

**THE DOCTRINE OF LEGITIMATE EXPECTATION IN SOUTH AFRICAN
LABOUR LAW**

BY

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Declaration by candidate

I declare that this dissertation for the degree Master of Laws hereby submitted has not been previously submitted by me for a degree at this or any other University that it is my work in execution and design and all the material contained has been duly acknowledged.

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DECLARATION BY SUPERVISOR

I hereby declare that this dissertation by candidate student number: 9326788, for the degree Masters of laws in the Department of Labour Law, be accepted for examination.

Dr K.O Odeku

Abstract

The study evaluates the common law position regarding the principle of legitimate expectation at the workplace. Under the common law, the employer had the power to hire and to fire as he or she pleased. The employer could either fire for a good reason or for a bad one or for no reason at all, provided the dismissal was on notice. In other words the employer was not required to show good cause for terminating the contract or to inform them employee of such reasons as they may be or to follow any special procedures before termination. It was not possible for the employee to raise question of legitimate expectation by then. The study exposed the complexity of this principle in our current labour laws. The two schools of thoughts regarding the principle have been analysed herein and a proper recommendation was made.

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CHAPTER 1

1. INTRODUCTION

Under the common law, the employer had virtually the power to hire and to fire as he or she pleased.¹ The employer could either fire for a good reason or for a bad one or for no reason at all, provided the dismissal was on notice². In other words the employer was not required to show good cause for terminating the contract or to inform the employee of such reasons as they may be or to follow any special procedures before termination. Provided that a requisite notice was given, common law permitted the employer to either dismiss the employee or to suspend the employment contract or even to unilaterally change the terms and conditions of employment in any manner he or she deemed fit. Common law permitted the employer to act in any way that may otherwise be regarded as unfair, for as long as a requisite notice was given.³ The employer could even avoid giving the employee a requisite notice by paying the latter money in lieu of a notice. According to common law contract of employment, a fixed term contract of employment terminates at the end of its term and such termination flowed automatically and was not seen as a dismissal or termination at the initiative of the employer, as such notice of dismissal was not required.⁴

Two decades ago the concept of justiciable unfair labour practice was introduced into that branch of our law, which has come to be known as labour law. The concept of justiciable unfair labour practice drastically changed the

¹ *Martine v Murray* (1995) 16 ILJ 589 (IC), see also Brasseley M, *The New Labour Law* (1987) 2-9, *Ridgeway v Hungerford Market Co.* (1835) 3 A&E 171.

² *Lamprecht and another v McNeillie* (1994) 15 ILJ 998 (A).

³ *Emling v The headmaster, St Andrews College and another* (1991) 12 ILJ 277(E).

⁴ Grogan J, *Workplace Law*, 7th ed (2003) at 106, see also Roux P and Van Niekerk A, *The South African Law of Unfair Dismissal* 1st ed (1994) at 86.

common law individual contract of employment and consequently disarmed the employers of their absolute powers.⁵

1.1. THE MEANING AND HISTORICAL ORIGIN OF LEGITIMATE EXPECTATION

The concepts of liberty, property and existing rights are reasonably well defined, that of reasonable expectation is not.⁶ Like public policy, unless carefully handled it could become an unruly horse.⁷ And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb.⁸ A reasonable balance must be maintained between the need to protect the individual from the decision unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.⁹ Baldwin CJ in the Australian high court case of *Salemi v McKellar*,¹⁰ construed the word ‘legitimate’ as expressing the concept of entitlement or recognition by law’. The court in *Attorney-General of Hong Kong v Ng Yuen Shiu*,¹¹ held that the concept ‘legitimate’ should be

⁵ *Modise and others v Steven’s Spar Blackheath* (2000) 21 ILJ (LAC) 519 at 524 (I), see also *MAWU v Mauchle (Pty) Ltd t/a Precious Tools* (1980) 1 ILJ 227 (IC), the court acknowledged that it would amount to unfair labour practice, if the employer does not renew a fixed-term contract where there is a legitimate expectation. Section 23 of the *Constitution of the Republic of South Africa*, Act 108 of 1996 affords all employees the right to fair labour practices.

⁶ *Administrator Transvaal v Traub* 1989 (4) SA 731 at 761F, *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91(CC) at 107, see also *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 at 32 par I-J.

⁷ *ibid*, see also Amirthalingam K, The Shifting Sands of Negligence: Reasonable Reliance to Legitimate Expectation? (2003) *Oxford University Commonwealth Law Journal* vol 3 No.1, 81 at 100, where the author mentioned opined that the framework of legitimate expectation may be the bridle to tame the ‘unruly horse’ that is policy.

⁸ *ibid*.

⁹ *ibid*.

¹⁰ (2) (1977) 137 CLR 396.

¹¹ [1983] 2 AC 629 (PC), [1983] 2 All ER 346.

equated with ‘reasonable’ and that legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. If a legitimate expectation is aroused, then, save in exceptional circumstances, the body that aroused that expectation should fulfill that expectation.¹²

Although the doctrine of legitimate expectation is not well defined the courts found it to be capable of two meanings, a wider meaning on the one hand and the narrow meaning on the other hand. In terms of the wider meaning the doctrine of legitimate expectation could mean that before a body vested with decision-making powers takes a decision, which is potentially adverse against someone, the former has to follow certain procedures, which in this case would be to afford the latter hearing. (Procedural expectation).¹³ This doctrine has been described as a “sacred principle” by our courts.¹⁴

Apart from the wider meaning of legitimate expectation, section 186(1) (b) of the *Labour Relations Act, 1995*¹⁵ provides the narrow meaning of legitimate expectation as it only confines itself to legitimate-expectation in the context of a fixed-term contract of employment. Section 186(1)(b) provides as follows:

“Dismissal means that...an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar

¹² Forsyth C, *The Provenance and Protection of Legitimate Expectation: a Confusion of Concepts*, [1980] *Camb LJ* 238 at 241.

¹³ *Winter and others v Administrator in executive Committee and others* 1973 (1) SA 873 (A) at 890, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A), see also *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*[1995] 2 All ER 714 (QBD) at 725i, where the court held ‘It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take any particular step.’

¹⁴ *Diamond v Minister of Justice* 1934 AD 11; *R v Ngwevela* 1954 (1) SA123 (A).

¹⁵ Act 66 of 1995.

terms but the employer offered to renew it on less favourable terms, or did not renew it...”

Here the expectation is of a favourable decision or a substantive benefit being conferred or continued (substantive expectation).¹⁶ The court in the case of *Council of Civil Service Union and Others v Minister for the Civil Service*,¹⁷ held that legitimate-expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege. Substantive expectation was also demonstrated in the case of *R. v Home Secretary, ex parte Asif Mahmood Kahn*,¹⁸ where Mr. Kahn was advised to meet certain requirements in order for a child to be admitted in the UK for adoption. After meeting the requirements he had a legitimate expectation that such a child will be admitted. The doctrine of substantive legitimate expectation is part of the South African legal system.¹⁹

This doctrine is construed broadly to protect both the substantive and procedural expectations.²⁰ In practice the two forms of expectation may be interrelated and even tends to merge.²¹ There is no reason in principle for differentiating between expectation as to procedure and expectation as to

¹⁶ *Mokoena and Another v Administrator, Transvaal* 1988 (4) SA 731 at 756H, see also Pretorius DM, *Letting the Unruly Horse Gallop in the field of Private Law: The Doctrine of Legitimate Expectation in Purely Contractual Relations* (2001) 118 SALJ 503 at 504, citing the decision of the court in the case of *Ex parte Coughlan* [2000] 3 All ER 850(CA), where the court recognized that a lawful promise or practice may induce a legitimate-expectation of a substantive benefit and once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

¹⁷ [1984] 3 All ER 935 (HL) at 954, see also *Foulds v Minister of Home Affairs and Another* 1996 (4) SA 137 at 145 par G.

¹⁸ [1984] 1 W.L.R. 137(CA), *R. v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 W.L.R 622 (CA) / (2003) 3 All ER 850, see also Vicuna FO, *Regulatory Authority and Legitimate Expectation: Balancing the Rights of the State and the Individual under International Law in a Global Society*, *International Law Forum du droit International* 5: 188-197, 2003. at 193.

¹⁹ Quinot G, *Substantive Legitimate Expectations in South African and European Administrative Law*, *Gernam Law Journal* vol.5 No.01 65 at 77.

²⁰ Riggs R E, *Legitimate Expectation and Procedural Fairness in English Law*, *American Journal of Comparative Law*, [v.36] 395 188 at 404.

²¹ *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others*, 1994 (4) SA 104 at 115D, see also Williams RC, *The Doctrine of Legitimate Expectation May Prevent The Revenue Authorities From Reneging on an Undertaking to a Taxpayer*, (2001) 118 SALJ 242 at 244.

substance and that it is often easy to describe expectation in both procedural and substantive terms.²²

It is important to note that this doctrine is not of a South African origin, but it is of English origin.²³ Corbett CJ said that the phrase ‘legitimate-expectation’ was evidently first used in this context by Lord Denning MR in the English case of *Schmidt and Another v Secretary of State for Home Affairs*.²⁴ The case concerned a decision by the Home Secretary not to extend the study permits of two aliens who were studying in the United Kingdom. The court held that the students concerned had not had any right, or indeed any legitimate-expectation, of being allowed to stay once their permits had expired.

