Early termination of fixed-term employment contracts in Botswana: revisiting *Rakhudu v Botswana Book Centre Trust*

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Abstract

In July 2005 the Court of Appeal of Botswana delivered a judgment in a case where an employee employed on a fixed-term contract had been dismissed from employment prior to the expiry of the agreed duration. The employee had committed no act of breach, and the employer had advanced no reason for terminating the contract of employment. In the course of its judgment, the Court of Appeal made a finding that at common law, absent an express or implied term to the contrary, and provided due notice is given, a fixed-term contract of employment may be terminate before the expiry of the agreed time frame, without having to provide a valid reason. That finding has since been accepted and applied by the High Court of Botswana as binding judicial precedent. This article interrogates that finding, and argues that at common law, a fixed-term contract of employment may not be lawfully terminated prematurely in the absence of a valid reason.

INTRODUCTION

In Botswana, the sources of the law governing the employer-employee relationship are the common law, legislation, international labour standards, collective labour agreements – if any – as well as the terms of the contract agreed to by the parties. These sources are hierarchical.

The common law of Botswana is Roman-Dutch law.[1] The common law applies as the foundational law in all aspects where it has not been excluded by the other sources. Consequently, if none of the other sources of law

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[1] *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* 1996 BLR 190 at 194–195.

provides a solution to a particular issue, recourse will be had to the common law. Legislation, in the main, comprises the various Acts of parliament[2] and the statutory instruments made thereunder.[3] The Employment Act, which for present purposes, stands out as the primary piece of legislation, modifies and or supplements the common law in every aspects on which the Act touches.[4] Legislation, therefore, takes precedence over the common law wherever there is conflict between the two. In this regard, the Employment Act provides the minimum floor of rights and obligations for the parties to the employment relationship. An employer may not, for instance, offer the employee terms and conditions of employment less favourable than those provided for under the Act.[5] Parties to the contract are free to agree on more favourable terms than those set out in legislation. In this regard, where an employee is a member of a recognised trade union, the terms and conditions of the collective labour agreement form part of the employee's contract of employment.[6] However, the individual contract of employment entered into by the particular employee and employer, takes precedence in the event of contradiction between the collective labour agreement and the individual contract of employment.[7] International labour standards emanating from the jurisprudence of the International Labour Organisation, are referred to by the court in suitable cases as a guide to interpretation, or to complement the national law where there is a gap – for example, to resolve a trade dispute directly.[8]

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2 These include the Employment Act [Cap 47:01], Employment of Non-Citizens Act [Cap 47:02], Trade Disputes Act [Cap. 48:02], Workers Compensation Act [Cap 47:03] and the Factories Act [Cap 44:01].

3 In terms of the Interpretation Act Cap 01:04 '*"statutory instrument" means any proclamation, regulation, rule, rule of court, order, bye-law or other instrument made, directly or indirectly, under any enactment and having legislative effect*'.

4 *Sekgwa v Institute of Development Management* 2001 2 BLR 434 at 460.

5 Section 37 Employment Act provides that '[w]here a contract of employment, whether made before or after the commencement of this Act, provides for conditions of employment less favourable to the employee than the conditions of employment prescribed by this Act, the contract shall be null and void to the extent that it so provides'.

6 *Botswana Breweries Distribution Staff v Botswana Breweries (Pty) Ltd* 1997 BLR 312 (IC).

7 See for instance *SAMWU obo Abrahams* v *City of Cape Town* 2008 7 BLR 700 (LC) and *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2005 2 BLR 173 (SCA).

