation of the LRA and the Code of Good of Practice: Dismissal. The Code, said the court, spells out 'in specific terms' what is now required of employers when they take disciplinary action against their employees. The judge emphasized, in particular, that a pre-dismissal inquiry need not be formal. He summarized the requirements as follows:

(T)he conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a

[96] (2006) 27 *ILJ* 1644 (LC).

reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

According to the court the 1995 Labour Relations Act marked a decisive break from the manner in which the requirement of procedural fairness had been handled in the past where the criminal law system which followed the strict 'beyond reasonable double' burden of proof and where the employers had to follow disciplinary proceedings that were similar to criminal courts system.

4.6.1 Investigation of the offence

The Code requires employers to investigate reported cases of misconduct to determine whether there may be grounds for dismissal. Disciplinary action may itself be prejudicial to employees. It is only fair, therefore, that an employee should not be subjected to a charge of misconduct unless there are at least *prima facie* grounds for suspecting that the employee actually committed the misconduct alleged. However, a pre-dismissal investigation is not an inflexible requirement. If the employee is found guilty after a properly constituted and conducted hearing, it is unlikely that a dismissal will be ruled unfair merely because there was no prior investigation, unless the employee was somehow prejudiced in his or her defence by the absence of an investigation, or by the manner in which the investigation was conducted.

4.6.2 Fair hearing.

According to Grogan[97], of the so- called rules of natural justice, the most important is enshrined in the maxim *audi alteram partem,* literally, ' hear the other side'. In the employment context, this means that employers cannot take disciplinary action against employees without affording them a fair hearing. While the *audi* rule applies in all forms of dismissals, it takes different forms, depending on the reasons for the dismissals. So, for example, in cases of incapacity the employer must counsel and consult the employee concerned, while in cases of retrenchments,

[97] *Dismissal* 224-225.

employees are afforded an opportunity to influence the decision during the process of consultation.

4.7 ARE THE DEEMING PROVISIONS IN CONFLICT WITH THE LRA?

Section 34 of the Constitution provides that:

> *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

Section 34 of the Constitution emphasizes compliance with the procedural provisions contained in that section as well as the procedural requirements of the rule of law and also procedural requirements of Convention 158. The fundamental question is whether the deeming provisions are in conflict with those of section 188 of the LRA, which decree that 'a dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or incapacity and that the dismissal was effected in accordance with a fair procedure.

4.7.1 Termination of Employment by operation of law

A number of statutes, including the Public Service Act, 1994 provide that employees are ' deemed ' to have been discharged if they are absent from work without permission for longer than a stipulated period. The courts have consistently held that employees whose services are terminated under these provisions are not dismissed, but are 'discharged by operation of law'. The *ratio* for these decisions is that the coming into operation of such deeming provisions is not dependent on any decision. It is to be noted that all these cases concern public sector employers.

These judgments were confirmed by the Supreme Court of Appeal in *Phenithi v Minister of Education & others*[98]*.*The services of the appellant teacher were terminated when she had been absent from work for about two months. When she referred a dispute to the Education Labour

[98] *Supra.*

Relations Councils for arbitration, the arbitrator, ruled that he lacked jurisdiction because Ms Phenithi had not been dismissed, but had been 'discharged by operation of law' in terms of section 14(1)(a) of the Employment of Educators Act,1998. The applicant launched an application to the High Court, contending that her discharge had been 'an unfair labour practice and unconstitutional.' That application was dismissed. On appeal, the court held that the issues were (i) whether the applicant's discharge constituted fair administrative action and (ii) whether section 14(1)(a) of the Act was unconstitutional. The Supreme Court of Appeal confirmed earlier judgments in which it was held that, where employees are informed of their discharge in terms of the provisions in which an employee is 'deemed' dismissed after a period of absence, there is no exercise of a discretionary power. There was accordingly no 'decision' or administrative act to review. This reasoning is open to debate. Section 14(1)(a) provides that the termination is effected 'unless the employer directs otherwise'. This phrase suggests the existence of a discretion, the exercise of which should in principle be open to attack by way of review. Furthermore, it is trite that a failure to act is also open to review.

The court also rejected the argument that the deeming provision is in conflict with the Constitution because section 14(2) affords absconded employees a right to a hearing if they return to work after their 'automatic discharge'. So, although the employee is deemed to have been 'automatically discharged', the employer must still afford employees an opportunity to make representations, albeit after the event, as to why the employer should not exercise the discretion to reinstate them.

Following *Phenithi* , arbitrators and the Labour Court have consistently ruled that the discharge of employees under section 17(5) and similar statutory provisions does not constitute dismissal. In the light of the finding in *Phenithi,* a deemed discharge does not constitute administrative action because it does not require a decision by the employer. It can also be argued that such a discharge cannot for the same reason constitute a dismissal either.

In *HOSPERSA* case, *supra,* the court argued that section 17(5)(a)(i) of the Public Service Act, 1994, constitute a draconian procedure which may infringe the employee's rights to a hearing

and must be used sparingly. It is against this background that the court laid down the following requirements that must be strictly met before invoking the deeming provisions:

- the person concerned must be an officer;
- the employee must absent herself or himself from his or her official duties;
- such absence must be without authorization and
- such absence must be for more than one calendar.

The circumstances must be such that the Disciplinary Code and Procedure, Resolution 2 of 1999[99] has no application.