The first case in which the English doctrine of legitimate expectations was adopted and incorporated into the South African administrative law is *Everett v Minister of interior*,²⁵ where the applicant was a British citizen by birth and successfully applied for a temporary residence permit to stay in the Republic of South Africa. Her temporary permit was extended from time to time to enable her to study. She finished her studies and got a temporary teaching post which was later terminated, and while still looking for another job, she successfully applied for an extension of her temporary residence permit for a period of one year, which was finally extended until 8 July 1980. As she had no intention of going back to England, she intended to make further representation to the immigration authorities to be granted a permanent residence. On the 10 June 1980 she was personally served a letter, in terms of which she was informed that the Minister of Interior had under powers vested

²² Baldwin R and Home D, *Expectation in a joyless land scape* (1986) 49 Morden LR 685 at 694.

²³ Robertson JC, *Legitimate Expectation*, (1991) SA Pubic Law at 157, *Traub’s case* supra note 6 at 754 par G, see also Carpenter G, *Legitimate Expectation: Some Real Progress*, (1989) SA Pubic Law at 299.

²⁴ [1969] 1 All ER 904 (CA) at 909C and F.

²⁵ 1981 (2) SA 453(C).

in him by section 8(2) of the *Aliens Control Act* of 1937,²⁶ ordered that her temporary residence permit was withdrawn with immediate effect. She was ordered to leave the country on or before 11 June 1980. The applicant made an urgent application to the Supreme Court requesting that the notice withdrawing her temporary residence permit be set aside as it was contrary to natural justice in the sense that she had been afforded no opportunity of making representations and that the notice was unreasonable. The court in this case made an order setting aside such a notice withdrawing the applicant's temporary residence permit on the following reasons: the applicant was entitled to a reasonable time, but none was afforded, and *audi alteram partem* was not followed.²⁷

In 1987 the Appellate Division had its first occasion to pronounce upon legitimate expectation test in the case of *Castel NO Metal and Allied Workers Union*,²⁸ where the respondent union's application for permission to hold an open-air annual conference was denied by the acting magistrate in terms of section 46(3) of the *Internal Security Act* 74 of 1984. The respondent made an urgent application to a local division for an order setting aside the applicant's refusal and directing the appellant to authorize the meeting, because the former contended that it had a legitimate expectation to be heard, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. The order was granted.

In the Appellate Division the court in as far as "Legitimate Expectation" was concerned held that there was no factual basis for the respondent's submission that it had a legitimate expectation, in that nothing had happened before the application for authority was submitted and nothing happened thereafter

²⁶ Act 1 of 1937.

²⁷ *ibid* at 459G-H.

²⁸ 1987 (4) SA 795 (A) at 810 I-811A.

which could have caused the respondent to entertain such an expectation, there is not even an allegation in its affidavits that it in fact did entertain it.

In 1989 the Appellate Division in the case of *Traub*, actually applied the doctrine of legitimate expectation. Traub's case became very important in the field of labour law as it established that employees with legitimate-expectation must be accorded a fair hearing before being dismissed or before being refused re- appointment.²⁹ The court held that, in general it is probably correct to say that a person who applies for appointment to a post is not entitled to be heard before the authority concerned decides to appoint someone else or to make no appointment.³⁰

The rules of natural justice more especially the *audi* rule is incorporated into both the interim and final South African constitutions, which provides every person with the right to procedurally fair administrative action where any of his or her rights or legitimate-expectations is affected or threatened.³¹

Of particular interest is what Lord Denning, Master of the rolls, in the case of *Breen v Amalgamated Engineering Union and Others*,³² said 'Then comes a problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim-such as an appointment

²⁹ See note 6 above.

³⁰ *ibid* at 761H.

³¹ Section 24(b) of Act 200 of 1993(Interim Constitution) and section 33 of Act 108 of 1996 (Final Constitution of the Republic of South Africa), see also Ikhariale M A, *The Doctrine of Legitimate Expectations: Prospects and Problems in Constitutional Litigation in South Africa*, *Journal of African Law*, 45, 1 (2001), 1-12 at 2.

³² [1971] 1 All ER 1148 (CA) at 1154F-H, see also *Ramburam v Minister of Housing (House of Delegates) and Others* 1995 (1) SA 353 at 364 par G-I.

to some post or other-then he can be turned away without a word. He need not be heard. No explanation need be given, but if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate-expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, accordingly as the case may demand’.

“The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God Himself did not pass sentence upon Adam, before he was called upon to make his defense.”³³

³³ *President of Bophuthatswana and Another v Sefularo*, 1994 (4) SA 96 (B AD) at 98H.

CHAPTER 2

2. A BROADER MEANING OF LEGITIMATE-EXPECTATION

2.1. INSTANCES WHERE THE COURTS HAVE FOUND THAT LEGITIMATE EXPECTATION EXISTED.

In *Wood v Nestle*,³⁴ the applicant had been employed by the respondent company under numerous temporary, fixed-term contracts for a continual period of three years. The applicant had been promised a permanent position by the respondent employer.³⁵ The respondent subsequently refused to place the applicant on a permanent position.³⁶ The court found that it was plain from the evidence that the applicant was unequivocally given to understand that she would be placed on the respondent's permanent staff as a result of which she formed a legitimate expectation of permanent appointment.³⁷ The court accordingly concluded that the failure of the respondent to appoint the applicant to a permanent position constituted an unfair labour practice and the court awarded the applicant compensation.³⁸

In the case of *Shaya v Minister of Education*,³⁹ Mrs. Shaya the Chief Superintendent of Education received a notification from the Department of Education that she was to be transferred to the post of Chief Education Specialist, without first affording her a hearing. Mrs. Shaya successfully applied for an interdict restraining the respondent employer from transferring her.

³⁴ *Wood v Nestle (SA) (Pty) LTD* (1996) 17 ILJ 184 (IC).

³⁵ *Ibid* at 186H-187A-B.

³⁶ *Ibid* at 187 F-G.

³⁷ *Ibid* 191 H-I.

³⁸ *Ibid* at 191 J.

³⁹ 1989 (4) SA 560(D).

In *Tettey v Minister of Home Affairs and another*,⁴⁰ the applicant was a citizen of Ghana who entered the Republic of South Africa illegally.⁴¹ The second applicant, a South African citizen, became the wife of the first applicant after the latter's illegal entry into the Republic. After the first applicant's entry into the Republic he was issued with irregular residence permit by an official of the first respondent. Later in the year he became aware that the first respondent was investigating the status of foreigners as a result he handed himself in fearing that he might be discovered, and he promised to help the first respondent with investing the latter's corrupt official who helped illegal emigrant with irregular papers. The court held that, reasonable expectation was engendered to the first applicant on the basis of *inter-alia* the following factors:

Firstly, the first applicant was issued with temporary residence permit in terms of section 41(1) of Act 96 of 1991.⁴² The permit enabled him to remain in the country and has since then been renewed from time to time.⁴³

Secondly, the advice given by the official of the first respondent to apply for a temporary residence, so that he might be allowed to apply for a permanent residence while in the Republic.⁴⁴

Thirdly, the fact that he was allowed to testify on behalf of the first respondent and that he was not deported immediately after the case was finalized.⁴⁵

Fourthly, the promises contained in the first respondent's policy document No.1 that *inter-alia*, the first respondent together with other certain foreigners would be allowed to apply to legalize their status.⁴⁶

⁴⁰ 1999 (1) BCLR 68 (D).

⁴¹ *ibid* at 70 A-B.

⁴² *Aliens Control Act*, 96 of 1991.

⁴³ See note 40 above at 71D.

⁴⁴ *ibid* at 74 I.

⁴⁵ *ibid*.

In its judgment the court held that the first and second respondents are interdicted from removing the first applicant from the Republic and that his temporary residence be extended until the application for review of the decision of the first respondent requiring the first applicant to depart from the Republic is finalized.⁴⁷

In the case of *Administrator, Transvaal, and others v Zenzile and others*,⁴⁸ the respondents who had been employed at the Natalspruit Hospital as cleaners and ward aids had been summarily dismissed from their employment after they had participated in a work stoppage. It was argued on behalf of the applicants that the respondents had been dismissed without a hearing, because the relationship between the applicants and the respondent was simply one of master and servant governed exclusively by common law of contract, and the respondents' participation in the work-stoppage had amounted to unlawful repudiation to their obligation to work which entitled the applicants to summarily dismiss the respondents.

The court held *inter-alia* , that the decision to summarily dismiss had affected the respondents prejudicially in their rights and therefore, *audi alteram partem* principle had been applicable to this case and the appeal was accordingly dismissed.

In *South African Roads Board v Johannesburg City Council*,⁴⁹ the appellant commenced the erection of a toll gate on the N13, a national road which fell

⁴⁶ *ibid* at 77H.

⁴⁷ *ibid* at 81A-F.

⁴⁸ 1991 (1) SA 21 (AD).