8 See for instance *Phirinyane v Spie Batignolles* 1995 BLR 1 (IC). where the Industrial Court for the first time applied ILO Convention 158 to cases of unfair dismissal; *Diau v Botswana Building Society (Ltd)* 2003 2 BLR 409 in which it was applied the ILO Declaration on Fundamental Principles and Rights at Work in a case concerning an employee dismissed for her HIV status; and *Botswana Public Employees Union v The Minister of Labour and Home Affairs* High Court Case No: MAHLB–000674–11, in

The law of Botswana recognises two principal types of the contract of employment. The first type is a contract of employment for a specified period of time, or for a specified piece of work (without reference to time).[9] This type of contract is commonly known as a 'fixed-term contract of employment'. In a fixed-term contract the parties agree at the outset that their relationship will run only for a specific period, or until the conclusion of a specific piece of work. At the end of the agreed period, or upon completion of the agreed work, the employer-employee relationship terminates automatically[10] without the need for prior notice.[11] The second type, is a contract of employment for an unspecified period, commonly known as 'permanent and pensionable employment'. This type of contract remains valid and operational for a continuous and indefinite period until it is lawfully terminated. Common law applies the strict rules of the master-and-servant relationship to the termination of an indefinite contract of employment. In terms of these rules, such a contract may be terminated by the employer at anytime with prior notice, and without the need to provide a reason.[12] The position with regard to fixed-term contracts is different, and it has to this end been stated that

> Whereas the right to terminate on notice is a normal incident of contracts of employment entered into for an indefinite period, a contract for a fixed term may normally not be terminated on notice before the expiry of the term.[13]

A principle similar to the common law master-servant scenario of indefinite contracts of employment, applies in the United States of America (USA) under the 'employment at will' doctrine. This doctrine is part of the common law of the USA, in terms of which the employment relationship remains valid at the will of the parties, but may be terminated by either at their pleasure.[14] Therefore, save in the cases where either of the recognised

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which determinations of the ILO Committee of Experts were applied vis-à-vis the question of whether or not workers in the teaching, transport, diamond sorting and cutting services constitute essential services within the meaning of ILO Convention 87.

9 Section 17 Employment Act.

10 See s 17(1) Employment Act, and also Rycroft & Jordaan *A guide to South African labour law* (1994) 54.

11 Grogan *Workplace law* (2007) 80.

12 *National Development Bank v Thothe* 1994 BLR 98 (CA) at 105E–H.

13 Rycroft & Jordaan n 10 above at 87.

14 Stone 'Revisiting the at-will employment doctrine: imposed terms, implied terms, and the normative world of the workplace' *Ind Law J* (2007) 36 (1) 84–101.

exceptions applies,[15] and barring any contractual term to the contrary, the doctrine of at-will employment allows an employer, in an indefinite contract of employment, to terminate the employment relationship at any time for good reason, bad reason, or no reason at all without incurring legal liability.[16]

Under the Employment Act of Botswana, parties are allowed to terminate their relationship either on notice or without notice. Section 26(1) permits an employer to dismiss any employee, whether employed on fixed-term or otherwise, without notice where the employee has committed an act of 'serious misconduct'.[17] Likewise without regard to whether they are employed on fixed-term or otherwise, an employee may terminate the relationship without notice where any of the five grounds listed at section 26(2)(a)–(e) is present.[18] The listed grounds basically allow the employee to terminate the contract where the employer has committed a material breach of contract. Sections 18 and 19 respectively provide for the termination of contracts of employment on notice, or after the payment of money in lieu of notice. However, these two provisions deal only with contracts of employment for unspecified periods. No reference is made in the Act to the termination of fixed-term contracts of employment on notice (or payment of money in lieu thereof). Rather, section 17(1) provides that a fixed-term contract of employment will run until it terminates at the expiry of the

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15 The exceptions are mostly statutory and include prohibition of termination of employment based on race, religion, sex, age, or on the reason, amongst others, of whistle-blowing, serving on a jury or engaging in lawful union activities.

16 Muhl 'The employment-at-will doctrine: three major exceptions' *Monthly Labor Review* (January 2001): 3–11 at 3. See also Matheny and Crain's statement that '[t]he vast majority of private sector employees in the United States are employees-at-will, who can be dismissed "for any reason, even for no reason, without legal liability attaching'" in Matheny & Crain 'Disloyal workers and the "un-American" labor law' 82 *NC L Rev* 1705, 1708 (2004).