Therefore, it means that if an employer is aware of the whereabouts of the employee or is able to contact him or her, section 17(5)(a)(i) cannot be used. The Court observed:

> "All in all, section 17(5) is a draconian procedure. It must be used sparingly and only when the Code cannot be invoked when the employer has no alternative. That would be so, for example, when the respondent is unaware of the whereabouts of the employees and cannot contact them. Or, if the employees make it quite clear that they have no intention of returning to work. The Code is a less restrictive means of achieving the same objective of enquiring into and remedying an employee's absence from work. It enables employees to invoke the rights to fair labour practice and administrative justice. All the jurisdictional prerequisites for proceeding in terms of section 17(5)(a)(i) must be present before it can be invoked".

Whether an employee will be 'deemed' dismissed by virtue of a similar provision in a domestic disciplinary code has not yet been decided. In *SA Post Office Ltd v Mampeule*[100] the employee was appointed as a CEO of the company for a period of five years. He was also a member of the board of directors. The contract of employment stipulated that his membership of the board

[99] As amended by Resolution 1 of 2003.
[100] (2010)10 BLLR 1052 (LAC).

was a prerequisite for his appointment as a CEO. After some time his membership of the board was terminated and it was held that his appointment had also been automatically terminated. Interestingly, the contract of employment could be fairly terminated on the grounds of misconduct, incapacity and operational requirements. The employee then challenged his dismissal as being unfair. The employer argued that the employee's removal from the board of directors was by operation of a contractual term that automatically brought about the termination of his contract of employment. Therefore, there has been no dismissal of the employee by the employer. The Labour Appeal Court held that parties to an employment relationship cannot be allowed to contract out of the LRA provisions in order to evade the obligations imposed by the LRA. Therefore, it seems that a similar provision in a domestic disciplinary code will not pass muster the LRA provisions concerning the requirements for a fair dismissal.

The *HOSPERSA* judgment suggests that a court will be slow to draw a conclusion except where the employee has disappeared without trace for a considerable period. Even then, it is at least arguable that such a deeming provision, if not backed by force of statute, is irreconcilable with section 186(1)(a) of the LRA. In cases of abscondment, the common law regards the employer as having accepted the employee's repudiation of the employment contract, which constitutes a dismissal for purposes of that provision of the LRA.

4.7.2 Appeal against deemed discharge

In *HOSPERSA & another v MEC for Health* the court held that the only remedy afforded employees discharged under section 17(5) of the Public Service Act is an appeal to the head of department concerned, showing good cause why they should be reinstated. Less clear is whether an employee whose application for reinstatement has been rejected may claim relief under the unfair dismissal provision of the LRA. The Labour Court has held that an employee cannot claim to have been dismissed after an unsuccessful appeal either because, such an employee is no longer in employment and occupies the same position as a work seeker[101]. On

[101] *PAWUSA & another v Department of Education, Free State Province & others*(2008) 29 *ILJ* 3013(LC).

the other hand, the court has also held that an employee in this situation may seek relief under section 158(1)(h) of the LRA, because the decision as to whether to reinstate an employee involves the exercise of a discretion. In that case, the court appeared to accept that the refusal constituted a dismissal as the matter was struck off the roll because the dispute should have been referred to statutory arbitration.[102]

4.7.3 *Noyo v Minister of Agriculture and Land Affairs & Other* [103]

This matter concerned an employee who was arrested and detained by the SAPS on charges of robbery. The employer was made aware of the whereabouts of the employee. The employer wrongly relied on section 17(5)(a)(i) of the Act. It should be mentioned that in *HOSPERSA, supra,* the court held that if the employer is aware of the whereabouts of the employee or is able to contact him or her, section 17(5)(a) of the Act cannot be invoked.

On his release the employee reported for duty and was subsequently dismissed. The employee then approached the High Court to review and set aside his dismissal.

In the proceedings before the High Court the employer for the first time referred to section 17(5)(a) of the Public Service Act. The employer contended that in terms of that section the employee was deemed to have been discharged by operation of law as he had been absent from work for a certain number of days. If he intended challenging his dismissal then he ought to have invoked section 17(5)(b) to be reinstated.

The court considered the employers' reliance on section 17(5)(a) of the Public Service Act. The court found that the employer could either had relied on section 17(5) and deemed him dismissed or it could have charged him with misconduct in terms of the disciplinary code and could have conducted a hearing against the employee. Once the employer made its election it was bound by it and was not entitled on the unsuccessful application of that application to then change course. The court found that the employer had elected to proceed against the

[102] *Mahlangu v Minister of Sport & Recreation*(2010) 5 BLLR 551 (LC).
[103] (2008) 29 *ILJ* 564 (E).

employee by way of a disciplinary hearing in terms of the code. Once it had made such election the employer was prevented from that stage or any later stage relying on section 17(5)(a) or (b).

The court found that the employer had fabricated the redundancy of the employee's post, which was created as a last resort. It also deplored the delay by the employer in providing the reasons for not reinstating the employee.

The court made the finding that section 17 of the Public Service Act, was inconsistent with Section 165 of the Constitution in that it usurps a function of a juristic person. There is no room in the principles of the rule of law for deeming legislation like section 17(5)(a), which creates norms of binding effect without the intervention of an officer to whom the legislative process has been delegated. In the absence of a delegation that section is flawed.

