

**PROTECTING FIXED-TERM CONTRACT EMPLOYEES IN
SOUTH AFRICA : THE PAST AND THE PRESENT**

GREGORY MARCELLUS BOTHA

Student no. 203 509 607

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Summary - Purpose and aim of research dissertation

The aim of this dissertation is to assess whether or not fixed-term contract employees are adequately protected in South Africa as those who form part of a non-standard workforce.

This assessment will provide a detailed account of the fixed-term contract of employment along with insight into the role fixed-term employees play in the South African labour market and it will explore the reason for the existence of the fixed-term contract of employment and the vulnerability of those employed under such contracts.

The paper will then explore the provisions (both past and present) of South African labour legislation affecting fixed-term contract employees and give an opinion on the effectiveness of such provisions in protecting the rights of the employed. This will include a discussion of the relevant jurisprudence and identify a number of shortcomings associated with the relevant legislation prior to recent amendments. Those relevant amendments will then be detailed and summarized in order to establish their effectiveness in remedying these shortcomings.

The paper will close with recommendations with reference to foreign jurisdictions and a concluding remark on the present state of the law protecting fixed-term contract employees in South Africa.

CHAPTER ONE

1.1 Introduction

The right to fair labour practices is a basic human right extended to all persons under the Constitution of the Republic of South Africa Act 108 of 1996¹ (the Constitution). In the case of *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*,² the Constitutional Court held that an individual's work is linked closely to their dignity and that work forms the basis of an individual's existence.

With the above in mind, it is quite apparent that in South Africa, employment is a deeply important issue³ and that the rights of employees⁴ must be safeguarded.

In the early 20th Century, the employment relationship was viewed as a simple and private contractual arrangement governed by the common law principles relating to contract. This generally placing the employer (with their superior economic resources) in a position of power over the employee. This focus more on contract law rather than the fairness of the relationship between the parties⁵ was found to be unsuited to the task of protecting employee rights in modern business and industry.⁶ In answer, South Africa adopted statutory regulation of employment contracts and created an industrial court empowered to hear disputes concerning 'unfair labour practices'.⁷ More recent labour legislation

¹ Section 23(1) of Act 108 of 1996

² 2005 (6) BCLR 529 (CC) at paragraph [59]

³ It should be noted that the South African Constitution is the only Constitution (save for the Constitution of Malawi, which was modelled on South Africa's Constitution) that includes the right to fair labour practices.

⁴ Various forms of 'employment' and 'employees' are excluded from the ambit of section 23(1) of Act 108 of 1996. It is not necessary to distinguish the relevant positions and / or persons here, save to state that fixed-term contract employees fall within the ambit of employees protected in terms of section 23(1).

⁵ John Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2006) at page 6

⁶ Robert Sharrock *Business Transactions Law* 8 ed. (2011) at page 423

⁷ John Grogan *op cit* note 5 at page 6

sought⁸ to give effect to the rights and guarantees that flow from section 23 of the Constitution and the further aim of which was to regulate the employment relationship between the parties subject to same. These laws made major statutory inroads into the common law relating to the contract of employment⁹ and the rights and obligations of the parties to such contracts.¹⁰

Yet even with these measures in place, the rights of employees continue to be violated by employers. Consider, in support of this statement, the caseload statistics for the Commission for Conciliation, Mediation & Arbitration's (CCMA) which report 171,854 cases referred to them during the 2014/2015 financial year, 96% of which related to the terms of the Labour Relations Act 66 of 1995 (LRA).¹¹

Changing concepts of 'employment' and 'employee' have created a class of workers who are not protected by the traditional safeguards designed for the standard formulation of employment on which the legislation was modelled.¹² Fixed-term contract employees¹³ are a particularly vulnerable part of the South African workforce. Their positions are often fraught with inequality, uncertainty and are prone to abuse.¹⁴ As the guardian of employees' rights it is necessary

⁸ The labour associated legislation was also enacted with a view to give effect to various other employee / employer rights, for example, see the description given by O'Regan J when he described the purpose of the Labour Relations Act 66 of 1995 in *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at pages 531 – 532.

⁹ For example, the Basic Conditions of Employment Act 75 of 1997 determines minimum standards / conditions that an employer cannot contract out of and that will take preference over and nullify any terms of a contract of employment that provide a right that falls short of the minimum standards / conditions prescribed by the said Act.

¹⁰ Robert Sharrock *op cit* note 6 at page 423, and also see page 461 of the same publication where an outline is provided of the inroads made into the employer's common law right to terminate a contract of employment and how the common law notion of dismissal differs from the meaning of dismissal provided in the Labour Relations Act 66 of 1995.

¹¹ Commission for Conciliation, Mediation & Arbitration Annual 2014/15 Report, page 48, available at <http://www.ccma.org.za/Display.asp?LI=45&L2=155>, accessed on 7 June 2016

¹² T Cohen and L Moodley 'Achieving "decent work" in South Africa?' (2012) (15)2 PER at page 329

¹³ A person employed in terms of a 'fixed-term contract of employment'. The definition of this form of employment follows in Chapter Two hereafter.

¹⁴ SB Gericke 'The regulation of successive fixed-term employment in South Africa: Lessons to be gleaned from foreign and international law' (2016) 1 TSAR 94 at page 96

that South African labour law be transformed so as to satisfactorily guarantee the right to *fair labour practices* to all, including fixed-term contract employees.¹⁵

1.2 Non-standard employment in South Africa

Why, considering our commitment to fair labour practice, is fixed-term employment recognized in South Africa and so commonly used? The 'Quarterly Labour Force Survey – Quarter 1: 2016'¹⁶ released by Statistics South Africa in May 2016 confirmed that the unemployed in South Africa had increased over the first quarter of 2016 by more than half a million (521,000) leaving more than a quarter of the defined population unemployed. This increase in unemployment is the second highest within a single quarter period since 2010 (the highest increase over a single quarter period being the first quarter in 2015 – 626,000).¹⁷ The unemployment situation in South Africa is dire and the need for job creation requires urgent attention.

In South Africa, the labour market is made up of both standard (full-time or permanent employment) and non-standard employment.¹⁸ Non-standard employment is typically temporary in nature and such employees are often paid for results rather than their time.¹⁹ Fixed-term contract employment falls within this sphere.

A notable increase in non-standard employment in South Africa can be attributed to globalization, industry deregularization and advancements in technology.²⁰ In their effort to reduce costs and meet the demands of globalization, employers seek 'employment flexibility', disregarding the traditional boundaries of standard employment, seeking to sidestep labour legislation and avoid the employee

¹⁵ *Ibid*

¹⁶ Statistical release P0211, page xii, available at <http://www.statssa.gov.za>, accessed on 7 June 2016.

¹⁷ *Ibid*

¹⁸ E Fourie 'Non-standard workers: The South African context, International law and Regulation by the European Union' (2008) (11)4 PER at page 111

¹⁹ *Ibid*

²⁰ E Fourie *op cit* note 18 at page 110

protections therein.²¹ There is no doubt too that at present the economic pressures of an ailing rand value, a catastrophic drought and poor investment outlook has had an effect on all spheres of business. It is under these circumstances that the appointment of non-standard employees becomes a far more attractive option for prospective employers who face the economic rollercoaster that is the South African economy and this is borne out in the increased use of flexible non-standard employment as a means to cut costs and stay afloat.

1.3 Ensuring *decent work* in South Africa

Non-standard employees have limited job security, are unlikely to be promoted and generally do not receive the same benefits (i.e. access to an employer pension fund or medical aid) as standard employees.²² Consequently, non-standard employees must be considered a vulnerable class, open to exploitation and in many cases unable to rely on the protections afforded to standard employees for relief in instances of a dispute with the employer or a dismissal.²³

As indicated above, South African courts have recognized²⁴ that one's work is closely related to one's dignity and plays a large role in a person's life. Accordingly, ensuring that every South African has access to *decent work* is to give effect to the Constitutional rights guaranteed to them. And as a member of the International Labour Organisation (ILO), whose aim it is, amongst others, to ensure decent employment opportunities,²⁵ the South African Government is

²¹ E Fourie *op cit* note 18 at page 110

²² Stella Vettori 'Fixed-term contracts: A comparative analysis of the Mozambican and South African legislation' (2008)2 *De Jure* 371 at page 372

²³ E Fourie *op cit* note 18 at page 110

²⁴ *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at paragraph [59]

²⁵ See reference to the aims of the ILO available at www.ilo.org/global/about-the-ilo/lang--eng/index.htm, accessed on 21 May 2016

committed and bound by constitutional law to achieving ‘*decent work*’ in South Africa for all.²⁶

The concept of *decent work* is summed up by the ILO as follows:

“It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that effect their lives and equality of opportunity and treatment of all women and men.”²⁷

The concept is notably broad but it can be deduced from the description that general protection (security) is necessary for work to be considered *decent*. This protection is the goal of South African labour legislation and to ensure that all forms of employment, including fixed-term employment, can be considered *decent work*. Fixed-term contract work must be placed on a par with other forms of employment.

In addition to the protections provided to employees by labour legislation, the South African Government has undertaken to pursue other aspects of the concept of *decent work* through national development strategies. Some of these strategies are considered briefly below:

The National Development Plan: In May 2010 President Jacob Zuma appointed the National Planning Commission to formulate a National Development Plan (NDP).²⁸ One of the primary challenges identified by the Commission was that too few people in South Africa work²⁹ thus “achieving faster economic growth and

²⁶ T Cohen and L Moodley *op cit* note 12 at page 320

²⁷ See reference to the aims of the ILO available at www.ilo.org/global/about-the-ilo/lang--eng/index.htm, accessed on 21 May 2016

²⁸ Executive Summary of the National Development Plan ‘Our future – make it work National Development Plan 2030’ page 15, available at <http://www.gov.za/issues/national-development-plan-2030>, accessed on 12 June 2016

²⁹ *Ibid*

greater investment and labour absorption” is a priority of the NDP.³⁰ The NDP aims to raise employment through economic growth³¹ and recognizes that this requires a labour market that is more responsive to economic opportunity. This in turn requires (to list but a few) lifelong learning and career advancement, strengthening dispute resolution institutions, and addressing public sector labour relations.³²

The Employment Tax Incentive Act 26 of 2013: The aim of the Employment Tax Incentive Act (the ETI Act) is to persuade private sector business to employ more young and inexperienced workers by offering a tax incentive to those who employ such persons.