17 Serious misconduct constitutes breach of contract. A non-exclusive list of instances constituting 'serious misconduct' is provided in s 26(4) to include, amongst others: wilful disobedience of the employer's lawful orders; habitual or wilful neglect of duties; acts of theft; acts of violence; offering or receiving bribes; inability to carry out normal duties due to the consumption of alcohol or habit-forming drugs; and persistent absence from work without permission.

18 These limited grounds are as follows: (*a*) the employee is employed on work markedly different in nature from the work she was originally engaged to perform;(*b*) the employee's continued employment necessitates a change of residence for which no provision is made by her contract of employment; *(c)* the employee is transferred to lower grade work; (*d*) the employee is badly treated by her employer or the employer's representative; or (*e*) by virtue of her employment she or her dependants are immediately threatened by danger to the person from violence or disease such as she did not undertake to accept by her contract of employment.

agreed time, unless it is otherwise lawfully terminated earlier. The key word here is 'lawfully'. The question is: how does a party, in the absence of material breach, 'lawfully' terminate a fixed-term contract of employment before the expiry of the agreed period. The Court of Appeal in *Rakhudu*[19] noted the failure of the Employment Act to provide an answer to this question, and correctly concluded that in the circumstances, resort must be made to the common law. The court then proceeded to state the answer to the question as extracted from the common law.[20]

This paper interrogates the above question, against the backdrop of the solution offered by the Court of Appeal in *Rakhudu*, and concludes that the answer was incorrect, or at the least misleading. The paper opens with a concise discussion on the facts and the judgment in *Rakhudu*. It proceeds to deal with subsequent judgments of the High Court of Botswana which adopted and embraced the answer in *Rakhudu*. The part that follows explores the *ratio decidendi* of the answer offered by the Court of Appeal, and presents the 'opposite view', a view which I argue is the correct position under common law regarding the early termination of fixed-term contracts of employment in the absence of breach.

RAKHUDU v BOTSWANA BOOK CENTRE TRUST

Two courts in Botswana have concurrent jurisdiction to hear and determine labour law disputes. These are the High Court[21] and the Industrial Court.[22] Parties are free to choose in which of these two courts they prefer to lodge their disputes.[23] Currently, appeals from either one of the two courts lie to the Court of Appeal, the highest court in the land. The employee in *Rakhudu* had elected to litigate his matter before the High Court, after which he lodged an appeal with the Court of Appeal.

The facts

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19 *Rakhudu v Botswana Book Centre Trust* 2005 2 BLR 283 (CA).

20 See at 290D–E.

21 The High Court is established under s 95 of the Constitution of Botswana and is endowed with 'unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law … .

22 Section 15 of the Trade Disputes Act establishes the Industrial Court as a court of law and equity, and mandates it with the functions of settling trade disputes; and furthering, securing and maintaining good industrial relations in Botswana.

23 *Botswana Railways' Organisation v Setsogo* 1996 BLR 763 (CA).

The applicant in *Rakhudu* had been employed by the respondent as its general manager. The employment was for a fixed period of three year effective from 5 October 2000. The letter of appointment required the applicant to serve a three months' probation period. On 7 December 2000, while still in the period of probation, the applicant's employment was terminated by the respondent on fourteen days' notice. The respondent provided no reasons for its sudden change of heart, nor was the applicant afforded any prior hearing. Aggrieved, the applicant challenged the respondent's decision before the High Court, contending for a right of hearing. This was, however, unsuccessful. On appeal to the Court of Appeal, it was found by the court, and conceded by the applicant, that the letter of appointment allowed for the termination of his employment during the period of probation. The applicant then argued that it had been unlawful for the employer to provide for probation in a fixed-term contract of employment. The applicant argued that the Employment Act did not permit for the insertion of a probationary clause in fixed-term contracts of employment. It was then that the Court of Appeal turned to consider the Employment Act vis-à-vis fixed-term contracts of employment.