The court therefore, held that the employee could not be deemed to have been dismissed in terms of section 17(5)(a). The court further held that if it was incorrect in its view above, the discretion afforded the employer in terms of section 17(5)(b) was not clearly defined, or structured as required by the Constitution.

Section 1 read with section 3 of the LRA requires compliance with Articles 7 and 8 of the ILO Convention 158 of 1982, when the employment of a worker has been terminated by his or her employer. Section 34 of the Constitution over-arches this compliance with procedural provisions contained in that section as well as the procedural requirements of the rule of law and also procedural requirements of Convention 158.

In the present matter the court found that the employer had not reasonably complied with the requirements of section 34 of the Constitution in that it had not afforded the employee a hearing as contemplated in Article 7(1) of Convention 158, had not informed the employee of his rights to appeal as in Article 8 of Convention 158, did not comply with requirements of the rule of law by indicating the scope of the discretion and the manner of its exercise by the

executive authority to the employee, and had not applied the *audi alteram partem* principles as required by the rule of law when the employee reported for duty.

In conclusion the court's opinion was that section 17(5)(a) was inconsistent with the Constitution and in order to cure its flaws, it will be necessary for parliament to amend it by bringing about the existence of a functionary who must exercise the necessary discretion in terms of section 17(5)(a).

The court found that in the light of the history of the matter and the incomprehensible and malicious attitude and bias on the part of the employer against the employee, it would be a dereliction of duty if the court referred the matter back to the employer. The court accordingly set aside the suspension of the employee and set aside the conviction and dismissal of the employee by the disciplinary body, with costs.

4.7.4 Deemed dismissals- draconian provisions?

Cohen[104] shows that the right to a procedurally dismissal espoused in by section 188(1) of the LRA of 1995 guarantees employees an independent right to fair process prior to dismissal. The requirements of procedural fairness are founded upon the fundamental tenets of natural justice. Natural justice is an administrative law concept that focuses on the process by which a decision is reached and based on primarily on the fundamental maxim *aude alteram partem.* Applying this principle of natural justice to employment law it is an essential requirement of a fair dismissal that the employee should know the nature of the accusation against him and be given an opportunity to state his case. A literal interpretation of the deeming provisions contained in the Public Service Act; Educators Act, SAPS Regulations and Insolvency Act that provide for the automatic termination of employment contracts, results in the protections afforded by the LRA being circumvented. Similarly, the automatic termination of an employment contract by operation of the common law principles of impossibility of performance enables the dismissal provisions of the LRA to be bypassed.

[104] *Supra.*

By depriving an employee of fair process these provisions appear to conflict with the purpose and ethos of the LRA and an employee's constitutional right to fair labour practices[105]. While section 23 of the Constitution provides that everyone shall have the right to fair labour practices, fair labour practice are not defined in the Constitution and this intentionally flexible concept, which is intended to accommodate and balance the evolving rights and interests of employers and employees, takes its shape from the labour legislation, common law contract of employment and constitutional interpretation.

Cohen[106] further shows that fairness by its nature is a malleable and expansive concept, which premised on the individual circumstances of a particular case and the conflicting and evolving rights and interests of employers and employees. Although the labour legislation was enacted to regulate relations between employers and employees, it was not 'intended to regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution', as the field of labour law is too wide to be contemplated in a single statute. Thus, workplace practices that are not regulated by labour legislation might nevertheless infringe the broad protection offered by section 23 of the Constitution and constitute an unfair labour practice. In *NEHAWU v UCT and Others*[107] the Constitutional Court held that legislation must be purposively construed in order to give effect to the Constitution and legislation that is capable of two conflicting interpretations should be given the meaning that best accords with the Constitution, unless there is clear legislative intention to the contrary. If this was the case the court would have to be convinced that this limitation of a constitutionally protected right could be justified in accordance with section 36 of the Constitution. As Ngcobo J aptly noted in *NEHAWU v UCT & Others* [108] 'the courts and the legislature act in partnership to give life to constitutional rights'. All labour legislation is accordingly subjected to 'constitutional scrutiny' to ensure that the rights of employees and employers are protected and while these disputes are designed to be adjudicated by the responsible labour tribunal the Constitutional Court (and by necessary

[105] Cohen, *Supra* ,p 10 -12
[106] *Procedurally Fair Dismissals-Losing the Plot,*SA Mercantile Law Journal Vol 17(2005)33.
[107] (2003) 24 ILJ 95 (CC) 114 para 41.
[108] (2003) 24 *ILJ* 95 (CC).

implication the High Court) retains an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied.

Lawful conduct is not necessarily fair. As Nienaber J, delivering the majority of judgment in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others*[109] , noted there is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair, a lawful dismissal will not for that reason alone be fair. Also, the court in *Fedlife Assurance Ltd v Wolfaardt*[110] observed that the purpose of the LRA of 1995 is to 'provide an additional right to an employee whose employment might be terminated lawfully, but in circumstances that were nevertheless unfair'. Thus while the termination of a deserting employee's contract of employment may well be lawful, provided that the requirements of the statutory provisions are satisfied , it may nonetheless be unfair to an employee that is deprived of the right to a fair hearing.