⁴⁹ 1991 (4) SA 1 (AD).

within the municipal area of the respondent. Although the appellant had decided to declare such road a toll road, it never declared it road as such as envisaged by section 9 of the *National Roads Act*.⁵⁰ The respondent successfully applied for an interdict in the court *a quo*⁵¹ restraining the appellant from proceeding with the erection of a toll gates and setting aside the decision of the appellant declaring the N13 a toll road. On appeal the court was required to decide whether the decision to erect a toll gate was *ultra vires* the appellant and whether the appellant was obliged to give the respondent a hearing before its decision to declare the N13 a toll road. As to the contention that the application of the *audi alteram partem* principle was impliedly excluded the court of appeal held that the mere fact that the legislature provided for prior consultation in other respect, it did not necessarily follow that in the present situation the legislature had intended to deprive persons in the situation of the respondent of their common law right to be heard before a decision was taken in terms of section 9(1) of the Act. The appeal was dismissed and the decision of the court *a quo* was confirmed.

2.2. INSTANCES WHERE THE COURTS HAVE FOUND THAT LEGITIMATE EXPECTATION DID NOT EXIST.

In *Sibanyoni and others v University of Fort Hare*,⁵² the students of the University of Fort Hare engaged in a strike and boycotted lectures and in view of the student conduct the Rector of the respondent issued a notice calling upon students to attend lectures. The notice stated that students failing to comply therewith would be regarded as having chosen to discontinue their studies and the university indeed adopted that attitude in respect of the

⁵⁰ 54 of 1971.

⁵¹ *Johannesburg City Council v National Transport Commission and others* 1990 (1) SA 199 (W).

⁵² 1985 (1) SA 19 (CkSC) at 32 I-33A-E.

appellants who had been aware of the terms of the notice but nonetheless failed to comply therewith. The court ruled in favour of the respondent. In the appeal to the full bench the applicant contended that the respondent's action had infringed the *audi alteram partem* rule in as much as their expulsion was a disciplinary or punitive matter and they had not been afforded a hearing.

The appeal court held that in as much as the university's rules specifically provided that no student could absent himself from lectures without leave, the failure of the appellants from obtaining such leave had amounted to a breach which, went to the root of the contracts between the appellants and the University and justified their termination by the University. The court held accordingly that the *audi alteram partem* principle could not be invoked and the appeal was dismissed.

In the case of *Malandoh*,⁵³ the applicant employee was employed by the South African Broadcasting Corporation (SABC), the respondent in terms of a temporary contract as a television license inspector and subsequently employed by the latter on a fixed-term contract of employment renewable at the sole discretion of the respondent employer.⁵⁴ The employee was required to resign one of the positions and he resigned as a television inspector.⁵⁵ Before the expiry of the contract the respondent employer consistently renewed it monthly for eight months. During the eighth month the employee was informed that the employer would not renew his fixed-term contract when it expired.⁵⁶ The applicant employee applied to the Labour Court for an interdict to prevent his dismissal. The applicant employee contended that his

⁵³ *Malandoh v South African Broadcasting Corporation* (1997) 18 ILJ 544 (LC).

⁵⁴ *ibid* at 545 H-J.

⁵⁵ *ibid*.

⁵⁶ *ibid* .

position had been made permanent and therefore he had a reasonable expectation of continued employment.⁵⁷ The court found that the employee did not have a bona fide expectation of a continued employment and did not deserve to be consulted before dismissal.⁵⁸ The court held further that the contract of employment was concluded on the basis that the employee was to be a temporary employee and the court intended to give effect to the terms of such a contract. The court was loath to incorporate other factors in the parties' agreement as by so doing it would be imposing a different contract to that which the parties entered into.⁵⁹

In *Xu v minister van Binnelande Sake*,⁶⁰ the two applicants who were both aliens, one unsuccessfully applied for temporary residence permit in terms of section 26 (1) of the *Aliens Control Act* 96 of 1991 and the other one unsuccessfully applied for an extension of his temporary residence permit. The applicants sought orders compelling the respondent to furnish written reasons in terms of section 24 of the *Constitution of the Republic of South Africa Act* 200 of 1996. The court held that the applicants had no legitimate expectation of residence or continued residence, since they had been informed from the outset that any permit granted was temporary in nature and lapses on expiry. The court further found that it was trite law that the state had an absolute and exclusive discretion, arising from its territorial sovereignty, to decide which aliens would be permitted to enter or remain in its national territory. The court ultimately found that *audi alterm partem* rule did not apply.

⁵⁷ *ibid* at 546 B.

⁵⁸ *ibid* at 549 A.

⁵⁹ *ibid* at 547 I.

⁶⁰ 1995 (1) BCLR 62 (T).

In the case of *Ludick v SAMCA Tiles (Pty) Ltd*,⁶¹ the applicant had been employed as a foreman by the respondent and the former was dismissed for his racist attitude towards black employees. The applicant was given a one-month notice and he had been paid a month's wages in lieu of notice. The applicant conceded that although his contract of employment does not provide him with the right to a pre-dismissal hearing, the length of time for which the applicant had been in the respondent's service, which is five years, created a legitimate expectation that his contract would not be terminated without a hearing.⁶² After a thorough observation the court decided that the applicant's contract did not provide him with the legitimate expectation to be heard and therefore to read that into the contract would amount to introducing something into the contract, which was never intended by the parties.⁶³

On the question of the reasons given by the applicant (long service, his age and experience) the court relied on *Langeni's*⁶⁴ case where the court said '...the fact that in some cases, such as that of the first applicant, the employment has continued for many years, in no way confers any additional right, interest or legitimate expectation upon the employee'.

In *Embling v The Headmaster, St Andrew's College (Grahamstown) & Another*,⁶⁵ a private school teacher whose contract provided for termination by

⁶¹ 1993 (3) SA 197 (BGD).

⁶² *ibid* at 198B-C.

⁶³ *ibid* at 198I.

⁶⁴ *Langeni and Others v Minister of Health and Welfare and Others* 1988 (4) SA 93 (W) at 101.

⁶⁵ 1991 (4) SA 458 (E) See also Grogan J, *Natural Justice and Employment Contracts: A Rearguard Action* (1992) 109 SALJ 187 at 187.

either party on term's notice. The school terminated the teacher's contract of employment on the ground of incapacity without affording the latter a hearing. Like in *Ludick's*⁶⁶ case the applicant contended that he was entitled to a hearing because of his long service (eight years) with the school. The court held that the rules of natural justice have no application in the field of contract, that contractual rights and obligations are governed by the law of contract and that, as the applicant's employment was terminated in accordance with the terms of his contract, he was not entitled to a hearing prior to the termination of such a contract.

The court in the case of *Selodi and Others v Sun International (Bophuthatswana) Ltd*,⁶⁷ where an oral contract of employment between the applicant and the respondent provided that one month's notice of termination of a contract of employment could be given by either party, held that there could be no necessary implication that the *audi alteram partem* rule applied to such contract. In *Grundling v Beyer and Other*,⁶⁸ the court said that, in contract there is no presumption that the *audi alteram partem* rule operated for the obligation to afford a hearing according to natural justice to apply. There must be an express or necessary implied term of the contract before a hearing could even be considered.⁶⁹ The duty to afford a hearing must be respected by any domestic tribunal charged with quasi-judicial functions except to the extent that it is expressly excluded by the contract.⁷⁰

⁶⁶ See note 61 above.

⁶⁷ 1993 (2) SA 174 (BGD) at 180D.

⁶⁸ 1967 (2) SA 131 (W).

⁶⁹ *Marlin v Durban Turf Club and Others* 1942 AD 112 at 122, 127-128.

⁷⁰ *Turner v Jockey Club of South Africa*, *supra* note 9.

CHAPTER 3

3. LEGITIMATE EXPECTATION UNDER THE LABOUR RELATIONS ACT.

3.1. INSTANCES WHERE THE COURTS HAVE FOUND THAT LEGITIMATE EXPECTATION EXISTED.

In *Alvillar v National Union of Mineworkers*,⁷¹ the employee party was employed to head up the employer union's legal unit on one-year fixed-term contract, after its expiry the employee party continued in employment until the second fixed-term contract was signed.⁷² Even after the expiry of the second term the employee party continued in employment as before, but later the union notified her that it had decided not to renew the contract and gave three months notice of termination of service.⁷³ The employee party referred the dispute to the CCMA alleging that she had reasonably expected the union to renew her contract and that its failure to do so amounted to an unfair dismissal in terms of section 186(1) (b) of the *Labour Relations Act* of 1995.⁷⁴ The commissioner concluded that it was not unreasonable for the employee to have expected that the employer would renew her contract since she continued in employment even after the expiry of the second term and also that the task for which she was employed was not yet complete at the time the union decided not to renew her contract.⁷⁵

⁷¹ (1999) 20 *ILJ* 419 (CCMA).

⁷² *Ibid* at 422 B.

⁷³ *ibid* at 422 C.

⁷⁴ *ibid* at 422 E.

⁷⁵ *ibid* at 429 E-G.