The New Growth Path: The New Growth Path (NGP) was adopted as a framework for the country’s economic policy and the driver of its jobs strategy.³³ The NGP was drawn from a growing consensus that creating decent work, reducing inequality and defeating poverty could only be achieved through the restructuring of the South African economy.³⁴ The aim is to utilize existing capital and capacity to maximize the creation of *decent* work and employment on a large scale.³⁵ The desired outcome (to be achieved by the year 2020) is an economic environment that provides ample opportunity for employment, a fast and effective economic growth rate, and in turn achieve better equity in the workforce and *decent* work opportunities for all.³⁶

Ensuring *decent work* for fixed-term contract employees in South Africa is a work in progress. To uplift these employees, an in-depth consideration of the

³⁰ *Op cit* note 28 at page 16

³¹ *Op cit* note 28 at page 17

³² *Op cit* note 28 at page 29

³³ ‘The New Growth Path: Framework’. The Department of Economic Development available at <http://www.economic.gov.za/communications/publications/new-growth-path-series>, accessed on 12 June 2016 at page 1

³⁴ *Op cit* note 33 at page 6

³⁵ *Op cit* note 33 at page 18

³⁶ *Op cit* note 33 at page 18. It is also relevant to mention that the NGP aims to reduce unemployment in South Africa to around 15% by the year 2020.

hardships they face is required. This will identify the starting point from which *decent work* must ultimately be achieved in this vulnerable sector.

CHAPTER TWO

2.1 Defining the Fixed-Term Contract of employment

South African labour legislation did not define fixed-term contract employment contract until the Labour Relations Amendment Act 6 of 2014 (LRAA).

Previously, the common law definition was *a contract of employment, the duration of which was limited as a result of the parties (employer and employee) specifying a set termination date.*³⁷ Additionally, the parties could agree that termination would take place on the occurrence of a particular event or on the completion of a specific task.³⁸

The LRAA now provides a statutory definition for such contracts of employment, defining the fixed-term contract of employment as:

- “198B(1) ...a contract of employment that terminates on –
- (a) the occurrence of a specified event;
 - (b) the completion of a specified task or project; or
 - (c) a fixed date, other than an *employee’s* normal or agreed retirement age...”

It is apparent from both the common law and statutory definitions that the fixed-term contract terminates on an agreed date (other than the employee’s normal or agreed retirement age), event, or completion of a task.

Where a specified date is set, the employer and fixed-term employee will in the fixed-term contract specify the said date, it being an express term of the fixed-term contract of employment.

However, where the terminating condition is an event or the completion of a task, no actual date is expressed in the contract of employment. The *event* or

³⁷ John Grogan *Dismissal* 2 ed. (2014) at page 48

³⁸ John Grogan *Workplace Law* 9 ed. (2007) at page 43

completion of the task form an express term of the contract of employment regarding termination and on the occurrence of the event or task completion, the fixed-term contract comes to an end. In such instances, the onus rests on the employer to show that the terminating conditions have been met.³⁹

Possible termination of a fixed-term contract of employment at some point prior to the express (or implied) date of termination is not an inherent feature of this kind of employment contract⁴⁰ and the Labour Court has confirmed that it is necessary to include in a fixed-term contract of employment a provision which specifically allows for premature termination if an employer is to successfully do so.⁴¹

2.2 Dismissal in terms of section 186(1)(b) prior to amendment

It is necessary at this juncture to point out that the amendment to section 186(1)(b) of the LRA through section 30 of the LRAA is by way of addition to the section with a further sub-section. Consequently, what follows in this chapter is still entirely relevant to the interpretation of section 186(1)(b) of the LRA now in its present form.

It is generally accepted that the 'natural' termination of a fixed-term contract of employment does not constitute a dismissal, as the termination occurs by operation of law and in accordance with the intentions of the parties.⁴² This has resulted in the misuse of fixed-term contracts by employers who seek to avoid the appointment of permanent employees by the repeated renewal of fixed-term

³⁹ *Ibid*

⁴⁰ *Lottering v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC) at page 1310[14]

⁴¹ *Ibid* and further see the most recent Judgment of the Labour Court per Ah Shene AJ in *Adam Nord v Civicus World Alliance for Citizen Participation Inc.* [2016] ZALCJHB 162 at paragraphs [63 – 65] where the Court confirmed the principle in the *Lottering* case and that premature termination of a fixed-term contract for operational requirements was possible where such a clause was present in the relevant contract.

⁴² Tamara Cohen 'When common law and labour law collide – some problems arising out of the termination of fixed-term contracts' (2007) 19(1) *SA Merc LJ* at page 26

contracts of employment, denying such employees the rights associated with permanent employment.⁴³

The LRA sought to prevent such abuse of employees' rights by defining *dismissal* in the original wording of section 186(1)(b) of the LRA as follows:

"Section 186(1) 'Dismissal' means that –

(a) ...

(b) an *employee* reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;"⁴⁴

Simply put, in terms of section 186(1)(b), fixed-term contract employees who acquire a reasonable expectation that their fixed-term contract will be renewed on termination will have been dismissed where their contract is not renewed, or the offer to renew is for a further fixed-term contract on less favorable terms.⁴⁵ The section implies that where such 'reasonable expectation' cannot be proved by the employee, the non-renewal or renewal on less favourable terms cannot constitute a dismissal.⁴⁶

But the wording of the section is such that by proving a reasonable expectation of renewal, the fixed-term employee shows only that 'a dismissal' has taken place. It is quite possible then for the employer to show that the *dismissal* was fair in terms of section 192(2) of the LRA.⁴⁷

2.2.1 The reasonable expectation of renewal

⁴³ D du Toit ... *et al.* 'Labour Relations Law – A Comprehensive Guide'. 6 ed. Part II, Chapter VIII, paragraph 2.1. available at <https://www.myllexisnexis.co.za/> accessed on 30 June 2016.

⁴⁴ Section 186(1)(b) of the Labour Relations Act 66 of 1995 prior to amendment in terms of Act 6 of 2014

⁴⁵ John Grogan *op cit* note 37 at page 48

⁴⁶ John Grogan *op cit* note 37 at page 48

⁴⁷ Also see *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at page 420E-F

To rely on section 186(1)(b) the fixed-term employee must prove a *reasonable* expectation of renewal on the same or similar terms. The expectation must be shown to have been reasonable in the objective sense that a reasonable employee in the relevant circumstances would have expected the fixed-term contract to have been renewed on the same or similar terms.⁴⁸ In addition, a subjective expectation on the part of the relevant employee must also be shown.⁴⁹

The Labour Appeal Court in *De Milander v MEC for the Department of Finance: Eastern Cape*⁵⁰ has confirmed that the test in determining whether a dismissal has occurred in terms of section 186(1)(b) is two-fold – it is first necessary to determine whether in fact the relevant employee expected his or her contract to be renewed (the subjective requirement) and secondly, in the event of such a subjective expectation, whether, in the light of all the relevant facts, the expectation was reasonable (the objective requirement). Where the answer to both inquiries is in the affirmative, a dismissal in terms of section 186(1)(b) has occurred.

In *Dierks v University of South Africa*⁵¹, Oosthuizen AJ held that the following criteria could all be taken into account when determining whether a reasonable expectation for the renewal of a fixed-term contract existed:

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

⁴⁸ John Grogan *op cit* note 37 at page 54

⁴⁹ John Grogan *op cit* note 37 at page 54

⁵⁰ (2013) 34 *ILJ* 1427 (LAC) at paragraph [29]

⁵¹ (1999) 20 *ILJ* 1227 (LC) at page 1246[133]

In *Joseph v University of Limpopo and Others*⁵² Jappie JA noted that circumstances such as the previous regular renewals of a fixed-term employee's contracts, the terms of such a contract and the nature of the business in which the employment exists, could all be taken into account in determining whether a reasonable expectation existed. Even more significantly, the court went on to state these considerations do not form part of a closed list and that the outcome depends on the circumstances of each case.⁵³

In proving that both a subjective and objective expectation exists, the facts of each case must be considered, and from the judgments referred to above, various factors may be taken into account, some of which are discussed below.

2.2.2 Factors to be considered in determining whether a reasonable expectation of renewal exists

2.2.2.1 Clauses which expressly exclude the possibility of a reasonable expectation of renewal

Where a clause in a fixed-term contract of employment expressly excludes the fixed-term employee's reliance on an expectation of renewal, an expectation of renewal may still be reasonable.⁵⁴ In other words, a company may not simply sidestep the expectation of renewal by excluding the possibility from their contract.

In *SACTWU & Another v Cadema Industries (Pty) Ltd.*⁵⁵ the Court held that provisions of a fixed-term contract are important, but not decisive in determining an expectation of renewal – the evidence as a whole informed by the entire circumstances surrounding the case shall determine a finding of reasonable

⁵² [2011] 12 BLLR 1166 (LAC) at paragraph [35]

⁵³ *Ibid*

⁵⁴ John Grogan *op cit* note 37 at page 57

⁵⁵ [2008] 8 BLLR 790 (LC)

expectation in those cases where a provision in the contract excludes such an expectation.⁵⁶

In *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*⁵⁷ the Court remarked per Basson J that where a clause exists in a fixed-term contract of employment in which an express exclusion of an expectation of renewal is included, the surrounding circumstances of the case will still need to be considered in determining whether a reasonable expectation of renewal existed.