Cohen[111] further shows that the deemed discharge of an employee not only flies in the face of the basic principles of natural justice and the ethos of the LRA but also infringes the constitutional right to fair labour practices, unless such limitations can be shown to satisfy the limitation clause. As a result these draconian statutory and contractual provisions should be relied upon with caution and only where an employer has no other fairer alternative.

4.8 CONCLUSION

From the above it can be deduced that the automatic termination of contract of employment means that the employment contract lapses by operation of law and not by an act of the employer. Such termination will not constitute a dismissal within the meaning of section 186 of the LRA and the employee whose employment has been terminated will not be able to challenge the termination through the structures and protections afforded by the LRA. Such deprivation of that protection afforded by the LRA against unfair dismissal may breach the

[109] (1996)17 *ILJ* 455 (A) at 459H.
[110] ((2001) 22 *ILJ* 2407 (SCA) at 2414.
[111] *Supra.*

employee's constitutional rights to fair labour practices if it cannot be justified in accordance with the constitutional limitation clause. The purpose of section 17(5)(a)(i) and section 14(1)(a) of the Acts is to enable public service to discharge deserting employees that cannot be located.

In *HOSPERSA*, the court held that these provisions must be used sparingly since they constitute a draconian measure. The circumstances must be such that the Disciplinary Code and Procedure could not be invoked. Therefore, it means that if an employer is aware of the whereabouts of the employee or is able to contact him or her, these provisions cannot be used.

CHAPTER 5

THE DEEMING PROVISIONS AND ADMINISTRATIVE ACTION

5.1 INTRODUCTION

The courts have held in a number of decisions that the deeming provisions are not unconstitutional nor in conflict with the provisions of the LRA. Therefore, termination of employment by operation of law does not constitute a dismissal within the meaning of section 186(1) of the LRA.

section 33 of the Constitution provides that:

> *(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
>
> *(3) National legislation must be enacted to give effect to these rights, and must-*
>
> *(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
>
> *(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
>
> *(c) promote an efficient administration.*

The Promotion of Administrative Justice Act[112] has been enacted to give effect to section 33 of the Constitution.

[112] 3 of 2000.

5.2 ADMINISTRATIVE ACTION IN GENERAL

According to Plasket[113]administrative law serves both to empower administrative officials so that they can implement policies and programs and to limit the exercise of power by officials by requiring all administrative action to meet certain minimum of legality, reasonableness and fairness.

Like other democratic countries, South Africa is governed by the Constitution[114].One of the important activities the Constitution does is to make South Africa a 'constitutional democracy'. This means that the Constitution is the highest law in the country and all laws and all people must follow and obey the Constitution. It should be mentioned that the first provisions relating to the administration are found in the introductory sections to the Constitution[115] and the introduction to the Bill of Rights[116]. Of prime importance for the present purpose is the fact that the Constitution is based on the founding values of the constitutional democracy and the rule of law. The Bill of Rights contains fundamental rights for all people of South Africa. Section 7 of the Constitution stipulates that the state must respect, protect, promote and fulfill the rights in the Bill of Rights. Section 8 of the Constitution further stipulates that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organ of state.

For the purpose of this Chapter it should be emphasized once more that section 33 of the Constitution deals with the right to administrative justice. Section 33(1) guarantees administrative action that is reasonable, lawful and procedurally fair. Section 33(2) makes sure that people have the right to request written reasons for administrative actions that negatively affects them. Section 33(3) stipulates that national legislation must be enacted to give effect to this right. This resulted in the promulgation of the Promotion of Administrative Justice Act 3 of 2000 to fulfill these constitutional imperatives.

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[113] *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000*, Rhodes University, Grahamstown.
[114] 108 0f 1996.
[115] S 1 and 2.
[116] S 7 and 8.

Because it makes the administrators accountable to people for their actions, the Promotion for Administrative Justice Act is an extremely important law in ensuring that South Africa's democracy continues to grow.

The Act requires that there should be a rational objective basis justifying the connection made by the decision maker between the material properly available to him and the conclusion he or she eventually arrived at. It can therefore be deduced that the grounds for the administrative action must be rationally connected to the information before the administrator and the reasons provided by the administrator.

According to Plasket section 6(2)(f) makes the failure to take a decision a ground for review and, finally section 6(2)(i) provides that administrative action that is otherwise unconstitutional or unlawful can be set aside on review.

5.3 DO THE DEEMING PROVISIONS CONSTITUTE ADMINISTRATIVE ACTION

In *Phenithi*[117] case the first prayer sought by the employee in the notice of motion was the setting aside of the "decision of the employer to dismiss" the employee and that such decision be declared an unfair labour practice. The employee further argued that her termination of employment was both substantively and procedurally unfair. The employee contended that she was never given an opportunity to state her case and the termination was apparently by operation of law without any hearing. The employee further argued that the provision of section 14(1)(a) of the Employment of Educators Act,1998 violates fundamental rights to administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution in that the employer is not obliged to institute disciplinary hearing nor to provide reasons for decision taken.