In *Maritime Industries Trade Union of South Africa and Others v Portnet*,⁷⁶ a dispute arose between Maritime Industries Trade Union of South Africa and some of its members who were employed as tug masters by Portnet, a trading division of Transnet Ltd. The appellants alleged that they had a reasonable expectation that the respondent employer would afford them an opportunity to undergo training that would enable them to qualify for the job that they had been employed to do, as the latter was contractually obliged to do so. The respondent employer disputed the allegations and further alleged that it had in any event equipped them with the necessary skills to do the jobs they had been employed to do. The dispute was referred to the CCMA by the applicant. The arbitrating Commissioner issued an award in the appellants' favour.

In *Ackerman and another v United Cricket Board*,⁷⁷ the first applicant was employed full time as a cricket coach, initially by the South African Cricket Union and later on in 1998 by the respondent.⁷⁸ The first applicant's employment was informal and indefinite. In the year 2000, feeling vulnerable to change, the first applicant sought and was granted a written two-year fixed-term contract of employment.⁷⁹ After two years the respondent advertised the first applicant's position, for which the latter applied to be considered for the post, but was neither interviewed nor appointed. He then referred the dispute to the CCMA alleging unfair dismissal.⁸⁰ The CCMA Commissioner held that the purpose of the fixed-term contract was not to replace the indefinite relationship, but to give the employee some further security and protection than he enjoyed on the indefinite unwritten contract.

⁷⁶ (2000) 21 *ILJ* 2519 (CCMA).

⁷⁷ (2004) 25 *ILJ* 353 (CCMA).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

He further held that the employee was de facto a permanent employee and he had a legitimate expectation of continuing in employment on the same or similar terms. The termination of his employment on the basis of expiry of his fixed-term contract amounted to a dismissal in terms of section 186(1)(b) of the Labour Relations Act and it was procedurally and substantively unfair.⁸¹

In *South African Rugby Players Association on behalf of Bands and others v South African Rugby (Pty) Ltd*,⁸² The Association on behalf of the three employees, Matfield, Bands and Bezuidenhout, all rugby players who had been employed by the respondent employer on fixed-term contracts referred a dispute to the CCMA when the employer refused to renew their contracts, where they had a legitimate expectation that same would be renewed on the same or similar terms. Matfield had a one year contract with the employer, whereas Bands and Bezuidenhout had three months contracts for a specific purpose of participating in a rugby world cup 2003. The CCMA found that the players had been unfairly dismissed in terms of section 186 (1)(b) of the *Labour Relations Act* of 1995 and ordered compensation. The employer referred the decision of the CCMA to the Labour Court on review.⁸³ Gering AJ in the Labour Court was satisfied that the commissioner's reasoning and conclusion in relation to Matfield's contract were clearly justified, but the same could not be said with regard to the other two employees, since the latter had no annual contracts and the purpose for which they were employed was fully fulfilled.

⁸¹ *ibid* at 362 G.

⁸² (2005) 26 *ILJ* 176 (CCMA).

⁸³ *South African Rugby (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*, (2006) 27 *ILJ* 1041 (LC).

3.2. INSTANCES WHERE THE COURTS HAVE FOUND THAT LEGITIMATE EXPECTATION DID NOT EXIST.

In *Auf der Heyde v University of Cape Town*,⁸⁴ the applicant a white male had been employed on a fixed-term appointment for three years as a lecturer of the respondent. He was notified that the appointment was for the period specified and did not carry any commitment to a permanent appointment. Two other persons, who were black males, were appointed on the same basis. The respondent advertised for, and the applicant unsuccessfully applied to a permanent lectureship position. His two colleagues were appointed. The applicant's fixed-term contract terminated and was not renewed and therefore he contended that the respondent's failure to appoint him in a permanent position, alternatively to renew his fixed-term contract constituted an unfair labour practice in terms of section 2(1)(a) of schedule 7 of the *Labour Relations Act* 66 of 1995.

The court considered whether the employee had been dismissed in the sense contemplated in section 186 (1)(b) and found that this section was explicitly narrow in its terms and the reasonable expectation to a renewal of a fixed-term contract could not be extended to an expectation of a permanent employment. It followed that the employee did not have such expectation, though his dismissal was found to be unfair in terms of section 187(1) (f) of the *Labour Relations Act*, 1995.

In *Zwane v Elegance Jersey*,⁸⁵ the employee party was employed as a temporary worker by the employer party in terms of a fixed-term 13 weeks contract, which was renewed three times. When the final renewal expired the

⁸⁴ (2000) 21 *ILJ* 1758 (LC).

⁸⁵ (1998) 19 *ILJ* 969.

employer party served a notice that it did not intend to renew the contract. The employee party referred the dispute concerning the fairness of the dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner found that there was no legitimate expectation in this case, based on the fact that, each renewal period was very short and that the employee party had produced no witness to corroborate her contention that she believed herself entitled to a permanent job. There was nothing to show an underlying motive that influenced the dismissal of an employee party other than that the work that she was initially hired to do had dried up and the time period of the contract had expired. The commissioner found in this case that the dismissal of the employee party was not unfair.

In *PRASAD v Lebea and others*,⁸⁶ the appellant was employed by the second respondent (University of Venda) on a fixed-term contract basis from 1 January 1991 to 31 December 1993, from 1 January 1994 to 31 December 1995, and finally from 1 January 1995 to 31 December 1998. Thereafter the second respondent failed to enter in to a new contract of employment with the appellant.⁸⁷ The appellant contended, and the second respondent disputed, that she was dismissed by it and the latter relied on legitimate expectation as contemplated in terms of section 186(1)(b) of the LRA.⁸⁸

The matter was eventually in terms of section 136 and 191(5)(a)(i) of the LRA, referred for arbitration to the first respondent, who upon relying on *inter alia*, *Dirks v University of South Africa*,⁸⁹ *Colavits v Sun International*

⁸⁶ Case No. JA 12/02.

⁸⁷ *Ibid* at 1 par 1.

⁸⁸ *Ibid* at 2 par 2.

⁸⁹ See note 125 *infra*.

Bophuthatswana Limited,⁹⁰ *FGWU v Letabakop Farm (Pty) Limited*,⁹¹ *Wood v Nestle (SA) (Pty) Ltd*,⁹² extract from professor Olivier's article⁹³ on this subject etc, found that the requirements for dismissal reflected in the provisions of section 186 relied upon were not satisfied, because it is clear from the provision of the section, that the employee can only rely on legitimate expectation based on section 186(1)(b) LRA, if her contract had been renewed in the previous occasions. In this case it was not in dispute that each time the employee's contract expired the contract was not renewed. The employer advertised the position and the employee competed with other external candidates.

The appellant took the matter on review to the Labour Court, where the application was dismissed with costs. With the leave of the learned judge the appellante launched an appeal to the Labour Appeal Court and the appeal also, was dismissed with costs.

In *Malinga and others v Pro-Al Engineering cc*,⁹⁴ the applicants were employed by the respondent on a number of fixed-term contracts to repair certain equipments owned by a certain Alusifa. The respondent was required to tender from Alusifa for contracts, and for each contract awarded the respondent would employ the applicants on a fixed-term contract. Later on the respondent's tender to Alusifa was unsuccessful, and the applicants' employment was terminated. The applicants referred a dispute to the bargaining council, alleging that they had a legitimate expectation that their

⁹⁰ (1995) BLLR 88 (IC) at 93E.

⁹¹ 1995 BLLR 23 (IC) at 31B-C.

⁹² See note 34 above.

⁹³ See note 102 *infra*.

⁹⁴ (2003) 24 *ILJ* 2030 (BCA).

contracts would be renewed and that they had been dismissed in terms of section 186 (1)(b) of the *Labour Relations Act* of 1995. The arbitrator found no evidence that the respondent created a reasonable expectation that the final contract would be renewed, and that the applicants had not been dismissed. In *Solidarity on behalf of Smit and Denel (Pty) Ltd and another*,⁹⁵ the applicant was employed by the first respondent on fixed-term contract which was renewed for ten years. The first respondent then outsourced its contract labour to the second respondent, which in turn concluded a fixed-term contract with the applicant, which was renewed once. When the second respondent notified the applicant that it would not renew again, the applicant claimed that he had a legitimate expectation of renewal, and that the second respondent's failure to renew constituted an unfair dismissal in terms of section 186(1) (b) of the *Labour Relations Act* of 1995. The arbitrator found that the second respondent did nothing to create an expectation that it would renew the applicant's contract and therefore the applicant was not dismissed.

3.3. FACTORS THAT MAKE AN EXPECTATION LEGITIMATE

To ask whether a person's expectation of a hearing was 'legitimate' is in fact to ask whether denying him a right to state his case was reasonable in all the circumstances.⁹⁶

Originally a person could only be heard by the court claiming that he had a legitimate-expectation if his or her existing rights or liberty or property have been detrimentally affected by the decision of a public body.⁹⁷ The *Traub* case

⁹⁵ (2004) 25 ILJ 2405(BCA).

⁹⁶ Grogan J, *When is the 'Expectation' of a Hearing 'Legitimate'?* (1990) 6 SAJHR 36 at 38.

