ESTABLISHING GOOD CAUSE SUBSEQUENT TO A DEEMED DISMISSAL

by

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Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM
(Labour Law)

in the Faculty of Law
at the
Nelson Mandela Metropolitan University

SUPERVISOR: PROF JA VAN DER WALT 2017
DECLARATION

I MG Rafapa, student number 212486829, hereby declare that the treatise for the Magister Legum (Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

MG RAFAPA
ACKNOWLEDGEMENTS

My special acknowledgment goes to my family. This research has been a success because of their unwavering understanding and support.

To both my supervisors, Prof JA Van Der Walt and Mr T Qotoyi, I owe my academic development to your intelligible guidance and encouragement.

The following have been very important in the accomplishment of this research:

- Mokgadi Germina Mabogo for her wisdom and guidance on how to write a research. Her wealth of knowledge on writing a research will be forever cherished.

- Takalane Rendani Rambau for helping me with proof reading and editing of this research work. His sharp eye on typographical mistakes helped to maintain the required standard of written language.

- Sello Joseph Makhailemele for the formatting of this document and providing technical support. His skill of computer usage helped in ensuring that the outlook of this document becomes attractive.
DEDICATION

I would like to dedicate this research to my parents who sacrificed a lot for my upbringing and particularly my education. I am proud of them for having believed in me.

My mother Sebolaishi Enerth Rafapa for the love, support and the amazing strength in my upbringing and throughout my studies.

My late father Malose David Rafapa for his guidance and support in my growth as a man, and my development, educationally.

To my wonderful family:

- My wife Mahlatsi Prudence Rafapa who has become my source of inspiration in the successful completion of this research. Her warmth and support helped to cushion the difficulties I experienced during the writing of this research.

- My two daughters; Setepi Lethabo Rafapa and Mphodi Tebogo Rafapa who have become the reason for my consistent personal development. This research is dedicated to you my girls.
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LIST OF ABBREVIATIONS AND ACRONYMS

BC         Bargaining Council
BCEA       Basic Conditions of Employment Act 75 of 1997
CCMA       Commission for Conciliation Mediation and Arbitration
DPSA       Department of Public Service and Administration
EAHF       European Alcohol and Health Forum
ed         edition
ed(s)      editor(s)
EEA        Employment of Educators Act 76 of 1998
EHW        Employee Health and Wellness
et al      et aliis [and others]
etc        et cetera
HIV & AIDS Human Immunodeficiency Virus & Acquired Immune Deficiency Syndrome
HOD        Head of Department
i.e        id est [that is]
ILO        International Labour Organisation
ITHPCSA    Interim Traditional Health Practitioners Council of South Africa
LAC        Labour Appeal Court
LC         Labour Court
LPDE       Limpopo Province Department of Education
LRA        Labour Relations Act 66 of 1995
MEC        Member of Executive Council
NWPGDPS    North West Province Government Department of Public Safety
PAMB       Public Administration Management Bill
PERSAL     Personnel and Salary
PSA        Public Service Act 103 of 1994
PSCBC      Public Service Co-ordinating Council
PSR        Public Service Regulations
s          section
SCA        Supreme Court of Appeal
THO        Traditional Healers Organisation
SUMMARY

The establishing of good cause subsequent to a deemed dismissal, as practiced currently only in the public sector, has been a controversial issue for the courts, labour law commentators and academics alike. It has been so because of a number of legislative deficiencies which caused the inconsistent application of the deeming provisions across the public service.

Amongst others, the legislative deficiencies regarding establishing good cause are; the time-limit for establishing good cause, what happens when the employee returns, whether establishing of good cause should be entertained through written response or a hearing, the Termination of Employment Convention, 1982(No. 158) is silent on the deeming provisions, review of the employer’s discretion not to reinstate the absconding employee and the legal position regarding the traditional healer’s certificate.

There will be an intensive investigation on the validity of the traditional healer’s certificate. Majority of South Africans rely on the THP for a number of illnesses. In some cases, they use the traditional healer’s certificate to establish good cause subsequent to a deemed dismissal. The traditional healer’s certificate is not yet valid given the pending legislative processes. This issue will be broadly explored in order to uncover the causes for the delay in finalising this crucial issue.

Most of the absconding employees have a problem of alcoholism. There is a causal relationship between deemed dismissal and alcoholism. It is again the intention of this study to fully investigate this phenomenon and provide solutions for the employers faced with this challenge.

Practical solutions will be proposed for each identified legislative deficiency and any related challenge to help employers to manage the deeming provisions in a very effective and efficient manner.
CHAPTER 1
RESEARCH PROPOSAL

1.1 BACKGROUND AND RATIONALE FOR THE STUDY
The rational for this study is to investigate the legislative deficiencies regarding the establishing of good cause subsequent to a deemed dismissal, and to identify legislative proposals to remedy the situation. The study mainly focuses on the public sector. The reason for focussing on the public sector is that the deeming provision is promulgated only for the sector, and there is no equivalent deeming provision in the private sector.

The comprehensive and comparative analysis of the practice relating to absences from work for long periods as applied in the private sector, and the deeming provision as applied in the public sector, will be carried out in chapter 2. The comparative analysis becomes important because of the differences in approach between the two sectors.

There are two pieces of legislation which provides for the deeming provision in the public sector. The first deeming provision is section 14(1) of the Employment of Educators Act 76 of 1998 (EEA) which applies specifically to the Department Education, and the second one is section 17(3) of the Public Service Act 103 of 1994(PSA) which applies to the entire public service with the exception of the Department of Education. The above two provisions give employees an opportunity to establish good cause upon their return.

Section 14(1) of the EEA\(^1\) states as follows:

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14 (1) An educator appointed in a permanent capacity who-
(a) is absent from work for a period exceeding 14 consecutive days without 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 yet been disposed of, resigns or without permission of the employer assumes
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\(^1\) 76 of 1998.
employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, …"

The whole of section 14(1) of the EEA\textsuperscript{2} above deals with the termination of contract of employment through operation of the law. The notion of “termination of contract through operation of the law”, will be explored in chapter 3.

Section 14(2) of the EEA\textsuperscript{3} deals with establishing of good cause. It states as follows:

“If 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 the re-instatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine.”

It has to be noted that the above provision is silent on which office should entertain establishing of good cause. This legislative deficiency will be extensively elaborated upon in chapter 4.

Another deeming provision in the public sector which is similar to section 14(1) of the EEA,\textsuperscript{4} is section 17(3)(a)(i) and (ii) of the PSA.\textsuperscript{5} It states as follows:

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

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

\textsuperscript{2} 76 of 1998.

\textsuperscript{3} Ibid.

\textsuperscript{4} Ibid.

\textsuperscript{5} 103 of 1994.
The above deeming provision deals with the termination of contract through operation of the law. Section 17(3)(b) of the PSA\(^6\) deals with establishing good cause. It states as follows:

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

The above provision, contrary to the EEA\(^7\) provision on establishing good cause, clearly indicates that the power to entertain establishing good cause rests with the office of the executing authority. The comparative analysis between the EEA and the PSA regarding the office with authority to entertain establishing good cause and the negative implications arising out of the EEA’s legislative deficiency will be carried out in chapter 4.

1.2 PROBLEM STATEMENT

The study identifies a number of legislative deficiencies arising from the interpretation and implementation of both section 14(1) and (2) of the EEA and section 17(3) (a) and (b) of the PSA. There is a mountain of case law to demonstrate the legislative deficiencies relating to this very fundamental deeming provision in the public sector. This will be demonstrated in both chapters 3 and 4.

Given the topicality of the study, the problem statement is divided into a number of sub-sections for purposes of clarifying the content and context for each.

The sub-sections are as follows:

\(^6\) Ibid.
\(^7\) See s 14(2).
1.2.1 THE EMPLOYEE RETURNS AFTER THE LAPSE OF TIME-LIMIT FOR THE APPLICATION OF THE DEEMING PROVISION, BUT BEFORE THE ISSUING OF COMMUNICATION FOR TERMINATION OF CONTRACT

The primary focus of this study is establishing good cause subsequent to deemed dismissal. One of the legislative deficiencies regarding the interpretation and application of the above provisions is in circumstances where the employee whose contract has been terminated through operation of the law, returns. The above provisions\(^8\) are silent about this. This forms part of a host of issues to be explored.

1.2.2 SHOULD ESTABLISHING GOOD CAUSE BE DONE THROUGH RESPONDING TO REPRESENTATIONS OR THROUGH A HEARING?

The above provisions are again silent on the approach which should be used when adjudicating on establishing good cause subsequent to a deemed dismissal. In the case of *Phenithi v Minister of Education & Others*,\(^9\) the Supreme Court of Appeal (SCA) held that the employer may not be expected to convene a disciplinary hearing for an employee whose whereabouts are not known. In my view, the court was correct. Now, when the employee returns, is the same position sustainable? This matter will be explored in the context of the principle of natural justice, fairness and reasonableness, and section 3 of schedule 8 of the Labour Relations Act 66 of 1995(LRA).

1.2.3 TIME-LIMIT FOR ESTABLISHING GOOD CAUSE

Both section 14(2) of the EEA and section 17(3)(b) of the PSA are silent about the prescribed time-limit regarding establishing good cause. It is therefore permissible that the employee’s contract may be terminated through operation of the law, and you find that the affected employee only considers establishing good cause after a year or so.

Given the fact that both section 14(2) of the EEA and section 17(3)(b) of the PSA are silent about time-limit for establishing good cause, it is therefore highly impossible for the employer to refuse to entertain the representations from the affected employee.

It is a serious legislative deficiency for the above provisions not to prescribe time-limit for establishing good cause. It has to be noted that there are time-limits for grievances,

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\(^8\) See s 14(2) of EEA and s 17(3)(b) of the PSA.

disputes, appeals and conclusion of disciplinary cases. The disciplinary cases should be concluded within ninety (90) days in terms of EEA.\textsuperscript{10} Appeals should be submitted within five (5) working days in terms of the EEA.\textsuperscript{11} Equally, disciplinary cases should be concluded within sixty (60) days in terms of the Public Service Bargaining Co-ordinating Council(PSCBC) Resolution 1 of 2003.\textsuperscript{12} Additionally, appeals should be submitted within five (5) working days\textsuperscript{13} and finalised within thirty (30) days, in terms of the above PSCBC resolution.\textsuperscript{14}

The lack of prescribed time-limits for the above provisions relating to establishing of good cause is open for a number of interpretations and a cause for unnecessary disputes. This matter will be fully explored in chapter 4.

\textbf{1 2 4 THE OFFICE WHICH EXERCISED TERMINATION OF CONTRACT SHOULD NOT BE THE SAME OFFICE WHICH ENTERTAINS ESTABLISHING GOOD CAUSE}

Section 17(3)(b) of the PSA is clear that establishing good cause should be done through the office of the executing authority, but the same cannot be said about section 14(2) of the EEA. It is probably this legislative deficiency which led the Department of Education in Limpopo to opt for using the Head of Department’s (HOD) office to both exercise the termination of contract through operation of the law, and to entertain establishing good cause. There will be an extensive analysis of legal implications for this kind of practice in chapter 4.

\textbf{1 2 5 THE CORRELATION BETWEEN DEEMED DISMISSAL AND ALCOHOLISM}

One of the lifestyle problems which affect employees negatively, to the extent of making it difficult for them to report for work as expected, is alcoholism. It is therefore not surprising that the majority of cases of deemed dismissals involve employees who are alcoholic. This issue will be fully explored in chapter 5.

\textsuperscript{10} See s 6(3)(b).
\textsuperscript{11} See s 9(2).
\textsuperscript{12} See s 7.2(c).
\textsuperscript{13} See s 8.2.
\textsuperscript{14} See s 8.8.
12.6 BLOCKING OF DEEMED DISMISSED EMPLOYEES FROM PERSAL SYSTEM AND MAKING IT DIFFICULT FOR THEM TO BE EMPLOYED AGAIN IN THE PUBLIC SERVICE

The bone of contention here is that employees whose contracts have been terminated through operation of the law are not given an opportunity to be employed once establishing of good cause is turned down, and possibly, even after the courts would have handed down judgements against them. They are forever barred from getting employment in the public service. There will be an extensive analysis of this challenge in chapter 4.

12.7 THE LEGAL POSITION OF THE TRADITIONAL HEALER’S CERTIFICATE

Majority of employees whose contracts have been terminated through operation of the law in terms of section 14(1) of the EEA and section 17(3)(a) of the PSA, present the traditional healer’s certificate to establish good cause. It is therefore imperative for this study to venture into the area of the legality of the traditional healer’s certificate to help employers manage this often confusing phenomenon.

There have been attempts by the government to standardise and regulate the Traditional Health Practice (THP). The Traditional Health Practitioners Act (THPA)\(^{15}\) was promulgated and made provision for the establishment of the Interim Traditional Health Practitioners Council of South Africa (ITHPCSA) in chapter 2 of the Act.

Amongst others, the Act describes the mandate of the council in chapter 2 as follows:

> “[to] promote and maintain appropriate ethical and professional standards required from traditional health practitioners, [to develop the] code for traditional health practice, and [to] ensure that traditional health practice complies with universally accepted health care norms and values.”

There is a need to track and trace the job that has been done by the council. The work of council should be critically analysed in light of the current developments in labour law parlance, particularly the SCA in the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoleli*.\(^{16}\) This case dealt with traditional healer’s certificate presented by Johanna

\(^{15}\) 22 of 2007.

\(^{16}\) (2014) 35 ILJ 585 (SCA).
Mmoledi. On her return from training as a sangoma, Kiviets, her employer, refused to recognise it.

1.3 RESEARCH QUESTIONS
The research questions are categorised into two parts. The first part is the main research question and the second part is comprised of sub-questions.

1.3.1 THE MAIN QUESTION
The main question is: What should be the reasonable and justifiable approach when entertaining establishing of good cause subsequent to a deemed dismissal, by the affected employee?

1.3.2 SUB-QUESTIONS
The sub-questions are as follows:

(a) What should happen when the affected employees return to work?
(b) How long should it take for the affected employee to establish good cause?
(c) What is the appropriate approach when entertaining establishing good cause?
(d) Whether the office which exercises the termination of the contract of employment through operation of the law should be the same office which entertains establishing of good cause?
(e) Is the termination of contract through operation of the law administrative action or administrative decision?
(f) Are employees terminated through the deeming provision entitled for appointment again in the public service?
(g) What is the correlation between deemed dismissals and alcoholism?
(h) What is the legal position regarding the TH’s certificate?

1.4 AIMS AND OBJECTIVES OF THE STUDY
The aims and objectives of the study are as follows:

(a) To clarify the conceptual framework of the deemed dismissal in the public service and distinguish it from abscondment as well as desertion, as largely practiced in the private sector.
(b) To help employers in the public sector to understand the legal consideration regarding termination of contract through operation of the law.

(c) To help employers in the public sector to ensure compliance with the principles of natural justice, fairness and reasonableness when terminating the contract of employment through operation of the law, and even when entertaining establishing of good cause from affected employees.

(d) To help employers in the public sector to set up early warning systems to mitigate against the negative effects of alcoholism at the workplace, which may result in deemed dismissals.

(e) To clarify the current legal position regarding the traditional healer’s certificate in relation to its use in establishing good cause.

1 5 RESEARCH METHODOLOGY
The research methodology to be used in this study is literature review research. The following are the sources of literature review:

(a) The International Labour Organisation(ILO): The Termination of Employment Convention, 1982(No. 158);
(b) The Constitution of the Republic of South Africa, 1996;
(c) The Labour Relations Act(LRA);
(d) The Basic Conditions of Employment Act(BCEA);
(e) The Public Service Act(PSA);
(f) The Employment of Educators Act(EEA);
(g) Public Service Co-ordinating Bargaining Council(PSCBC) Resolution 1 of 2003;
(h) Traditional Health Practitioners Act(THPA); and
(i) Case law

1 6 LIMITATIONS OF THE STUDY

1 6 1 PERSONAL OBSERVATION: MY RESPONSIBILITY AS A MANAGER FOR CONDUCT MANAGEMENT

(a) Majority of those establishing good cause are alcoholic
The argument that the majority of those establishing good cause are alcoholic is based on my personal observation in the Limpopo Province Department of Education. The
observation is by virtue of my responsibility as a manager for conduct management. This observation arises from the representations from affected employees when they establish good cause. It is therefore possible for another person to have a different observation.

(b) Majority of affected employees use traditional healer’s certificate when establishing good cause
During the course of my job as the manager responsible for conduct management, I personally observed that majority of employees use traditional healer’s certificate when establishing good cause. Therefore, a different person may have different observation.

(c) Potential for bias in this study
Given my role as a manager responsible for conduct management, my personal experiences had a huge influence on this study. I therefore acknowledge that a different person, who is not in my position, may have had a different approach and arrived at a different outcome.

162 THE SCOPE AND NATURE OF THE ENQUIRY
This study is on critiquing the law in respect of establishing good cause subsequent to a deemed dismissal. The focus is mainly on legal enquiry. However, there are other issues which may have a bearing on the research outcome, if the scope of this study allowed such.

These issues are not confined to the legal enquiry but goes into the realm of medical fraternity. Amongst others, such issues include; HIV and AIDS and mental disorder. These are potential issues for further research in the context of establishing good cause subsequent to a deemed dismissal.

17 OUTLINE OF RESEARCH
This study is divided into six chapters. The chapters are as follows:
CHAPTER 1: GENERAL BACKGROUND AND RATIONALE FOR THE STUDY

This chapter provides a summary which will briefly outline a snapshot of the general thrust of the study. The issues covered in this chapter include; the introduction (background and rationale for the study), the primary focus of the study; the problem statement which will elaborate on the different aspects which prompted this study and the possible remedies, the research questions which are divided into the main question and sub-questions, the aims and objectives of the study which will outline the purpose of the study and how it will be beneficial to the employers, the research methodology which identifies the method to be used in the study and sources to be used for literature review, and the outline of research which identifies and details all the chapters to be covered in the study.