On appeal, the Supreme Court held that there were two issues to be decided (i) whether the employee's discharge constituted fair administrative action and (ii) whether section 14(1)(a) of the Act was unconstitutional. The court held that where employees are informed of their

[117] *Supra,* at para 8.

discharge in terms of the provisions in which an employee is 'deemed' discharged for an unauthorized absence for more than fourteen consecutive days there is no exercise of discretionary power. There was accordingly no decision or administrative act to review. The court rejected the argument that the deeming provision is in conflict with the Constitution because section 14(2) affords absconded employees a right to a hearing if they return to work after their 'automatic discharge'. The employer must still afford employees an opportunity to make representations, after the discharge, as to why the employer should not exercise the discretion to reinstate them. The court held that the fact that section 14(2) provides for a hearing only after an educator has been deemed to be discharged in terms of section 14(1)(a) does not mean that the latter subsection is in conflict with the Constitution.

Some authors argued that section 14(1)(a) provides that the termination is effected 'unless the employer directs otherwise. Accordingly, that phrase suggests the existence of a discretion, the exercise of which should in principle be open to attack by way of review.

5.4 REFUSAL TO REINSTATE: DISMISSAL OR ADMINISTRATIVE ACTION.

In *De Villiers v Head of Department: Education Western Cape Province*[118] The Court held that the *Phenithi* judgment was that section 14(1) of the Employment of Educators Act, 1998 is constitutionally valid and that a discharge effected in terms of the section is not the consequence of any discretionary decision rather than a statutory result; hence it is not a dismissal for the purpose of the LRA nor is it susceptible to review. The court went further to state that, that judgment did not address the nature of a refusal to approve reinstatement of an educator, nor whether that refusal constitutes a dismissal.

Sections 14(2) of the Employment of Educators Act, 1998[119] and 17(5)(b) of the Public Service Act,1994[120] stipulate that any employee deemed to have been discharged may show good cause why he or she should be reinstated. In the *Phenithi* case the Supreme Court of Appeal held that the provisions do not totally exclude a hearing. While it is true that the provisions do

[118] (2008) C934 (LC)(unreported) para 7.
[119] 76 of 1998.
[120] 103 of 1994.

not place an obligation on the employer to invite an employee to a hearing, the employee is not precluded from placing before the employer material or facts that may move the latter to 'direct otherwise'. Sections 14(2) and 17(5)(b) also afford an employee an opportunity to be heard and to be reinstated, provided he is able to show good cause as why the employer should reinstate.

The questions that need to be answered is whether a refusal to reinstate constitute a dismissal which can be dealt with in terms of the dispute resolution mechanism as contemplated in the LRA or after that if need be on review. Secondly, whether refusal by the employer to reinstate the employee in terms of sections 14(2) and 17(5)(b) constitutes administrative action and therefore the court is entitled to exercise its review jurisdiction in that regard.

5.4.1 SECTION 14(2) OF THE EEA[121] AND SECTION 17(5)(b) OF THE PSA[122]

In *De Viliers, supra,* the facts of the case were: The employee was dismissed for contravening the Employment of Educators Act. The arbitrator reinstated the employee. Subsequent to that, a further dispute arose between the parties. The employer invoked section 14(1)(a) of the Act. The matter was referred to the bargaining council and the arbitrator ruled that the council had no jurisdiction to arbitrate the dispute.

During the court proceedings the employer contended that the decision not to reinstate the employee amounted to a dismissal as contemplated in the LRA. The employer further argued that the employee would have referred this matter to the bargaining council that had jurisdiction and ultimately a right of recourse to this court under section 145 of the LRA. The court disagreed with this contention. The court held that section 186(1)(a) of the LRA defines dismissal as a termination of employment contract by an employer with or without notice. The employer that considered representations from an employee in terms of section 14(2) of the Act, is faced with a contract that has terminated by operation of law independently of any act or decision on the part of the employer. Therefore, the employer does not terminate the

[121] Employment of Educators Act,1998.
[122] Public Service Act,1994.

employment contract when electing not to resuscitate it because the contract has ceased to exist.

The court noted that the LRA confers review powers on the Labour Court in relation to conduct by the state as employer. Section 158(1)(h) empowers the Labour Court to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

The court held that the applicant had already found himself non-suited in both the relevant bargaining council and the High Court. If the court was to distance itself from the exercise of discretion such as that established by section 14 of the EEA, the employer's power would effectively be unchecked, and the employee would be left without a remedy. For these reasons, the court found that the employer's conduct in deciding in terms of section 14(2) of the Act to refuse to reinstate the applicant constituted administrative action, and that the Court was entitled to exercise its review jurisdiction on these basis. The court further held that the employer's action remain open to review under section 158(1)(h) of the LRA on the ground of legality. section 158(1)(h) of the LRA empowers the Labour Court to review any conduct by the State in its capacity as employer, on any grounds that are permissible in law.

The above decision was further confirmed in *Grootboom v NPA & another*[123]. That case concerned an employee who was dismissed for misconduct by the employer, the National Prosecuting Authority. The matter was referred to arbitration and his dismissal was set aside by the Bargaining Council. While the employee was still on suspension he took an unauthorized study leave to complete his studies in the United Kingdom. Subsequent to that his salary was stopped and his services were terminated in terms of section 17(5)(a)(i) of the Public Service Act, 1994. The employee approached the Labour Court seeking to review the decision to terminate his employment relying on the grounds set out in the Promotion of Administrative Justice Act 3 of 2000.

[123] (2010) 9 BLLR 949 (LC).