⁹⁷ *Publications Control Board v Central News Agency Ltd* 1970 (3) SA 479 (A) at 488H-449B, where the court found that the rights of the respondents were prejudicially affected, and as such they had a legitimate-expectation to be heard before an adverse decision could be taken against them, *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A), see also *Ridge v Baldwin* [1964] AC 40 (HL),

extended the application of legitimate-expectation to cases which were previously immune, owing to the existing rights test, by providing that legitimate-expectation arises only where the authority concerned had engaged in some past practices or some promise that gave rise to a reasonable expectation to be heard.⁹⁸ The so-called prior-rights doctrine was eliminated by the landmark decision of Traub.⁹⁹ But to confine the application of this doctrine to some specific categories would undoubtedly lead back to the deficiencies and anomalies that were sought to be avoided. This would certainly hinder the inherent flexibility of legitimate-expectation, and therefore the development of natural justice to meet the needs of a rapidly developing and expanding society.¹⁰⁰

Although the list is not exhaustive, there are several factors which are considered by our courts as constituting a legitimate expectation. In *Truter v Mechem*,¹⁰¹ the court held that whether an employee had a legitimate expectation that a fixed-term contract would be renewed would upon among other things depends on the following: the number of times that the contract was renewed, the conduct of the employer in dealing with the relationship, what the employer said to the employee at the time of concluding a contract

[1963] All ER 66 Which was quoted with approval in Traub at 754I-J: 'Where the court held, whether an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representation ... all depends on whether he has some rights or interest, or, I would add, some legitimate-expectation, of which it would be unfair to deprive him without hearing what he has to say'. All the above quoted by Grogan J in his article '*Dismissal of Public-Sector Employees: The Final Piece in the Puzzle*' (1993) 110 SALJ 422 at 427.

⁹⁸ Grogan J, *Audi After Traub* (1994) 3 SALJ 80 at 82.

⁹⁹ Grogan J, *Dismissal in the Public-Sector: The Triumph of Audi?* (1991) 108 SALJ 599 at 601.

¹⁰⁰ Hlope J, *Legitimate-expectation and Natural Justice: English, Australian and South African Law*. (1987) 104 SALJ 165 at 179.

¹⁰¹ (1977) 18 ILJ 803 (CCMA), see Forsyth C, *The Protection of Legitimate Expectations: Some Pitfalls for Botswana to Avoid*, *University of Botswana Law Journal* 5 2006 at 6, see also Council of Civil Service Union v Minister for the Civil Service 1984 3 All ER 935 (HL).

and even during the course of the relationship, the motive or a reason for terminating a contract by the employer.

Olivier, also mentioned other factors of which some are similar to the once mentioned above, as such mention would only be made to those factors which are not mentioned above, which are the following: practice or custom of re-employment or continued employment, the purpose of or reason for entering into the fixed-term form of employment relationship, inconsistent conduct on the part of the employer, failure to give reasonable notice that the fixed-term contract is not to be renewed, the nature of the employer's business, the continued availability of the particular job or position.¹⁰² It is of uttermost importance that some of the above-named factors be illustrated in terms of case law.

3.3.1 THE TRUE NATURE OF THE CONTACT

The reason why the legislature recognizes section 186(1)(b) dismissal is to discourage employers from keeping all their employees indefinitely on fixed-term contracts, in order to circumvent the LRA, making it possible to terminate the contract of employees without allowing fair procedure and proving good reason.¹⁰³

I am particularly interested in the provision of the personnel policy manual of nestle company dated 1st august 1992 as quoted by Bulbulia DJ in the case of *wood v nestle (SA) (Pty) Ltd*,¹⁰⁴ in that although it is not an authority in our

¹⁰² Olivier M, *Legal Constraints on the Termination of Fixed-term Contract of Employment: An Enquiry into Recent Developments*, (1996) 17 *ILJ* 1001at 1030-1035.

¹⁰³ See note 34 above.

¹⁰⁴ *ibid* at 185 F-G.

law, it has interesting reasons why bogus fixed-term contracts of employment should be discouraged, the policy provided the following: “continued extension of casual and temporary contracts is an unfair labour practice because it effectively prevents the employee from joining the pension fund, medical aid and other benefits of permanent employment. However, these contracts must not be extended without serious consideration being given to employing the person on a permanent basis”

When an employee is appointed on a fixed-term basis, it is generally understood that such an appointment expires automatically at the expiration of its term. But nothing will prevent the CCMA and the labour court from looking beyond the label the parties attach to their relationship in order to determine the true nature of their relationship.¹⁰⁵ The same was corroborated by Justice Gold Stone in *NUM’s* case where he said:

“In the exercise of its powers and the discretion given to it, the Industrial Court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of principles of fairness.”

In *McKenzie v Econ Systems and another*,¹⁰⁶ the court held that the mere mentioning of the fact that the contract with the employee will expire at a certain date is as a rule not sufficient to warrant the inference that the employment contract is of limited duration. In *SACTW v Mediterranean Wollen Mills (Pty) Ltd*,¹⁰⁷ the employer re-employed the dismissed employees

¹⁰⁵ *SA Clothing and Textile Workers Union v Mediterranean Wollen Mills (Pty)Ltd* (1995) 16 ILJ 366 (LAC), see also *NUM v East Rand Gold and Uranium Co. Ltd* (1991) 12 ILJ 122 (IC) at 1237G-H.

¹⁰⁶ (1995) BLLR 64 (IC) at 69J-70A.

¹⁰⁷ (1995) 16 ILJ 366 (LAC).

who were participating in an unprotected strike, on fixed-term contract of employment. The main reason being that he wanted to observe if the employees would again be suitable to form part of the employer's business on permanent basis. The court found that the employees' position was similar to that of employees on probation. This simply means that the court was able to see beyond the label that the employer attached to the contract.

3.3.2. THE NUMBER OF TIMES THAT THE CONTRACT WAS RENEWED

In the case of *Magubane and others v Amalgamated Beverages*,¹⁰⁸ the applicants' fixed-term contracts of employment were renewed six times and the latter unsuccessfully claimed unfair dismissal on the basis that they had reasonable expectation of a continued employment. Although the applicants failed to convince the commissioner about such reasonable expectation, interestingly relevant is what the commissioner said in passing, when he mentioned that cases such as this where the contract term had been renewed six times may in many instances lead to a reasonable expectation of continued employment.¹⁰⁹

3.3.3. WHAT THE EMPLOYER SAID TO THE EMPLOYEE

Sometimes the employer could say things or make promises to the employee at the time of the conclusion of the contract or even during the subsistence of their employment relationship, which will cause the employee to be under the impression that his contract will be renewed on another fixed-term or on permanent terms, therefore the employer who made such a promise may not be heard to say that the employee's service has elapsed by operation of the

¹⁰⁸ (1997) 18 *ILJ* 1112 (CCMA).

¹⁰⁹ *ibid* at 1115H.

law of contract. In the case of *Wood v Nestle*,¹¹⁰ the applicant employee who worked for the respondent employer on fixed term contract for a period of three years, had been informed by her employer that she would be appointed to a permanent position, and the respondent thereafter reneged on its promise.¹¹¹ The Industrial Court found that the employer's refusal to honor its promise to be unfair labour practice and ordered compensation in favour of the employee.¹¹² In *Zwane v Elegance Jerseys*,¹¹³ the employee was employed on fixed-term contract which was renewed three times. Before the expiry of the final renewal the employer served a notice that it did not intend to renew the contract. In her evidence the employee party alleged unsuccessfully that the employer party promised that once her contract had been renewed she would be entitled to a permanent employment.¹¹⁴ In his decision Commissioner Cowling, found that the employee produced no witness to support her contention that she believed herself entitled to a permanent contract.¹¹⁵ It is therefore deduced from the commissioner's argument that if the employee party was able to corroborate her allegation that the employer promised her a permanent employment after the renewal of her contract, the commissioner would have decided in her favour. This is therefore a good case, which shows that what the employer says at the commencement and/or during the subsistence of the employment relationship could inculcate reasonable expectation in the mind of the employee on fixed-term contract of

¹¹⁰ See note 34 above.

¹¹¹ *ibid* at 185J-186A.

¹¹² *ibid* at 192.

¹¹³ (1998) 19 *ILJ* 969 (CCMA).

¹¹⁴ *ibid* at 972 A.

¹¹⁵ *ibid* at 973 I.

employment. The same was said by Commissioner Robertson in *Magubane's* case.¹¹⁶

3.3.4. PRACTICE AND CUSTOM

The industrial court case of *Wood v Nestle*,¹¹⁷ as mentioned above also illustrates that the employer's past practices and customs can create a reasonable expectation to the employee. In that case it was the company's practice contained in the company's personnel manual that the employees' fixed-term contract of employment should not be extended without serious consideration being given to employing such person on permanent basis.¹¹⁸

In *Food and General Workers Union and Others v Lanko Co-operative Ltd*,¹¹⁹ the applicant employees were seasonal workers who had been employed several times in the previous seasons, but had been refused employment in 1992 season. First time job applicants were employed in their stead. The Industrial Court found, on the facts, that there was a past practice of re-employing workers who had been employed in previous seasons.¹²⁰ This amounted to a tacit undertaking to re-employ the applicants on preferential basis and the refusal to re-employ amounted to an unfair labour practice.¹²¹ Another case where the employer had a past practice of preferring to re-employ seasonal workers who had been employed previously, was the case of *Food and General Workers Union and others v Letabakop Farm (Pty) Ltd*,¹²²

¹¹⁶ See note 108 above.