CHAPTER 2: THE CONCEPTUAL FRAMEWORK

For purposes of the appropriate interpretation and contextualisation of the study, it is important to clarify the conceptual framework of the concepts used. This chapter will extensively deal with the definition of the following concepts; the concept of absenteeism, the concept of desertion, the concept of abscondment and the concept of deemed dismissal; the critical analysis of concepts; private and public sector terminations; establishing good cause and grappling with the notion of administrative action.

CHAPTER 3: LEGAL CONSIDERATIONS FOR THE DEEMED DISMISSALS

The content and context of any legal writing should be underpinned by the statutory framework. Therefore, the parameters of this study, in terms of the extent to which logical reasoning could be pursued, are constrained by the constitutional and statutory imperatives. Additionally, due to the fact that South Africa has incurred international obligations through ratification of a number of conventions and the recommendations of the ILO, both international and domestic law will be considered for purposes of this study.

This chapter covers the ILO Termination of Employment Convention, 1982 (No. 158), the definition of “termination” in terms of Convention 158, the constitutional provisions, the constitutionality of section 14(1) of EEA and section 17(3)(a)(1) of the PSA, the
purposive interpretation of section 14(1) of the EEA and section 17(3)(1)(i), statutory provisions, the need to communicate with the affected employee and the content thereof, application for review of the employer’s refusal to reinstate the absconding employee, facts to be considered before termination of contract through operation of the law, and the fact that the deeming provision should be applied sparingly.

174 CHAPTER 4: ESTABLISHING GOOD CAUSE
There are a number of apparent legislative deficiencies arising from the interpretation and application of both section 14(1) and (2) of the EEA and section 17(3)(a) and (b) of the PSA.

This chapter will comprehensively deal with the following aspects; two stage process on termination of contract through operation of the law, freezing of salary of absconding employee, the employer’s discretion on whether or not to reinstate the affected employee, the office which exercises termination of contract should not be the same office which entertains establishing good cause, the employee returns after the lapse of time-limit for the application of the deeming provision, the time-limit within which the affected employee should be afforded an opportunity to establish good cause, should establishing good cause be done through responding to representations or through a hearing?, policies on entertaining representations from deemed dismissed employees, the right to be heard, the duty of fair dealing with deemed dismissed employees, blocking of deemed dismissed employees from PERSAL system, proposed amendments on re-employment of former employees dismissed.

175 CHAPTER 5: DEEMED DISMISSAL AND ALCOHOLISM
The causal relationship between deemed dismissal and alcoholism is well documented. This chapter will provide evidence of the causal relationship between deemed dismissal and alcoholism. To a large extent, this chapter deals with preventative measures relating to alcoholism.

This chapter covers the following; alcoholism and productivity, the definition of the concept of alcoholism, signs of alcoholism, alcoholism as a health problem, paradigm shift from assistance to prevention, nipping alcohol abuse in the bud, employers should focus on promoting healthy lifestyle for all employees, the primary paradigm
shifter(support from management), assistance from those in the “red zone”, stages of assistance for an alcoholic employee, capacity building for management and trade union officials, identification of alcohol abuse and intervention before the application of deemed dismissal.

17.6 CHAPTER 6: LEGAL POSITION REGARDING THE TRADITIONAL HEALER’S CERTIFICATE

This chapter will in general deal with processes set up or established by government to standardise and regulate the THP. The topical issues covered in this chapter include; the use of traditional healer’s certificate in establishing good cause, the fact that majority of Africans rely on traditional healers for treatment of certain illnesses, the THP is a human rights issue, critical analysis of section 23 of the BCEA, are traditional healer’s certificates not covered by the BCEA, the current legal position regarding the traditional healer’s certificate, the proclamation by the President of the Republic of South Africa on the commencement of the Traditional Health Practitioners Act,\(^\text{17}\) the critical analysis of the case of \textit{Kievits Kroon Country Estate(Pty)Ltd v Mmoledi}\(^\text{18}\) and the fact that there is no room for some employers to cater for visions of ancestors.

18 CONCLUSION

There is no doubt that the establishing of good cause needs some intensive and critical analysis in order to deal with the legislative deficiencies identified in this study. The subsequent chapters will explore a number of possible and sustained interventions to remedy the situation.

\(^{17}\) 22 of 2007.

\(^{18}\) (2014) 35 \textit{ILJ} 585 (SCA).
CHAPTER 2
THE CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION
In this chapter, there will be a comprehensive definition of concepts, critical analysis of definitions and dealing with the notion of administrative action. The concepts to be defined include; absenteeism, desertion, abscondment and deemed dismissal.

The first part will deal with the definition of concepts, followed by the critical analysis of concepts. As indicated chapter 1, the focus of this study is to identify the legislative deficiencies regarding establishing good cause subsequent to a deemed dismissal. Therefore, the critical analysis of concepts will help to identify such legislative deficiencies.

2.2 THE DEFINITION OF CONCEPTS
The first concepts to be defined are; absenteeism, desertion and abscondment. There are two reasons for starting with these concepts. The first reason is that these concepts are often confused with each other, and the second reason is that these concepts are closely related. These concepts are usually grouped together because of their interrelationship.

The common denominator amongst both desertion and abscondment is the concept of absenteeism. For either desertion or abscondment to take place, there has to be some form of absenteeism. Lastly, the concept of deemed dismissal will be defined.

2.2.1 THE DEFINITION OF ABSENTEEISM
It is important to start with the concept of absenteeism because abscondment is the product of absenteeism. Absenteeism is defined as the fact of being frequently away from work or school, especially without good reasons.19 This definition implies that there has to be good reasons for absence from work. Absenteeism, in turn, can be

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divided into late-coming, absences from an employee’s workstation, and absences from the workplace itself for short periods.20

Grogan’s definition of absenteeism built on the mould of the definition in the Oxford dictionary. It does not matter whether it is the complete absence from work or late-coming. The rule of thumb is that there has to be good reason for absence as per the classification of absences by Grogan.

Under normal circumstances, a complete absence from work should be prior the approval of the employer. The prior approval will exclude absence from work due to illness. The employee is required to fill the leave forms in situations where the absence will be for a full day. The employer has discretion to either grant the leave or decline it, depending on the circumstances. If the employer notices absences without prior authorisation or good reason, the affected employee will face disciplinary measures.

222 2 THE DEFINITION OF DESERTION

For desertion to take place, the employee should unequivocally demonstrate an intention not to return to work.21 Desertion is deemed to have taken place when the employee has actually intimated expressly or by implication that he or she does not intend to return to work.22

Van Niekerk, Christiaan, McGregor, Smith and van Eck,23 explains the concept of desertion as follows:

“Desertion is distinguishable from absence without leave in that, in the former instance, the employee’s conduct indicates or gives the employer reason to believe that the employee does not intend to return to work. The courts require that an employer establish whether the employee’s intention was not to return to work, and that the employer considers an employee’s claim that he or she had a good reason for being absent.

Unless employees who have deserted or absconded are able to produce compelling reasons for their absence, their conduct would normally justify dismissal.”

22 Ibid.
The above definitions have two things in common. Firstly, a desertion has an element of the employee’s intention not to return to work. Secondly, a desertion should have some form of absence from work. Therefore, desertion is preceded by the employee’s absence from work.

2 2 3 THE DEFINITION OF ABSCONDMENT

(i) The dictionary definition of abscondment
The definition of abscondment is “to escape from a place that you are not allowed to leave without permission”.24 This definition indicates that abscondment occurs in situations where the employee decides to absent himself or herself from the workplace without permission of the employer.

The absence should be for an unreasonably long period. The period of absence should be to the extent that the employer arrives at the conclusion that the employee no longer wants to return to work. Abscondment is deemed to have occurred when the employee is absent from work for a time [period] that warrants the inference that the employee does not intend to return to work.25

2 2 4 THE DEFINITION OF DEEMED DISMISSAL

Deemed dismissal implies that the contract of employment terminates through operation of the law. It is neither terminated at the instance of the employer nor the employee. It is neither a dismissal nor a resignation.26 In some cases, an employment relationship is terminated by neither the employer nor the employee but by operation of law. This is sometimes called an automatic termination.27

In the case of De Villiers v Head of Department: Education, Western Cape Province,28 Van Niekerk J remarked as follows regarding the termination of contract through operation of the law:

25 Grogan Dismissal 177.
26 Grogan Dismissal 71.
“An employer who receives an application in terms of s 14(2) 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 employment contract when electing not to resuscitate it- at that point, the contract has ceased to exist.”

The above argument advanced by Van Niekerk J emphasises the point that the contract of employment terminates at the time the affected employee absconds from his/her work or deserts his/her work. It terminates by automatic application of the law.

In the case of *HOSPERSA v MEC for Health*,29 Pillay J unequivocally explained the precise manner in which the contract of employment terminates through operation of the law. The explanation was with regard to the amended section 17(5)(a) of the PSA. He expressed it as follows:

“Employees who absent themselves without permission for more than one calendar month shall be deemed to have been discharged on account of misconduct. The words “shall be deemed” implies that the provisions are automatically invoked by operation of law.”

It is clear from the above that the termination of contract through operation of the law is determined by the expiry of the period of abscondment or desertion. It is not occasioned by the decision of the employer.

Whilst the public sector has a deemed dismissal provision, there is no equivalent statutory provision in the private sector.30 There are two statutory provisions for deemed dismissals in the public sector. The provisions are section 14(1) and (2) of the EEA and section 17(3)(a) and (b) of the PSA.

(i) The definition of deemed dismissal in terms of section 14(2) of the EEA

Section 14(2) of the EEA constitutes the core of this study. It is this section which provides for establishing good cause subsequent to deemed dismissal. The section states as follows:

“…

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29 [2003] 12 BLLR 1242 (LC) par 35.

2. If 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 the re-instatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine."

In terms of the above provision, there is no specified office for entertaining establishing good cause. The above provision loosely makes use of the general term “employer”. This is open for the discretion of officials in departments. The likelihood is that the “employer” may mean the very office which dealt with the deemed dismissal. This may result in a situation where one office deals with both termination of contract through operation of the law, and establishing good cause.

(ii) The definition of deemed dismissal in terms of section 17(3) of the PSA

Another deeming provision in the public sector, which is similar to section 14(2) of the EEA, is section 17(3)(b). Section 17(3)(b) of the PSA constitutes the core of this study as well. It provides for establishing good cause subsequent to deemed dismissal. It states as follows:

“…

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

In terms of the above provision, the office responsible for entertaining establishing good cause is specified. The “executing authority” is the one responsible for entertaining establishing good cause.31

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31 See s 17(3)(b) of the Public Service Act 103 of 1994.
2.3 CRITICAL ANALYSIS OF CONCEPTS

The application of the concepts of desertion, abscondment and deemed dismissal, have always been the centre of much heated debates. Large volumes of case law indicate that the courts have been seized with these concepts for a very long period.

The key issue which has always been contested is “who terminates the contract of employment?” This question has become important for the courts and other forums because it helps to classify whether the matter is an unfair dismissal or not. In the private sector, desertion and abscondment are largely classified as unfair dismissal cases. However, in the public sector, the deemed dismissal is not classified as an unfair dismissal case.

2.3.1 WHO TERMINATES THE CONTRACT OF EMPLOYMENT?

In the private sector, the termination of contract of employment arising from desertion or abscondment is handled in compliance with both sections 2 and 4 of schedule 8 of the Labour Relations Act (LRA). In contrast to the private sector, the public sector termination of employment arising out of desertion or abscondment does not comply with the provisions of schedule 8 of the LRA. The termination occurs through operation of the law. Therefore, there is no dismissal.

Basson et al raised the critical question in relation to a situation where the employee deserts or absconds his or her employment. They raised the question as follows:

“If an employee absconds or deserts his or her employment the question arises as to who terminates the employment contract. Does the employee, by leaving his or her employment without an explanation or reason, terminate the employment contract or does the employer terminate the contract by accepting the repudiation of the contract?”

In terms of the current situation in the country, the answer to this question will depend on whether the affected employee is employed by the private sector or the public sector. In the public sector, there is a deeming provision and there is no such provision in the private sector.

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32 See the case of Msweli v MEC: Gauteng Province Department of Education (2013) 34 ILJ 650 (LC) par 41.
2311 PRIVATE SECTOR TERMINATIONS

(i) Tracing the whereabouts of the absconding employee

In the private sector, terminations are effected after the employer would have made efforts to trace the whereabouts of the absconding employee. The court in the case of Kotze v Public Health & Sectoral Bargaining Council,\(^\text{35}\) made this point abundantly clear. The court held as follows:

“In the private sector cases of abscondment entail both absence from work without authority and evidence of the intention on the part of the employee not to return to work. To satisfy the requirements of fairness in abscondment cases the employer had to show that it took steps to locate the whereabouts of the employee.”

2312 TERMINATIONS BY THE EMPLOYER CONSTITUTE A DISMISSAL

In the private sector, termination of the contract of employment by the employer constitutes a dismissal. It therefore follows that, private sector employees are entitled for accessing the services of the Bargaining Council (BC) or the Commission for Conciliation, Mediation and Arbitration (CCMA). Their terminations will be conciliated and arbitrated by either the BC or the CCMA if there is no council with jurisdiction. This is the case because there is no deeming provision in the private sector.\(^\text{36}\)

2313 PUBLIC SECTOR TERMINATIONS: DEEMED DISMISSAL

(i) Termination of contract through operation of the law

The termination of the contract of employment arising from desertion or abscondment in the public sector, occurs through operation of the law. In terms of section 14(1) of the EEA, the expiry of fourteen (14) consecutive days marks the automatic termination of contract of employment. In terms of section 17(3)(a) of the PSA, the expiry of the period of one (1) calendar month marks the automatic termination of the contract of employment.


\(^{36}\) See Kotze v Public Health & Sectoral Bargaining Council (2010) 31 ILJ 302 (LC) par 9.
The fact that the termination is dependent on the expiry of the prescribed period of desertion or abscondment, implies that there is no decision taken to terminate it. It could be concluded that, in terms of the deeming provisions in the public sector, there is no dismissal.

In the case of *Msweli v MEC: Gauteng Department of Education*,37 Snyman AJ cited the case of *Jammin Retail (Pty) Ltd v Mokwane*,38 when elaborating on the termination of contract through operation of the law. He explained as follows:

> “Of particular relevance to the current matter, the judgment of *Jammin Retail (Pty) Ltd v Mokwane* and Others deals specifically with the distinction between employees that have absconded in the public sector and those in the private sector. It was held as follows at paragraph 13 with specific reference to public service employees:

> ‘The authorities are in agreement that such a termination is not a dismissal as the contract is not terminated by virtue of the decision of the employer but by the operation of law. In other words the employment contract is deemed to have been terminated due to absence from work by the employee and not the decision of the employer. This approach is generally applicable in the public sector and the same does not apply in the private sector.’ “39

The position of the court in terms of the above judgement is too mechanical. This creates a grey area in terms of the role that the employer should play when an employee absconds. There is a need for the relook at the deeming provision to avoid the abuse of the deeming provision by public sector employers.40

(ii) Establishing good cause

Whilst section 17(3)(b) of the PSA specifies the office responsible for entertaining establishing good cause, the same cannot be said for section 14(2) of the EEA. Section 14(2) does not specify the office responsible for entertaining establishing good cause. It only makes mention of the “employer”. The use of the general term “employer” may cause confusion in situations where there is no policy framework to provide guidance on this.

37 [2012] 34 ILJ 640 (LC) par 40.
39 See *Msweli v MEC: Gauteng Department of Education* [2012] 34 ILJ 640 (LC) par 40.
40 See *Grootboom v National Prosecuting Authority & Another* (2014) 35 ILJ 121(LAC) par 40.
There is a prevalent practice in the public service where absconding or deserting employees are issued with notices of termination of contract of employment. In certain situations, the “employer” may mean the same office which issued the notice of termination. Therefore, the objectivity of the “employer” in the context of establishing good cause, is questionable.

(iii) Identified legislative deficiencies in relation to establishing good cause subsequent to deemed dismissal

After the termination of contract through operation of the law, the affected employee has the right to establish good cause. Establishing good cause is done in terms of section 14(2) of the EEA and section 17(3)(a) of the PSA. According to my observation, the following are the legislative deficiencies with regard to the application and implementation of the above provisions:

(a) Section 14(2) of the EEA does not specify the office to whom establishing good cause should be directed, whilst section 17(3)(b) of the PSA specifically indicates that establishing good cause should be directed to the office of the executing authority.

(b) The affected employee’s representations are entertained through written response, without any formal hearing.

(c) There is no time-limit within which the affected employee should be afforded an opportunity to establish good cause.

The above identified deficiencies will be comprehensively elaborated upon in chapter 4 of this study.

2.4 GRAPPLING WITH THE NOTION OF ADMINISTRATIVE ACTION

Unpacking the notion of administrative action is important in the context of establishing good cause subsequent to deemed dismissal. The primary focus is with regard to the recourse available to the affected employee after the failure by the employer, to reinstate the affected employee. Did the conduct of the respondent in failing to reinstate

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41 The Limpopo Province Department of Education issue notices to the affected employees informing them about the termination of contract through operation of the law. See also the North West Provincial Government Department of Public Safety: Human Resources Policy Pack (2009) 7.2(b)(ii) 179.
the applicant in terms of section 14(2) of the EEA constitute administrative action? This question will invariably apply to section 17(3)(b) of the PSA.

241 THE TEST FOR DETERMINING ADMINISTRATIVE ACTION

Consistent with this study, the court in the case of *De Villiers v Head of Department, Western Cape supra*, raised a fundamental question regarding establishing good cause. The question pertained to the failure by the Western Cape Department of Education to reinstate De Villiers. The court asked the question as follows:

“Did the conduct of the respondent in failing to reinstate the applicant in terms of s 14(2) of the EEA constitute administrative action?”

In the same case of *De Villiers v Head of Department, Western Cape*, the court cited the case of *President of RSA v SARFU*, as per Chaskalson CJ. It was in the case of President of RSA that the test for determining administrative action was developed. The court formulated the following test to determine whether an action should be characterised as administrative action:

“Determining whether an action should be characterised as the implementation of legislation or formulation of policy may be difficult subject. It will, as we have said, depend primarily on the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls.