In *Mediterranean Woollen Mills (Pty) Ltd. v SACTWU*,⁵⁸ the Appellant's (Mediterranean Woollen Mills) work force embarked on illegal strike action following protracted wage negotiations. The Appellant dismissed the striking workers who subsequently sought reinstatement. The Appellant agreed to re-employ the dismissed employees in terms of fixed-term contracts in which the following clause was included:

"6.1. I do hereby accept that I am accepting a Temporary Contract of Employment and do not expect any greater rights than those granted by law to temporary workers. In addition, I fully understand that I have no expectation of this Contract being renewed."⁵⁹

Prior to signature of the contracts, the Appellant's managing director addressed the dismissed employees stating the following during his address:

"Now the purpose of that contract ... is to see whether we at management and you as workers ... can develop a relationship that we can work together, to see if we can work together and if we can work together we will review this contract with the workers that can work."⁶⁰

⁵⁶ *SACTWU & Another v Cadema Industries (Pty) Ltd.* [2008] 8 BLLR 790 (LC) at page 794[20]

⁵⁷ (2009) 30 ILJ 407 at pages 418I – 419B

⁵⁸ 1998 (2) SA 1099 (SCA)

⁵⁹ *Mediterranean Woollen Mills (Pty) Ltd. v SACTWU* 1998 (2) SA 1099 (SCA) at page 1102A

⁶⁰ *Supra* note 58 at page 1102C-D

“The purpose of this contract is to see whether we can re-establish a working relationship that we used to have between the workers and management. ... If however there are workers that management feels happy about, then management will renew the contract. They will come out with a new contract, a permanent contract. Is that understood?”⁶¹

The Supreme Court of Appeal, in considering the facts, held that despite the strict wording of the fixed-term contract of employment, the employees could in fact come to hold an expectation of renewal.⁶² The court reasoned that regardless of the wording of the contract, the assurances made by the Appellant’s managing director created the impression in the minds of the employees that there was a very real prospect of re-employment so long as their behaviour during the fixed-term contract was such that it enabled management to feel ‘happy’ about them.⁶³

Where a standard clause excluding an employee’s expectation of renewal is simply included in the employment contract as a matter of course, this will not in itself exclude the reliance on a reasonable expectation as circumstances since having entered into the fixed-term contract of employment may have changed.⁶⁴

It appears, however, that the inclusion of such a clause in a fixed-term contract of employment may have the effect of placing on the employee claiming dismissal in terms of section 186(1)(b) a heavier burden in proving that a reasonable expectation existed.⁶⁵

2.2.2.2 An implied or express assurance of renewal

Surrounding factors in each case may contribute towards an implied assurance of renewal. For example, silence on the part of the employer may suffice in

⁶¹ *Supra* note 58 at page 1102D-F

⁶² *Supra* note 58 at page 1102F-G

⁶³ *Supra* note 58 at page 1102F-G

⁶⁴ John Grogan *op cit* note 37 at page 56

⁶⁵ John Grogan *op cit* note 37 at page 56

circumstances where the contract has in the past been repeatedly renewed.⁶⁶ Silence may also reinforce an implied assurance of renewal where the employer goes on to arrange the fixed-term employees work schedule for a date beyond the termination date stated in the fixed-term contract of employment.⁶⁷

Regarding an express assurance of renewal, the facts in *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd. & Others; SA Rugby (Pty) Ltd. v SARPU & Another*⁶⁸ are of assistance. The Applicants, despite a clause in their contracts having stipulated that no reasonable expectation of renewal would arise, claimed that they had been given a reasonable expectation that their contracts would be renewed.⁶⁹ Certain promises had been made to them by the then coach to this effect.⁷⁰ For a number of reasons, the Labour Appeal Court found that the Applicants had not been dismissed. The court found that the coach he had lacked the necessary authority to make such assurances and held accordingly that his assurances could not have been properly relied upon by the Applicants.⁷¹

2.2.2.3 The reasons for entering into a fixed-term contract of employment

The following view was endorsed by Molahlehi J in *SACTWU & Another v Cadema Industries (Pty) Ltd.*⁷²

“It is apposite to consider the reasons why parties enter into a fixed-term contract. Usually a fixed-term contract is entered into because the task to be performed is a limited or specific one, or the employer can offer the job

⁶⁶ John Grogan *op cit* note 37 at page 56. But regard should be had to the decision in *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd. & Others; SA Rugby (Pty) Ltd. v SARPU & Another* [2008] 9 BLLR 845 (LAC) at page 858[50] where the LAC found that SA Rugby's failure to reply to a letter from SARPU and to indicate its intention not to renew certain fixed-term contracts did not, in the circumstances, imply that the fixed-term contracts would be renewed on the same or similar terms.

⁶⁷ John Grogan *op cit* note 37 at page 56

⁶⁸ [2008] 9 BLLR 845 (LAC)

⁶⁹ *Supra* note 68 at page 847[3] and page 848[8]

⁷⁰ *Supra* note 68 at page 849[12], page 85[19-20] and page 853[26-30]

⁷¹ *Supra* note 68 at page 859[52]

⁷² [2008] 8 BLLR 790 (LC) at page 793[18]

for a limited or specified period only."

In *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd. & Others; SA Rugby (Pty) Ltd. v SARPU & Another*⁷³, consideration was given to the fact that the fixed-term contracts entered into by the Applicants applied to the World Cup Rugby tournament and accordingly (for this and other reasons) the LAC found that no reasonable expectation of renewal beyond the tournament existed.⁷⁴

The reasons for the conclusion of a fixed-term contract of employment are of importance. Where the reason is for the fixed-term employee to provide a service for a specific task, the implication is that no reasonable expectation of employment beyond completion of the task can be expected.⁷⁵ Surrounding circumstances would, however, need to be considered on a case by case basis.

2.2.2.4 Where conditions provided for renewal have been met

In *Mthembu and Trans Caledon Tunnel Authority*,⁷⁶ an extension of a fixed-term contract of employment was subject to the employee's satisfactory performance.⁷⁷ On finding that the employee had performed her services satisfactorily, it was found that a legitimate reasonable expectation for the renewal of the fixed-term contract of employment existed on the part of the employee.⁷⁸

Where conditions required for the renewal of a fixed-term contract of employment have been met, a reasonable expectation of renewal is likely. But where such

⁷³ [2008] 9 BLLR 845 (LAC)

⁷⁴ *Supra* note 73 at page 858[48]

⁷⁵ Stella Vettori *op cit* note 22 at page 372

⁷⁶ [2009] 9 BALR 934 (CCMA)

⁷⁷ *Mthembu and Trans Caledon Tunnel Authority* [2009] 9 BALR 934 (CCMA) at page 935I and page 937G

⁷⁸ *Supra* note 77 at page 937F

conditions have not been met, even an implied assurance of renewal may not suffice to create a reasonable expectation of renewal.⁷⁹

2.2.2.5 Repeated renewals of a fixed-term contract of employment

In *SACTWU & Another v Cadema Industries (Pty) Ltd.*⁸⁰ the Court found that the repeated renewal of a fixed-term contract over several years was sufficient to create a reasonable expectation of renewal. As is suggested by Grogan,⁸¹ common sense would suggest that the more frequently a fixed-term contract is renewed, the more likely an employee is to gain an expectation of renewal and the more likely it is for this expectation to be reasonable.

2.2.2.6 Additional factors that may be considered

As the scope of this work is not to provide an exhaustive and detailed account of all possible factors that can be considered for or against the existence of a reasonable expectation of renewal, mention will simply be made below of a number of additional factors (other than those detailed above) that can be of relevance in a specific case:

- (i) The period of service of the employee, whether by way of a single or a number of fixed-term contracts.⁸² The longer the period of service, the more realistic the likelihood of a reasonable expectation;

⁷⁹ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & Others* (2013) 34 *ILJ* 1427 (LAC) at page 1439D-F where it was held that certain promises made to the employee where not enough to create a reasonable expectation of renewal due to the fact that certain conditions required for renewal of the contract (namely, the employee was required to have enrolled for a degree or diploma and a position would have had to have been created for the employee) were, or could not be met.

⁸⁰ *Supra* note 72 at page 794[22]

⁸¹ John Grogan *op cit* note 37 at page 55

⁸² M Olivier 'Legal constraints on the termination of fixed-term contracts of employment: An enquiry into recent developments' (1996) 17 *ILJ* 1001 at page 1032

- (ii) The availability of the position post expiry of the fixed-term contract of employment may be considered as a factor in favour of the existence of a reasonable expectation of renewal;⁸³
- (iii) The reason for termination of the fixed-term contract may be of relevance, for example, the employer may not rely on the automatic expiration of the fixed-term contract where he would have renewed or where no reason not to renew existed, but for some or other reason under the guise of the automatic expiry of the fixed-term contract;⁸⁴
- (iv) In certain circumstances, a failure on the part of the employer to give notice of termination of the fixed-term contract of employment prior to the termination date may stand to give rise to a reasonable expectation of renewal on the part of the employee,⁸⁵ and
- (v) The nature of the employer's business can also be regarded as a relevant factor.⁸⁶ For example, where the business of the employer is seasonal in nature, an expectation of renewal on the part of a fixed-term employee for employment beyond the relevant seasonal period would presumably not easily be entertained.

2.2.3 Renewal on *less favourable terms*

The definition of dismissal in terms of section 186(1)(b) of the LRA includes instances where a fixed-term employee's contract is renewed on less favourable terms where an expectation existed on the part of the fixed-term employee that the contract would be renewed on the *same* or *similar* terms.

⁸³ *Ibid* at page 1033

⁸⁴ M Olivier *op cit* note 82 at page 1035

⁸⁵ M Olivier *op cit* note 82 at page 1035

⁸⁶ M Olivier *op cit* note 82 at page 1035

A mere expectation of renewal does not suffice. What is required is that the fixed-term employee expected renewal on the *same* or at least *similar* terms as those in their previous fixed-term contract.⁸⁷

Where a fixed-term employee claims dismissal on the basis that the terms of renewal are less favourable, a determination is required as to the extent of the changes in terms, if they are in fact so much '*less favourable*' that the fixed-term employee may rely on the provisions of section 186(1)(b) and claim dismissal. It is not enough that the contracts not be identical, but must show that the conditions of employment are substantially less favourable.

Grogan suggests⁸⁸ that in interpreting this form of dismissal recourse should be had to section 186(1)(f) of the LRA, the relevant wording of which reads as follows:

“Section 186(1) ‘Dismissal’ means that –

...

(f) an *employee* terminated a contract of employment... because the new employer... provided the *employee* with conditions or circumstances at work that are substantially less favourable to the *employee* than those provided by the old employer.”⁸⁹

The section deals with instances where pursuant to a transfer of employment in terms of section 197 or 197A of the LRA, the new employer provides conditions or circumstances less favourable than those under the previous employer. Where the conditions or circumstances are *substantially less favourable*, the employee may terminate the employment relationship and claim dismissal. The implication of this wording is that the employee may not terminate the contract of employment and claim dismissal in terms of section 186(1)(f) where the conditions and circumstances under the new employer are, say, *similar*, to those

⁸⁷ John Grogan *op cit* note 37 at page 59

⁸⁸ John Grogan *op cit* note 37 at page 59

⁸⁹ Section 186(1)(f) of the Labour Relations Act 66 of 1995

under the previous employer. Grogan's suggestion is that the interpretation of the words '*or similar*' in section 186(1)(b) should be the same in determinations of fixed-term contract cases. A claim of dismissal under section 186(1)(b) would not be justified in a renewal of the fixed-term contract on *similar* terms, only in instances of a renewal on *substantially* less favourable terms.⁹⁰

⁹⁰ John Grogan *op cit* note 37 at page 59

CHAPTER THREE

3.1 The lack of protection of fixed-term contract employees prior to recent amendments

In order to put into context the recent legislative amendments (LRAA) relating to fixed-term contract employees, it is necessary to give an account of the position of such employees prior to those amendments.