¹¹⁷ See note 34 above.

¹¹⁸ *ibid* at 185F-G.

¹¹⁹ (1994) 15 *ILJ* 876 (IC).

¹²⁰ *ibid* at 884I.

¹²¹ *ibid* at 886C-D.

¹²² (1995) 16 *ILJ* 888 (IC) at 902B.

where the court also found that the employer's refusal to re-employ was an unfair labour practice and compensation was ordered.

CHAPTER 4

4.1. SECTION 186(1)(b) AND AN EXPECTATION OF A PERMANENT APPOINTMENT.

Although in the case of *Fedlife*,¹²³ the court was not directly dealing with section 186(1)(b), the court had the following to say,

“By enacting section 186(1)(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full performance of the employer’s contractual obligations, compensation if the employer refuses to renew the contract where there was a reasonable expectation that such would occur.”

If a reasonable expectation has been found to exist, the main question which this paper intends to answer is whether such an expectation as contemplated in terms of section 186(1)(b) can lead to an entitlement for a permanent appointment?

In *Mtshamba and others v Boland Houtnywerhede*,¹²⁴ the industrial court expressed the following:

“In the vast field of labour relationships there are many variations to continuing employment relationships and the consequent expectations of continuity and security of continuity related thereto. It is, in fact, this continuity, security of continuity and expectations of continuity, which

¹²³ *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA) at 2415 I-J.

¹²⁴ (1986) 7 ILJ 563(IC).

forms part of the subject-matter of many referrals before the industrial court.”

There are two schools of thoughts in this regard, the first of which is represented by *Dierks v University of south Africa*,¹²⁵ and it cherishes the idea that a legitimate expectation in terms of section 186(1)(b) cannot lead to an expectation of a permanent appointment. The court submitted that an entitlement to permanent employment cannot be based simply on the reasonable expectations in terms of section 186(1)(b), an applicant couldn't rely on an interpretation by implication or 'common sense'. It would require a specific statutory provision to that effect.¹²⁶

Oliver submits that, it is evident that the Act does not require that or regulate the position where the expectations implies a permanent or indefinite relationship on an ongoing basis, the reference to a renewal on the *same or similar terms* supports that this is the inference to be drawn from the wording of the subsection. What section 186(1)(b) apparently envisages is that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is justified.”¹²⁷

In *Auf Der Heyde v University of Cape Town*,¹²⁸ the court's view was different as compared to the submission of the court in the case of *Wood v Nestle (SA) (Pty) Ltd*,¹²⁹ where the court contended that the employee should be protected not only against the failure to renew, but also against the failure to extend or failure to make the contract permanent, by submitting that,

¹²⁵ (1999) 20 ILJ 1227 (LC).

¹²⁶ *ibid* at 1248 D-F.

¹²⁷ See note 102 above.

¹²⁸ See note 84 above at 1767 B-F.

¹²⁹ See note 34 above.

“The wording of section 186(1)(b), incorporated in an Act which is acknowledged to have been the product of an intensive consultation and debate directed, *inter-alia*, towards the creation of a legislated broader employment equity environment, is equivocal and unambiguous. It contemplates a reasonable expectation of renewal of a fixed-term contract of employment...the question must be asked why the simple expedient of including a reference to expectation of a permanent employment was not followed. It does not seem to me that such omission can be explained as an oversight.”

The second school of thought is represented by *McInnes v Technikon Natal*,¹³⁰ which holds the view that; an expectation in terms of section 186(1)(b) can lead to an expectation of permanent employment. The court in defending its opinion, held that, what section 186(1)(b) clearly sought to address was the situation where an employer failed to renew fixed-term employment where there was a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the expectation which the employer created is that the renewal is to be indefinite, and then the section must be held also to cover such a situation.¹³¹

¹³⁰ (2000) 21 *ILJ* 1138 (LC).

¹³¹ *ibid* at 1143 B-D.

John Grogan supports the above opinion by saying,

“There seems to be no reason in logic or law why an expectation of permanent employment should not provide a ground for a claim of dismissal under this provision”.

According to him a sounder view is that employees may claim to be dismissed within the meaning of section 186(1)(b) if they reasonably believed that their fixed-term contract would be of an indefinite period.¹³² Grogan further argued that, another equally compelling reason for accepting that employees who can prove a reasonable expectation of permanent employment are dismissed within the meaning of section 186(1)(b) is that they have in fairness an even stronger claim to relief than employees whose expectation is merely of another temporary contract. What better way to abolish the invidious practice of repeated renewals of fixed-term contract than to force the guilty employer to take the employee into permanent employment?¹³³

In *Wood v Nestle (SA) (Pty) Ltd*,¹³⁴ the central issue to be decided was whether the refusal of an employer to place an employee who is engaged on a fixed-term contract on the permanent staff gave rise to an unfair labour practice in circumstances where the initial fixed-term contract was renewed and/or extended for a continual period of some three years. In the above-mentioned case the court found that, ‘the applicant after having, served the respondent in a temporary capacity for three years, deserved to be accorded all the company benefits as listed in the personnel policy manual by being transferred to the permanent staff’.

¹³² Grogan J, *Workplace Law*, 7th ed at 107-108.

¹³³ Grogan J, *Great Expectations, Termination of Fixed-term Contract*, (1999) 15 *Employment Law* 10 at 13.

¹³⁴ See note 34 at 191G.

In his *obiter dictum* Commissioner Robertson in the case of *Magubane and others v Amalgamated Beverages*,¹³⁵ also agreed with the views of the second school of thought by submitting that, Whilst the rolling of such contract on no less than six occasions may in many instances lead appropriately to a reasonable expectation of continued employment. In the same way Commissioner Cowling implied that if the applicant had enough evidence to corroborate her allegation that she was led to believe that she would be entitled to a permanent contract of employment, and then section 186(1)(b) would be employed to her rescue.¹³⁶

4.2. PRE-MATURE TERMINATION OF A FIXED-TERM CONTRACT OF EMPLOYMENT

After the coming into being of the Labour Relations Act 66 of 1995, the common law contract together with its remedies had almost been forgotten, as the focus of attention had almost completely shifted, at that time, to the statutory remedies for an unfair dismissal as provided for in terms of the LRA.¹³⁷ The Labour Relations Act provides that if the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may, order the employer to reinstate the employee from any date not earlier than the date of dismissal; order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms or from any date not earlier than the date of dismissal; or order the employer to pay compensation to the employee. As a result of the afore-

¹³⁵ (1997) 18 *ILJ* 1112 (CCMA) at 113H.

¹³⁶ *Zwane v Elegance Jerseys* (1998) 19 *ILJ* 969 (CCMA) at 973 I.

¹³⁷ Section 193(1) (a)-(c) of the *Labour Relations Act* 66 of 1995.

mentioned, employees whose dismissals were alleged to be unfair resorted to either the CCMA, relevant bargaining councils or the Labour court for one of the remedies mentioned above. It was almost forgotten that the contract itself and the law related thereto are the integral part of the fixed-term contract of employment, and therefore the employee whose contract was terminated where the latter had a reasonable expectation, had a choice between the labour law remedies enforceable by the CCMA or the Labour court, and common law contractual claims enforceable through the civil court.¹³⁸

The above was illustrated in the supreme court of appeal decision in *Fedilife Assurance Ltd v Wolfaardt*.¹³⁹ In this case the employee and the employer entered into a contract of employment for fixed-term of five years. The employer repudiated the contract by purporting to terminate it, on the ground that the employee's position had become redundant. The employee allegedly accepted the repudiation, cancelled the contract and successfully instituted an action in the High Court for damages for material breach of contract. The principal contention advanced on behalf of the employer was that chapter VIII of the LRA codifies the rights and remedies that are available to all employees in our law arising from the termination of their employment, which has the effect of depriving employees of their common law remedies.¹⁴⁰ The High Court in its judgment handed by Justice Nugent held that the 1995 Act does not expressly abrogate an employee's common law entitlement to enforce contractual rights and nor do I think it does so by necessary implication.¹⁴¹ The court further held that section 186(1)(b) specifically deals with fixed-term

¹³⁸ see note 139 *infra*.

¹³⁹ (2001) 22 *ILJ* 2407 (SCA).

¹⁴⁰ *ibid* at 2414 A-B.

¹⁴¹ *ibid* at 2415 E.

contract in its definition of unfair dismissal, but it did not include the premature termination of such a contract, notwithstanding that such a termination would be manifestly unfair. According to the court the reason for that omission was that the common law right to enforce such a term remained intact and therefore it was not necessary to declare a premature termination of a fixed-term contract of employment to be unfair dismissal.¹⁴²

The employer appealed against the decision of the High Court, on the ground that the Labour Court has exclusive jurisdiction to adjudicate dismissals occasioned by operational requirements in terms of section 191(5) and 189 of the LRA and wrongful dismissal is no longer cognizable in our law and that the employee concerned has no remedies other than those provided for in terms of the LRA.¹⁴³

Justice Froneman in the Supreme Court of Appeal to a larger extent concurred with Justice Nugent's decision and dismissed the appeal with costs. The underlying principle in the *Fedilife* case is that the legislature's intention was neither to interfere with either the common law or its remedies.¹⁴⁴

In the case of *SA Breweries Ltd v Food & Allied Workers Union*,¹⁴⁵ Smalberger JA said 'there is a presumption against the deprivation of, or interference with common-law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured.'