The source of the power, though not necessarily decisive, is a relevant factor. So too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other hand to the implementation of policy, which is.

While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of ss 33. These will need to be drawn carefully in light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.”

Based on the position of the court as cited above, it is clear that the view of the court is that failure by the employer to reinstate the affected employee constitutes administrative action reviewable by the Labour Court (LC). In the case of *Mahlangu v*

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42 *De Villiers v Head of Department, Western Cape Province* [2010] JOL 24964 (LC) par 8.
43 2000 (1) SA 1 (CC).
Minister of Sport and Recreation, the court explained the powers of the LC regarding the employer’s discretion not to reinstate the absconding employee. The court held as follows:

"In my view failure by the functionary of the state to apply his or her mind in considering whether or not to reinstate an employee who has been deemed to have been dismissed by operation of the law renders the decision reviewable under section 158(1)(h) of the LRA which provides that the Labour Court may:

‘(h) Review any decision taken or any act performed by state in its capacity as employer, on such grounds as are permissible in law.’"

When determining whether a matter constitutes administrative action, particular consideration should be had on the source of the power, the nature of the power and its subject matter. These important elements were summarised as follows in the case of Transnet Ltd v Goodman Brothers (Pty) Ltd:

“(a) Administrative law is an incident of the separation of powers under which courts regulate and control the exercise of public power by other branches of Government.
(b) The question relevant to ss 33 of the Constitution is not whether the action is performed by a member of the executive arm of Government, but whether the task itself is administrative or not and answer to this is to be found by an analysis of the nature of the power being exercised.
(c) What falls to be considered is, inter alia, the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is.”

The power that is vested in the state as employer is not above the Constitution of the Republic of South Africa, 1996 (the Constitution). The power should be exercised in a manner that is consistent with the Bill of Rights as contained in the Constitution. It is within this context that deemed dismissal cases be adjudicated by the courts to ensure compliance with the principles of natural justice and fairness.

2.5 CONCLUSION
There is a clear distinction between absenteeism, desertion and abscondment. In the context of termination of the contract of employment, the concepts of desertion and
abscondment are not applied the same way. The manner in which these concepts are applied in the private sector, is different from how they are applied in the public sector.

In the private sector, the termination of contract of employment warrants a claim of unfair dismissal. The affected employee has access to both conciliation and arbitration processes. On the other hand, in the public sector, the termination of contract of employment happens through operation of the law. Therefore, in the public sector, the termination of contract does not constitute dismissal.

Because of the fact that termination of contract through operation of the law does not constitute dismissal, public sector employees are not entitled for both conciliation and arbitration processes. The further complication is that, when public sector employees establish good cause, there is no formal hearing to hear their case. Their representations are responded to in writing.

The glaring discrepancy is around discrimination between private and public sector employees. Employees in the same country are subjected to different treatment. There is no applicable deeming provision for employees in the private sector but there are about two applicable deeming provisions for employees in the public sector. The deeming provisions in the public are; section 14(1) of the EEA and section 17(3)(a) of the PSA. There is no justification for this kind of discrimination. Obviously, this differentiation between private and public sector employees cannot be classified as fair discrimination.

Another critical issue is the extent of the abuse of the deemed provision by employers in the public sector. The fact that the termination is through operation of the law is interpreted in a manner that suggests that the affected employees are not supposed to enjoy their constitutional rights.

In terms of case law pertaining to the private sector, the courts held that it is required of the employers to trace the whereabouts of the absconding employees. The court held that for purposes of ensuring that the dismissal is fair, the employee should be traced. This is an important practice which should be shared with the public sector.
It therefore remains a challenge for the public employees because employers may just wait for the expiry of the prescribed period of abscondment and exercise the termination through operation of the law. Because of this legislative deficiency, public sector employers may terminate contract of employment even when they know the whereabouts of the employee. The case of *Grootboom v National Prosecuting Authority*,47 bears testimony to this assertion. As per Boshielo AJ, the held as follows:

“It is so that the applicant was absent from his employment. He was absent because he was suspended. This means that he was absent with the permission of his employer. Therefore, one of the essential requirements of section 17(5)(a)(i) has not been met.”

The court held that the application of section 17(5)(i) is invalid and unlawful because the employer knew Grootboom’s whereabouts.

In the next chapter, the study will focus on legal considerations for deemed dismissals. The following will be covered; a brief historical background and the significance of international law, the Termination of Employment Convention, 1982(No. 158), the definition of “termination” in terms of convention 158, ratification status of SA regarding convention 158, the constitutional provisions, the role of the courts in developing common law, the constitutionality of section 14(1) of the EEA and section 17(3)(a)(i) of the PSA, statutory provisions, the need to communicate with the affected employee and the content thereof, application for review of the employer’s refusal to reinstate the absconding employee, the facts to be considered before termination of contract through operation of the law and the fact that the deeming provisions should be applied sparingly.

47 [2014] 1 BLLR 1 (CC) par 42.
CHAPTER 3
LEGAL CONSIDERATIONS FOR THE DEEMED DISMISSALS

3.1 INTRODUCTION
This chapter is intended to help to clarify the position of the law and the courts regarding deemed dismissals. It will critically analyse the position of the law at both international and domestic levels. There will be a brief historical background in relation to the manner in which international law has been developed. This will cover our international law obligations.

The main focus of this chapter is the constitutionality of the deeming provision. A number of aspects will be critically analysed to help to test the constitutionality of the deemed dismissals. Firstly, the role of the courts in developing common law will be analysed. Secondly, the constitutionality of the deeming provision will be analysed and this will be tied with the purposive interpretation of the deeming provision. Thirdly, the recourse available to absconding employees will be scrutinised to fully comprehend the constitutional protection afforded.

Lastly, the chapter will comprehensively deal with the fact that the deeming provision should be used sparingly. Case law will be used to demonstrate the extent of abuse of the deeming provision by public sector employers. The context is that the deeming provision can only be used in circumstances where the employer cannot be expected to invoke disciplinary codes. In situations where the whereabouts of the employee is known, the employee should be charged for misconduct.

3.2 INTERNATIONAL LAW
3.2.1 A BRIEF HISTORICAL BACKGROUND AND THE SIGNIFICANCE OF INTERNATIONAL LAW
The International Labour Organization (ILO) is the creature of the United Nations (UN). The ILO became the first specialised agency of the United Nations (UN). It was established by the treaty of Versailles, signed in 1919. When the treaty of Versailles

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49 Ibid.
was signed, South Africa was already a member of the League of Nations, now the UN. All members of the League of Nations became founder members of the ILO.\textsuperscript{50} South Africa is a member state of ILO.\textsuperscript{51}

It is through ILO that South Africa becomes part of the international family in terms of issues relating to labour law. ILO concludes treaties or conventions and recommendations. South Africa, as a member state of ILO, is expected to ratify treaties or conventions so that they become part of domestic law.\textsuperscript{52}

It has to be noted that a recommendation is not capable of ratification. A recommendation, as the name implies, is not capable of ratification, and is not binding on member states.\textsuperscript{53} Recommendations provide guidelines on how a particular matter might be regulated or when adopted with a convention, provide more detailed measures that are supportive of the terms of the convention itself.\textsuperscript{54}

The 1996 Constitution of South Africa enjoins the Republic to comply with its international law obligations. It states as follows:

\begin{quote}
"231 International agreements
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).\textsuperscript{55}"
\end{quote}

The Constitution further makes it mandatory for every court to resort to the interpretation which is consistent with international law. It requires every court to observe international law when interpreting any legislation. Section 233 states as follows:

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The Constitution further makes it mandatory for every court to resort to the interpretation which is consistent with international law. It requires every court to observe international law when interpreting any legislation. Section 233 states as follows:
\end{quote}

\begin{itemize}
\item \textsuperscript{50} Ibid.
\item \textsuperscript{51} South Africa became a founding member of ILO in 1919 by virtue of been a member of the United Nations (UN). Also see the constitution of ILO art 2 on membership.
\item \textsuperscript{52} See art 19 of the constitution of ILO on the obligations of members in respect of conventions 14.
\item \textsuperscript{53} Van Niekerk \textit{et al Law@Work} (2008) 21.
\item \textsuperscript{54} Van Niekerk \textit{et al Law@Work} 21-22.
\item \textsuperscript{55} Only s 231(2) has been cited.
\end{itemize}
“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

The devastation that was caused by World War II helped humanity to come together as one. This has led to the development of international law. At the heart of international law is human dignity. International law ensures the protection of the rights of individuals through treaties. Dugard,56 eloquently explains the importance of international as follows:

“Since World War II numerous treaties have been signed extending the protection of international law to individuals. These human rights treaties impose obligations of varying kinds upon signatory states to afford protection to their own citizens. In this way millions of people have the beneficiaries of international law. Individuals benefit from the protection of international law and participate in its processes.”

3 2 2 THE TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO. 158)
The above convention is important for protecting employees against unfair termination of contract of employment. Article 7 of the convention states as follows:

“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 this opportunity.”

In the context of this study, there are two important aspects of the above. The first one relates to the notion of “an opportunity to defend”. The second one relates to the notion of “… unless the employer cannot reasonably be expected to provide this opportunity”.

The most critical aspect of the above is the notion of “an opportunity to defend”. Granting of an opportunity to defend cannot be reduced to mere written representations by the employee and a corresponding written response by the employer.57

57 See 3 8 3 of this chapter.
(i) **The definition of “termination” in terms of Convention 158**

It is important to have an understanding of the definition of termination of contract of employment from the convention’s perspective. This will help us to relate deemed dismissal with the international understanding of termination of contract of employment. The concept of termination is defined as follows:\(^{58}\)

“The Termination of Employment Convention, 1982 (No. 158) (hereinafter referred to as “the Convention”) regulates termination of employment at the initiative of the employer. This means that the termination of an employment relationship by an employee does not fall to be considered within the scope of the Convention, neither would termination which arises out of a freely negotiated agreement reached by both parties. Similarly, the Convention would not apply to cases where an employee willingly resigns or takes voluntary retirement.”

The above definition does not cover the termination of contract through operation of the law. This clearly creates a *lacuna* in terms of our observance of international law.

(ii) **Ratification status of SA regarding convention 158**

Although South Africa did not ratify this convention,\(^ {59}\) it has been used by the courts and tribunals when handling cases involving termination of contracts of employment. This was observed by ILO’s Committee of Experts.\(^ {60}\) The general observations of the Committee of Experts are recorded as follows:

“The Committee wishes to note that many more countries than those that have ratified the Convention give effect to its basic principles, such as notice, a pre-termination opportunity to respond, a valid reason and an appeal to an independent body. Most countries, be they ratifying countries or otherwise, have provisions in force at the national level that are consistent with some or all of the basic principles of the Convention. The Committee notes that the principles of the Convention are an important source of law for labour courts and tribunals in countries that have or have not ratified the Convention. At its present session, the Committee noted with satisfaction the rulings handed down in March 2006 and July 2008 by the Court of Cassation in France directly applying the Convention. As an example of a non-ratifying country, the Committee notes from information supplied to it that the courts in South Africa have used the Convention in developing its jurisprudence.”\(^ {61}\)

\(^{58}\) See s A on definition and concepts, Part I Convention No. 158 and Recommendations No. 166.

\(^{59}\) See status of ratifications of Convention No. 158 as at 20 January 2009.

\(^{60}\) See Appendix V General observation on the Termination of Employment Convention, adopted by the Committee of Experts at its 79\(^{th}\) Session, 2008.

3.3 THE CONSTITUTIONAL PROVISIONS

3.3.1 SECTION 23 OF THE CONSTITUTION

The Constitution is the supreme law of the country and it creates conditions for the promulgation of statutes to regulate different spheres of governance. Statutes so promulgated create rights and remedies for all to whom the legislation is applicable. The legislative process leading to the promulgation of such statutes should pass the constitutional muster in relation to compliance with the Constitution. Therefore, the provisions of such statutes should be constitutional.

The constitutionality of deemed dismissal provisions should be scrutinised in light of the Constitution. The Constitution remains the litmus test regarding the extent of the protection of employees’ rights. Therefore, the interpretation and application of empowering provisions such as section 14(1) of the EEA and section 17(3)(a)(i) should comply with the Constitution. This matter revolves around the correct interpretation and application of section 17(5)(a)(i) of the Act. Section 39(2) of the Constitution requires legislation to be interpreted to promote the spirit, purport and objects of the Bill of Rights.

Section 23 of the Constitution states as follows:

“Labour relations
(1) Every has the right to fair labour practices.
(2) Every worker has the right-
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union; and
   (c) to strike.
..."

3.3.2 THE ROLE OF THE COURTS IN DEVELOPING COMMON LAW

Given the LRA’s insufficient protection of the rights of absconding employees, the Constitution empowers the courts to fill this lacuna. The case in point regarding this legislative deficiency is the Grootboom case. Both section 8(2) and (3) states as follows:

See Grootboom v National Prosecuting Authority & Another (2014) 35 ILJ 121(LAC) par 37.
See Grootboom v National Prosecuting Authority & Another supra par 42.
application
...
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
...

It was held in the Grootboom case that although the constitutional issue may not be under scrutiny, section 17(3)(a)(i) should be interpreted in a manner compatible with the Constitution. The court's attitude is that the deemed dismissal, as applied in the public service, has a negative impact on the rights of the affected employees in this sector. The court further held as follows:

“Section 17(5)(a)(i)[as amended] effectively countenances the dismissal of a state employee without a hearing. That implicates the right to fair labour practices enshrined in section 23 of the Constitution. The constitutionality of the section is not attacked; hence it must be interpreted in a manner best compatible with the Constitution. A constitutional issue is thus at stake here.”

3 4 THE CONSTITUTIONALITY OF BOTH SECTION 14(1) OF THE EEA AND SECTION 17(3)(a)(i) OF THE PSA

3 4 1 CRITICAL ANALYSIS OF THE CASE OF PHENITHI v MINISTER OF EDUCATION

(i) Phenithi’s claim of unfair labour practice in terms of section 23 of the Constitution

Ms Phenithi raised a constitutional issue regarding section 14(1) of the EEA. Her argument was that section 14(1) is unconstitutional because she was not afforded the opportunity by the employer to state her case. In her view, section 14(1) violated her fundamental right to fair labour practice in terms of section 23(1) of the Constitution. In addressing her concerns, the court held as follows:

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65 See Grootboom v National Prosecuting Authority & Another (2014) 35 ILJ 121(LAC) par 37.
66 Ibid.
“As to the ground that s 14(1)(a), read with s 14(2), violates the appellant’s fundamental right to fair labour practices in terms of s 23(1) of the Constitution, it is not clear what ‘act’ of the employer is alleged to be allowed by the section ‘without considering the substantive and procedural aspects of the case’. It would not be out of place to interpret the word ‘act’ to mean ‘to decide to terminate or discharge’, to which the answer again is that the employer takes no decision to terminate an educator’s services under s 4(1)(a) of the Act. The discharge is by operation of law. In my view, the provision creates an essential and reasonable mechanism for the employer to infer ‘desertion’ when the statutory prerequisites are fulfilled. In such a case there can be no unfairness, for the educator’s absence is taken by the statute to amount to a ‘desertion’. Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome.”

(ii) Phenithi’s claim that the opportunity to be heard after the fact is unconstitutional

The court held that the employer cannot be blamed for having behaved in a manner that violates the right of Ms Phenethi because the contract terminated through operation of the law. It further held that section 14(2) creates an opportunity for being heard, although after the fact. The court held as follows:

“Section 14(2) also affords an educator an opportunity to be heard and to be reinstated, provided he/she is able to show good cause as to why the employer should reinstate. The fact that s 14(2) provides for a hearing only after an educator has been deemed to be discharged in terms of s 14(1)(a) does not mean that the latter subsection is in conflict with the Constitution.”

(iii) The employer cannot be expected to suspend the application of section 14(1) in order to convene a hearing

In this case, the court held that the employer does not have any role to play regarding termination of contract of employment through operation of the law. The contract terminates automatically. This happens when all the requirements for abscondment are satisfied. Therefore, there is no way in which the employer can convene a disciplinary hearing. The court held as follows:

“The section, however, does not require any decision to be made for its provisions to come into operation and for that reason no hearing is contemplated prior to its coming into operation. And it is difficult to fathom how the employer could suspend the operation of the provisions of the section so as to afford an educator an opportunity to be heard.”

70 See chap 4 of this study particularly the section titled “first stage process”.
It is apparent from the Phenithi case that the position of the court is that the deeming provisions are constitutional. It is for employers in the public service to adopt a purposive approach in terms of interpretation of the deeming provisions.

3.4.2 PURPOSEFUL INTERPRETATION OF BOTH SECTION 14(1) OF EEA AND SECTION 17(3)(1)(i) OF THE PSA

The interpretation of deemed dismissal provisions by some public sector employers is sometimes worrying. The fact that the contract of employment terminates through operation of the law is confused to imply that absconding employees forfeit their constitutional protection. This attitude has led the court in the case of *Grootboom v The National Prosecuting Authority*,\(^\text{72}\) to scrutinise the interpretation of section 17(5)(a)(i) of the PSA. Because of the similarity between section 17(5)(a)(i) and section 14(1) of the EEA, the Grootboom at the same vein will apply to section 14(1) of the EEA. The court held as follows:

> “This matter revolves around the correct interpretation and application of section 17(5)(a)(i) of the Act[PSA]. Section 39(2) of the Constitution requires legislation to be interpreted to promote the spirit, purport and objects of the Bill of Rights. This court has held that a constitutional issue is raised where the interpretation of legislation may impact on a fundamental right of a litigant under the Bill of Rights.”\(^\text{73}\)

The above case emphasised the need for a purposive interpretation of the deeming provisions. It is important for employers in the public service to adopt a purposive approach to the interpretation of the deeming provision. The purposive interpretation will help to compensate for the deeming provision’s failure to sufficiently comply with section 2 of schedule 8 of the LRA. Legislation must be purposively construed in order to give effect to the Constitution.