The decision of the Court of Appeal

The Court of Appeal in *Rakhudu*, analysed the Employment Act in detail, with particular regard to the termination of fixed-term contracts of employment. The court noted that despite professing to make 'comprehensive provision' for the law relating to employment,[24] the Employment Act deals only cursorily with the termination of fixed-term contracts of employment. The Court of Appeal noted, in particular, that section 17 of the Act,[25] which deals with the termination of contracts of employment, does not provide guidance on the point. It was further noted that whilst sections 18 and 19 respectively provide for the termination of contracts of employment, and for the notice or the payment of cash in lieu of notice, neither of these sections applies to a fixed-term contract of employment. These provisions apply only to employment contracts of an

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[24] See the long title of the Act.

[25] Section 17 of the Employment Act deals with the termination of contracts of employment generally and provides as follows: '(1) A contract of employment for a specified piece of work, without reference to time, or for a specified period of time shall, unless otherwise lawfully terminated, terminate when the work specified in the contract is completed or the period of time for which the contract was made expires. (2) A contract of employment for an unspecified period of time (other than a contract of employment for a specified piece of work, without reference to time) shall be deemed to run until lawfully terminated.'

unspecified period. From such analysis, the court then found that the Employment Act provides for the following principles in relation to fixed-term contracts of employment that the contract must be terminated lawfully as in section 17(1):

> that where she is required to undergo probation, the employee must be informed in writing of the length of the probationary period – section 20(3); that an employee may not, in her contract of employment, be offered conditions which are less favourable to the employee, than those prescribed by the Employment Act – section 37.

The court then proceeded to address each of these principles in turn against the evidence placed before it. The first issue to be addressed was on the lawfulness of terminating the fixed-term employment contract prior to the expiry of the agreed time frame. On this point, and based on its earlier finding that the Employment Act only cursorily deals with the issue, the court held that

> Since the Act makes no specific provision as to the method of termination of a fixed term contract of employment, we must fall back on the common law, which clearly allows the termination of an employment contract (a fortiori during a probationary period) on reasonable notice without the giving of reasons or the right of appeal, unless there are terms, express or implied, to the contrary. The original court application was based on the common law and specifically on an allegation of breach of contract.[26]

In support of its conclusion, the Court of Appeal referred to six South African cases:

Nchabaleng v Director of Education (Transvaal),[27] where it was said that at common law an employer has the right to dismiss an employee for misconduct, without affording the employee any right to a hearing before such dismissal.

Mustapha v Receiver of Revenue, Lichtenburg,[28] in which it was said that where a contract provides that it may be terminated on notice without specifying the need to provide prior hearing, it will be lawful to terminate

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[26] At 290D–E.
[27] 1954 1 SA 432 (T) at 440A–B.
[28] 1958 3 SA 343 (A) at 357A–C.

such contract on due notice, and the other party may not demand to be heard before the notice of termination effects.

Van Coller v Administrator, Transvaal,[29] in which the court affirmed the position that there is no implied operation of the *audi alteram partem* rule under the common-law master-and-servant contract.

Grundling v Beyers,[30] where the court, dealing with the application of the *audi alteram partem* rule, said that

> In a statute empowering an official or body to give a decision adversely affecting the rights of liberty or property of an individual, a legal presumption usually operates that the *audi alteram partem* rule has to be observed. There is no such presumption in a contract. The obligation to afford a hearing according to natural justice must there be either an expressed or necessarily implied term of the contract.

Embling v Headmaster, St Andrew's College (Grahamstown),[31] in which Cooper J reiterated that the *audi* rule has no application in the field of contract, and that the parties' relationship is rather governed by the law of contract. In that case it was found that an employee whose employment is terminated under the terms of a contract is not entitled prior hearing by way of the *audi* rule, and that the employer is not required to advance reasons for the termination.