3.1.1 The nature of the expectation – an expectation of permanent employment

Previously, the only legislative protection offered specifically to South African fixed-term contract employees was under section 186(1)(b) of the LRA. The section is reproduced hereunder:

“Section 186(1) ‘Dismissal’ means that –

(a) ...

(b) an *employee* reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;”⁹¹

As written, this section required, in order to prove a dismissal had taken place, that the employee demonstrate a reasonable expectation of renewal of the fixed-term contract on same or similar terms. By referring specifically to the renewal of a *fixed-term contract* and in doing so, limited the application of the section to instances where the nature of the employee’s expectation was for the renewal of the *fixed-term contract*, it implicitly excludes instances where the employee’s expectation was for something other than renewal of a fixed-term contract on the same or similar terms.

⁹¹ Section 186(1)(b) of the Labour Relations Act 66 of 1995 in its pre-amendment form.

These limitations were demonstrated by the decision in *University of Pretoria v CCMA and Others*⁹² in which the Labour Appeal Court finally ended the debate on this issue.⁹³

Briefly, the facts in *University of Pretoria v CCMA and Others*⁹⁴ were as follows:

During the period of 2004 to 2007, the University of Pretoria (the University) had employed Judith Geldenhuys (Geldenhuys) on a number of fixed-term contracts.⁹⁵ In late 2007, Geldenhuys applied for a permanent position and was denied, but again offered a renewal of her fixed-term contract.⁹⁶ Geldenhuys refused the University's offer, unwilling to continue her employment on what would be eighth fixed-term contract.⁹⁷ Geldenhuys then approached the CCMA and relying on section 186(1)(b) of Act 66 of 1995 claimed she had been unfairly dismissed.⁹⁸

In arbitration, the University claimed that the CCMA did not have jurisdiction as Geldenhuys' dismissal did not fall within the ambit of section 186(1)(b).⁹⁹ The Commissioner decided that the refusal to accommodate a reasonable expectation of permanent employment, where proved, could constitute a dismissal within the scope of section 186(1)(b).¹⁰⁰ The University then approached the Labour Court to (among other orders) have the Commissioner's decision set aside.¹⁰¹ The Labour Court

⁹² (2012) 33 *ILJ* 183 (LAC)

⁹³ For example, see *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) at paragraphs 118 – 149 and *Mc Innes v Technikon Natal* (2006) 27 *ILJ* 1041 (LC) at page 1143[20], where the Court concluded that where an employer creates an expectation of renewal on an indefinite basis, such expectation must be held to fall within the ambit of section 186(1)(b) of Act 66 of 1995.

⁹⁴ (2012) 33 *ILJ* 183 (LAC)

⁹⁵ *University of Pretoria v CCMA and Others* (2012) 33 *ILJ* 183 (LAC) at page 185[1]

⁹⁶ *Ibid*

⁹⁷ *Supra* note 95 at page 185[1]

⁹⁸ *Supra* note 95 at page 185[2]

⁹⁹ *Supra* note 95 at page 185[3]

¹⁰⁰ *Supra* note 95 at page 185[4]

¹⁰¹ *Supra* note 95 at page 186[5]

dismissed the University's application but granted it leave to appeal to the Labour Appeal Court.¹⁰²

The facts of the matter were common cause. The question set to the Labour Appeal Court was whether or not a fixed-term employee's expectation of permanent employment met the requirements of section 186(1)(b) of the LRA.¹⁰³ The University argued that the language of the section specifically stated the *renewal of a fixed-term contract of employment* and that this could not be equated with an expectation of the conclusion of a permanent contract of employment.¹⁰⁴

Geldenhuis argued that the purpose of section 186(1)(b) was to prevent employers from denying to fixed-term employees the rights and protections associated with permanent employment.¹⁰⁵ She further argued that the meaning of section 186(1)(b) should be given a broader interpretation that included the reasonable expectation of permanent employment and that doing so would give effect to the constitutional right to fair labour practices.¹⁰⁶

In its judgment per Davis JA (Ndlovu JA and Mocosie AJA concurring) the Labour Appeal Court reiterated the importance of respecting the language and words chosen by the legislature and that the court could not interpret legislation to mean simply what it may wish it to mean.¹⁰⁷

The court held that the wording of section 186(1)(b) meant that in order to prove that a dismissal had occurred, an employee must demonstrate two things, a reasonable expectation (on the part of the employee) that a *fixed-term contract*

¹⁰² *Supra* note 95 at page 186[5]

¹⁰³ *Supra* note 95 at page 187[9]

¹⁰⁴ *Supra* note 95 at page 188[13]

¹⁰⁵ *Supra* note 95 at page 188[14]

¹⁰⁶ *Supra* note 95 at page 188[14-15]

¹⁰⁷ *Supra* note 95 at page 189[17]

would be renewed on the same or similar terms, and that the employer had failed to make such an offer.¹⁰⁸

The court held thus that section 186(1)(b) could not provide relief to Geldenhuys on the basis on which she sought to rely.¹⁰⁹ The Labour Appeal Court concluded that Geldenhuys had not been dismissed.¹¹⁰

The result of the judgment was that fixed-term contract employees in Geldenhuys' position, having requested and been denied permanent employment, but then offered a further fixed-term contract which they go on to refuse, had no remedy available to them in terms of the LRA no matter what their circumstances.¹¹¹

3.1.2 The remedy of re-employment under a fixed-term contract of employment – successive renewal of fixed-term contracts of employment

In the past, a fixed-term contract has allowed an employer to evade duties and obligations that would generally be owed to permanent employees, medical aid and provident/pension funds for example.¹¹² And when their fixed-term contract expired, statutory obligations that would protect those with a permanent contract of employment again ignore the fixed-term contract worker, who is left with no opportunity for severance pay or other similar protections/benefits. These benefits for the employer are disadvantages for the employee.¹¹³

It was also to the disadvantage of fixed-term employees in this country that in the past, the underlying reason for a fixed-term contract was only scrutinized if and

¹⁰⁸ *Supra* note 95 at page 189[18]

¹⁰⁹ *Supra* note 95 at page 190[21]

¹¹⁰ *Supra* note 95 at page 190[24]

¹¹¹ John Grogan *op cit* note 37 at page 59

¹¹² Stella Vettori *op cit* note 22 at page 372

¹¹³ Stella Vettori *op cit* note 22 at page 372

when that employee claimed a dismissal in terms of section 186(1)(b).¹¹⁴ The result has been that some employers have continued to employ in terms of successive fixed-term contracts so as to take advantage of the power imbalance and freedom from responsibility it creates. The effect on the employee is continued vulnerability and no means of recourse until such time as employment is terminated without an offer of renewal on equal terms.

Section 193(1) of the LRA (which remains unchanged by the LRAA), reads as follows:

“Section 193 Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator... ..finds that a *dismissal* is unfair, the Court or the arbitrator may –

(a) order the employer to reinstate the *employee*... .

(b) order the employer to re-employ the *employee*... .

(c) order the employer to pay compensation to the *employee*.”

Section 193(2) of the LRA requires the Labour Court or arbitrator to order reinstatement (193(1)(a)) or re-employment (193(1)(b)) unless certain conditions exist, namely those set out in sub-sections (a) through to (d) of section 193(2).

The outcome therefore, for a dismissed fixed-term worker seeking remedy is likely to be a fresh fixed-term contract of employment on the same or similar terms.¹¹⁵ Reinstatement or re-employment on a permanent or indefinite basis is not an available remedy.¹¹⁶ This allows the employer, if they so wish, to ensure that during the term of the new fixed-term contract, no reasonable expectation of renewal is created, making termination simply a matter of time. The arbitrator or judge’s decision then, to order re-employment or compensation must be based

¹¹⁴ Stella Vettori *op cit* note 22 at page 382

¹¹⁵ M Olivier *op cit* note 82 at page 1036

¹¹⁶ *Gubevu Security Group (Pty) Ltd. and Ruggiero NO & Others* (2012) 33 ILJ 1171 (LC) at page 1178[24]

on a consideration of what is reasonable in the circumstances, and whether re-employment is impracticable.¹¹⁷

This issue highlights the lack of security associated with this form of non-standard employment. The fixed-term employee is all but assured only one final renewal of the fixed-term contract as remedy under section 193(1)(a) or (b). Or, alternatively, they may find themselves in a continuous cycle of fixed-term renewals, employed indefinitely, but without the benefits associated with a standard contract.

The alternative award of compensation is of course only a temporary relief to the employee who remains unemployed at conclusion of the proceedings. Further, section 194 of the LRA limits the amount of compensation to a maximum of 12 months' remuneration (except in cases of automatically unfair dismissal, in which the maximum compensation is doubled to 24 months' remuneration).¹¹⁸

3.1.3 The onus of proving a dismissal in terms of section 186(1)(b)

Section 191 of the LRA allows an employee to refer to the CCMA a dispute relating to a dismissal they believe to be unfair. Crucially, a *dismissal* must be found to have taken place in order for the CCMA to have jurisdiction to hear the dispute.

This finding was reinforced in *Asara Wine Estate & Hotel (Pty) Ltd. v Van Rooyen & Others*,¹¹⁹ where the court per Steenkamp J noted with approval the decision in *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd. & Others*.¹²⁰ The Labour Appeal Court held¹²¹ that it was necessary to establish

¹¹⁷ Stella Vettori *op cit* note 22 at page 376

¹¹⁸ See the facts in *Solidarity obo McCabe c SA Institute for Medical Research* [2003] 9 BLLR 927 (LC) where the employers' refusal to renew a fixed-term contract as a result of the employee's pregnancy was held to be an automatically unfair dismissal.

¹¹⁹ (2012) 33 *ILJ* 363 (LC) at page 368[18]

¹²⁰ (2008) 29 *ILJ* 2218 (LAC)

that a dismissal had occurred under section 186(1)(b) in order for the CCMA to have jurisdiction. Section 192 of the LRA requires that in proceedings before the CCMA the employee must prove that a dismissal has taken place. Absent such proof, the CCMA cannot hear the dispute.

Proving that a dismissal has taken place is an onerous task, requiring the fixed-term employee to prove the existence of both a substantive and objective expectation of renewal.