The orthodox approach required the words of a statute to be given their “ordinary literal and grammatical meaning” unless this would lead to “a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent”, in which case

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\(^{72}\) (2010) 9 BLLR 949 (LC).

\(^{73}\) *Grootboom v The National Prosecuting Authority* (2010) 9 BLLR 949 (LC) par 37.
certain contextual aids could be invoked. This method has been trenchantly criticised for its failure to take into account the “legal-political activity” involved in the process of statutory interpretation.

3.5 STATUTORY PROVISIONS

To give effect to the constitutional provision regarding the guarantee of the rights of employees, the LRA, which is the legislative off-shoot of the Constitution, protects the rights of all employees against unfair labour practice. Additionally, employees are protected against unfair termination of their contract of employment.

Establishing good cause subsequent to a deemed dismissal should be interpreted in the context of the protections afforded to employees by the LRA. The refusal by employer to reinstate the affected employee constitutes administrative action, and therefore, the principles of natural justice should apply.

In the case of *De Villiers v Head of Department, Western Cape Province*, the court held as follows:

“The governing principles in section 2 of the Schedule[of the LRA, schedule 8] expressly state that discipline is a corrective and not a punitive measure, and that discipline must be applied in a prompt, fair, consistent and just manner. It is in this context that the requirement of “good cause” [establishing good cause] referred to in section 14(2) must be read.”

In the above case, the court held that the governing principles in section 2 of schedule 8 of the LRA are based on the principles of natural justice. Employers are therefore required to ensure that establishing good cause subsequent to deemed dismissal is subjected to the principles of natural justice. Therefore, absconding employees have the full protection of section 2 of schedule 8 of the LRA.

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77 [2010] JOL 24964 (LC) par 30.
The above point was emphasised in the case of *SA Post Office Ltd v Mampeule,*78 in which the court held as follows:

“Thus Mampeule, like any other employee, enjoyed the right not to be unfairly dismissed or more appropriately unfairly removed. This is more so since the Act [LRA] was enacted to give effect to the right to fair labour practices guaranteed in s 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996. The right not to be unfairly dismissed is not only essential to the enjoyment of this constitutional imperative but is one of the most important manifestations thereof and further forms the foundation upon which the relevant sections of the Act are erected and is consonant with the spirit and the letter of the Act.”

3 6 THE NEED TO COMMUNICATE WITH THE AFFECTED EMPLOYEE AND THE CONTENT THEREOF

The content of the communication should be very simple between the employer and the affected employee. The fact that the contract terminates through operation of the law should make the job of the employer easier. The following are the aspects which should constitute the content of the letter communicating the termination of contract through operation of the law:79

(i) The employee should be informed that it has come to the attention of the employer that he or she has been absent from work for more than the prescribed period of abscondment.

(ii) The date on which the termination occurred through operation of the law should be specified.

(iii) The employee should be made aware of the fact that if there is any liability owing to the employer, same will be deducted from his or her pension money.

(iv) The employee should be advised of his or her rights to establish good cause.

It should be recalled that one of the fundamental distinction between section 14(1) of the EEA and section 17(3)(a)(i) of the PSA is the prescribed period of abscondment. In terms of the EEA, the prescribed period is fourteen (14) consecutive days and in terms of the PSA, the prescribed period is one(1) calendar month.

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78 (2009) 30 *ILJ* 664 (LC) par 42.

79 The Limpopo Province Department of Education uses this format when communicating with the affected employee.
In terms of section 14(2) of the EEA, the contract of employment terminates the day following immediately after the last day on which the educator was present at work. In terms of section 17(3)(b) of the PSA, the contract of employment terminates with effect from the date immediately succeeding the employee’s last day of reporting for work. The date of termination for EEA and PSA are almost similar.

The communication is therefore intended to ensure that the termination of contract of employment through operation of the law is recorded and acknowledged by the employee. This is in line with section 33 of the Constitution. Section 33 of the Constitution states as follows:

“Just administrative action
(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.
...”

In the case of Minister van Onderwys en Kultuur v Louw, the court held as follows regarding the implication of communication with the affected employee:

“The court held further that where, as in that case (and also the present matter) the employee is informed in a letter of discharge that he/she has been discharged in terms of s 72(1) - in this case s 14(1)(a) - it is not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law (at 388 I).”

37 APPLICATION FOR REVIEW OF THE EMPLOYER’S REFUSAL TO REINSTATE THE ABSCONDING EMPLOYEE

After the termination of contract through operation of the law, the affected employee has the right to establish good cause. The employer may reinstate the employee after consideration of good cause or refuse to restate the employee. Given the fact that deemed dismissal does not occur because of the action of the employer, it is not classified as an unfair dismissal.

Therefore, after the refusal by the employer to reinstate the affected employee, the only recourse available for the employee is to approach the LC for review of the

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administrative action of the employer. The BC does not have jurisdiction to entertain deemed dismissal because it only deals with unfair dismissal and not deemed dismissal. In the case of PAWUSA v Department of Education, Free State Province,\(^8^1\) the court held as follows regarding the lack of jurisdiction by the BC:

“All that was then left for the applicant to do, in my view, was to take the decision of the employer, not to 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. He ought not to have referred the matter to the third respondent [the BC], which had no jurisdiction to adjudicate the matter, in the first place.”

In terms of section 158(1)(h) of the LRA, the LC has the power to review the employer’s administrative action. It states as follows:

“…
(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;
…”

In the case of Weder v MEC for the Department of Health, Western Cape,\(^8^2\) the court elaborated on the jurisdiction of the LC regarding the review of the administrative action of the employer and held as follows:

“In light of the concession by Mr De Villiers-Jansen that the appellant’s conduct in terms of s 17(3) (b) of the Act is reviewable in terms of a residual principle of legality, there is no need to parse further the key findings in Gcaba. Irrespective of the classification of the decisions of appellant as administrative action, appellant’s actions are open to review in terms of s 158(1) (a) of the LRA on the ground of legality, a principle that has been developed significantly by the courts over the past decade. So much so, that a parallel system of review for action which falls outside of the strict definition of administrative action in terms of the poorly drafted PAJA, has developed.”

Additionally, in the case of Mahlangu v Minister of Sport & Recreation,\(^8^3\) as per Molahlegi J, the court emphasised the recourse available to employees whose employers refused to restate them after establishing good cause. The court held as follows:

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\(^8^1\) (2008) 29 ILJ 3013 (LC).
\(^8^2\) [2013] 1 BLLR 94 (LC)
\(^8^3\) (2010) 31 ILJ 1907 (LC) par 20.
“In my view failure by the functionary of the state to apply his or her mind in considering whether or not to reinstate an employee who has been deemed to have been dismissed by the operation of the law renders the decision reviewable under section 158(1)(h) of the LRA…”

On the basis of the above, although the BC does not have jurisdiction to entertain deemed dismissal, the LC does. The challenge with this is that it defies the logic of making the country’s dispute resolution mechanism cost effective.

3.8 FACTS TO BE CONSIDERED BEFORE TERMINATION OF CONTRACT THROUGH OPERATION OF THE LAW

It is important for employers to be very careful when terminating the contract of employment through operation of the law. This is all the more important because it is easy to confuse a refusal to carry out a lawful instruction with abscondment.

3.8.1 THE DE VILLIERS CASE

In the case of De Villiers, Mr De Villiers, as an educator, was redeployed through the Rationalisation and Redeployment (R & R) process.

Mr De Villiers refused to be redeployed and approached his union because he was not satisfied with the process. He was then advised by his union to remain at his workstation until the matter was resolved. The Department of Education terminated his contract on the basis that Mr De Villiers absconded. In this case, the court held that Mr De Villiers cannot be said to have absconded because the employer knew his whereabouts.

The court held as follows:

“Under the circumstances, it is doubtful whether the applicant’s failure to report at Elswood could be considered misconduct at all, particularly given the absence of any fault on his part. If it could be categorised as such, the gravity of such misconduct was slight, as opposed to severe enough, in itself, to render a continued employment intolerable.”

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84 De Villiers v Head of Department, Western Cape Province [2010] JOL 24964 (LC).
85 De Villiers v Head of Department, Western Cape Province [2010] JOL 24964 (LC) par 32.
3 8 2  THE GROOTBOOM CASE

A similar case to the case of De Villiers case is the case of Grootboom v National Prosecuting Authority. Mr Grootboom was suspended by the National Prosecuting Authority. Whilst on suspension, he applied for leave to study in the UK. The employer refused but Mr Grootboom nevertheless went ahead to study in the UK. The National Prosecuting Authority terminated his contract on the basis that he absconded. The court held that his suspension meant that he was absent from work with the authority of the employer. His suspension implies that he was absent from duty with the permission of the employer.

The court held as follows:

“...The applicant submits that the respondents have failed to prove that by going to the UK on a study programme, he absented himself from his official duties as contemplated by the section. The premise of this argument is that it is fallacious for the respondents to suggest that the applicant had absented himself from his employment. This is so because he had already been placed on suspension and prohibited from performing any official duties with clear instructions not to come to his place of employment or have any contact with the NPA’s staff. It was therefore impossible for him to absent himself from his place of employment within the meaning of section 17(5)(a)(i) from when his employer expressly required his absence from the workplace.”

3 8 3  THE CASE OF MOGOLA V DEPARTMENT OF EDUCATION, LIMPOPO PROVINCE

In the case of Mogola v Limpopo Department of Education, Mr Mogola and his wife, both educators, were evicted by the community in the Ga-Sekgopo village. The Department terminated the contracts of both Mr and Mrs Mogola on the basis that they absconded. The court held, on the basis of the evidence presented, that the employer knew about the fact the two were evicted by the community. The court further held that the whereabouts of the two were known by the employer and therefore, section 14(1) of the EEA did not apply. The court held as follows:

“The absence of the applicants in this instance was understandably due to the unlawful means used by the community to evict them. The respondent failed to protect the applicants’ right to work by acceding to the unlawful conduct of the community.”

86  Grootboom v National Prosecuting Authority (2014) 35 ILJ 121 (CC).
87  Grootboom v National Prosecuting Authority supra par 40.
88  JR2987/2010.
Given the position of the courts in the above cases, it is important for employers in the public service to be more vigilant when applying section 14(1) of the EEA and section 17(3)(a)(i) of the PSA. In the case of PAWUSA v Department of Education, Free State, as per Cele AJ, the court held as follows:

“The provisions of section 17(5)(a)(i)[as amended] clearly contemplate the existence of certain facts before an officer shall be deemed to have been discharged from the public service. These facts are:
The officer,
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.”

In the case of PAWUSA supra, the court emphasised the fact that it is the existence of each of the above facts which necessitates the application of the deeming provision. It was further held that these facts occur out of the contract of employment. It was held as follows:

“It is clearly the existence of each of the facts herein above outlined that triggers the deeming provision of the subsection. No action of the employer will accordingly trigger the deeming provision to come into operation, which occurs ex lege.”

3.9 THE DEEMING PROVISIONS SHOULD BE APPLIED SPARINGLY

The magnitude of the legislative deficiencies discovered through this study is quite critical. Convention 158 does not give protection to absconding employees. The deeming provisions in terms of the domestic law, are problematic in terms of interpretation and application. There is therefore, a potential danger of abuse of authority by employers in the public service.

This calls for caution and vigilance on the part of employers in the public service. The deeming provisions should be used sparingly. Employers in the public service should not rush to invoke the deeming provisions. In the context of the latter and spirit of schedule 8 of the LRA, the purpose of discipline should be progressive rather than punitive. The deeming provisions should only be invoked when everything else has failed.

90 PAWUSA v Department of Education, Free State supra par 16.
91 See s 3 of schedule 8 of the Labour Relations Act 66 of 1995.
In the case of HOSPERSA v MEC for Department of Health,\textsuperscript{92} the court elaborated on the need for employers to use the deeming provisions sparingly. It was held as follows:

“All in all, section 17(5)[as amended] is a draconian procedure. It must be used sparingly and only when the Code cannot be invoked when the employer has no other 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 is invoked.”

Additionally, in the case of Mogola, the court cautioned that the deeming provisions should be used sparingly. It was held as follows:

“In addition to the above facts it should be noted that this is not a case in which it can be said that the respondent did not know the whereabouts of the applicants. This fact on its own called for the respondent to use section 14 of the EEA sparingly because its consequences can be devastating to even employees who are absent from work for good and valid reasons.”

The cases of De Villiers, Grootboom and Mogola bear testimony to the fact that the deeming provisions are at times used as draconian measures. It could be safely concluded that employers deliberately choose to neglect their managerial role with the intention of punishing employees. The punishment comes through the termination of contract through operation of the law by ignoring the causal and contextual factors.

In the case of HOSPERSA above, the court elaborated on how the rights of absconding employees are affected by the deeming provision. It held as follows:

“Because the employees are discharged, they are deprived of all the rights and protections afforded by the unfair dismissal laws. As a discharge is deemed to be on account of misconduct, the employees are condemned before they have been given a hearing. Section 17(5)(a) not merely restricts, but excludes the employees’ right to a fair hearing before being found guilty and dismissed. It deprives the employees of challenging the termination of their services through conciliation and arbitration. It automatically deprives employees of their employment.”

\textsuperscript{92} (2003) 24 ILJ 2320 (LC) par 37.
It is clear from the above case that the court’s position is that the deeming provision should only be applied when it not possible to apply either section 17 and 18 of the EEA, or the PCSBC Resolution 1 of 2003.\(^{93}\) As far as possible, the disciplinary process should be based on the principles of natural justice.

3.10 CONCLUSION

This chapter covered both international and domestic law in so far as deeming provisions are concerned. Convention 158 does not cover deeming provisions. Deeming provisions are only covered through both section 14(1) of the EEA and section 17(3)(a)(i) of the PSA. This is mainly in the public sector and there is no such deeming provisions in the private sector.

A number of critical analyses have been carried out in this chapter. At the heart of the critical analysis was to establish whether the deeming provisions are constitutional. Firstly, the role of the courts in developing common law helped to draw a conclusion that absconding employees are protected by the Constitution. Although at face value, the deeming provisions appear to be contrary to the Constitution.

Secondly, the constitutionality of the deeming provisions was tested using the *Phenithi* case. It has been established through critical analysis that the position of the court is that the deeming provision is constitutional. The court has been very emphatic on the purposive interpretation of the deeming provision. For the deeming provision to be in line with the Constitution, employers in the public service should adopt a purposive approach in terms of interpretation.

The third point is that absconding employees have the opportunity to establish good cause in terms of section 14(2) of the EEA and section 17(3)(b) of the PSA. Additionally, they have recourse to approach the LC for review of the employer’s administrative action. The review is in terms of section 158(1)(h) of the LRA. The

\(^{93}\) Ss 17 and 18 of the Employment of Educators Act 76 of 1998 are applicable to employees in the Department of Education, who are employed in terms of this Act. The Public Service Co-ordinating Bargaining Council (PSCBC) Resolution 1 of 2003 is applicable to those employees in the public service, who are employed in terms of the Public Service Act 103 of 1994.
recourse in terms of the LC is problematic because of the prohibitively expensive legal costs.

The last and the most significant point is that the deeming provision should be used sparingly. The critical analysis of the cases of *Grootboom, De Villiers* and *Mogola* resulted in a conclusion that some employers in the public service use the deeming provision for what it was not intended. Their attitude is that the deeming provision is intended to punish employees. The deeming provision should only be used in circumstances where the employer cannot be expected to invoke the disciplinary code. This is in circumstances where the whereabouts of the employee is not known. In circumstances where the whereabouts of the employee is known, the employer should charge the employee for misconduct.

In the next chapter, the study will focus on “Establishing good cause”. The chapter will amongst others, deal with; two stage process on termination of contract through operation of the law, the employer's discretion on whether or not to reinstate the affected employee, the fact that the office which exercises termination of contract should not be the same office which entertains establishing good cause, situations where the employee returns after the lapse of time-limit for the application of the deeming provision, should establishing good cause be done through responding to representations or through a hearing?, the right to be heard, and blocking of deemed dismissed employees from PERSAL.
CHAPTER 4
ESTABLISHING GOOD CAUSE

4 1  INTRODUCTION
This chapter focuses on establishing good cause. Amongst others; the chapter will deal with the stages of establishing good cause, the freezing of salary of an absconding employee, whether the office which exercises termination of contract should be the same office which entertains establishing good cause, the employer’s discretion on whether or not to reinstate the affected employee, time-limits within which the affected employee should be afforded an opportunity to establish good cause, the right to be heard, the duty of fair dealing, blocking of deemed dismissed employees from PERSAL system and the proposed amendments.

4 2  TWO STAGE PROCESS ON TERMINATION OF CONTRACT THROUGH OPERATION OF THE LAW
It is important to separate the process of termination of contract through operation of the law into two stages. The separation is intended to linearize and delineate the process of termination of contract through operation of the law. This will help to ensure the proper understanding of the rights and obligations of both the employer and the employee.

There are two interrelated stage processes regarding termination of contract through operation of the law. From the above cases, it is clear that there is a two stage process present in terminations by operation of law in the public sector.94 The first stage process is the termination of contract (deemed dismissal) and the second stage process is establishing good cause subsequent to a deemed dismissal.

4 2 1  THE FIRST STAGE PROCESS
The first stage process includes; freezing of salary of deemed dismissed employee and termination of contract through operation of the law. In the case of Maphanga v

94 Maphanga v Department of Justice and Constitutional Development [2010] 137 (LC) par 27.
Department of Justice and Constitutional Development, the court, as per Reddy AJ, held as follows in relation to the first stage process:

“The first stage is where the employer effects a termination where the employee has been absent without authorisation for more than one calendar month. There is no dismissal of the employee and the rights to a hearing prior to the dismissal do not apply.”

(i) **Freezing of salary of deemed dismissed employee**

There is a prevalent practice of freezing the salaries of deemed dismissed employees and this practice is prevalent in the public service. There are policies in place which give some public service employers the power to freeze the salaries of deemed dismissed employees.