¹⁴² *ibid* at 2415 F-H.

¹⁴³ Mischke C, *Fixed-term Contract and Unfair Dismissal*, (2005) Contemporary Labour Law vol. 14 No.8 at 77.

¹⁴⁴ *Ibid.*

¹⁴⁵ (1989) 10 ILJ 844(A) ; 1990 (1) SA 92 (A) at 99F.

Almost similar facts to the *Fedilife* case appeared before the Labour Appeal Court in *Buthelezi v Municipal Demarcation Board*,¹⁴⁶ where Justice Jafer had to determine whether the employer had an entitlement to terminate a fixed-term contract of employment prematurely on the ground of operational requirements. In this case the appellant employee entered into a fixed-term contract of employment for a period of five years, and hardly twelve months had later the respondent served the appellant with a notice of retrenchment. The notice stated, *inter alia*, that the respondent embarked upon an institutional restructuring process in terms whereof the appellant's position was going to be rendered redundant.¹⁴⁷ The court on appeal found that the appellant's decision was substantively unfair; in that there is no doubt that at common law a party to a fixed-term contract has no right to terminate such a contract prematurely in the absence of a material breach by the other party. The fact that the employer may have had operational requirements justifying a dismissal did not give the employer the right to terminate the employment contract before its expiry.¹⁴⁸

The rationale in the above decisions is that parties to a fixed-term are bound by the duration of such a fixed-term, unless if both parties agreed that such a contract might be terminated before its term, for example, on notice by either party or it may be terminated by the employer in the case of misconduct, incapacity or operational requirements.¹⁴⁹ The rationale is clear in that when

¹⁴⁶ (2004) 25 *ILJ* 2317 (LAC); [2005] 2 *BLLR* 115 (LAC).

¹⁴⁷ *ibid* at 2318 C-D.

¹⁴⁸ *ibid* at 2322 I.

¹⁴⁹ *ibid* at 2320 E-F, the same sentiment was echoed by the court in the case of *R v Bhama* 1941 SR 186 when the court held that if the parties agreed at the outset that the contract of employment was for a specific period, the contract terminates at the end of that period. Notice is not required to effect the termination. The employer may terminate such a contract before the agreed date of termination only if the employee is in material breach.

parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations and each party is entitled to expect that the other has carefully looked into the future and had satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled later to seek to escape its obligations in terms of the contract on the basis that its assessment for the future had been erroneous or had overlooked certain things.¹⁵⁰

4.3. TERMINATION OF A FIXED-TERM CONTRACT OF EMPLOYMENT WHERE LEGITIMATE EXPECTATION HAS BEEN CREATED.

The fact that the employer created a legitimate expectation on the part of the employee does not necessarily mean that the expectation will endure in perpetuity. The decision-maker (employer) may terminate the expectation by revoking or canceling the act that gave rise to that expectation and where such revocation or cancellation is known or ought to be known to the affected person, the basis for relying on the expectation no longer exists.¹⁵¹

In *Malandor's*¹⁵² case the applicant employee's fixed-term contract of employment was consistently renewed at the end of each month, until the time that the respondent employer gave the applicant notice that it did not intend to renew his contract, because the employment relationship had been regulated by the contract of employment and therefore effect has to be given to the

¹⁵⁰ *ibid* at 2322 G-I.

¹⁵¹ Pretorius D M, *Ten years after Traub: The Doctrine of Legitimate Expectation in South African Administrative Law*, (2000)117 SALJ 520 at 537.

¹⁵² See note 53 at 547H-I.

terms of the contract. The court was reluctant to incorporate other factors in the parties' agreement, as by so, it would be imposing a different contract to that which the parties entered into.

In the second case of *Fisher v Minister of Public Safety and Immigration*,¹⁵³ the court said that the decision-maker may act inconsistently with a legitimate expectation he has created, provided he gives adequate notice of his intention to do so and provided he gives all affected persons an opportunity to state their case.

In Mavata v Afrox Home Health Care,¹⁵⁴ the position of an employee who was employed on temporary basis, was rightfully terminated on 24 hours notice as the contract specifically provided that the employment was not of an indefinite period and therefore terminable on 24 hours' notice.

In *Avenant v Mesh Gear Manufacturers*,¹⁵⁵ the applicant who was employed on a three months fixed-term contract of employment alleged that he was dismissed unfairly a week before his contract expired and that he had a reasonable expectation for a permanent employment. The CCMA commissioner found that the applicant's contract had terminated through an effluxion of time and that there was no dismissal.

A fixed-term contract of employment where legitimate-expectation under normal circumstances could reasonably be construed to have been created may also be terminated by the happening of a specific event. On the

¹⁵³ [1999] 2 WLR 349.

¹⁵⁴ (1998) 19 *ILJ* 931 (CCMA) at 934 C.

¹⁵⁵ (2001) 22 *ILJ* 1247 (CCMA).

happening of such an event the contract is automatically terminated in accordance with the intention of the parties and therefore it does not give rise to a claim of unfair dismissal.¹⁵⁶

4.4. EFFLUXION OF TIME NOT ALWAYS A REASON FOR TERMINATION

According to common law a fixed term contract of employment terminates at the end of its term and such termination flowed automatically and was not seen as a dismissal or termination at the initiative of the employer.¹⁵⁷ It therefore meant that once a fixed-term comes to an end, the employment relationship between the employer and the employee comes to an end and the employer is not obliged to consult the employee.¹⁵⁸ A fixed-term contract terminates automatically and without the intervention of the employer, no dismissal in the strict sense of the word, takes place.¹⁵⁹ Unfortunately for the employers the employment relationship as envisaged by the *Labour Relations Act* of 1995 is not one that terminates as it would in common law, where it terminates solely by expiry of a fixed-term period stipulated in an employment contract. But that does not mean that the contractual terms agreed to by the parties can now simply be ignored by the employee and that he can, for instance, demand, prior to the agreed date of termination of his contract, that that date be ignored and that the termination of his contract of employment be determined in terms of the principles formulated for

¹⁵⁶ *Maritz v Cash Towing CC* (2002) 23 ILJ 1083(CCMA).

¹⁵⁷ see note 4 above.

¹⁵⁸ *ibid.*

¹⁵⁹ Cheadle et al, *Current Labour Law* (2000) 1st Ed at 4 and *Tiopaizi v Bulawayo Municipality* 1923 AD 317; Rycroft A and Jordaan B, *A Guide to South African Labour Law* (1992) 2nd Ed at 87. see also *MAWU v Screenex Wire Wearing Manufactures (Pty) Ltd* (1984) 5 ILJ 35 (IC), where the court rejected an argument that migrant workers had been unfairly retrenched on the basis that there had been no retrenchment. Their fixed-term contracts had expired automatically.

retrenchment or retirement. What may, in appropriate circumstances, be open to the employee is to call upon the employer to re-employ him or her after the contractual termination and the refusal or failure of the employer to re-employ the employee may under certain circumstances be considered unfair labour practice.¹⁶⁰ A reasonable expectation of renewal can exist even though the written contract of employment expressly stipulates that the employee fully understands that he has no expectation of the contract being renewed.¹⁶¹ The Industrial Court in the case of *MAWU v Machle (Pty) Ltd t/a Precious Tools*,¹⁶² accepted the principle that failure to renew a fixed-term contract could amount to unfair labour practice where there was an expectation of renewal by the employee.

In *National Automobile and Allied Workers Union v Borg-Warner SA (Pty)*,¹⁶³ the court held that the consensual determination of the duration of the contract would not necessarily denote an agreement between the parties that the employment relationship for the purpose of the Act has come to an end and ‘it is therefore sufficient that the legislature clearly had in mind that once a particular employment relationship is established, the parties to it remain “employee” and “employer” as defined, beyond the point of time at which the relationship would have terminated under the common law..’ This therefore means that the employer cannot be heard saying that the complainant does not

¹⁶⁰ *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 at 373.

¹⁶¹ *Dirks v University of South Africa* (1999) 20 ILJ 1227 (LC) at 1250 par 161, see also *Mediterranean Wollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* 1998 (2) SA 1099 (SCA); (1998) 19 ILJ (SCA) at 733-734. where, although the terms of the contract were clear and explicit, and left no room for entertainment of an expectation of renewal, the court held that the assurance given to the workers clearly conveyed to them that they could entertain such expectation.

¹⁶² (1980) 1 ILJ 227 (IC).

¹⁶³ (1994) 15 ILJ 509 (A) at 518 F-G.

have a *locus standi* by virtue of the fact that their contract has elapsed by effluxion of time.