The principles of fairness and reasonableness are applied to each specific case to determine whether a dismissal has occurred in terms of section 186(1)(b).¹²² Vettori describes these principles as vague, creating uncertainty for the fixed-term employee seeking redress.¹²³ The case law may provide guidance, but the fixed-term employee is ultimately at the mercy of the arbitrator or judge and their own subjective sense of what is reasonable or fair in the circumstances.¹²⁴

3.1.4 Discrimination on the basis of fixed-term employment

It is well documented that in general, a fixed-term employee will be undercompensated in pay and benefits, compared to an equally performing worker with a standard contract.¹²⁵ This type of non-standard employee is also unlikely to have equal access to promotion, training, vacancies within the employer's business and the like.¹²⁶

The Employment Equity Act 55 of 1998 (EEA) seeks to give effect to section 9 of the Constitution which guarantees to *everyone* the right to equality. The EEA

¹²¹ *Ibid* at page 856[39 – 41]

¹²² Stella Vettori *op cit* note 22 at page 373

¹²³ Stella Vettori *op cit* note 22 at page 373

¹²⁴ Stella Vettori *op cit* note 22 at page 373

¹²⁵ SB Gericke 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' 2011 (14)1 PER 105 at page 107

¹²⁶ *Ibid*

promotes the achievement of equality in employment¹²⁷ and section 6(1) of the EEA contains a list of grounds on which discrimination is prohibited, which includes the right not to be discriminated against on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹²⁸ While the status of a person's employment is not included specifically in this list, the legislature's use of the word '*including*' in the section does not limit the list to those grounds listed therein,¹²⁹ and indicates that the legislature did not intend for the list to be exhaustive and to exclude any other grounds for discrimination.

In *Middleton v Industrial Chemical Carriers (Pty) Ltd.*¹³⁰ the court said of *unfair discrimination* that implicit in same was disadvantage and prejudice.¹³¹ Where disadvantage and prejudice is perpetrated against a fixed-term employee solely on the basis of their employment status (and without any other valid legal reason), then such behaviour must surely qualify as unfair discrimination.¹³²

¹²⁷ SB Gericke *op cit* note 125 at page 111

¹²⁸ Sub-section 9(4) of Act 108 of 1996

¹²⁹ SB Gericke *op cit* note 125 at page 114

¹³⁰ 2001 22 ILJ 472 (LC)

¹³¹ *Middleton v Industrial Chemical Carriers (Pty) Ltd.* 2001 22 ILJ 472 (LC) at page 476B

¹³² SB Gericke *op cit* note 125 at page 115

CHAPTER FOUR

4.1 The Labour Relations Amendment Act 6 of 2014

In order to overcome the restrictive limitations and safeguards presented by South African labour law, many employers reacted by restructuring their businesses or in some instances, disguising permanent employment as a form of temporary or fixed-term employment.¹³³ This resulted in a reduction in employment security for a significant portion of the South African work force.¹³⁴ A reform of employment legislation became necessary.

This need for reform was identified in research commissioned by the Department of Labour in 2002 and was submitted to the National Economic, Development & Labour Council in 2004,¹³⁵ though little was done in the way of reform in the immediate years that followed.

In 2009 the ANC Government's election manifesto promised to introduce laws that would govern contract work, prohibit abusive labour practices, prevent exploitation of workers and protect the employment relationship.¹³⁶ Together with calls by the Congress of South African Trade Unions for an outright ban on the practice of temporary employment services,¹³⁷ began the preparation and presentation to Parliament of labour related Amendment Bills.¹³⁸ After much

¹³³ P Benjamin 'Labour law beyond employment' (2012) *Acta Juridica* 21 at page 36

¹³⁴ *Ibid*

¹³⁵ Benjamin, Borat & Van der Westhuizen 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010, Basic Conditions of Employment Amendment Bill, 2010, Employment Equity Amendment Bill, 2010, Employment Services Bill, 2010' 2010 University of Cape Town at page 12

¹³⁶ *Ibid*

¹³⁷ D du Toit ... *et al.* 'Labour Relations Law – A Comprehensive Guide'. 6 ed. Part I, Chapter I, paragraph 8.3. available at <https://www.mylexisnexis.co.za/> accessed on 30 June 2016.

¹³⁸ The bills where the Labour Relations Amendment Bill 2010, the Basic Conditions of Employment Amendment Bill 2010, the Employment Equity Amendment Bill 2010 and the Employment Services Bill, 2010

debate and opposition, the Bills were passed by Parliament and assented to by the President during the course of 2013 and 2014.¹³⁹

4.1.1 The amended section 186(1)(b)

The amended section 186(1)(b) reads as follows:

“Section 186(1) ‘Dismissal’ means that –

(a) ...

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

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

(ii) to retain the *employee* in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee*.”¹⁴⁰

By and large, section 186(1)(b)(i) is unchanged and does not require further discussion here. The information and analysis provided in Chapter 2 of this dissertation and the relevant case law is still applicable and will be used by the courts in interpreting and dealing with cases that fall to be decided under the new section 186(1)(b)(i).

The addition of the further sub-section (ii) can be described as a direct response to the untenable situation in which Mrs. Geldenhuys found herself following the decision in *University of Pretoria v CCMA and Others*.¹⁴¹ With the enactment of the new section 186(1)(b)(ii), the legislature voided the precedent set by the Labour Appeal Court in that case. No longer will fixed-term employees be unable

¹³⁹ D du Toit ... *et al.* ‘Labour Relations Law – A Comprehensive Guide’. 6 ed. Part I, Chapter I, paragraph 8.3. available at <https://www.mylaxisnexis.co.za/> accessed on 30 June 2016.

¹⁴⁰ Section 186(1)(b) of the Labour Relations Act 66 of 1995, as amended.

¹⁴¹ (2012) 33 *ILJ* 183 (LAC) - See the discussion regarding this case and the expectation of indefinite employment in paragraph 3.1.1. above.

to claim dismissal where their expectation was of a contract of indefinite employment rather than a further fixed-term contract.

The amendment is certainly a welcome relief to fixed-term contract employees, closing a past vulnerability. In circumstances where an employee seeks to rely on the new section 186(1)(b)(ii), the following is submitted:

- a) the employee will still need to prove that the expectation of renewal on an *indefinite* basis was reasonable, both subjectively and objectively; and
- b) the facts of each case and the surrounding circumstances will determine whether the expectation of renewal on an *indefinite* basis was reasonable or not.

4.1.2 The new section 198B

The new section is reproduced at some length below:

“Section 198B Fixed term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a ‘fixed term contract’ means a contract of employment that terminates on —

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

(2) This section does not apply to —

- (a) *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act*,
- (b) an employer that employs less than 10 employees, or that employs less than 50 *employees* and whose business has been in operation for less than two years, unless —
 - (i) the employer conducts more than one business; or

- (ii) the business was formed by the division or dissolution for any reason of an existing business; and
- (c) an *employee* employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

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

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

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

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

(5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an *employee* on a fixed term contract or to renew or extend a fixed term contract, must —

- (a) be in writing; and
- (b) state the reasons contemplated in subsection (3)(a) or (b).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8)(a) An *employee* employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an *employee* employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10)(a) An employer who employs an *employee* in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable *collective agreement*, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the *Basic Conditions of Employment Act*.

(b) An *employee* employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

(11) An *employee* is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the *employee* employment or procures employment for the *employee* with a different employer, which commences at the expiry of the contract and on the same or similar terms.”

The introduction of section 198B is an attempt to limit fixed-term contracts to types of employment where this type of employment is genuinely required and

appropriate and to address the issue of indefinite renewals of fixed-term contracts.¹⁴²

Section 198B(1) provides a statutory definition of a *fixed-term contract* of employment. The statutory definition, discussed in some detail in Chapter Two, must be read together with section 198B(3), which limits fixed-term contracts to a period of 3 months unless otherwise justified.

Section 198B(2) provides a closed list of persons to whom the whole of section 198B does not apply. This will be discussed in detail in section 4.2.1. but briefly, the excluded persons are:

- a) employees earning in excess of the *threshold* determined by the Minister of Labour;¹⁴³
- b) an employer that employs less than 10 employees or an employer that employs less than 50 employees and whose business has been in operation for less than 2 years, unless the employer carries on more than one business or the business was formed as a result of the division or dissolution (for any reason) of an existing business.¹⁴⁴
- c) an employee employed in terms of a fixed-term contract of employment which is permitted in terms of a specific statute, sectoral determination or collective agreement.¹⁴⁵

In most cases, section 198B(3) limits the duration of a fixed-term contract to 3 months. The 3 month limitation also applies as the total period over which successive fixed-term contracts may be renewed,¹⁴⁶ so, for example, a one month fixed-term contract may only be renewed for 3 consecutive months before

¹⁴² SB Gericke *op cit* note 14 at page 97

¹⁴³ Section 198B(2)(a) [The threshold is currently set at an earning of R205,433.30 per annum – Government Notice no. 531 in Government Gazette no. 37795, Vol. 589 of 1 July 2014]

¹⁴⁴ Section 198B(2)(b)

¹⁴⁵ Section 198B(2)(c)

¹⁴⁶ John Grogan *op cit* note 37 at page 650

it offends section 198B(3). The section provides for the duration of the fixed-term contract (or renewal period) to extend beyond this period *only* if the nature of the work is for a *definite* (i.e. fixed) or *limited* (i.e. temporary) duration. The subsection goes on to allow an employer to demonstrate *any other justifiable reason* for employing in terms of a fixed-term contract of employment that extends beyond three months.

Section 198B(4) goes on to provide examples of common *justifiable reasons* for a fixed-term contract or one in excess of the normal 3 month limit. These specific examples however, do not limit the *generality* of section 198B(3)(b) and the words '*any other justifiable reason*' therein, meaning that the list provided in section 198B(4) is not closed and an employer may still raise other reasons to justify fixed-term contracts, or a fixed-term longer than 3 months.

Section 198B(5) offers further protection, providing that a fixed-term contract of employment concluded or renewed in *contravention* of section 198B(3) is *deemed to be of indefinite duration*. The section aims to restore those employees improperly held under fixed-term contracts to standard employment, and to restore to them the accompanying rights and considerations that they had been denied..

Section 198B(6) should be read with section 198B(3) and (5) in mind. This section requires that a fixed-term contract or the offer to renew a fixed-term contract be in writing and that the written offer must state the rationale for having a fixed-term, or for continuing it.

It is possible that going forward, a failure to comply with 198B(6), a failure to make one's offer in writing or provide justification will be interpreted by the courts as non-compliance with section 198B(3). As a result then of section 198B(5) the work could then be deemed to be of an indefinite duration.