The court held that the applicant had been absent from work without the permission of the employer. The court noted that under section 17(5)(b) of the Act the employee is required to show good cause for his absence. The court rejected the argument that the only remedy availably to employees is to refer the matter to statutory arbitration if the employer refuses to reinstate in terms of section 17(5)(b) of the Act. In the circumstances the court concluded that when considering the employee's representations the employer exercises a power conferred by statute, and exercise discretion. The court, accordingly, held that the employer's decision not to reinstate the employee constituted administrative action subject to review.

In another court decision in *PSA obo Van der Walt v Minister of Public Enterprise & another*[124] , the employee was employed by the Department of Public Enterprise. During the course of employee's employment she was informed by the employer that there were serious allegations of misconduct leveled against her. Accordingly, she was suspended pending the outcome of investigation. During suspension it transpired that the employee misconstrued the conditions of her suspension and her services were terminated in terms of section 17(5)(a)(i) of the Public Service Act on account of misconduct. The applicant referred a dispute to the bargaining council. The arbitrator dismissed the matter on grounds that the bargaining council lacked jurisdiction since the termination of employment was by operation of law.

The court held that the employee's discharge did not constitute administrative action capable of review and setting aside. The coming into operation of the deeming provision requires no decision of the employer. The court noted that the employee was not left without a remedy. Employees who are deemed to have been discharged must report for duty and make representations in terms of section 17(5)(b) of the Public Service Act, 1994 and show good cause. It is at this stage where an employee can raise the issue around why she did not report for work. In circumstances where the employer refuses to consider representations or found that the employee has not shown good cause, the employee could then declare a dispute and refer it to the relevant bargaining council and after that if need be on review.

[124] (2010) 1 BLLR 78 (LC).

This question is still under debate in the courts of law. In *Mahlangu v Minister of Sport & Recreation*[125] the employee was discharged from the public service in terms of section 17(5)(a)(i) of the Public Service Act, 1994 on account of misconduct. It is common cause that the employee suffered from major depression and he was an alcoholic. He approached the Labour Court seeking to review and set aside the decision not reinstate him.

The court held that the "deeming provisions" in the public service on account of misconduct remains even when the provisions of section 17(5)(b) comes into operation and therefore deeming provision does not change into the decision of the employer when the employee is afforded a reasonable opportunity to make representations showing good cause why he or she should be reinstated.

The court noted that section 17(5)(b) of the Public Service Act requires a functionary who considers representations made by the discharged employee to apply his mind before arriving at any conclusion. The court held that one of the key elements that need to be taken into account was whether the employment relationship has been rendered intolerable or has broken down due to what section 17(5)(a)(i) has already categorized as misconduct on the part of the employee.

The court concluded that failure by the employer or any functionary employed by the State to consider representations made by the employee whether or not to reinstate the employee who has been deemed to have been discharged by the operation of law renders the decision reviewable.

The court further noted that the employee's case did not concern a complaint about the decision of the employer to refuse to reinstate but rather an alleged unfair dismissal. In the circumstances, the court did not have jurisdiction to entertain unfair dismissal disputes relating to misconduct on the part of the employee.

[125] (2010) 5 BLLR 551 (LC).

In *Pawusa obo Mdali v Department of Education: Free State Province & Others*[126], the employee was employed by the respondent as a General Assistant in terms of the Public Service Act, 1994. The employee was charged with misconduct and dismissed. During internal appeal process the employer changed the stance that he had adopted and the charges of misconduct against the employee were withdrawn. Subsequent to that the employer invoked section 17(5)(a)(i) of the Public Service Act, 1994 and the employee was discharged from the public service on account of misconduct. The employee referred an unfair dismissal dispute to the relevant Bargaining Council. The arbitrator found that the council had no jurisdiction to entertain the dispute as the employee's termination of employment was by operation of law and not a dismissal as claimed by the employee. The union as the first applicant in the matter had also made representations on behalf of the employee for reinstatement. The applicant approached the Labour Court seeking to have the arbitration award reviewed and set aside in terms of Section 158(1)(g) of the LRA.

The court held that there are certain requirements that need to be met before section 17(5)(a)(1) of the Act can come into operation. "In the absence of a decision of the employer to dismiss, as the discharge takes place by operation of law, neither the CCMA nor Council would have jurisdiction to entertain the dispute which might have arisen. The disgruntled employee, however, is not left without a remedy. It is always open to the employee to persuade the employer to reinstate him in terms of section 17(5)(b) of the Act".[127]

The court further held that "section 17 (5)(b) is clearly intended by the legislature to satisfy the *audi alteram partem* rule which hitherto would not have come into operation. The employee is thereby accorded an opportunity to explain whether he indeed absented himself from his official duties without permission of his head of department, office or institution for a period exceeding one calendar month. The employer is then to consider whether or not to approve

[126] (2004) JR 2316(LC).
[127] para 17.

the reinstatement of that employee. The situation where the employer decides not to reinstate the employee, as in the present case, needs to be briefly examined".[128]

The court disagreed with the contentions that a refusal to reinstate an employee in terms section 17(5)(b) is a dismissal which could only be determined in terms of the statutory arbitration. The court noted that termination of employment by operation of law is not a dismissal within the ambit of section 186 of the LRA. If the employer exercises his discretion in terms of section 17(5)(b) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer.