There are two provinces which are known to engage in this practice namely; the Limpopo Province Department of Education (LPDE) and the North West Province Department Government of Public Safety (NWPGDPS). The LPDE uses the circular, to freeze the salaries of deemed dismissed employees. The NWPGDPS relies on human resources policy, to freeze the salaries of deemed dismissed employees.

(a) **Freezing of salary of deemed dismissed employee as practiced by the LPDE**

The LPDE’s circular on freezing of salaries of deemed dismissed employees states as follows:

2. It has come to the attention of the Department that absconding employees continue to earn their salaries long after the expiry of the prescribed period of abscondment.

3. The following procedure should be followed when handling abscondment cases:

   3.1. Once an employee absconds from work, full investigations should be conducted to establish the whereabouts of the absconding employee.

   3.2. On the expiry of the prescribed period as outlined in clause 2 above, a comprehensive report detailing the people who have been interviewed during the investigations, should be compiled and forwarded to Employee Relations section.

4. Therefore, concurrent to the submission of the report to Employee Relations section, you are directed to make a submission to Human Resources section for the freezing of the salary of the absconding employees.

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96 See the Limpopo Province Department of Education circular 86 of 2009 titled: Freezing of salaries of absconding employees.

5. The freezing of the salary should happen immediately on the expiry of the prescribed period.”

In terms of the above, the freezing of salary of deemed dismissed employee happens immediately on the expiry of the prescribed period of abscondment.

(b) Freezing of salary of absconding employee as practiced by the NWPGDPS
In terms of the NWPGDPS’s human resources policy, the salary of a deemed dismissed employee should be frozen simultaneous with the issuing of the letter communicating the termination. It states as follows:

“7.2. Procedure in the event an employee does not report for duty
(b) Discharging an employee that is deemed to have absconded
(iii) Simultaneous to the issuing of the letter in terms of section 17(5), the employee’s salary shall be frozen.”

(c) Is the freezing of salary lawful?
Both the EEA and the PSA are silent in respect of the freezing of salary of a deemed dismissed employee. Freezing of salary of an absconding employee should be equated to the termination of contract through operation of the law. The freezing of salary will become lawful when it happens after the expiry of the prescribed period of abscondment. In this sense, the freezing of salary will be justifiable because the employer cannot be expected to pay an employee who fails to avail himself or herself for work. It is submitted that the freezing of salary which happens before the expiry of the prescribed period of abscondment is unlawful.

(ii) Termination of contract through operation of the law
During the first stage process, the termination of contract through operation of the law occurs. The termination does not constitute dismissal because it is not effected due to the employer’s decision. It happens automatically.96

In De Villiers v Head of Department: Education, Western Cape Province,99 the court held as follows when addressing the question: “[d]id the termination of the applicant’s employment constitutes ‘dismissal’?”

98 Refer to chapter 2 of this study par 2 2.
“That may be so, but it does not necessarily follow that a decision to refuse to reinstate an employee whose discharge has been statutorily deemed to have occurred constitutes a ‘dismissal’ as defined by s 186(1) of the LRA. On the contrary, the prevailing authority is that it is not. In *MEC Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration & others*, Freund AJ held:

‘In my view, a decision not to reinstate an employee whose employment has been terminated by operation of law is not a ‘dismissal’ for the purposes of s 186 of the LRA. In particular, s186 (a), which provides that ‘where an employer has terminated a contract of employment with or without notice there is a ‘dismissal’, does not in my view apply. If the employer exercises his discretion in terms of s 17 (5) (b) (i) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer.’ °101

It is on the basis of the above that the BC lacks jurisdiction to deal with deemed dismissal.

**4 2 2 THE SECOND STAGE PROCESS**

The second stage process includes; establishing good cause, the employer’s discretion whether or not to reinstate the affected employee and the fact that the office which exercises termination of contract should not be the same office which entertains establishing good cause.

In the case of *Maphangaw* above, as per Reddy AJ, the second stage process was described as follows:

“The second stage is where the employee makes an application to be reinstated on good cause shown. At this stage the employer exercises a discretion in deciding whether good cause has been shown and whether the employee should be reinstated. Good cause may include grounds such as the employee was not absent for more than one calendar month or that the employee did in fact obtain authorisation for the absence or that the employee was not in a position to make the necessary application for leave prior to being absent without leave and where the absence is for a good reason, for example if the employee was in critical care in hospital and not physically or mentally able to make the application. Clearly the grounds are not limited to these examples cited here.” °102

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100 (2003) 24 *ILJ* 2155 (LC).
101 2158 H-J.
(i) Establishing good cause

The application for establishing good cause is done by the employee during the second stage process. When establishing good cause, the deemed dismissed employee should explain the circumstances which prevented him/her from reporting for work as expected.

The court in *Maphanga*, cited the case of *Grootboom* regarding establishing good cause and particularly, what is it that is expected from the affected employee. The court further emphasised the need for the employer to ensure that the discretion whether or not to reinstate the employee is based on fairness and the principle of natural justice. The court held as follows:

"The findings of Molahlehla J in the *Grootboom* matter are apposite insofar as the employer’s discretion is concerned. At paragraph 56 thereof that Court held:

'It is clear in my view that the requirement of good cause in terms of s 17(5)(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorization. The employer in considering whether or not to reinstate the employee has to exercise a discretion given by s 17(5)(b) of the PSA. In this respect the decision by the employer has to be influenced by fairness and justice. In other words, the employer does not have an unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her mind to the submission made by the employee for the decision to be said to be reasonable and lawful. The key factor amongst others, which the employer has to take into account, is whether or not the unauthorized absence was wilful on the part of the employee.'"103

Additional to the explanation, supporting documents should be attached. It is during this stage process that the employer exercises its discretion whether or not to reinstate the affected employee.

(ii) The employer’s discretion on whether or not to reinstate the affected employee

The exercise of the discretion by the employer should be justifiable, reasonable and fair. Thus, where an exercise of discretion is involved, the test will be that of

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103 See the case of *Grootboom v National Prosecuting Authority* [2014] 1 BLLR 1 (CC) par 56.
reasonableness which must “suffuse” administrative action to comply with the constitutional standard.\textsuperscript{104}

The affected employee has recourse to challenge the employer’s refusal to reinstate him/her. The discretion of the employer whether or not to reinstate the affected employee is reviewable by the LC.\textsuperscript{105} In the case of \textit{Maphanga}, the court held as follows:

“If these grounds exist, the employee would have to record them in her application to be reinstated. If the employer does not properly consider these grounds or ignores them and refuses the application for reinstatement, then that decision not to reinstate her may be reviewable.”\textsuperscript{106}

(iii) The office which exercises termination of contract should not be the same office which entertains establishing good cause: The comparative analysis between section 14(2) of the EEA and section 17(3)(b) of the PSA

(a) Section 14(2) of the EEA

Section 14(2) of the EEA lacks clarity as to which office should entertain establishing good cause. It makes reference to “the employer”. In the Limpopo Department of Education, the office of the Head of Department (HOD) exercises the termination of contract and at the same time entertains establishing good cause. It is therefore submitted that the office which exercises a discretion whether or not to terminate the contract should not be the same office which entertains establishing of good cause.

Section 14(2) deals with establishing of good cause. It states as follows:

“If 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 the re-instatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine.”

\textsuperscript{105} See Chap 3 of this study par 3 7.
\textsuperscript{106} \textit{Maphanga v Department of Justice and Constitutional Development} [2010] 137 (LC) par 29.
(b) Section 17(3)(b) of the PSA

Section 17(3)(b) sets out which office should entertain establishing good cause. It clearly indicates that the Executing Authority (EA) is the one responsible for entertaining establishing good cause. This is in line with the principles of natural justice, as the HOD deals with the termination of contract whilst the EA deals with establishing good cause. It states as follows:

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

4.3 THE EMPLOYEE RETURNS AFTER THE LAPSE OF TIME-LIMIT FOR THE APPLICATION OF THE DEEMING PROVISION, BUT BEFORE THE ISSUING OF COMMUNICATION FOR TERMINATION OF CONTRACT

The public service is complex and highly bureaucratic. It is not always easy to communicate the termination of contract with the necessary speed. It should be noted that the issuing of the communication for termination of contract is intended to ensure that the termination is recorded and acknowledged by the employee.\(^{107}\)

4.3.1 THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION (DPSA)’S POLICY

In terms of the DPSA’s policy,\(^ {108}\) the employee who returns after the time-limit for application of the deeming provision has lapsed, should not be allowed to resume duties. It states as follows:

“12.2.9 If the employee returns to work after being absent without permission for the period of one month he/she must not be allowed to resume duties, but should be informed that he/she can make representations to the Minister.”

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\(^{107}\) See Chap 3 of this study par 3 6.

\(^{108}\) See the Department of Public Service and Administration (DPSA): Policy and Procedure on employees exiting the Department (2012) 9.
4 3 2 THE NWPGDPS’S POLICY

In terms of the NWPGDPS’s policy, when the employee returns after the time-limit for the application of the deemed dismissal has lapsed, he/she should be advised to wait for the letter at his/her place of residence. The policy states as follows:

“7.2(d) Procedure when an employee reports for work after 30 calendar days
(i) Where the employee resurfaces after the expiry of 30 calendar days, the manager/supervisor will draw his or her attention to the provision of section 17(5).
(ii) If the letter to an employee who has been absent for 30 calendar days, implementing section 17(5), is not yet signed by the HOD or the delegated person, the employee may be informed to wait for his or her letter at his or her residence.
(iii) The employer must ensure that the employee receives the letter within five (5) working days from the date he or she resurfaced.”

4 3 3 ARE THE ABOVE POLICIES LAWFUL?

The above policies are lawful because the termination of contract through operation of the law is not dependent on the employer’s decision. Neither does it depend on the issuing of the letter confirming the termination. It happens as a result of the expiry of the prescribed period of abscondment. The advice that the deemed dismissed employee should wait at his or her place of residence comes after the contract had terminated.

4 4 THE TIME-LIMIT WITHIN WHICH THE AFFECTED EMPLOYEE SHOULD BE AFFORDED AN OPPORTUNITY TO ESTABLISH GOOD CAUSE

There are no time-limits on establishing good cause. Both the EEA and the PSA are silent about this. Because of this legislative deficiency, absconding employees may choose to establish good cause after a year or so. The lack of time-limit on establishing good cause has a negative effect on the employer’s operations. The employer may not fill the post of the absconding employee until the case is concluded through establishing good cause. It is therefore important for the amendments to address this deficiency.

4.5 SHOULD ESTABLISHING GOOD CAUSE BE DONE THROUGH RESPONDING TO REPRESENTATIONS OR THROUGH A HEARING?

There is overwhelming evidence about the inappropriate application of the deeming provisions.\(^{110}\) This is partially attributable to the fact that employers in the public service deal with establishing good cause through responding to representations. The approach of entertaining establishing of good cause through representations blinds the employer from objectively adjudicating on the totality of the situation. This leads to flawed decisions which are not sustainable when reviewed by the LC.

4.5.1 POLICIES ON ENTERTAINING REPRESENTATIONS FROM DEEMED DISMISSED EMPLOYEES

(i) The policy of NWPGDPS\(^{111}\) on entertaining representations from deemed dismissed employee

The NWPGDPS policy as to how representations should be entertained. The policy states as follows:

“7.3. Procedure to deal with an employee who is deemed to have been discharged

\[(c)\] On receipt of the report of the application for re-instatement, the MEC shall consider the application and communicate the decision to the employee.”

(ii) The policy of the DPSA\(^{112}\) on entertaining representations from deemed dismissed employee

The DPSA’s Policy and procedure on employees exiting the Department indicates that the Minister will consider the representations from the deemed dismissed employee and decide whether or not to reinstate the affected employee. It states as follows:

“12.2.10 The Minister will consider the representations and-

12.2.10.1 If the representations are acceptable, reinstate the employee to his/her former post or any other position on such terms and conditions as may be determined. The period he/she was absent must be regarded as leave without pay; or leave on such other conditions as the said authority may determine.

12.2.10.2 If the representations are not acceptable, the employee will remain discharged.”

\(^{110}\) See the case of Grootboom v National Prosecuting Authority [2014] 1 BLLR 1 (CC) and Mogola v Limpopo Department of Education JR2987/2010.

\(^{111}\) See the North West Provincial Government Department of Public Safety: Human Resources Policy Pack 180.

\(^{112}\) See the Department of Public Service and Administration (DPSA): Policy and Procedure on employees exiting the Department 10.
4.5.2 THE RIGHT TO BE HEARD

It has been established in *MEC: Education, North-West Provincial Government v Gradwell*,\(^ {113}\) that the right to be heard is derived from the LRA.\(^ {114}\) The LAC held as follows:

“The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, PAJA or as an implied term of the contract of employment, but is a right located within the provisions of the LRA, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights.”\(^ {115}\)

Based on the *Gradwell* case above, it is clear that the right to be heard is a non-negotiable. It is a right guaranteed to all employees through the LRA. Therefore, absconding employees have the right to be heard when establishing good cause.

4.6 BLOCKING OF DEEMED DISMISSED EMPLOYEES FROM PERSAL SYSTEM

The blocking of deemed dismissed employees from PERSAL system is derived from the legislative provisions.\(^ {116}\) These legislative provisions relate to; the prohibitions on re-employment of former employees, re-employment of former employees and the power of the Minister to prescribe the period for re-employment of former employees. Although this provision empowers the Minister to determine the prescribed period of re-employment, there is no such a determination. This is explained by the fact that deemed dismissed employees are rejected by PERSAL even after a long period of termination of contract.

\(^{113}\) [2012] 8 BLLR 747 (LAC).

\(^{114}\) See ch 1 s 1.

\(^{115}\) *MEC: Education, North-West Provincial Government v Gradwell* [2012] 8 BLLR 747 (LAC) par 45.

\(^{116}\) See s 3(a)(i) and (ii), 4(a)-(c) of the Public Service Act 103 of 1994.
The PSA on re-employment of former employees deemed to be dismissed

The PSA specifically makes provision for re-employment of former employees deemed to be dismissed. In terms of these provisions,\(^{117}\) re-employment can only be effected after the expiry of the prescribed period. The determination of the prescribed period is the prerogative of the Minister. Section 3(a)(i) and (ii), and section 4(a)(ii), (b) and (c) states as follows:

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

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

“(4) (a) A person deemed to be dismissed in terms of subsection (3), may only be re-employed by any department after the expiration of a prescribed period.

(b) Different periods may be so prescribed for different categories of misconduct.

(c) Notwithstanding the condition contained in paragraph (a) that an employee may only be re-employed in any department after the expiration of a prescribed period, the Minister may prescribe acts of misconduct in respect of which no period need expire before a person is again employed in a department.”

The Public Service Regulations (PSR)\(^{118}\) on prohibition of re-employment of former employees

The Public Service Regulations (PSR) provides for prohibition of re-employment of former employees. It lays down the conditions under which former employees may not be allowed re-employment in the public service. Section B.3 of the PSR states as follows:

“B.3 Reappointment of former employees

B.3.1 An executing authority may not reappoint a former employee where—

(a) the former employee left the public service earlier on the condition that she or he would not accept or seek reappointment;

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\(^{117}\) See s 3(a)(i) and (ii), 4(a)-(c) of Public Service Act 103 of 1994.

\(^{118}\) See S B 3 of the Public Service Regulations.
(b) the original grounds for termination of service militate against reappointment; or
(c) the former employee left the public service due to ill health and cannot provide recent and conclusive evidence of recovery."

(iii) First appointment or appointment after break in service of educator: section 6 A the EEA

The EEA is not clear about which category of employees should be re-employed. It only refers to “appointment after break in service”. It states as follows:

“Section 6A

First appointment or appointment after break in service of educator

(1) Despite section 6(3)(a), in the case of a first appointment or an appointment after one or more years’ break in service to any provincial department of education, the employer may-
(a) receive applications from first-time applicants or applicants returning after a break in service;
(b) process the applications and match applications to vacant posts; and
(c) make appointments to a school subject to subsection (2)

(2) The appointment contemplated in subsection (1) may only be made after the employer has-
(a) consulted the relevant governing body on the specific post and the requirements thereof;
(b) ensured that the applicant to be appointed matches the requirements of the post; and ensured that the applicant has prescribed qualifications.”

There is an urgent need for the amendment of the section 6A of the EEA as cited above. The amendment of this section will help to address the apparent legislative deficiencies relating to the lack of categories of employees to be re-employed after a break in service. The amendments should clearly categorise the type of misconduct according to the prescribed period of re-employment.

(iv) The identified legislative deficiencies

There are a number of legislative deficiencies arising out of the legislative provisions on re-employment of former employees. The first one is that in terms of the PSA, the power to prescribe the period of re-employment of former employees is only bestowed on the Minister. 119 This implies that if the Minister fails to prescribe the period, the affected employees will forever be rejected by PERSAL. It further implies that in the absence of the prescribed period of re-employment by the Minister, the Departments

119 See s 4(c) of the Public Service Act 103 of 1994.
in the entire public service lacks jurisdiction to decide on re-employment of former employees.

The second legislative deficiency is that in terms of the EEA, it is not clear which categories of employees are supposed to be re-employed. There is no specific re-employment of absconding employees. It is therefore important for the EEA to be amended to cover the absconding employees.