In the case of *Zank v Natal Fire Protection Association*,¹⁶⁴ the industrial court found that the terms of employment contract may be indicative of an agreement between the parties as to when the employment relationship will come to an end, but that is not necessarily conclusive. The surrounding circumstances, such as the purpose for which the parties entered into a fixed-term contract and the conduct of the parties at the expiry of the fixed period, must also be considered in order to determine whether such relationship has terminated. In *Cremerk a Division of Triple P-Chemical Ventures (Pty) Ltd v SA Chemical Workers Union & Others*,¹⁶⁵ after the business had been sold to the appellant employer, it required all its employees to sign new fixed-term contracts of employment for a period of 12 months and could be renewed after expiry of such a period. A month before expiry of such contract the appellant employer gave all its employees notices of its intention to terminate some of its employees' contracts, which intention subsequently came to pass without any further notice. The reason advanced for termination was that respondent employees' contract had expired, although 70 other employees whose contracts also expired on the same day had their contracts renewed. Those employees, whose contracts were not renewed, were replaced by new employees. The Industrial Court found that the employees' services had been terminated for reasons other than the expiry of their contracts and that it had been unfair for the appellant employer to do so.

¹⁶⁴ (1995) 16 *ILJ* 708 (IC).

¹⁶⁵ (1994) 15 *ILJ* 289 (LAC).

Commissioner JS Talane in *Nicolaisen v Great North Transport*,¹⁶⁶ also looked beyond the expiry of a fixed-term contract between the parties in order to determine the true nature of their relationship. The applicant employee in the above case continued working after the fixed-term contract elapsed and the respondent employer continued paying the former a salary. After a period of two years the employer dismissed the employee on the basis that his fixed-term has expired. The main thrust of the employee's case is based on reasonable expectation of permanent employment and not the non-renewal of a fixed-term contract with a further fixed-term contract. The commissioner in that case determined that the employee's expectation of permanent employment was reasonable under the circumstances.

4.5. AVOIDING CREATION OF LEGITIMATE EXPECTATION

Employers sometimes are confronted with a situation whereby they would want to keep certain employees on fixed-term contract perpetually and at the same time avoid the creation of legitimate expectation. In that case it is preferred that the employers should avoid the renewal of contracts, but instead, advertise the position as soon as its duration elapses and subject such employees to apply and compete with the other candidates as illustrated in the unreported Labour Appeal Court case of *PRASAD v Lebea* and others,¹⁶⁷ and the case of *Swart v Department of Justice*,¹⁶⁸ in the latter case the applicant employee was employed on a fixed-term contract which was renewed from month to month, the post was advertised as a permanent position. The applicant employee applied, interviewed and recommended for appointment,

¹⁶⁶ Case No. GA40395-04 (CCMA).

¹⁶⁷ See note 86 above for the full discussion of the case.

¹⁶⁸ (2003) 24 *ILJ* 1049 (BCA).

but unfortunately appointments were not made. Later the position was re-advertised, but the applicant employee did not reapply. The applicant employee claimed that she had a reasonable expectation of the renewal of her contract on a permanent basis, and that she has been unfairly dismissed. The CCMA commissioner found that the fact that the contract had been renewed a number of times did not indicate a reasonable expectation of renewal because for the post to be filled permanently, it had first to be advertised.

4.6. ONUS OF PROOF

Section 192 of the LRA,¹⁶⁹ provides that in any proceedings concerning any dismissal, the employee must establish the existence of a dismissal. If the existence of a dismissal is established, the employer must prove that the dismissal is fair. John Grogan correctly stated that in case where employees claim to have been dismissed by virtue of the none-renewal of a fixed-term contract they must firstly prove on balance of probability that they were employees at the time of the dismissal and secondly that they had a reasonable expectation that their contracts would be renewed on the same or similar terms.¹⁷⁰ It therefore means that once the employee had discharged his/her burden of proof the onus shifts to the employer to prove that the dismissal is fair.

In the case of *Finkenstein v PME Consulting Group*,¹⁷¹ Commissioner Mzamane found that the duty to prove that a reasonable expectation, in terms of section 186(1)(b) of the LRA 1995, has been created rests with the employee. The employee has to show that the employer has done something

¹⁶⁹ Section 192(1)-(2) of the *Labour Relations Act* 66 of 1995.

¹⁷⁰ Grogan J, *Workplace Law* 9th ed (2007) at 123.

¹⁷¹ (2001) 22 *ILJ* 2342 (CCMA).

that could objectively be construed as having led him or her to have such expectation.

4.7. TEST OF REASONABLE EXPECTATION

Commissioner Moletsane in the *Swart's* case¹⁷² referred to above held that it is trite that the test of a reasonable expectation is an objective one, which means that both the interest of the employee and the employer are to be taken into account. In his objective view the commissioner in the above-mentioned case held that the fact that the fixed-term contract of employment had been renewed a number of times is not in itself indicative of a reasonable legitimate expectation of renewal because in terms of the public service regulations for a post to be filled permanently, it must first be advertised.¹⁷³

With regard to the test of legitimate-expectation Penzhorn AJ, in the case of *Mcinnnes v Technikon Natal*,¹⁷⁴ the judge said the following:

“Here the court had to conduct a two-stage enquiry. The first stage is to determine what the applicant’s subjective expectation actually was in relation to renewal. This is a question of fact. Only once the subjective expectation has been established as a fact does the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstances”.

¹⁷² See note 168 above at 152 paragraph 14.

¹⁷³ *ibid* at paragraph 15.

¹⁷⁴ (2000) 21 *ILJ* 1138 (LC) at 1142 par 15, see *Dirks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) at 1246 par 132, where Oosthuizen AJ, said “In my view, it can be deduced from the foregoing and the use of the word ‘reasonable’ that the applicant as the employee must prove that he had an expectation of renewal and that the expectation was reasonable in that apart from subjective say-so or perception there is an objective basis for the creation of his expectation. See also *Auf Der Hyde v University of Cape Town* (2000) 21 *ILJ* 1758 (LC) at 1766 and *South African Rugby (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*, (2006) 27 *ILJ* 1041 (LC) at 1045 par 11.

What the learned judge meant here was that the employee must first have believed that his or her fixed-term contract would be renewed in the same or similar terms, once that is established the court or any relevant forum would then enquire as to the basis of such a belief, by checking the surrounding circumstances which led the employee to have such an expectation. Caldwell JL recoded that a person may have a subjective hope that an adverse determination would not be made, but that in itself is generally not a “legitimate expectation”.¹⁷⁵

Grogan J said that the notion of reasonable expectation suggests an objective test: the employee must prove the existence of facts that, in the ordinary course, would lead a reasonable person to anticipate renewal.¹⁷⁶ Toohey J, expressed the following sentiments, in the Australian High Court case of *Minister for Immigration and Ethnic Affairs v Teor*,¹⁷⁷

“...But the assumption of such an obligation may give rise to legitimate expectation in the minds of those who are affected by the administrative decisions on which the obligation has some bearing...legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned. The matter is to be assessed objectively...a subjective test is particularly inappropriate when the legitimate expectation is said to derive from something as general as the ratification of the convention...”

¹⁷⁵ Caldwell JL, *Legitimate-expectation and the rules of natural justice* (1983) 2 Canterbury LR 45 at 50.

¹⁷⁶Grogan J, *Workplace Law* 8th ed 2005 at 110-111.

¹⁷⁷ (1995) 183 CLR 273 at 301.

CHAPTER 5

COCLUSION

It is a long standing rule of interpretation of statutes that the court or the appropriate tribunal will usually begin its interpretation of statute by applying the literal rule, that is, that the words of a statute must be given their ordinary, literal and grammatical meaning.¹⁷⁸

The main objective of interpreting a statute is to ascertain the intention, which the legislature meant to express from the language it employed. By far the most important rule to guide the interpreter in arriving at that intention is to take the language of the instrument as a whole, and when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.¹⁷⁹ The role of the text also plays a significant role in the interpretation of the bills of rights. In *S v Zuma*,¹⁸⁰ as quoted by De Waal *et al*, where Kentridge AJ warned against underestimating the importance of the text:

“While we must always be conscious of the values underlying the constitution, it is nonetheless our task to interpret a written instrument...We must heed Lord Wilberforce’s reminder that even the constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination...I would say that a constitution ‘embodying fundamental

¹⁷⁸ *Ebrahim v Minister of Interior* 1977 (1) SA 665 (AD) AT 678.

¹⁷⁹ *Minister of Interior v Machododorp Investments* 1957 (2) SA 395(AD) at 402, *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) at 621.

¹⁸⁰ 1995 (2) SA 642 (CC); De waal J, et al, *The bill of Rights Hand book* 4 ed at p.129.

principles should as far as its language permits be given a broader construction”

In *S v Makwanyane*,¹⁸¹ the court held that grammatical interpretation is said to focus on the linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text.

In the same way, in order to determine the true nature of the expectation as envisaged by section 186(1)(b), the interpreter has to begin with the provision of the section itself. Section 186(1)(b) provides as follows,

“Dismissal means that 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.”

Oliver submits that what is required in order to activate the provision of section 186(1)(b) is an expectation that the fixed-term contract in question would be renewed on the same or similar terms.¹⁸²

After analyzing the views of the two school of thought, the body of the opinions submit that the first school of thought is to be preferred, in that section 186(1)(b) is unambiguously clear that the legislature had in mind that the expectation should be of another fixed-term contract on the same or similar terms, of which permanent employment is totally on different terms.

¹⁸¹ 1995 (3) SA 391 (CC) see also Botha C, *Statutory interpretation, an introduction for students* 3rd Ed 141.

¹⁸² See note 102 above at 1006.

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