The court also noted that the first applicant submitted written submissions to the respondent employer on behalf of the employee. The court further went to say that the submission of written representations was a proper means of showing good cause. All that was then left for the applicant to do was to take the decision of the employer not reinstate him, on review, in terms of section 158(1)(h) of the Act, if he felt that the decision could be reviewed on any grounds that are permissible in law.

5.5 CONCLUSION

It is submitted that the *Phenithi* judgment was that section 14 of the Employment of Educators Act, 1998 is constitutionally valid and that a discharge effected in terms of that section is not the consequence of any discretionary decision rather than a statutory result; hence it is not dismissal for the purpose of the LRA nor it is susceptible to review. I submit that the *Phenithi* matter addressed the constitutionality of the deeming provisions and it fell short of clearly outlining whether refusal to reinstate amounts to administrative action. Subsequent cases have held that the employer's conduct in deciding in terms of section 14(2) of the Act to refuse to reinstate the employee constituted administrative action, and that the courts are entitled to exercise their review jurisdiction on this basis. Section 158(1)(h) of the LRA empowers the

[128] paras 18-19.

Labour Court to review any conduct by the State in its capacity as employer, on any grounds that are permissible in law.

CHAPTER 6
CONCLUSION

The Department of Education has two categories of employees, the educators employed in terms of the Employment of Educators Act, 1998[129] and non-teaching staff employed in terms of the Public Service Act, 1994[130]. Section 14(1)(a) of the EEA[131] and a similar provision section 17(5)(a)(i) of the PSA[132] provide for the discharge of an employee in the event that he or she absents himself or herself from his or her workplace for a certain number of days without the permission of the employer.

Attempts have been made in this piece of work to examine the constitutionality and validity of the deeming provisions and whether they fulfill the constitutional imperatives to promote the realization of everyone's rights to fair labour practices and just administrative action.

It is submitted that there can be little doubt that the right to fair labour practices is having a deep and profound impact on the contract of employment. Section 23(1) of the Constitution stipulates that 'everyone has the right to fair labour practices'. Less clear are the circumstances under which an applicant may rely directly on the Constitution where legislative provisions offer no protection against a practice which may be unfair, for instance, dismissing an employee without a fair procedure and for a fair reason.

The courts have held in a number of decisions that termination of employment contract in terms of the deeming provisions does not constitute a dismissal for the purposes of the Labour Relations Act. It is submitted that such terminations are by operation of law. It can therefore be deduced that no decision of the employer is required in terminating the contract of employment in terms of the deeming provisions. As a consequence the bargaining councils

[129] 76 of 1998.
[130] 103 of 1994.
[131] Employment of Educators Act,1998.
[132] Public Service Act, 1994.

often find that they do not have jurisdiction to entertain these disputes since these provisions are peremptory.

The Constitutional Court in *NEHAWU v University of Cape Town*[133] held that the right to fair labour practices is not defined by the Constitution and that the meaning of the concept of 'fair labour practice' can be gathered from legislation and through the decisions of the courts . In *Fedlife Assurance Ltd v Wolfaardt*[134] the court held that the clear purpose of the legislature when it introduced a remedy against unfair dismissal was to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of the employer. It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

In *Old Mutual Assurance Co SA v Gumbi* the court noted that it is within that premise that whilst an employer who holds a disciplinary enquiry may determine its form and procedures to be adopted, these must be fair. Fairness requires, *inter alia,* that the employee should be given an opportunity of meeting the case against him in that the employer must obey the injunction *audi alteram partem.*

In recognizing a right to a hearing the court held that our law is consistent with the international law relating to pre-dismissal hearing as set out in Article 7 of the International Labour Organization (ILO) Convention on Termination of Employment 158 of 1982.

The court further held that by extending requirements of the *audi alteram partem* rule to the employment relationship, South African law promotes justice and fairness in the workplace and promotes the primary objectives of the LRA. In this context, the court held that fairness must benefit both the employer and the employee. The right to pre-dismissal hearing imposes on employers an obligation to afford employees an opportunity of being heard before their employment is terminated by means of dismissal. However, should employees fail to take this

[133] *Supra.*
[134] *Supra.*

opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural fairness.

It is further submitted that until these judgments, the common law never recognized an employee's right to pre-dismissal processes. These developments show, however, the force and effect of the Constitution, that the common law principles extended and developed by the courts in the light of the fundamental principles of constitutional order.

Coming again to the automatic terminations of employment contract in the education sector, it is submitted that a number of statutes including the Public Service Act of 1994 provide that employees are deemed to have been discharged if they are absent from work without the permission of the employer for longer stipulated periods. The courts have consistently held that employees whose services are terminated under these provisions are not dismissed, but are rather discharged by operation of law.

It is submitted further that perhaps the solution lies in the *Phenithi* case, where the Supreme Court of Appeal dealt with the constitutionality of the deeming provisions. In that case the Court confirmed earlier judgments in which it was held that, where employees are discharged in terms of the deeming provisions there is no exercise of discretionary power. There was accordingly no decision or administrative act to review. This reasoning is open to debate. Some authors are of the view that section 14(1)(a) provides that termination is effected 'unless the employer directs otherwise'. Accordingly, this phrase suggests the existence of a discretion, the exercise of which should in principle be open to attack by way of review.