4.6.2 PROPOSED AMENDMENTS ON RE-EMPLOYMENT OF FORMER EMPLOYEES DISMISSED

(i) The Draft Public Administration Management Bill (PAMB)\textsuperscript{120}

There is a legislative deficiency regarding the powers that public service employers have in terms of taking decisions to re-employ former employees. The public service employers do not have the power to decide on the re-employment of former employees. This deficiency has been addressed through this Bill. The Bill gives employers in the public service the authority to take a decision regarding re-employment of former employees. The Bill states as follows:

"Prohibition on re-employment if dismissed for misconduct
40. (1) A person dismissed for misconduct by an institution may only be reemployed by the same or any other institution after the expiry of a prescribed period.
(2) Different periods may be so prescribed for different categories of misconduct.
(3) If the prescribed period has expired or no period has been prescribed, any decision whether or not to employ a person dismissed for misconduct must be taken with due regard to the nature of the misconduct concerned."\textsuperscript{121}

(ii) The Draft Public Service Regulations\textsuperscript{122}

In terms of the PSA,\textsuperscript{123} the Minister has discretionary powers to determine the period of re-employment of former employees. This implies that if the Minister fails to determine the prescribed period for re-employment of former employees, they will forever be rejected by PERSAL. The draft public service regulations deal with this

\textsuperscript{120} The Draft Public Administration Management Bill, Government Gazette No. 37029 of 14 November 2013 (draft legislation for a single public service) for public comments.
\textsuperscript{121} The Draft Public Administration Management Bill, Government Gazette No. 37029 of 14 November 2013 (draft legislation for a single public service) for public comments 37.
\textsuperscript{122} See the Draft Public Service Regulations for public comments 2015. As above.
\textsuperscript{123} See s 4(c) of the Public Service Act 103 of 1994.
legislative deficiency. The draft specifically prescribes the period of re-employment of deemed dismissed employees. Section 58 of the proposed amendments states as follows:

“58. Prohibition on re-employment of former employees dismissed for misconduct

(3) Subject to section 17(3)(b) of the Act, an employee deemed to have been dismissed in terms of section 17(3)(a) of the Act, shall not be re-appointed in the public service for a period of one year after the effective date of his or her deemed dismissal.”

4 7 CONCLUSION

The above critical analysis of the process of establishing good cause reveals a number of legislative deficiencies. It is clear that the right of deemed dismissed employees have been trampled upon. There is a wide range of issues which points to the fact that public service employers are not using the deeming provision as a draconian measure.

The first issue is the freezing of salary of absconding employee. If the freezing of salary happens before the expiry of the prescribed period of abscondment, it is unlawful. If the employee absents himself or herself from work, he or she should be charged with misconduct. They have to be charged with absenteeism. The freezing of salary cannot therefore be effected in a situation where the deeming provision is applicable. The deeming provision is only applicable after the expiry of the prescribed period of abscondment.

The second issue is the blocking of deemed dismissed employees from PERSAL system. There are legislative deficiencies identified regarding this. The Minister has the power to prescribe the period of re-employment but such determinations are not been promulgated. This is demonstrated by the fact that public service employers lack jurisdiction to take a decision to re-employ deemed dismissed employees. Deemed dismissed employees are forever rejected by PERSAL system. The proposed amendments seek to address this anomaly.

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124 See s 58(1) of the Draft Public Service Regulations. It clearly prescribes the period of re-employment of former employees according to the nature and gravity of the misconduct committed. There is a grid diagram which enjoins all employers in the public service to observe the prescribed period of re-employment. In effect, these proposed amendments seek to remove the discretionary power of the Minister to determine the prescribed period for re-employment of former employees.
The third issue is the right to be heard. Deemed dismissed employees have the right to be heard. The approach of adjudicating on the affected employee’s representations through a written response proved to be short sighted. The employer is caused to take a decision without looking at the totality of circumstances. This leads to a situation where deemed dismissed employees are subjected to unfair labour practice.

In the next chapter, the study will deal with the correlation between “deemed dismissal and alcoholism”. The chapter will amongst others deal with; alcoholism as one of the lifestyle causes of absenteeism, the role of Employee Health and Wellness (EHW) section on curbing the problem of alcoholism.
CHAPTER 5
DEEMED DISMISSAL AND ALCOHOLISM

5.1 INTRODUCTION
Alcoholism is one of the lifestyle causes of deemed dismissals. Given the causal relationship between deemed dismissal and alcoholism, public service employers are expected to develop intervention strategies to curb alcoholism in order reduce incidences of alcoholism. This chapter is intended to help public service employers to change their attitude in dealing with deemed dismissals. Public service employers should understand that the deeming provisions should be used sparingly. This implies that it should be used as a draconian measure. It should only be used when other legislative provisions are not applicable.

In the majority of cases handled by the LPDE, it has been observed that in the majority of cases, absconding employees are alcoholic. This is realised when the employer intend to establish whether there are good cause subsequent to deemed dismissal. Even though alcoholism may make it difficult for employees to report for work as expected, it will be difficult for the affected employees to use it as defence when they are not on assistance programme.

This chapter deals with a wide range of issues regarding deemed dismissal and alcoholism. The first issue to be dealt with is the correlation between deemed dismissal and alcoholism. It is necessary to deal with this issue in order to factually justify the relationship between deemed dismissal and alcoholism, and to as well link alcoholism to productivity.

The second issue is the definition of alcoholism. The definition of alcoholism will help to contextualise the concept of alcoholism in terms of this chapter. Thirdly this chapter will deal with the characterisation of alcoholism as a health problem. This characterisation will help in changing the attitude of public service employers when they deal with deemed dismissal cases.
The third issue is a need to move from assistance to prevention where alcoholism is the primary cause. This paradigm shift will help employers to prevent employees from becoming alcoholic. The fourth issue is a need to help those in the “red zone”. It will be necessary to help those in the “red zone” so that they could become productive.

The fifth issue relates training for managers and trade union representatives. The training will help to ensure that the problem of alcoholism is handled efficiently and effectively. The last issue will be the identification of alcohol abuse. The identification of alcohol abuse will be helpful in determining appropriate intervention strategies.

5.2 DEEMED DISMISSAL, ALCOHOLISM AND PRODUCTIVITY

5.2.1 THE CORRELATION BETWEEN DEEMED DISMISSAL AND ALCOHOLISM

There are various causes of abscondment. There is a causal relationship between deemed dismissal and alcoholism. Employees who are alcoholics, are more prone to be absent on a regular basis from work than those who are not. Heavy drinking at the workplace may potentially lower productivity. Absenteeism as a result of illness, associated with harmful use of alcohol and alcohol dependence entails a substantial cost to employees and social security systems. 125

According to the European Alcohol and Health Forum (EAHF), 126 there was a study that was carried out in Sweden, confirming that there is a causal relationship between absenteeism and alcohol abuse. The study concluded that:

“Many individual level studies, but not all (e.g., Christensen et al. 2007 in Denmark) have found a relationship between alcohol intake and absenteeism (Vahtera et al. 2002; Leggat & Smith 2009; McFarlin & Fals-Stewart 2002; Hermansson et al 2002; Reynolds 2008), particularly episodic heavy drinking (Bacharach et al 2010).” 127

There is a need for public service employers to closely monitor and trace the pattern of absententeeism from work, to establish whether the employee is likely to abscond. This pattern of absententeeism should be obtained from the human resources section.

126 Alcohol, work and productivity: Scientific opinion of the Science Group of the European Alcohol and Health Forum (September 2011) 18.
127 Ibid.
5.2.2 ALCOHOLISM AND PRODUCTIVITY

Alcoholism has a negative impact on the productivity of the employer. Alcoholic employees become highly unproductive because they lose focus and concentration. The World Health Organisation,\textsuperscript{128} conducted a study in Latvia on the relationship between alcoholism and productivity. The focus of the study was in relation to the loss in production due to increased absenteeism caused by excessive alcohol abuse. The study revealed that:

"It has been reported that in Latvia, alcoholism has had adverse impacts on productivity in the workplace and increased absenteeism. No figures have been published on the extent of absenteeism due to excessive alcohol use. It is estimated that drinking and alcoholism have reduced labour productivity by some 10% (Trapenciere, 2000)."\textsuperscript{129}

Employees who are often absent from work slows down production. In the context of alcoholism, it is the primary role of supervisors to establish whether there is a decline in production and subsequently intervene timeously. This should be done through assistance programmes.

5.3 DEFINITION OF ALCOHOLISM

Alcoholism is the culmination of excessive intake of alcohol over a long period of time and it is a health problem.\textsuperscript{130} In terms of the ILO,\textsuperscript{131} alcoholism is defined as follows:

"Alcoholism, also known as “alcohol dependence”, is a health problem that includes four symptoms:

- Craving: A strong need or compulsion to drink.
- Loss of control: The inability to limit one's drinking on any given occasion.
- Physical dependence: Withdrawal symptoms such as nausea, sweating, shakiness and anxiety occur when alcohol use is stopped after a period of heavy drinking.
- Tolerance: The need to drink greater amounts of alcohol in order to get drunk. Among heavy, chronic drinkers, the reverse is true: intoxication occurs after just one or two drinks."

\textsuperscript{128} See the report compiled by the World Health Organization Department of Mental Health and Substance Abuse titled: World Health Organisation Global Status Report on Alcohol (2004) 60.
\textsuperscript{129} Ibid.
\textsuperscript{130} See the ILO book titled: Alcohol and drug problems at work: The shift to prevention (1987) 62.
\textsuperscript{131} Ibid.
“Alcoholics are in the grip of a powerful ‘craving’ or uncontrollable need for alcohol that overrides their ability to stop drinking. This need can be as strong as the need for food or water.”

5.4 SIGNS OF ALCOHOLISM

Public service employers should be able to identify employees suffering from alcoholism thus enabling the employers to assist such employees at an early stage. Additionally, early detection will help save employees from being terminated through operation of the law. It should be recalled that alcoholism alone cannot be used as a form of establishing good cause without proof of participation in the assistance programme.

The ILO,\textsuperscript{132} amongst others, identifies the following as signs of alcoholism:

- Absenteeism: - Calling in sick more often, especially for short periods, frequent absence without permission and implausible excuses for absence.
- Absence from workstation: - Taking extra-long breaks, taking frequent breaks, the employee is present, but not at his or her workstation
- Loss of concentration: - Being physically present, but mentally absent, work takes more time and energy than before, problems recalling instructions and making mistakes on complex transactions.
- Accidents: - Being involved in accidents, or near accidents, more often than other employees.
- Irregular work patterns: - Erratic periods of high and low productivity, increasing irresponsibility and unpredictable reactions.
- Externalities: - Visibly under the influence, smelling of alcohol, trembling hands, red swollen face, loss of weight and gaunt appearance, bloated appearance and injection marks on arms, worsened personal hygiene and seeking opportunity to have a drink.
- Decreased productivity: - Missed deadlines, more frequent mistakes, wasted materials, complaints from clients and co-workers, poor decisions.
- Bad relations with colleagues: - Reacting strongly to complaints or remarks, being moody and suspicious, attempting to borrow money, evading supervision or control.
- Other factors: - Psychological problems (symptoms of depression, fears, deflection and insomnia) and physical problems (stomach complaints, fatigue and memory loss)."

The signs of alcoholism described above should help public service employers to identify employees who need assistance. This kind of assistance should offered by a trained professional. Much harm can result when individuals without professional training attempt to assist, counsel or treat a person with substance abuse problems.\textsuperscript{133}

\textsuperscript{132} See the ILO book titled: Alcoholism and drug problems at work: The shift to prevention.
\textsuperscript{133} See the ILO book titled: Alcohol and drug problems at work: The shift to prevention (1987) 46.
5 5 ALCOHOLISM IS A HEALTH PROBLEM

Alcoholism is categorised as a health problem and should be treated as such. The above mentioned definition of alcoholism is very clear that alcoholism is a health problem.\textsuperscript{134} Therefore, alcoholism should not be treated as an act of misconduct \textit{per se}, unless an alcoholic person commits an act of misconduct. Workers with alcohol- or drug-related problems should be treated in the same way as workers with other health problems, in terms of benefits such as paid sick leave, paid annual leave, leave without pay and health-care insurance coverage, in accordance with national laws and regulations or as agreed upon in collective bargaining.\textsuperscript{135}

Flowing from an understanding that alcoholism is categorised as a health problem, procedures regarding incapacity due to ill health should be applied. Section 10(3) of schedule 8 of the LRA,\textsuperscript{136} outlines the approach in relation to assisting employees who are alcoholic, stipulates that:

“The degree of incapacity is relevant to the fairness of the dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider.”\textsuperscript{137}

When dealing with alcoholism as a health problem, public service employers are challenged to adopt a preventative approach. Awareness programmes will be necessary to ensure that employees are made aware of the dangers of alcoholism and the available assistance programmes.

5 6 PARADIGM SHIFT FROM ASSISTANCE TO PREVENTION

There is a need for employers to analyse and classify employees in relation to the alcohol abuse stage they are in. The classification will help employers to become proactive to ensure that those who are not yet affected by alcoholism remain healthy whilst assisting those who are already affected. The classification of employees in

\textsuperscript{134} See the definition of alcoholism in par 5 3 of this chapter.

\textsuperscript{135} See the ILO code of good practice on the management of alcohol and drug related issues in the workplace (1996) 17.

\textsuperscript{136} 66 of 1995.

\textsuperscript{137} 66 of 1995.
different categories is called “zoning”. The classification is based on the traffic light analogy. The ILO,138 describes the “zoning” of employees as follows:

“Zoning
Using the analogy of a traffic light, the level of a worker’s use of alcohol and drugs can be divided into one of three zones-the green zone, the amber zone or the red zone.

Moving from the green zone to the red zone is a process that occurs over time. It can take only a few months, especially in the case of certain drugs, or up to several years. The progression from one zone to the next is not marked by a single event or a specific amount of the substance consumed. In moving from green to amber, moderate use gradually develops into problem use. As substance abuse increases, the individual moves through the amber zone and may eventually become dependent. Because there is no uniquely identifiable event, only health professionals trained in substance abuse can determine when an individual becomes dependent.”

The above mentioned assists employers to detect whether the employees run a danger of becoming alcoholic. In this way, employees are continuously encouraged to maintain their healthy lifestyles.

5 6 1 AVOID TO TARGET ONLY THOSE IN THE “RED ZONE”
There is a huge risk in targeting only those in the “red zone”, as more and more employees are likely to join the ranks of the employees who are in the “red zone” because of lack of focus and attention on all employees in other zones. The focus on all employees should be intended to encourage them to stay healthy by maintaining a healthy lifestyle. The traditional workplace substance abuse programmes focus almost exclusively on providing assistance to workers in the red zone. As a result, available resources are concentrated on only a few workers, whilst others are placed at jeopardy, for not being detected sooner.139

The ILO,140 emphasises the need to focus on preventative measures targeting the entire workforce:

“By shifting to a substance abuse prevention programmes, the focus expands to the entire workforce; the emphasis is on workers in the green and amber zones. Prevention programmes dedicate the majority of available resources to those workers, while still providing help for workers in the red zone.”

139 Ibid.
140 Ibid.
5 6 2 NIPPING ALCOHOL ABUSE IN THE BUD

The primary strategic objective of intervention programmes on alcohol abuse should be to increase the awareness of employees about the dangers associated with alcoholism,\(^{141}\) and help to reduce the number of employees who need assistance. Research shows that very few employees who happen to be on assistance programme get rehabilitated.\(^{142}\) This is a clear demonstration that prevention is more effective than assistance. The ILO,\(^{143}\) explains the shortcomings of assistance as follows:

“Health promotion as prevention
Early intervention programmes which focus on the long-term medical effects of substance abuse have been found to have little impact on people who are already using drugs or abusing alcohol. Health promotion programmes which are aimed at the workplace as a whole can target a greater number of workers whose substance use is not yet problematic, and this can be used as a powerful form of substance abuse prevention.”

5 6 3 EMPLOYERS SHOULD FOCUS ON PROMOTING HEALTHY LIFESTYLE FOR ALL EMPLOYEES

Alcoholism is caused by the choice of a particular lifestyle by employees, the lifestyle of habitual drinking of alcohol. Therefore, the focus on the promotion of healthy lifestyle will help employees to avoid becoming victims of alcohol abuse.

The ILO,\(^{144}\) unpacks the importance of focus on promoting healthy lifestyle as follows:

“The focus of a health promotion programme is the encouragement of a healthy lifestyle, which includes teaching people to use alcohol appropriately and to avoid drug use. Its effects are long-lasting: as workers adopt a new lifestyle and experience better health, they have more incentive to maintain this status. An important part of such programmes is the provision or support of recreational and social activities for participants, either in the workplace or the community.”

5 6 4 THE PRIMARY PARADIGM SHIFTER: SUPPORT FROM MANAGEMENT

Employers may develop very impressive preventative programmes, but without the support of management, such programmes will never achieve the intended results.

\(^{141}\) Ibid.
\(^{142}\) Ibid.
\(^{144}\) Ibid.
Preventative programmes require the following from management; the acknowledgement of prevalence of alcoholism at the workplace, to prevent the negative impact of alcoholism on production, readiness to allocate budget for the programme, integration of the programme into the departmental strategic plan and the willingness to drive the programme from management level. The ILO,\textsuperscript{145} highlight the importance of management support on preventative programmes as follows:

“The support of the highest levels of management is essential to the success of any workplace substance abuse prevention programme. Management’s awareness, commitment and example are the best guarantees for the stability of the programme. Without them, long-term programme implementation will be hampered.”

5 7  \textbf{ASSISTANCE FOR THOSE IN THE “RED ZONE”}

5 7 1 THOSE IN THE “RED ZONE” NEED ASSISTANCE TO LESSEN THE POTENTIAL EMPLOYER COSTS

Most employees who are in the “red zone” end up absconding resulting in their contracts being terminated through the operation of the law. In the majority of cases, the affected employees fail to successfully establish a good cause and therefore remain terminated unless they approach the LC for review of the employer’s discretion not to reinstate them. The employer then incurs costs of recruitment and training of new employees.\textsuperscript{146}

It is therefore important for the employers in the public service to establish early warning systems, to detect those who are in the “red zone”. The early warning system should be based on the traffic light analogy as outlined above. Efforts should be made to ensure early identification and treatment of problems, thus facilitating good prognosis. Leadership (i.e. supervisors) of each department should ensure timely problem detection and referral of same.\textsuperscript{147} The need for early detection and the cost implications resulting from failure to provide assistance are outlined in the ILO.\textsuperscript{148} They are as follows:

\textsuperscript{145} See the ILO book titled: \textit{Alcohol and drug problems at work: The shift to prevention} (1987) 45.  
\textsuperscript{146} Ibid.  
\textsuperscript{147} See the Employee Assistance Programme Policy, Limpopo Province Department of Education Limpopo (2009) 5.  
\textsuperscript{148} See the ILO book titled: \textit{Alcohol and drug problems at work: The shift to prevention} (1987) 45.
“Harmful use of alcohol or drugs usually takes a number of years to develop. As it increases, individuals are rarely able to deal successfully with their problems without some level of assistance. The purpose of providing assistance is to interrupt the harmful use of alcohol and drugs, so that workers will make changes resulting in improved health and safety, which in turn improve job performance. Providing workers with access to assistance is often less expensive than incurring the costs of poor performance, lost productivity, disciplinary action, job termination and the recruitment and training of replacement workers.”