It is submitted that section 198B(7) creates a presumption in favour of the fixed-term employee, placing the *onus* on an employer to prove a justification for fixed-term employment in relevant proceedings. This contrasts sharply against the previous legislation discussed in 3.1.2 above, where the justification for entering into the fixed-term contract was only scrutinized if and when a dismissal was alleged under section 186(1)(b). Under the new section 198B(7), if the employer fails to show a suitable justification for a fixed-term contract, section 198B(5) would apply and the contract would then be considered an indefinite contract of employment. While the *onus* of proving a dismissal in terms of section 186(1)(b) still rests with the employee, it is commendable that an important *onus* now rests on the employer as well to provide a justification for employment on a fixed-term basis. The amendment is welcomed. Without it, a fixed-term employee would have difficulty in proving that their fixed-term contract was unjustified. The employer on the other hand, not only typically determines the type of contract offered, but has far greater access to the circumstances and facts that may justify such a contract. Where the employer has abused fixed-term contracts without justification, the *onus* being properly theirs under section 198B(7) will reveal the true intentions.

Section 198B(8)(a) is a step towards achieving equality in the workplace for fixed-term contract employees who have been treated poorly compared to permanent employees solely on the basis of their fixed-term employment. Section 198B(8)(a) does not allow a fixed-term employee to be treated differently to a permanent employee performing the *same or similar* work, unless a *justifiable* reason exists for such differentiation.¹⁴⁷ This section should be read alongside section 198D(2) which provides that a system legitimate criteria may

¹⁴⁷ Section 198B(8)(b) is in effect an administrative provision, providing the same rights as provided for in section 198B(8)(a) retrospectively to fixed-term employees employed in terms of fixed-term contracts prior to the commencement of the amendment Act 6 of 2014 but which continue to remain in existence thereafter. The sub-section stipulates that 198B(8)(a) will apply to fixed-term contracts entered into prior to the commencement of the amendment Act only 3 months after its commencement, presumably with a view to allowing employers (who may have distinguished or treated fixed-term employees differently to permanent employees performing the same or similar work) an opportunity to bring themselves within the ambit of 198B(8)(a).

be used to differentiate between employees (fixed-term or permanent) performing the same or similar work. These legitimate criteria for different treatment are listed as seniority, experience, length of service, merit, quality or quantity of work performed or any other criteria of a similar nature.¹⁴⁸

Section 198B(9) is a further step towards equality in the workplace ensuring that fixed-term employees have *equal access* to apply for vacancies that the employer may offer.

Section 198B(10)(a) is specific to fixed-term employees justifiably employed under a fixed-term contract contemplated in section 198B(4)(d), where the work is *exclusively on a specific project that has a limited or defined duration*. The subsection should also be regarded as an effort towards achieving equal treatment of fixed-term employees in the workplace. It ensures such employees receive (subject to any collective agreement¹⁴⁹), on expiry of the fixed-term contract, one week's remuneration for each completed year of service under the contract.¹⁵⁰ This acts as a form of severance pay, albeit it a small one.

Section 198B(11) limits section 198B(10) so that employees are not granted this additional pay if their employer has offered or procured for them further employment on the same or similar terms, commencing at termination of the fixed-term contract.

The section does not specify whether the *employment* to be offered or secured must be of a permanent, or a fixed duration, but it is submitted that whatever the

¹⁴⁸ Section 198D(2)(a) to (d) of Act 6 of 2014

¹⁴⁹ A 'collective agreement' is defined in section 1 of the Basic Conditions of Employment 75 of 1997 as a written agreement concerning terms and conditions of employment, or any other matter of mutual interest concluded between one or more registered trade unions and one or more employer/s, registered employers' organizations, or one or more of both.

¹⁵⁰ As with section 198B(8)(b), section 198B(10)(b) appears to be administrative in nature, but limiting fixed-term contract employees employed in terms of fixed-term contracts (falling within the realm of 198B(4)(d)) prior to the commencement of the amendment Act to the right prescribed by 198B(10)(a) only for periods worked after the commencement of the amendment Act.

offer, compliance with section 198B(3) must be met in that if the employment is to be for a fixed-term, it cannot be for a period exceeding 3 months unless the employer is able to prove an exception as listed in section 198B(3)(a) or (b).

4.2 The limitations of the legislation in its current form

While the enactment of the amendments detailed in paragraphs 4.1.1 and 4.1.2 above is a triumph for the rights and protection of fixed-term contract employees in South Africa, hurdles do still exist.

4.2.1 Section 198B(2)

The section lists certain individuals (employers and employees) to whom the provisions of section 198B do not apply. These are:

- (a) employees earning in excess of a *threshold* which is prescribed by the Minister of Labour in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), as amended;¹⁵¹
- (b) an employer that employs less than 10 employees or an employer who employs less than 50 employees and whose business has operated for a period of less than 2 years, but not in circumstances where the employer conducts more than one business or the business was formed by dissolution or division of an existing business;¹⁵² or
- (c) an employee employed in terms of a fixed-term contract which is permitted by statute, sectoral determination or collective agreement.¹⁵³

The fact that the protections and rights provided for in section 198B are not available to every fixed-term employee is a major setback for those who fall within one of the exclusionary categories.¹⁵⁴

¹⁵¹ 198B(2)(a) of the Labour Relations Amendment Act 6 of 2014

¹⁵² 198B(2)(b) of the Labour Relations Amendment Act 6 of 2014

¹⁵³ 198B(2)(c) of the Labour Relations Amendment Act 6 of 2014

No justification is provided in the legislation for the exclusions¹⁵⁵ and perhaps the most notable criticism is that the exclusionary provision is in apparent conflict with section 23(1) of the Constitution which guarantees *everyone* the right to fair labour practices, making no exceptions for income or the size of the employer.¹⁵⁶

The *threshold* stipulated in section 198B(2)(a) and prescribed by the Minister of Labour is currently set at R205,433.30,¹⁵⁷ a relatively low ceiling, meaning a large percentage of fixed-term contract employees will never receive the benefits of the provisions of section 198B¹⁵⁸ and will ultimately continue to be subject to the shortcomings of the LRA in its previous form. It is unclear as to why an exclusion is permitted based on an employee's earnings.

The legislature may have considered that high income employees are generally less vulnerable than lower income employees and accordingly the latter were in greater need of protection than the former. However, it is difficult to justify why a low income fixed-term employee should be afforded more rights than a high income fixed-term employee where they were in the past vulnerable to the same abuse, regardless of income.

This appears to be a limitation to the right to fair labour practices, which I pause to mention, is a right included in the Bill of Rights. A justifiable limitation of this right must be established by way of the limitations clause in the Constitution¹⁵⁹ if it is to survive constitutional muster and be upheld. In terms of section 36(1) of the Constitution, a limitation must be reasonable and justifiable taking into account certain relevant factors, including, the nature of the right being limited, the importance of the purpose of the limitation of the right, the nature and extent

¹⁵⁴ SB Gericke *op cit* note 14 at page 98

¹⁵⁵ Likewise, no explanatory note exists to aid in the interpretation of and reasoning behind the exclusions.

¹⁵⁶ SB Gericke *op cit* note 14 at page 98

¹⁵⁷ Government Notice no. 531 in Government Gazette no. 37795, Vol. 589 of 1 July 2014

¹⁵⁸ SB Gericke *op cit* note 14 at page 98

¹⁵⁹ Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996

of the limitation, the relation between the limitation and its purpose and whether less restrictive means exist to achieve the purpose of the limitation.¹⁶⁰

It is not necessary to provide a detailed analysis here, but only to point out that no explanation has been offered by the legislature and that the extent of the limitation is absolute with respect to the rights provided by section 198B, and the aspects of fair labour practices contained within. The right limited, the right to fair labour practices, goes to the heart of all employment relationships, ensuring fairness for the parties involved. The above considerations in mind, it is submitted that no justification exists for the exclusionary group created by section 198B(2)(a) of the LRA. Accordingly, it is in conflict with section 23 of the Constitution.

The exclusionary class associated with section 198B(2)(c) is made up of employees employed in terms of fixed-term contracts which are permitted by statute, a sectoral determination or by way of a collective agreement. The exclusion of these fixed-term employees from the protection offered by the LRAA is perhaps justified, the submission being that a collective agreement to this effect by the main bargaining parties concerned, meaning the employees are aware of and agree to the terms and conditions to which their employment will be subject. A sectoral determination or statute permitting exclusion would presumably do so for a legitimate reason.

4.2.2 The scope of the flexibility provided to employers

Section 198B(7) places an onus on employers to provide a justification for fixed-term employment. Sections 198B(3) and (4), however, together provide an employer with extensive grounds on which to do so.¹⁶¹ The justifications provided do not form part of a closed list and in essence the employer may rely on *any*

¹⁶⁰ Section 36(1)(a) – (e) of the Constitution of the Republic of South Africa Act 108 of 1996

¹⁶¹ SB Gericke *op cit* note 14 at page 98

justifiable reason for employing or continuing to employ in terms of a fixed-term contract.¹⁶² Little to no jurisprudence yet exists to inform the meaning and limits of these justifiable grounds prescribed in sections 198B(3) and (4). It will take time for our courts to set the bounds of these provisions which will determine the strengths and weaknesses of each.¹⁶³

4.2.3 Justified fixed-term employment on an indefinite basis

The provisions of section 198B allow for fixed-term employment for a period exceeding three months only where such extended period of fixed-term employment is justifiable. The provisions of section 198B(4) provide examples of justifiable reasons but the provisions of section 198B(3) allow for any other reason to be considered as justifiable.

While the sections do offer protection that fixed-term contract employees did not enjoy previously, the provisions do not appear to go so far as to offer assistance to fixed-term employees who may find themselves in justifiable fixed-term employment for what may ultimately become an indefinite period.¹⁶⁴ For example, if an employer is able to prove a justifiable ground on renewal of each fixed-term contract, there is no limitation to the number of renewals to which a fixed-term contract may be subjected, leaving the fixed-term employee without recourse. Perhaps the thinking of the legislature was that in circumstances where there is a justifiable reason, the fixed-term employee cannot be expected to receive anything more than what can justifiably be offered by the employer. In practice, however, it is possible (and quite probable) that employers will arrive at effective means by which to evade their legal obligations and responsibilities, providing simulated justification (for fixed-term employment) that on the face of it will satisfy legislative requirements.