Lamprecht v McNeillie,[32] where it was reaffirmed that the *audi* rule has no automatic application in contractual relationships unless the contract contains a term (express or tacit) that incorporates the rules of natural justice.

It was on the basis of the above authorities that the Court of Appeal held that the employee in *Rakhudu* did not have an automatic right of hearing prior to the employer terminating the employment relation on notice. The court was further of the view that there was no express or implied term in the parties' contract of employment that addressed early termination.

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29 1960 1 SA 110 (T) at 115A.
30 1967 2 SA 131 (W) at 141D–E.
31 1991 4 SA 458 (E) at 476J–468C.
32 1994 3 SA 665 (A) at 668C–H.

As to the other two points, on notice of probation in writing, and the prohibition against provision of less favourable terms than those prescribed by the Employment Act, the court found that the letter of appointment had advised the employee of the period, he would be required to serve as probation as well as the fact that no less favorable terms had been included in the parties' employer-employee relationship.[33] The Court of Appeal therefore dismissed the employee's appeal with costs.

SUBSEQUENT HIGH COURT JUDGMENTS THAT HAVE FOLLOWED *RAKHUDU*

The conclusion reached by the Court of Appeal in *Rakhudu* has been recited with approval in subsequent decisions by the High Court, principal of which are the cases of *First Sun*[34] and *James Molosankwe*.[35]

In *First Sun*, the court was confronted with a situation where an employee who had been employed on a three year fixed-term contract, had resigned just 13 months into his employment. The employee had not alleged any of the five instances in section 26(2) Employment Act allowing him to resign without notice. Rather, the employee had written to the employer that he was resigning and was willing to serve a month's notice.[36] The employer had then sued the employee for unlawful termination of the contract of employment, as well as for other claims surrounding such termination.[37] Deciding against the employer on this point, the High Court categorically noted that

> Termination of a fixed term contract of employment by the giving of notice (or payment of money in lieu thereof) is not provided for under the Act. The Court of Appeal has held in Rakhudu v Botswana Book Centre Trust And Others [2005] 2 BLR 283 at 290 that the common law therefore applies,

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33 It was noted in particular that the employee was dismissed on a fourteen-day notice, which is the same period provided by the Employment Act on termination of probationary employment of contracts of an unspecified period. The court noted further that in any event the employee had not contended that he was entitled to a longer notice period.

34 2010 1 BLR 316 (HC), delivered by Kirby J (as he then was) on the 19 February 2010.

35 *James Molosankwe v Botswana Telecommunications Corporation* (unreported) CVHLB-001824–08. The case involved the same issue as that of *Brightwell Nkambule v Botswana Telecommunications* (unreported) CVHLB-001829-08 hence the two matters were consolidated and argued together. A single judgment was then delivered with respect to both matters by Newman J on 6 September 2010.

36 See at 325A–B and at 338E–F.

37 The employer also sued for damages for breach of the duty of fidelity, fraudulent diversion of business and for loss occasioned by the employee's misrepresentation of material facts.

> which allows termination of any contract of employment, *whether for a fixed term or otherwise on reasonable notice without the giving of reasons*, unless there are terms express or implied, to the contrary.[38]

The court then held that on the evidence the employee had 'tendered to serve notice at the option of the [employer]', and that the employer waived its right to notice and allowed the employee to leave immediately. The natural extension of the opinion of the court here, is that the employee on fixed-term contract of employment, like an employee of a contract of employment for an indefinite period acting under section 18 and 19 of the Employment Act, could terminate the employment on notice or by making payment of money in lieu of such notice. This interpretation is supported by the fact that elsewhere in the judgment, when addressing Claim D in the suit (the employer's claim against the employee for damages in the sum of P100 000 alleged to be for the cost expended by the employer in recruiting and training a replacement principal officer for the defendant employee), Justice Kirby states that