The *HOSPERSA v MEC for Health*[135]also addressed the question of the deeming provisions. Neither that case nor *Phenithi*[136] were directly concerned with whether the discharge of an employee in terms of the deeming provisions constitutes a dismissal within the meaning of Section 186(1)(a) of the LRA. In the light of the finding in *Phenithi*[137] , deemed discharge does

[135] *Supra.*
[136] *Supra.*
[137] *Supra.*

not constitute administrative action because it does not require a decision on the employer's part. It is further argued that for the purposes of the LRA, such termination can be regarded as arising from acceptance by the employer of the employee's repudiation, which has been held to constitute a dismissal.

In *HOSPERSA* the court further found that the only remedy afforded to employees discharged under Section 17(5) of the Public Service Act is an appeal to the head of department concerned, showing good cause why the employee should be reinstated. On the other hand, the court held that an employee in this situation may seek relief under Section 158(1)(h) of the LRA, because the decision as to whether to reinstate an employee involves the exercise of discretion.

In *Noyo v Minister of Agriculture and Land Affairs & others*[138], the court considered the employer's reliance on section 17(5)(a) of the Public Service Act. The court found that Section 17 of the Public Service Act was inconsistent with section 165 of the Constitution in that it usurps a function of a juristic person. The court held that there is no room in the principles of the rule of law for deeming legislation like section 17(5)(a), which creates norms of binding effect without the intervention of an officer to whom the legislative process has been delegated. In the absence of a delegation that section is flawed.

The court noted that the employee could not have deemed to have been dismissed in terms of section 17(5)(a). The court held that if it was incorrect in its view above, the discretion afforded the employer in terms of section 17(5)(b) was not clearly defined, or structured as required by the Constitution. Section 1 read with section 3 of the LRA requires compliance with Article 7 and 8 of the ILO Convention 158 of 1982, when the employment of a worker has been terminated by his employer. Section 34 of the Constitution emphasizes this compliance with procedural provisions contained in that section as well as the procedural requirements of the rule of law and also procedural requirements of Convention 158.

In *Noyo* the court found that the employer had not reasonably complied with the requirements of section 34 of the Constitution in that it had not afforded the employee a hearing as

[138] *Supra.*

contemplated in Article 7(1) of Convention 158. It was held that the employer had not informed the employee of his or her rights to appeal as in Article 8 of Convention 158. Section 17(5)(a) also did not comply with the requirements of the rule of law because it did not indicate the scope of the discretion and the manner of its exercise by the executive authority to the employee. The section also resulted in a situation which in a way precluded the application of the *audi alteram partem* principles as required by the rule of law when the employee reported for duty.

The court found that section 17(5)(a) was inconsistent with the Constitution and in order to cure the flaws, it will be necessary for parliament to amend it by bringing about the existence of a functionary who must exercise the necessary discretion in terms Section 17(5)(a).

I submit once more, that perhaps the solution lies in the *De Villiers* case where the Labour Court ruled that the refusal of the employer whether or not to consider representations made by the employee who is deemed discharged in terms of section 14(2) and section 17(5)(b) constitutes administrative action which is reviewable. The court held that the *Phenithi* judgment was that section 14(1) of the Employment of the Educators Act, 1998 is constitutionally valid and that a discharge effected in terms of the section is not the consequence of any discretionary decision rather than a statutory result; hence it is not a dismissal for the purposes of the LRA nor is it susceptible to review. The court went further to state that, that the judgment did not address the nature of a refusal to approve reinstatement of an educator, nor whether that refusal constitutes a dismissal.

The court noted that the question that needed to be answered was whether a refusal to reinstate an employee constitutes a dismissal which can be dealt with in terms of the dispute resolution procedures as contemplated in the LRA. Secondly, whether refusal by the employer to reinstate the employee in terms of section 14(2) and 17(5)(b) constitutes administrative action and therefore the court would be entitled to exercise its review jurisdiction in that regard.

The court noted that the LRA confers review powers on the Labour Court in relation to conduct by the state as employer. Section 158(1)(h) empowers the Labour Court to review any decision taken or any act performed by the state in its capacity as employer, on such grounds are permissible in law.

The court held that an employee discharged in terms of the deeming provisions has no remedy or recourse in the relevant bargaining council and the High Court because these forums have no jurisdiction to entertain his or her case. If the Court was to distance itself from the exercise of discretion such as that established by section 14 of the EEA, then the employer's power would effectively be left unchecked, and the employee would be left without a remedy. For these reasons, the court found that the employer's conduct in deciding in terms of Section 14(2) of the Act to refuse to reinstate the employee constituted administrative action, and that the court was entitled to exercise its review jurisdiction on these basis. The Court further held that Section 158(1)(h) of the LRA empowers the Labour Court to review any conduct by the state in its capacity as employer, on any grounds that are permissible in law.

In the Eastern Cape Department of Education, I realized that there are challenges experienced by managers in handling abscondments across the District Offices. Some of the challenges emanate from the managers inability to deal with officials who resurface after a period exceeding the stipulated period. In other cases managers do not make attempts in finding the whereabouts of the absconding officials and some are doing nothing about the cases. The outcome of this improper handling of the abscondment policy leads to inconsistency in the handling of abscondments in the Department of Education and a lack of uniformity.

In view of the aforementioned factor it becomes apparent that a policy on abscondments be developed in order to provide guidance to managers and supervisors on how cases of abscondments should be handled.

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