¹⁶² 198B(3)(b) of the Labour Relations Act 66 of 1995 (as amended)

¹⁶³ SB Gericke *op cit* note 14 at page 98

¹⁶⁴ SB Gericke *op cit* note 14 at page 98

It must be said, however, that proper constructive comment regarding the issue above cannot be made until such time as the courts hear and rule on these types of cases. What is stated above is only speculative and it may be that the courts are able to effectively identify where an employer seeks to evade legal obligations by simulating permanent employment through what is presented as justified fixed-term employment. If this does transpire, then perhaps no further amendment is necessary, but if cases of abuse readily slip through the proverbial 'cracks', then further reform will be necessary.¹⁶⁵

4.3 The Employment Equity Act 55 of 1998

The Employment Equity Amendment Act 47 of 2013 (EEAA) amended section 6 of the EEA by including in section 6(1) a broader list of identified grounds on which an employer may not discriminate. One notes with disappointment that fixed-term contract employment (or non-standard employment) is still not expressly identified on this most important of lists. Section 6 of the EEA (as amended) does not limit non-discrimination to the grounds listed therein, but given our certainty that the legislature was aware of this group indicates that the legislature may have purposively excluded express reference to 'fixed-term employment' so as to ensure that it was still possible to show justification for discrimination on this basis, thereby retaining employer flexibility with respect to fixed-term employment.

As indicated above, the purpose of section 6 of the EEA is to give effect to the constitutional right to equality¹⁶⁶ which is guaranteed to *everyone*. The fact that section 198B(2) of the LRA excludes certain fixed-term contract employees from the rights and protections offered by it is in direct violation of the constitutional

¹⁶⁵ As to what 'reform' should be necessary, regard may be had to the provisions of the foreign legislation discussed in Chapter 5 hereafter which regulate the number of renewals of fixed-term contracts that are allowed by a single employer in respect of a specific fixed-term contract employee.

¹⁶⁶ Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996

right to equality, leaving the door open for fixed-term contract employees to be discriminated against on the basis of their employment.

CHAPTER FIVE

5.1 The approach in foreign jurisdictions

In assessing whether fixed-term employees are adequately protected in measuring the standard of South African legislation, it is useful to consider the protections and rights offered to such employees in foreign jurisdictions.

In providing a brief comparison, we will discuss two countries, both members of the ILO like South Africa, but with vastly different economic climates. Firstly, Germany, a Western European country with a GDP¹⁶⁷ of \$3.356 trillion in 2015,¹⁶⁸ compared to South Africa's GDP of \$312.798 billion in the same year.¹⁶⁹ The percentage of unemployed workforce in each country also differs substantially with Germany's estimated unemployment rate of only 5% in the year 2014,¹⁷⁰ also distinguishes it from our estimated 25.1% in the same year.¹⁷¹ Mozambique, the other country to which we will compare our legislation, recorded a GDP of \$14.689 billion¹⁷² in 2015 and an estimated unemployment rate of 22.6% in 2014.¹⁷³

5.1.1 German Labour Legislation

¹⁶⁷ Gross Domestic Product (GDP), which is the sum of gross value added by a; resident producers in the economy in addition to any product taxes, but less any government subsidies not included in the value of the products.

¹⁶⁸ The World Bank Statistical Data, Germany GDP, available at <http://data.worldbank.org/country/germany?view=chart>, accessed on 23 August 2016

¹⁶⁹ The World Bank Statistical Data, South Africa GDP, available at <http://data.worldbank.org/country/south-africa?view=chart> accessed on 23 August 2016

¹⁷⁰ The World Bank Statistical Data, total unemployment rate estimate Germany, available at http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?end=2014&locations=DE&name_desc=false&start=1991&view=chart accessed on 23 August 2016

¹⁷¹ The World Bank Statistical Data, total unemployment rate estimate South Africa, available at http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?end=2014&locations=ZA&name_desc=false&start=1991&view=chart accessed on 23 August 2016

¹⁷² The World Bank Statistical Data, Mozambique GDP, available at <http://data.worldbank.org/country/mozambique?view=chart> accessed on 23 August 2016

¹⁷³ The World Bank Statistical Data, total unemployment rate estimate Mozambique, available at <http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=MZ&view=chart> accessed on 23 August 2016

The Part-Time Work and Fixed-Term Employment Relations Act 2000 (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) (the German Act) provides for the rights of fixed-term employees in Germany.

The German Act was introduced with the intent of limiting discrimination against fixed-term and part-time employees and to improve the quality of this type of work, taking into account the needs of employers and workers.¹⁷⁴

The German Act provides that employment in terms of a fixed-term contract is permissible only if a 'good cause' exists for engaging in such an arrangement.¹⁷⁵ Specific examples of 'good cause' are listed, and two exceptions are listed that justify fixed-term employment where no 'good cause' exists. First, where the fixed-term contract is concluded after no longer than two years with an employee not previously employed by the employer for a preceding period of no less than three years. Secondly, for a young company that has been in existence for a period of less than four years.¹⁷⁶

The German Act limits the successive renewal of fixed-term employment contracts to 3 terms (within a period of two years).¹⁷⁷ It also provides that fixed-term employees may not be treated differently to permanently employed persons where no legitimate reason exists for such a difference. It further provides that a fixed-term contract concluded in contravention of the German Act (i.e. an invalid one) is deemed to be a contract of indefinite duration.¹⁷⁸

¹⁷⁴ Alexandra Scheele 'New law passed on part-time work and fixed-term employment contracts' available at <http://www.eurofound.europa.eu/observatories/eurwork/articles/new-law-passed-on-part-time-work-and-fixed-term-employment-contracts>, accessed on 30 June 2016

¹⁷⁵ Benjamin, Borat & Van der Westhuizen *op cit* note 135 at page 25

¹⁷⁶ Benjamin, Borat & Van der Westhuizen *op cit* note 135 at page 25

¹⁷⁷ SB Gericke *op cit* note 14 at page 102

¹⁷⁸ Benjamin, Borat & Van der Westhuizen *op cit* note 135 at page 25

The LRA is similar in many respects to the German Act. Both provide for situations where fixed-term contract employment is 'justified'¹⁷⁹ and both provide exclusionary relief to businesses which are relatively new to the market. The LRA falls short, however, by offering total exclusion of compliance with the provisions of section 198B where the salary threshold is exceeded¹⁸⁰ or where less than 10 persons are employed by a business.¹⁸¹ Notably, the German Act, but not the LRA (as amended), limits the successive renewal of fixed-term contracts of employment to 3 terms within a 2 year period. This leaves room for the possibility that a South African fixed-term employee may find themselves in a form of indefinite but legally justified fixed-term employment without suitable recourse.¹⁸² It would be premature, however, to suggest that this outcome will present itself in South Africa. The strength of the LRA protections will be decided ultimately in the courts.

Apart from the shortcomings above, South African legislation offers a similar standard of protection to fixed-term employees compared to the German Act. However, economic climates being so vastly different in the two countries, the reality of exploitive employment in the two countries may not be directly comparable. It seems strange that South Africa has only recently amended its legislation to come to the aid of non-standard employees where the hardships that accompany this type of employment have been evident for so long.

5.1.2 Mozambican Law

On 31 October 2007 the *Lei de Trabalho* (the Mozambican Act) came into effect in Mozambique.¹⁸³ Article 40(1) of the Mozambican Act makes fixed-term contract employment permissible only in the performance of temporary duties

¹⁷⁹ Section 198B(4)(a) – (i) of the Labour Relations Act 66 of 1995 (as amended)

¹⁸⁰ Section 198B(2)(a) of the Labour Relations Act 66 of 1995 (as amended)

¹⁸¹ Section 198B(2)(b) of the Labour Relations Act 66 of 1995 (as amended)

¹⁸² In this regard, see the more detailed discussion of this issue in paragraph 4.2.3.

¹⁸³ Stella Vettori *op cit* note 22 at page 377

and only for as long as such performance is strictly necessary.¹⁸⁴ Reference is made in article 40(2)(a) through to (f) as to what duties may be considered 'temporary'. These include, replacement of temporarily unavailable employees, where assistance is required to deal with an unusual increase in workload and / or seasonal work, duties that are not aimed at meeting the employer's permanent needs, the carrying out of a specific project or task (or being sub-contracted to perform in respect of such a project or task), and / or the performance of non-permanent activities.¹⁸⁵

In terms of Article 38(1)(g) of the Mozambican Act, a fixed-term contract must specify the grounds which justify the temporary nature of the contract and article 38(2) requires the grounds on which the employer seeks to rely (as a justification for fixed-term employment) to be recorded in a statement.¹⁸⁶ Where an employment contract does not specify the duration for which it will remain in existence, it is presumed to be permanent.¹⁸⁷

Article 42 allows for fixed-term contracts to be entered into for a period of up to two years, where after the contract may be renewed only twice (for up to two years on each renewal) by agreement between the parties.¹⁸⁸ Where there is non-compliance, the fixed-term contract of employment will be considered of permanent duration.¹⁸⁹ Small and medium-sized businesses are exempt from these provisions for the first 10 years of activity.¹⁹⁰

Again, as with the German Act, the South African legislation has many commonalities with the Mozambican Act. Both the LRA and the Mozambican Act

¹⁸⁴ Stella Vettori *op cit* note 22 at page 378

¹⁸⁵ Stella Vettori *op cit* note 22 at page 378

¹⁸⁶ Stella Vettori *op cit* note 22 at page 378

¹⁸⁷ Article 41(2) of *Lei de Trabalho*

¹⁸⁸ Article 42(1) of *Lei de Trabalho*

¹⁸⁹ Article 42(2) of *Lei de Trabalho*

¹⁹⁰ Article 42(3) of *Lei de Trabalho*

make provision for the justification of fixed-term employment¹⁹¹ in certain instances and in both, exemption is made for employers establishing their businesses. The Mozambican Act does not offer outright exclusion on the basis of an income threshold and the LRA must again be criticized for adopting an opposite approach.

Much like the German Act, article 42 of the Mozambican Act allows for fixed-term contracts to be entered into for up to two years, allowing for two renewals of up to two years each. As has been pointed out, the LRA does not offer similar protection explicitly limiting the total length of fixed-term employment relationships.

Mozambique and South Africa are far more similar with respect to GDP and unemployment rates compared to Germany, and yet the Mozambican Act has been in place since 2007. South Africa is noticeably late in its amended legislation to offer the protection, standards and rights which other countries, both economically similar and very different have already offered for many years.

¹⁹¹ Article 42(2) of *Lei de Trabalho*, compared with section 198B(4) of the Labour Relations Act 66 of 1995 (as amended)

CHAPTER SIX

6.1 Recommendations

Chapter 4 of this paper identified a number of issues associated with South Africa's fixed-term contract labour legislation in its current form. These issues require attention and the recommendations below, it is submitted, could assist in reinforcing the protections to this vulnerable class of worker..