> In the light of the Court of Appeal's decision in *Rakhudu's* case (supra), Claim D has scant prospects of success. In order to claim damages for breach of contract, a breach must be proved. The breach alleged is the unlawful termination of the contract before its term of three years had elapsed. Even if the defendant had departed the job abruptly and without notice, the measure of the plaintiff's damages would have been its loss for the period he should have served before departing lawfully. Since, on the strength of *Rakhudu's* case he could have departed lawfully after serving reasonable notice, the damages recovered would have been severely limited in any event, since reasonable notice amounted to one month.[39]

The High Court in the *James Molosankwe* case dealt with a case where two employees had each been employed on a three-year fixed-term contract, with effect from October 2006 and November 2006 respectively. Some time in October 2008, prior to the expiry of the agreed three year term, the employees were served with letters terminating their employment on three months' notice. The employer provided no reasons for the sudden terminations and the employees were afforded no prior hearing. In the course of its judgment, the High Court made specific reference to the dictum of the Court of Appeal in *Rakhudu* as reproduced above,[40] and concluded that the

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38 At 323D–E. (Author's emphasis.)
39 At 338B–D.
40 See at n 26 above.

two employees in that case were not in terms of the common law entitled to a hearing prior to the termination of the contracts of employment.[41] The court further referred to the Court of Appeal decision in *Manson Holdings*[42] as additional authority for the contention that a fixed-term contract of employment may at common law be lawfully terminated prematurely on notice without the need to provide reasons or afford the employee a hearing.[43]

Another case that relied on *Rakhudu,* is the Industrial Court decision in *Mukwemba.*[44] However, unlike the abovementioned High Court cases, *Mukwemba* dealt with an employee who had been dismissed whilst still serving the probationary period of his fixed-term contract of employment. The court found, contrary to the argument by the employee, that a fixed-term contract of employment may lawfully be preceded by a period of probation, during which time the contract may be terminated lawfully on notice without advancing reasons for the termination.[45] In that instance, the contract shall be deemed to have been terminated for just cause.[46] Reliance by the Industrial Court on *Rakhudu* was, therefore, for a different purpose than was by the High Court in the cases mentioned above.

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41 It is noteworthy that in *James Molosankwe* the parties' written contract contained a clause providing for the earlier termination of the fixed-term contract on three months' notice (clause 14) albeit on condition that the termination 'shall be for a reason' (clause 14.1). Since the employer had furnished the three months' notice, the ultimate decision for the court turned on a determination of whether or not clause 14.1 required that the employer also communicates the reason for the termination to the employees. The court answered the question in the affirmative, and in turn awarded employees damages for 'unlawful' termination of their contracts of employment, by reason of the fact that the reason of the termination had not been communicated to the employees.

42 *Manson Holdings v Nalin* 1995 BLR 446.

43 See at par [16] in *James Molosankwe*. A reading of *Manson Holdings* reflects two points – firstly that the Court of Appeal had on the contrary stated that 'if the parties to a contract of employment agree in unqualified terms upon a fixed period of service, they are bound thereby; neither is lawfully entitled to terminate the contract before the lapse of such period" (see at 448D), and secondly that the issue before the court was decided not on the basis of common law but on the interpretation and application of a termination clause in the parties' written contract – clause 9.

44 *Mukwemba v Debswana Diamond Company (Pty) Ltd* 2009 1 BLR 376 (IC).

45 The position is also the same at common law – see *Ndamase v Fyfe-King NO* 1939 EDL 259.

46 Section 20(2) Employment Act provides that: 'Where a contract of employment is terminated during a probationary period by either the employer or employee under s 18 or 19 by not less than 14 days' notice, the contract shall be deemed, for the purposes of this Part, to have been terminated with just cause and neither the employer nor the employee shall be required to give reasons therefore.'