5.7.2 STAGES OF ASSISTANCE FOR AN ALCOHOLIC EMPLOYEE

It should be noted that the assistance provided, should be undertaken by a trained professional. Managers/supervisors are not qualified to diagnose the nature of an employee’s personal problem, therefore any recommendation for referral, and subsequent treatment will be based purely on an assessment of job performance or on request from the employee. The initial stage is intended to understand the nature and the level of seriousness of the alcoholism. This will help in identifying the appropriate intervention.

There are different levels of assistance available to employees depending on the severity of their substance abuse problem. The first level is counselling. This level involves discussions between a trained professional and an employee. Counselling is used when the problem of alcohol abuse is identified early.

The second level is referral to treatment in case of those who have a serious alcohol abuse problem. The third one is rehabilitation which is intended to help employees to gain the physical and psychological state. The final goals of this level are; readjustment, independent functioning and return to work.

5.8 CAPACITY BUILDING: TRAINING FOR MANAGERS AND TRADE UNION REPRESENTATIVES

Given the strategic importance of the intervention programmes on alcoholism, there is a need for training of all parties to the employment relationship. The training will help...

149 Ibid.
150 See the Employee Assistance Programme Policy, Limpopo Province Department of Education Limpopo (2009) 14.
153 Ibid.
154 Ibid.
to ensure that all parties have a common understanding of the programmes. Subsequently, the potential conflict arising from different interests will be remarkably reduced through training.

581 TRAINING FOR MANAGERS

According to the ILO code of good practice on the management of alcohol and drug related issues in the workplace, the process of training for managers is outlined as follows:

“6.3. Training for supervisors and managers
6.3.1. In addition to participating in the information, education and training programmes that are directed at all workers, supervisory and managerial personnel should receive supplementary training to enable them:
(a) to identify changes in individual workplace performance and behaviour which may indicate that the services of an employee assistance programme (EAP) or health professional might be useful and give information on these services to the worker;
(b) to explain and respond to questions about the enterprise’s policy regarding alcohol and drugs;
(c) to support a recovering worker’s needs and monitor his or her performance, when the person returns to work;
(d) to assess the working environment and identify working methods or conditions which could be changed or improved to prevent, reduce or otherwise better manage alcohol- and drug-related problems.”

582 TRAINING FOR WORKERS’ REPRESENTATIVES

The process for the training of workers’ representatives is outlined as follows in the ILO code of good practice on the management of alcohol and drug related issues in the workplace:

“6.4. Training for workers’ representatives
6.4.1. In addition to becoming familiar with the information, education and training programmes that are directed at all workers, workers’ representatives should receive supplementary training or be allowed facilities to conduct training to:
(a) refer workers who may need help to an employee assistance professional to identify signs and symptoms of potential alcohol- or drug-related problems;
(b) be able to assess the working environment and identify working methods or conditions which could be changed or improved to

155 See the ILO code of good practice on the management of alcohol and drug related issues in the workplace (1996) 14.
156 See the ILO code of good practice on the management of alcohol and drug related issues in the workplace 15.
prevent, reduce or otherwise better manage alcohol- and drug-related problems;
(c) be able to explain and respond to questions about the enterprise's policy regarding alcohol and drugs;
(d) be able to help a rehabilitated worker with his or her needs when the person returns to work.”

5.9 IDENTIFICATION OF ALCOHOL ABUSE
Identification of alcohol abuse is a process whereby employees who are alcoholic are identified for purposes of assisting them. The ILO code of good practice on the management of alcohol and drug related issues in the workplace,\(^{157}\) describes the different methods of identification as follows:

“7. Identification
  7.1. Different types of identification
  7.1.1. The identification of individual workers with alcohol- or drug-related problems may be conducted at three levels:
  (a) self-assessment by the worker, facilitated by information, education and training programmes;
  (b) informal identification by friends, family members or colleagues, who suggest that the worker who appears to have a problem should seek assistance;
  (c) formal identification by the employer, which may include testing.”

It should be noted that both informal and formal identification should be kept confidential. Lack of confidentiality may cause the affected employee to lose trust and confidence in the assistance programme. When confidence is exercised, the credibility of the assistance programme will be maintained.

5.10 INTERVENTION BEFORE THE APPLICATION OF DEEMED DISMISSAL
Public service employers should ensure that employees with alcohol abuse problem are identified early. Once alcoholic employees are identified, they have to be allocated to the assistance programme to avoid termination of contract through operation of the law.\(^{158}\) The employer should consider that workers who have problems with alcohol and drug use may be suffering from a health problem. In such circumstances, the

\(^{157}\) Ibid.
\(^{158}\) See the Employee Assistance Programme Policy, Limpopo Province Department of Education Limpopo (2009) 14.
The employer should normally offer counselling, treatment and rehabilitation alternatives before consideration is given to the imposition of disciplinary measures.\textsuperscript{159}

Alcohol abuse problem can be used to establish good cause if the affected employee has been on an assistance programme before the application of the deeming provisions. If the affected employee consults with the employee wellness section after the deemed dismissal, the consultation will not help in justifying the abscondment and the employer is likely to reject the employee’s contention that there is good cause.

The affected employee has a duty to ensure that he/she cooperates with the employer regarding assistance programme. Failure by the affected employee to participate in the assistance programme may result in disciplinary action instituted against him/her. Should a worker fail to cooperate fully with the treatment programme, the employer may take disciplinary action as considered appropriate.\textsuperscript{160} A failure or refusal by the affected employee to attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3(8) of schedule 1, constitutes an act of misconduct.\textsuperscript{161} But the consideration of the act of misconduct should be done after the employer had provided either the affected employee or his/her trade union representative, with a report, and consulted the educator again.\textsuperscript{162}

5.11 CONCLUSION

It is an established fact that there is causal relationship between deemed dismissal and alcoholism. Obviously, alcoholism is not the only cause of deemed dismissal. The fact that in most of the cases, the cause of deemed dismissal is alcoholism is conclusive enough for public service employers to change their attitude and regard deemed dismissal as a draconian measure.

The first and the most important step that should be taken by the employers should be to identify the signs of alcoholism. This should be done through the help of a trained

\textsuperscript{159} See the ILO code of good practice on the management of alcohol and drug related issues in the workplace (1996) 15.
\textsuperscript{160} \textit{Ibid.}
\textsuperscript{161} See s 18 of the Employment of Educators Act 76 of 1998 C-10.
\textsuperscript{162} See s 9 of schedule 1 of the Employment of Educators Act 76 of 1998 C-16.
professional. The identification of the signs of alcoholism is intended for the employer to help those who are in the “red zone”.

Closely related to the process of identification of signs of alcoholism is the concept of “identification” or referral. This concept relates to how employees can access the employee wellness programmes. Employers should train employees to understand the different ways in which the services can be accessed. Following the process of identification of the sings of alcoholism, employees will be advised on how to get access the employee wellness services through “identification process”.

It is equally important for employers to understand that the intervention strategy should focus on all employees. The focus on all employees is emphasised by research finding that alcoholism is a health problem. Employers should therefore become observant on the behaviour of all employees. The risk of focussing on only those who are in the “red zone” is that employers may neglect those who are vulnerable for alcohol abuse.

Public service employers should develop programmes intended for encouraging employees to maintain a healthy lifestyle. Such programmes may include; inviting dieticians to train employees on healthy eating, inviting health officials to check blood pressure etc, organizing soccer and netball matches, inviting gym companies to promote their products as well as facilitating fun runs and aerobics, and advocacy and training for employee wellness programmes. The focus on healthy lifestyle will help employers to put more efforts on prevention.

Given the sensitive nature of alcoholism, all parties to the employment relationship should be involved. The involvement of all parties should start with the development of policies on employee assistance programmes until the training phase. Trade unions are a critical component of this process. This will help reduce the potential level of conflict that may arise during the course of assisting an alcoholic employee.

In the next chapter, the study will focus on “legal position regarding the traditional healer’s certificate. The chapter will amongst others, deal with; the processes set up by government to standardise and regulate the THP, the comprehensive analysis of the historical genesis of the THPA, the brief analysis of the mandate of the interim
ITHPCSA as established through the THPA, the legal position of traditional healers and their certificates in line with both section 23 of the BCEA and the rules of ethics of the PHCSA.
6.1 INTRODUCTION

Employers are often faced with a challenge regarding the validity of a traditional healer’s certificate. This chapter focuses on the legal position regarding the traditional healer’s certificate, as the use of a traditional healer’s certificate for purposes of sick leave, is unavoidable.

This chapter will deal with a broad range of issues revolving around the validity of the traditional healer’s certificate. This chapter will firstly unpack the use of traditional healer’s certificate in establishing good cause subsequent to a deemed dismissal. The reason for paying attention on this issue is that most of employees, who are terminated through operation of the law, use the traditional healer’s certificate to establish good cause.

The second issue to be articulated is the fact that majority of Africans rely on traditional healers for treatment of certain illnesses. Extensive elaboration on this issue will assist public service employers to come to terms with the reality that the traditional healer’s certificate is as important as the medical certificate.

The third issue to be elaborated upon is the fact that traditional healing is a human rights issue. It will be demonstrated that the Constitution guarantees every citizen the right to belief, freedom of trade, occupation and profession, and the right to participate in the culture of their own choice.\textsuperscript{163}

Thirdly, this chapter will critically analyse the Basic Conditions of Employment Act.\textsuperscript{164} The critical analysis of the BCEA will help to clarify the validity of both the traditional healer’s certificate and medical certificate. The fourth issue to be discussed is current legal position regarding the traditional healer’s certificate. It is necessary to deal with

\textsuperscript{163} See s 15, 22 and 30 of the Constitution of the Republic of South Africa.
\textsuperscript{164} 75 of 1997.
this issue because there is often confusion about the current legal position regarding the traditional healer’s certificate. This issue will be discussed in the context of the proclamation signed by the President of the Republic of South Africa.\textsuperscript{165}

Lastly, this chapter will focus on the critical analysis of the case of \textit{Kiviets Kroon Country Estate(Pty)Ltd v Mmoledi}.\textsuperscript{166} The intention for analysing this case is that, it is the landmark judgement regarding the validity of the traditional healer’s certificate.

\section*{6.2 The Use of Traditional Healer’s Certificate in Establishing Good Cause Subsequent to a Deemed Dismissal}

The use of traditional healer’s certificate to establish good cause has been observed in the LPDE. In the majority of cases, employees who are terminated through operation of the law use traditional healer’s certificate to establish good cause. In most cases, the traditional healer’s certificate is presented when employees establish good cause subsequent to deemed dismissals. Most of the traditional healer’s certificates come from the traditional healers affiliated to the Traditional Healers Organisation (THO).

The LPDE’s attitude towards the use of the traditional healer’s certificate to establish good cause is that the certificate is invalid. The argument is based on the fact that the certificate does not comply with section 23 of the BCEA.\textsuperscript{167} It is this experience and observation which prompted the need to extensively compile a research on the validity of the traditional healer’s certificate.

\section*{6.3 Majority of Africans Rely on Traditional Healers for Treatment of Certain Illnesses}

The use of traditional healers in Africa is well documented. It is not strange that majority of Africans resort to traditional healing. The WHO estimates that up to 80\% of the population in Africa, makes use of traditional medicine.\textsuperscript{168} This is strongly tied to the

\begin{flushleft}
\textsuperscript{165} See Government Gazette number 29 of 2014 titled: Commencement of Certain Sections of the Traditional Health Practitioners Act, 2007 (Act No. 22 of 2007).
\textsuperscript{166} [2014] 3 BLLR 207 (SCA).
\textsuperscript{167} 75 of 1997.
\end{flushleft}
long held traditional belief, customs and culture of the African people. These beliefs will obviously become prevalent in the workplace.

However, according to research done by Ricther,\textsuperscript{169} it is not clear at this stage how many South Africans use traditional healers. It was further discovered that other African countries have made some progress in recognising the traditional healer’s certificate. The research revealed the following:

“It is difficult to estimate how many South Africans make use of traditional healers and how many traditional healers practice their trade. While a number of other African countries have made early attempts to formally recognise traditional healers and to set up traditional healer organisations, the South African government has only recently embarked on this process – notably with the drafting of the “Traditional Health Practitioners Bill”. The first province-wide traditional healers’ council was only established in 1999.”\textsuperscript{170}

The African Renewal Magazine,\textsuperscript{171} indicates that traditional healers still remain the preferred choice for many Africans. The Magazine elaborates as follows:

“Although Western medicine is generally accepted throughout Africa, it has not replaced but rather augmented indigenous health approaches. Practitioners such as Mr. Masango remain central to the lives of many.”

The above analysis emphasises the fact that the use of traditional healer’s certificate cannot be avoided by employers in this country. The recognition of traditional healer’s certificate is not an option.

6.4 THE TRADITIONAL HEALTH PRACTICE (THP) IS A HUMAN RIGHTS ISSUE: TRADITIONAL HEALERS ARE PROTECTED BY THE BILL OF RIGHTS OF THE CONSTITUTION

The 1994 democratic breakthrough has led to the promulgation of the Constitution of the Republic of South Africa.\textsuperscript{172} The perpetual suppression of beliefs of the majority of


\textsuperscript{171} http://www.un.org/africanrenewal/magazine/january-2006/traditional healers boost primary health care- downloaded on the 19/10/2015.

\textsuperscript{172} 108 of 1996.
previously oppressed people is something of the past. In terms of the previous system of apartheid, traditional healers were referred to as “witch doctors”.

Some employers in this country are still trapped in the old mentality of undermining the THP. In the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, the appellant complained that it cannot be expected to plan and cater for perceptions of the supernatural – visions of ancestors – in the running of its business.

The Bill of Rights as contained in the Constitution protects the rights of all citizens to have freedom of religion, belief, trade and occupation. It states as follows:

6 4 1 THE RIGHT TO BELIEF
Section 15 of the Bill of Rights of the Constitution protects the freedom of religion, belief and opinion of all citizens of this country. It states as follows:

> “15 Freedom of religion, belief and opinion  
> (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

6 4 2 FREEDOM OF TRADE, OCCUPATION AND PROFESSION
Section 22 of the Bill of Rights guarantees everyone the freedom of trade, occupation and profession. It states as follows:

> “22 Freedom of trade, occupation and profession”

6 4 3 THE RIGHT TO PARTICIPATE IN A CULTURE OF YOUR CHOICE
Section 30 of the Bill of Rights protects the rights of all citizens to participate in a language and culture of their choice. THP constitutes part of the important cultural heritage of the majority of South Africans and therefore, to resort to traditional healing is consistent with the Constitution. It has to be noted that this section sounds a caution

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173 *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* [2014] 3 BLLR 207 (SCA) par 17.  
174 The Constitution.  
175 S 22 of the Bill of Rights of the Constitution of the Republic of South Africa states that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.  
that participation in one’s culture should not be at the expense of the rights others. It states as follows:

“30 Language and culture
Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

6.5 CRITICAL ANALYSIS OF SECTION 23 OF THE BCEA

The BCEA is the barometer for determining the validity of medical certificates used as proof of absence due to sickness. Section 23 is written in such a manner that it serves as a yardstick for the validity of a medical certificate. The primary condition for acceptance of such medical certificate is that the person issuing it should be registered with professional council established by the Act of Parliament. Once a person issuing a medical certificate is registered with the professional council, such a certificate is valid.

6.5.1 WHAT CONSTITUTES THE VALIDITY OF MEDICAL CERTIFICATES?

Section 23 of the BCEA outlines different requirements for the validity of medical certificates. The most critical part of section 23, is the requirement that a person issuing the medical certificate should be registered with the professional council established by an act of Parliament. It is important, because once a person is registered with a professional council, the council will then certify such a person to diagnose and treat patients. It states as follows:

“23 Proof of incapacity

... (2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.

...”

For the medical certificate to be valid, the following requirements are salient from the above BCEA provision:

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177 75 of 1997.
(i) **The medical certificate should be signed and issued by medical practitioner or other person**

In terms of the BCEA, traditional healers are not prohibited from signing and issuing medical certificates. Section 23(2) of the BCEA clearly states that the medical certificate should be issued by the medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council. The most important thing for anyone to qualify to issue a medical certificate is registration with the professional council.

(ii) **The medical practitioner or other person should be registered with a professional council established by an act of Parliament**

This is one basic requirement which made it difficult for the recognition of the traditional healer’s certificate. Since the promulgation of the Traditional Health Practitioners Act (THPA)\(^{178}\) until 2014, when the President signed the proclamation, traditional healers did not have a professional council. This Act is called the Traditional Health Practitioners Act, and comes into operation on a date determined by the President by proclamation in the Gazette.\(^{179}\)

It therefore implies that the THP in this country was not regulated until 2014 when the President signed the proclamation. The signing of the proclamation by the President was intended to ensure compliance with this important requirement of the BCEA.

**6 5 2 IS THE TRADITIONAL HEALTH PRACTICE NOT COVERED BY THE BCEA?**

The above critical analysis of section 23(2) of the BCEA helped to answer this question. According to the three requirements as analysed above, the intention of the drafters came out clearly. The intention was to accommodate other practices such as the THP.