- (i) The new section 198B of the LRA is a commendable step towards achieving equal treatment of fixed-term contract employees in South Africa. However, the exclusions provided for in section 198B(2) exclude a significant portion of this group from the entirety of the benefits and protections of that section. It is submitted that at least the exclusion in terms of section 198B(2)(a), that based on an earnings threshold, should be done away with. The submissions put forward in paragraph 4.2.1 with regard to this exclusion and the lack of a reasonable justification for the limitation of the rights of the class created by section 198B(2)(a) should be noted here. There appear to be no just grounds for excluding employees earning in excess of the prescribed threshold from the rights and protections provided for in section 198B. Neither of the comparison countries has a similar exclusion, demonstrating that it is not a widely valued consideration, nor does it solve a uniquely South African problem. Therefore the exclusion is ill-considered and should be removed on revision.
- (ii) While the new section 198B requires an employer¹⁹² to provide a justification for a fixed-term contract, the legislation still allows for the possibility that with the appropriate legal justification, successive fixed-term contracts can be renewed indefinitely, subjecting the employee to

¹⁹² Subject to those employers excluded in terms of Sub-section 198B(2)

the same prejudice suffered in the past.¹⁹³ The Part-Time Work and Fixed-Term Employment Relations Act 2000 (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) in Germany demonstrates a way in which this type of exploitive employment can be avoided, limiting the number of renewals of fixed-term contracts to three within a period of two years.¹⁹⁴ Gericke suggests that South Africa should adopt a similar approach and that section 198B should be amended accordingly.¹⁹⁵ It is submitted that it is still too early to tell whether Gericke's suggestion will prove necessary or if our jurisprudence will interpret the law in such a way that does not allow for this apparent 'loophole'. But should the loophole persist and fixed-term contract employees suffer as a consequence, the legislation should then be revisited in accordance with Gericke's suggestions. In the present circumstances, Gericke suggests¹⁹⁶ that the test to establish the merit of continued renewal, a fixed-term contract should be one of 'dominant impression', with each case decided on its own merits and no factor specified as a decisive one. The foreign jurisdictions discussed in Chapter 5 can offer guidance in determining relevant factors in such a determination, for example, where the continued renewal of a fixed-term contract is indicative of a need for permanent employment.¹⁹⁷ Our own jurisprudence can also be instructive in determining expectations of renewal (see 2.2.2 and the sub-sections that follow for discussion of such).

- (iii) The legislation in its current form still allows employers a degree of flexibility whereby prolonged employment under fixed-term contracts may be shown to be justifiable. For those employers who may still seek to evade statutory obligations by employing on a fixed-term basis

¹⁹³ SB Gericke *op cit* note 14 at page 107

¹⁹⁴ See the discussion of this legislation in Chapter Five under the heading 5.1.1.

¹⁹⁵ SB Gericke *op cit* note 14 at page 107

¹⁹⁶ SB Gericke *op cit* note 14 at page 107

¹⁹⁷ Section 3 of Chapter 1 of the Employment Contracts Act 55 of 2001

without proper justification, the legislature might provide a deterrent by prescribing dismissal in terms of section 186(1)(b) of the LRA as a ground for an automatically unfair dismissal. Exploitive employers abusing fixed-term contracts seek to enrich themselves (by evading statutory obligations) at the expense of the fixed-term employee who is denied the benefits and security to which they are entitled. Such behavior is morally reprehensible, violates constitutional rights to fair employment and should be prevented. By including dismissals in terms of section 186(1)(b) as automatically unfair, we could allow for harsher penalties for the employer and greater compensation for the employee.¹⁹⁸ The threat of greater intervention may curb the number of employers who are prepared to risk acting in contravention of section 186(1)(b).

- (iv) As is suggested by Gericke,¹⁹⁹ a *Code of Good Practice* should be developed as a guideline for establishing whether successive fixed-term contracts are justified, or merely an evasion of the employer's legal obligations. The guidelines offered by the *Code of Good Practice* should fall within the framework of the constitutional rights regarding both fair labour practices and equality,²⁰⁰ and grounded in the concept of 'decent work'. Realistically, such a code would have to be developed in line with developing jurisprudence as the courts hear cases on the new section 198B.
- (v) Section 6 of the EEA should be amended to expressly confer onto fixed-term contract employees (and non-standard employees in general) the right not to be discriminated against on the basis of the

¹⁹⁸ At present, a commissioner or court may award an amount not exceeding 24 months remuneration for an automatically unfair dismissal, whereas the amount that may be awarded in respect of an unfair dismissal is limited to an amount not exceeding 12 months remuneration. In this regard, see section 194 of the Labour Relations Act 66 of 1995.

¹⁹⁹ SB Gericke *op cit* note 14 at page 107

²⁰⁰ SB Gericke *op cit* note 14 at page 108

nature of the individual's employment. Sections 198B(8)(a) and (b) and 198(9) do attempt to level the position and treatment of fixed-term contract as compared to permanent employees but again the exclusionary section 198B(2) prevents these rights and protections from applying to *all* fixed-term employees. The right not to be discriminated against on the basis of one's employment is an aspect of equality, dignity, and other constitutionally protected rights, and must be guaranteed without exception.

6.2 Conclusion

The Bill of Rights is described as the cornerstone of our democracy, affirming the values of human dignity, equality and freedom and guaranteeing these to *everyone*.²⁰¹ Both the right to fair labour practices and the right to equality are included in the Bill of Rights and the state is obliged to respect, protect, promote and fulfil these rights.²⁰²

Furthermore, as a member of the ILO, South Africa has committed itself to achieving *decent work* for all within its borders.²⁰³ This commitment involves ensuring that all employees (both standard and non-standard) receive not only equal treatment, but equal employment security with a view to upholding and promoting human dignity.

The purpose of this research has been to consider the fixed-term contract of employment in South Africa, those subject to such employment and to give an account of the rights and protections offered to such employees, both under the old and the newly revised LRA. In providing such an overview, one must ask ultimately, are the rights of fixed-term employees in South Africa adequately protected?

²⁰¹ Section 7(1) of Act 108 of 1996

²⁰² Section 7(2) of Act 108 of 1996

²⁰³ T Cohen and L Moodley *op cit* note 12 at page 320

A twofold approach is needed to answer this question. Firstly, the legislation itself must be interrogated to determine if it is in line with constitutional obligations. Secondly, we must consider whether these laws are effective in practice, if they are properly enforceable and enforced, and if the protections actually reach all the employees whose rights they are meant to protect.

Each inquiry is a complex one, requiring a consideration of the rights both of fixed-term contract employees and their employers. The rights of these classes often compete and create friction in the domain of labour.²⁰⁴ One group cannot have unlimited protection at the expense of the other and business and trade, being at the bottom, compromises this and does not allow for absolute protection of any one party. Flexibility must exist for business to succeed and grow, and it is not in the national interest to make labour law so restrictive as to stifle business. But it is precisely this concern that has led to the country's rise in non-standard employment and the abuses made possible by the institution. Providing fixed-term employees with rights and protection that effectively destroys the flexibility of fixed-term employment could quite possibly negatively affect employment statistics and economic growth. Certain work is seasonal or temporary in nature and no employer can justify indefinite employment in these circumstances. To force an employer to do so would handicap their business model. South Africa's legislature has taken this into account and the recent amendments to the labour legislation, while offering greater and much needed protections, has sought a balance by offering flexibility to newly formed and small businesses. The intent of this compromise is to reduce the burden and barrier to entry of starting a new business, but with the hope that in time, they will have the means to employ permanently and provide all the associated benefits and protections. For work that is genuinely temporary in nature, fixed-term employment is allowed, but must be justified. Where this justification is absent, the legislation steps in to assist the fixed-term employee and protect them.

²⁰⁴ SB Gericke *op cit* note 14 at page 108

The comparison provided in Chapter 5 between South Africa and the other nations can assist in evaluating the adequacy of South African law. As discussed, the LRA is similar in many respects to German and Mozambican legislation governing fixed-term contracts of employment, but an important difference is noted in that both the German and Mozambican Acts limit the number of renewals of a fixed-term contract of, after which it is considered a permanent appointment. Only time and the decisions of the courts will determine whether this difference will leave open a method of exploitive employment, or if the law as written will adequately protect fixed-term contract employees. Accordingly, until the law is tested, it would be premature to call this a shortcoming of South African law, but it is certainly an area of ongoing concern.

The above uncertainty in mind, it is submitted that, broadly speaking, the rights provided to fixed-term contract employees under South African law are adequate. The recommendations above are offered as an aid to enforcement, narrowing the ability of employers to avoid their obligations.

As the second part of the inquiry regarding enforcement and accessibility, it is submitted that the rights offered by the legislation must be accessible to all fixed-term employees, if one is to accept that fixed-term contract employees *are* properly protected in South Africa. Section 198B(2) of the LRA provides that certain parties are entirely excluded from the provisions of section 198B.²⁰⁵ Where exclusion is justified, this is acceptable. But where there is unjustified exclusion the law falls short of its duties. There appears no reasonable justification for the exclusionary class created by section 198B(2)(a) of the LRA, that of employees earning in excess of the threshold set by the Minister of Labour. These employees are certainly guaranteed the right to fair labour

²⁰⁵ This is the main section in the Labour Relations Act 66 of 1995 that provides for the rights of fixed-term contract employees.

practices by the Constitution²⁰⁶ yet they are excluded from the entirety of the benefits under section 198B on account of their income. While higher income employees are generally less vulnerable than lower paid employees, they are similarly vulnerable to the unsavoury practices that all affected fixed-term contract employees in the past, regardless of income. Without the rights and the protection that is now offered by the LRA, fixed-term employees earning above the threshold prescribed in section 198B(2)(a) will not be properly protected in South Africa.

The recommendations suggested in this chapter are offered in the hopes of reversing the conclusion of the the preceding paragraph. Additionally, the recommendations would strengthen the rights already provided to fixed-term contract employees and help to reduce instances of non-compliance. While the recent amendments to labour legislation in South Africa relating to fixed-term contract employees are without a doubt an important step towards achieving the necessary balance between the rights of fixed-term employees and of their employers, the reality is that due to one unfortunate sub-section, a significant portion of fixed-term contract employees in South Africa will remain inadequately protected, exempted from the constitutionally guaranteed protections offered only to some, by the amended LRA.

²⁰⁶ The right to fair labour practices, section 23(1) of the Constitution of the Republic of South Africa 108 of 1996.

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