A CRITIQUE OF *RAKHUDU*

The South African case law referred to by the Court of Appeal in support of the ruling that the common law permits the termination of a contract (without qualification) on reasonable notice without providing reasons, has been noted above. It is important to note that in none of the six South African cases relied upon was the court dealing with a fixed-term contract of employment. The courts in those cases were dealing with contracts of indefinite period of time, and made various statements all of which were essentially reiterating that common law, does not impose the *audi alteram partem* rule on private contracts. On the other hand, in *Rakhudu* the Botswana Court of Appeal was dealing with a fixed-term contract of employment. Unfortunately, in adopting the statements from the South African cases, the Court of Appeal overlooked the need to tailor-make the statements for the particular perspective of a fixed-term contract of employment. The result was that the statement of law made by the Court of Appeal was understood to mean, as was indeed so comprehended and applied by Kirby J in *First Sun*, that the common law 'allows termination of *any contract of employment, whether for a fixed term or otherwise* on reasonable notice without the giving of reasons, unless there are terms express or implied, to the contrary'.[47]

Contrary to the above, a line of authorities shows that at common law a contract of employment may only be prematurely terminated by agreement of the parties or upon breach. As already indicated, a fixed-term contract of employment will ordinarily run until it is terminated automatically upon the expiry of the agreed time frame. Gericke says of this type of contract that

> The fixed-term contract has been used as a legal instrument by parties who wish to engage in an employment relationship within the framework of predictability and freedom to control the duration of their contractual relationship. Consensus between both parties on the contents and the specific limitations of this kind of atypical employment contract is vital to avoid any misunderstanding and unreasonable expectations on the part of the employee. At the conclusion of the contract, the parties need to be *ad idem* that employment would start at the time of the conclusion of their contract, or at a specific date or event stipulated therein, and would inevitably terminate automatically at such time as the parties have agreed upon. It should have been the mutual intention of the parties that the purpose of this type of contract is linked to a limited duration, unlike that of the

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47 At 323D–E. (Author's emphasis.)

> traditional contract of indefinite employment, which is likely to continue for an indefinite period.[48]

Two features from the above are key in this discussion. These are that by the option of a fixed-term contract, one the employer and the employee seek to ensure 'predictability and freedom to control the duration of their contractual relationship' and to the parties' mind are *ad idem* as to when the contract will start and when it will terminate. The effect of these features is that the parties tie each other to a certain time frame, during which their relationship will remain in force and bind each of them.[49] From this perspective, it will appear evident that, all things being equal, and in the absence of a contractual term to the contrary, no party to a fixed-term contract may unilaterally terminate the agreement in the absence of breach, without incurring liability to the other party. This, it is submitted, is the position under common law. This view finds support on a number of authorities.

Rycroft and Jordaan[50] state that 'where the contract is for a definite or fixed period, it will continue until the end of that period and then lapses automatically, unless it is … terminated by agreement or summarily (again the latter only in the event of serious breach).' This opinion is shared by Grogan,[51] who, when discussing termination of the employment relationship, writes 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. An employer may terminate a fixed-term contract before the agreed date of termination only if the employee is

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48 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] PER 105/234, available at http://www.saflii.org/za/journals/PER/2011/4.pdf (last accessed 20 August 2013).

49 The position is best captured by Jafta AJA in *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at par 11G–I where he says of a fixed-term employment contract that: '[T]he employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter into a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materialises. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.

50 See n 13 above, at 54–55 and at 87.

51 See n 11 above, at 80.

> in material breach. Otherwise, premature termination constitutes repudiation by the employer, for which the employer may in principle claim damages …

In *Buthelezi*[52] the Labour Appeal Court of South Africa presided over a case where an employee who had been employed on a five-year fixed-term contract, was dismissed one year into the contract on the basis of the employer's operational requirements. In holding against the employer,[53] the court expressed itself thus

> The first question that arises in the present matter is whether the respondent was entitled to terminate the employment contract between it and the appellant when it cancelled it. There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When 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 in terms of that contract for the duration of the contract …. Under the common law there is no right to terminate a fixed-term contract of employment prematurely in the absence of a material breach of such contract by the other party.[54]

The above common law position was reaffirmed by the South African Labour Court in *Nkopane* v *Independent Electoral Commission,*[55] and is repeated by Grogan on another occasion where he writes that when parties to an employment relationship have agreed on a fixed period 'the contract

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52 *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).