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179 S 52 of the Traditional Health Practitioners Act 22 of 2007.
6 6  THE CURRENT LEGAL POSITION REGARDING THE TRADITIONAL HEALER’S CERTIFICATE

The current legal position regarding the traditional healer’s certificate is that it is not yet valid. However, the recently signed proclamation by the President is a giant leap in the direction of the recognition of the traditional healer’s certificate.\textsuperscript{180}

6 6 1  THE PROCLAMATION SIGNED BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA\textsuperscript{181}

The proclamation signed by the President of the Republic of South Africa is a start of a long journey in regulating and standardising the THP. The signing of this proclamation brings to end, the confusion around the legal position of the traditional healer’s certificate. The successful implementation of the cited sections of the THPA\textsuperscript{182} will provide much needed clarity to both employers and employees on the validity of the traditional healer’s certificate.

The signed proclamation states as follows:

“In terms of the section 52 of the Traditional Health Practitioners Act, 2007(Act No. 22 of 2007), I hereby, determine 01 May 2014 as the date on which Sections 4, 5, 6, 8, 9, 16, 17, 18-28, 29-41, 42-46, and 51 of the Traditional Health Practitioners Act, shall come into operation.”

6 6 2  WHAT ARE THE IMPLICATIONS OF THE PROCLAMATION?

The implications of the proclamation are that the THPA\textsuperscript{183} has now become effective as from the 1 May 2014. This is the date determined by the President when he signed the proclamation.\textsuperscript{184}

It further implies that systems and structures will be put in place to ensure the regulation and standardisation of the THP. Amongst others; the Interim Traditional

\textsuperscript{180} See Government Gazette number 29 of 2014 titled: Commencement of Certain Sections of the Traditional Health Practitioners Act, 2007 (Act No. 22 of 2007).

\textsuperscript{181} Ibid.

\textsuperscript{182} 22 of 2007.

\textsuperscript{183} Ibid.

\textsuperscript{184} See the first paragraph of the Government Gazette number 29 of 2014, as cited in 6 5 1 of this chapter. The Government Gazette is titled: Commencement of Certain Sections of the Traditional Health Practitioners Act 2007 (Act No. 22 of 2007).
Health Practitioners Council of South Africa (ITHPCSA) will be established,\textsuperscript{185} the Minister may, after consultation with the Council, make regulations in order to comply with the BCEA,\textsuperscript{186} qualifications for registration,\textsuperscript{187} application for registration to practice,\textsuperscript{188} the removal from and restoration of name to register.\textsuperscript{189}

\section*{6.6.3 IS THE TRADITIONAL HEALER’S CERTIFICATE IMMEDIATELY VALID?}

The signing of the proclamation by the President does not make the traditional healer’s certificate immediately valid. All traditional healers in the country should first get registered with the ITHPCSA. The traditional healer’s certificate will only become valid once the traditional healer is registered with the ITHPCSA. The registration of traditional healers with the ITHPCSA is in compliance with section 23(2) of the BCEA.

In terms of the THPA,\textsuperscript{190} the ITHPCSA will be established as follows:

\begin{quote}
"Establishment of Interim Traditional Health Practitioners Council
4. (1) A juristic person to be known as the Interim Traditional Health Practitioners Council of South Africa is hereby established.
(2) The registrar must convene the first meeting of the Council within three months of the commencement of this Act.
(3) The term of office for the Council is three years, but the Minister may, in order to facilitate the implementation of, or development of amendments to, this Act, extend the term of office of the Council for a further period of not more than 24 months."
\end{quote}

Additional to the establishment of the ITHPCSA is section 47 of the THPA. In terms of this section, the Minister of Health should, in consultation with the relevant stakeholders, determine a regulatory framework necessary to oversee the THP. Amongst others the regulatory framework will deal with registration of traditional healers, their qualifications and conduct.

This implies that, until such time that the Minister of Health has promulgated applicable regulations in order to bring traditional healer certificates in line with the requirements

\begin{flushleft}
\textsuperscript{185} See ch 2 s 4(1),(2) and (3).
\textsuperscript{186} See s 47 of the Traditional Health Practitioners Act 22 of 2007.
\textsuperscript{187} See s 22 of the Traditional Health Practitioners Act 22 of 2007.
\textsuperscript{188} See s 21 of the Traditional Health Practitioners Act 22 of 2007.
\textsuperscript{189} See s 23 of the Traditional Health Practitioners Act 22 of 2007.
\textsuperscript{190} See ch 2 s 4(1), (2) and (3) of the Traditional Health Practitioners Act 22 of 2007.
\end{flushleft}
of the BCEA, employers are not obliged to accept a traditional healer’s certificate presented by employees.

Notwithstanding the significance of other sections of the THPA as proclaimed by the President, the most important once are the establishment of the ITHPCSA and the creation of the regulatory framework to bring the THP in line with requirements of the BCEA.

6.7 CRITICAL ANALYSIS OF THE CASE OF KIEVITS KROON COUNTRY ESTATE (PTY) LTD v MMOLEDI191

6.7.1 THERE HAS ALWAYS BEEN A DEMONSTRATION OF DESPERATION FROM THE RESPONDENT

Ms Johanna Mmoledi was consistent in her request for permission to train as a traditional healer. She even went to the extent of asking the employer to adjust the shifts to accommodate her training. She asked for exemption from the afternoon shift so that she could be able to attend the training course. In the case Kievits Kroon Country Estate (Pty) Ltd v Mmoledi,192 the court held as follows:

“Sometime between April and May 2007 the respondent approached the executive chef and her manager, Mr Stephen Walter, requesting that she be exempt from the afternoon shift so that she could attend a traditional healer’s course. She explained that she had been seeing visions of her ancestors, the significance of which, as I understand the evidence, was that she had a calling to become a traditional healer. Mr Walter spoke to the other staff affected by her request in an effort to accommodate her. They were willing to assist, and the shift-schedule was amended so as to excuse her from working the afternoon shift. For her part she agreed to assist if the need arose.”

6.7.2 MS JOHANNA MMOLEDI WAS BETWEEN THE ROCK AND THE HARD GROUND

The respondent felt that if she fails to attend the traditional healer’s training course, she was going to die. On the other hand, the employer refused to grant her unpaid leave to go and train as a traditional healer. She nevertheless went for a training amid the refusal by her employer, to grant her unpaid leave. In the case Kievits Kroon Country Estate (Pty) Ltd v Mmoledi,193 the court held as follows:

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“For her part the respondent testified that she believed that she was sick because she saw visions of her ancestors. She was therefore required to complete certain tasks with a traditional healer so that she also could become a traditional healer. Importantly, in response to questions from the commissioner, she testified that had she not attended the course, her health would have been in danger and she may have collapsed; only her traditional healer could help her. Mrs Masilo, her traditional healer, testified that she had treated the respondent from 13 January to 8 July 2007 because she had ‘perminitions’, which were visions of her ancestors. She testified further, also in response to the commissioner’s questions, that had the respondent not attended her course, something ill – including death – may have befallen her. Surprisingly, neither the respondent’s nor Mrs Masilo’s evidence in this regard was challenged. Their testimony on this aspect became the lynchpin for the commissioner’s award.”

6 7 3 THERE IS A CULTURAL CHASM BETWEEN MR WALTER AND THE RESPONDENT

At the heart of the disagreement on granting of unpaid leave was a huge gap in understanding the cultural dimension of what Ms Johanna Mmoledi was facing. For Mr Walter, acting on behalf of the employer, it was not clear what the traditional healer’s training entails and the importance thereof. Mr Walter was supposed to investigate this phenomenon further in order to have a clear understanding of what Ms Johann Mmoledi was facing. In the case Kievits Kroon Country Estate (Pty) Ltd v Mmoledi, the court held as follows:

“The commissioner considered that there was a cultural chasm between Mr Walter and the respondent. Because of this he was not able to understand the significance of her request to be released from duty to attend the traditional healer’s course. If he had understood the request, so the commissioner reasoned, he would have regarded her condition as a disease that would have qualified her for sick leave. And because the respondent genuinely believed that her health would be in danger if she did not heed the call from her ancestors to undergo training to become a traditional healer, which Mrs Masilo confirmed, she had no option but to defy her employer’s instruction to report for duty. She had thus proved, said the commissioner, that ‘her absence from duty was necessitated by circumstances beyond her control’. Her dismissal was therefore substantively unfair.”

6 7 4 NO ROOM TO CATER FOR VISIONS OF ANCESTORS: THE EXTENT TO WHICH THE EMPLOYER PERCEIVES THE THP

The appellant’s understanding of the traditional healer’s role in society is disturbing. It is rooted in the old stereotypes of undermining the African culture and regarding it as barbaric and inferior. His business is more important than African culture. He argued

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194 This was the conclusion of the Commissioner when adjudicating on the respondent’s case of unfair dismissal under the auspices of the Commission for Conciliation Mediation and Arbitration. [2014] 3 BLLR 207 (SCA) par 15.
that he cannot be expected to cater for visions of ancestors in his own business. In the case *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, 196 the court held as follows:

“The appellant takes issue with the award: it contends that the commissioner undertook the wrong inquiry by asking whether the respondent was justified in failing to report for duty. The problem was compounded, it is contended, when in the absence of any expert or other evidence by the respondent on what was meant by ‘perminitions’, calling or visions of ancestors, the commissioner took judicial notice of the meaning of these concepts. Furthermore, complains the appellant, it cannot be expected to plan and cater for perceptions of the supernatural – visions of ancestors – in the running of its business.”

6.7.5 THE RESPONDENT WAS JUSTIFIED IN ATTENDING THE TRADITIONAL HEALER’S COURSE WITHOUT THE PERMISSION OF THE EMPLOYER

The respondent had to go and attend the traditional healer’s training without the permission of the employer. She had to do so because of circumstances beyond her control. She faced death if failed to honour the visions of her ancestors. Therefore she was justified in attending the traditional healer’s training without the permission of the employer. In the case *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, 197 the court held as follows:

“Once it is accepted that the respondent experienced visions of her ancestors and used traditional healing methods because of sincerely held cultural beliefs, as the commissioner correctly found that she did, the line of questioning he pursued with her and Mrs Masilo regarding the possible consequences had she not attended the course was not only understandable, but unavoidable. In this regard it is well established that where an employee absents herself from work without permission, and in the face of her employer’s lawful and reasonable instruction, a court is entitled to grant relief to the employee if the failure to obey the order was justified or reasonable. The commissioner’s inquiry thus sought to determine whether the respondent was justified in failing to obey the order.”

6.7.6 THE TRADITIONAL HEALER’S CERTIFICATE SHOULD BE EQUATED WITH THE MEDICAL CERTIFICATE

The Bill of Rights of the Constitution, 198 guarantees everyone the right to belief, the freedom of trade, occupation and profession, and the right to participate in a culture of your choice. It is in this context that the medical certificate cannot be viewed as superior to the traditional healer’s certificate. Therefore, the traditional healer's

196 [2014] 3 BLLR 207 (SCA) par 17.
198 See 6.3 of this chapter.
certificate should be equated with the medical certificate. In the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, the court held as follows:

“It is also significant that Mr Walter testified that the respondent would not have been dismissed if she had produced a certificate from a medical practitioner, instead of the traditional healer, as proof of her illness. The certificate from the traditional healer was considered ‘meaningless’ and was therefore rejected as proof of illness. But had he understood it to be equivalent to a medical certificate, or tried to understand its import by asking the respondent to explain its meaning, instead of summarily rejecting it, he may well have accommodated her request. Further the appellant could have explored with the respondent alternatives to her taking leave at that time, such as her attending the course when it was convenient to accommodate her request if possible.”

6.8 CONCLUSION

It has been established through research carried out in this chapter that reliance on the THP is a reality. It has come out as well that majority of Africans rely on the THP. By implication, it is unavoidable for employers to experience traditional healer’s certificate attached as proof of illness.

The THP is a human rights issue. This formed part of many facets of African culture that was undermined by the colonial powers. The THP was regarded as barbaric and of lower standard. This was deliberately done in order to entrench the western culture amongst Africans. The Bill of Rights of the Constitution dealt with that cruel system of regarding Africans as sub-human.

The BCEA is the fundamental statutory framework for the creation of the minimum conditions of service for all workers in the country. Section 23(2) of the BCEA covers traditional healers. They are covered through a reference to “other person”. It states that: “The medical certificate should be signed and issued by medical practitioner or other person”.

The proclamation by the President on the commencement of certain sections of the THPA has concluded the ugly chapter of undermining this noble practice. The platform has now been created for the recognition of the THP. Employers’ frustrations about the validity and the lawfulness of the traditional healer’s certificate have been adequately addressed.

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The implication for the proclamation is that systems and structures will have to be put in place. This will help speed up the process of recognition of the traditional healer’s certificate. The traditional healer’s certificate is not yet valid. It will only become valid after the interim council will have been set up and traditional healers registered with the council.

Additionally, the Minister of Health will have to consult with all stakeholders to deal with issues of requirements for registration, qualifications required and the conduct of the traditional healers. This is a highly involved process which needs time and the requisite leadership skills. It is in this context that the traditional healer’s certificate should be brought in line with THPA.

Lastly, the case of *Kievits Kroon Country Estate* (Pty) Ltd is amongst many factors which helped to propel the process of the proclamation by the President. The critical analysis of this case has revealed shocking attitude by the appellant. Mmoledi was unfairly refused unpaid leave to honour the call by the ancestors. The appellant unashamedly argued that he cannot be expected to cater for visions of the ancestor in his business. This attitude is reminiscent of the mentality of the former colonisers.
CHAPTER 7
CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION
The purpose of this research is to identify the legislative deficiencies regarding establishing good cause subsequent to a deemed dismissal. The legislative deficiencies were investigated using the research questions. The process of identifying the legislative deficiencies was done through the critical analysis of section 14(2) of the EEA and section 17(3)(b) of the PSA.

The analysis was based on a number of topical issues and they are as follows; the conceptual framework, legal consideration for the deemed dismissals, establishing good cause, deemed dismissal and alcoholism, legal position regarding the traditional healer’s certificate. In areas where legislative deficiencies have been identified, recommendations on how to address these deficiencies have been made.

7.2 IDENTIFIED LEGISLATIVE DEFICIENCIES AND RECOMMENDATION
7.2.1 TRACING THE WHEREABOUTS OF THE ABSCONDING EMPLOYEE
In the case of Kotze v Public Health & Sectoral Bargaining Council, tracing of the whereabouts of the absconding employees is a requirement in the private sector. The deeming provisions in the public sector are silent about tracing the whereabouts of absconding employees.

There is a need for the amendment of section 14(1) of the EEA and section 17(3)(a) in order to make it mandatory for employers in the public service to trace the whereabouts of absconding employees. The employer should ensure that before the contract is terminated through operation of the law, the employee’s whereabouts is unknown.

It is therefore recommended that the tracing of the absconding employees should be done in two stages. The first stage is comprised of phoning the immediate family members. This should happen during the first week of abscondment. The main

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200 See the research questions on pg 19 of this study.
purpose of this is to ensure that there is a tangible evidence with regard to tracing the whereabouts of the absconding employee. The second stage is done through writing a letter to the absconding employee. The letter will serve as a warning to the absconding employee to report for work by a particular date. It should state that failure to do so will result in his/her contract terminated through operation of the law.

7.2.2 THE TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO 158) IS SILENT ON THE DEEMING PROVISIONS

The above convention is silent about the deeming provisions. The implication is that all over the world, there is no common approach regarding deeming provisions.

The ILO should consider amending this convention so that it caters for the deeming provisions. It is important for this convention to be amended because lack of clarity with regard to the position of international law may lead member states to adopt approaches that undermine the protection of the rights of employees.

7.2.3 REVIEW OF THE EMPLOYER’S DISCRETION NOT TO REINSTATE THE ABSCONding EMPLOYEE

The employer’s discretion not to reinstate the absconding employee is reviewable by the LC. The LC processes involve a lot of money. In most instances, employees may not always be in a position to afford prohibitively expensive legal costs. In terms of the deeming provisions, there is no opportunity for absconding employees to lodge an appeal and neither an opportunity to lodge a dispute. Both BC and the CCMA lack jurisdiction to entertain cases relating to termination of contract through operation of the law.

Firstly, it is recommended that section 14(1) of the EEA and section 17(3)(a) be amended so that absconding employees could be given the opportunity to appeal the employer’s discretion not to reinstate them. Secondly, the rules of the BC and the CCMA should be amended in order for these forums to have jurisdiction to deal with cases of termination of contract through operation of the law. The amendments will be in line with the notion of providing effective, efficient and less costly dispute resolution mechanism for all employees in the country.
7.2.4 SHOULD ESTABLISHING GOOD CAUSE BE DONE THROUGH RESPONDING TO REPRESENTATIONS OR THROUGH A HEARING?

The absconding employees are not subjected for a hearing when they return. This denies them the right to be heard. The approach of adjudicating on the affected employee’s representations through a written response proved to be short sighted. The employer is caused to take a decision without looking at the totality of circumstances. This leads to a situation where deemed dismissed employees are subjected to unfair labour practice.

It is therefore recommended that section 14(1) of the EEA and section 17(3)(a) of the PSA be amended to ensure that absconding employees are subjected to a hearing when they return.

7.2.5 THE TIME-LIMIT WITHIN WHICH THE AFFECTED EMPLOYEE SHOULD BE AFFORDED AN OPPORTUNITY TO ESTABLISH GOOD CAUSE

The deeming provisions are silent about the time-limit within which the affected employee should be afforded an opportunity to establish good cause. It is recommended that section 14(1) of the EEA and section 17(3)(a) should be amended in order to prescribe the time-limit.

7.3 GENERAL REMARKS

7.3.1 DEEMED DISMISSAL AND ALCOHOLISM

It is clear from the findings of this research that there is a causal relationship between deemed dismissal and alcoholism. Additionally, it has been established that most of absconding employees are alcoholic. Employers are therefore advised to ensure that early warning systems are put in place to detect and intervene on the problem of alcoholism. It is important to develop EHW policies which provides for procedures to deal with this challenge immediately it has been discovered.

7.3.2 LEGAL POSITION REGARDING THE TRADITIONAL HEALER’S CERTIFICATE

Majority of South Africans rely on the THP. There are instances where some employees present the traditional healer’s certificate for purposes of establishing good cause subsequent to a deemed dismissal. There is a need for the process of recognition of traditional healer’s certificate to be expedited.
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