53 The position in Botswana would however be different in this respect by reason of section 17(1) which provides that a fixed-term employment contract may '*lawfully'* be terminated earlier. Section 25 of the Employment Act recognises the employer's operational requirements (retrenchment or redundancy) as one of the lawful means of terminating *any* contract of employment. In *Silheshware Sethi v Botswana Savings Bank* Case No IC 76/98 the Industrial Court of Botswana dealt with the question of whether a contract of employment for a fixed period of time may be lawfully terminated, in the absence of breach by the employee, prior to the expiry of the agreed time frame. The court considered the legal principles and stated that a fixed-term contract of employment may lawfully be prematurely terminated under statutory law (*eg* under s 25 Employment Act for redundancy or s 26 Employment Act for serious misconduct; or, in case of insolvency of employers or the liquidation of the employer company in terms of the Insolvency Act and the Company's Act) and also at common law (through agreement, supervening impossibility or death of one of the parties).

54 *Buthelezi,* at par [9].

55 (2007) 28 ILJ 670 (LC), at pars [41]–[44].

will endure for the specified period, unless terminated earlier by agreement or by fundamental breach.'[56] It has further been indicated by Todd[57] that

> [A]n employer may only terminate a fixed-term employment contract of an employee, during the subsistence thereof, if he/she can show good cause for doing so or if the parties have initially agreed otherwise. If the employer, however, fails to show good cause for such termination, the termination will be regarded as unfair dismissal and the employer will then be in breach of the employment contract.

Hutchinson also reiterates that '[i]n terms of our common law, termination by an employer of a fixed-term contract before the term has expired can constitute a wrongful dismissal which would amount to a breach of contract and give rise to an action for wrongful dismissal.'[58]

In light of the above, it is submitted that the statement by the Court of Appeal in *Rakhudu* that the common law 'clearly allows the termination of an employment contract … on reasonable notice without the giving of reasons or the right of appeal, unless there are terms, express or implied, to the contrary', is misleading. It is the failure to qualify the statement, and indicate that it applies only to contracts of indefinite period and not to fixed term-contract, that particularly makes the statement misleading. The unqualified statement gives the reasonable impression that 'any' contract of employment may at common law be terminated without the need to proffer valid reason.

It is also interesting to note that the Court of Appeal in *Rakhudu* did not refer to an earlier decision by the same court, though differently constituted, in *Manson Holdings*.[59] In *Manson Holdings*, the court dealt with a case of an employee whose fixed-term contract of employment had been prematurely terminated by the employer on notice but without any disclosed ground. The parties' contract had included a term, clause 9, providing for the termination of the contract on ninety days' notice, and it was this provision that the

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56 Grogan *Riekert's basic employment law* (1993) at 21

57 Todd *Contracts of employment* (2001) 63–64, referred to in Timothy *Non-renewal of a fixed-term employment contract* (unpublished LLM thesis, (2006) Nelson Mandela Metropolitan University) at 5.

58 Hutchinson 'Premature termination of fixed-term and temporary employment contracts' 1998 *SALJ* 642–646, at 644.

59 In *Rakhudu*, the court was presided over by Zietsman, Moore & McNally JJ A whilst the sitting justices in *Manson Holdings* were Amissah JP, Steyn and Hoexter JJ A.

employer had simply invoked. The issue that was before the Court of Appeal was whether the employee was entitled to invoke the principle of fictional fulfilment, and thereby claim the payment of gratuity which was otherwise contractually due only when he had served the full term of the fixed-term contract. In deciding against the employee the court held that

> … if the parties to a contract of employment, agree in unqualified terms upon a fixed period of service, they are bound thereby; neither is lawfully entitled to terminate the contract before the lapse of such period. That, however, is not the situation in the instant case. From clause 9, whose terms have already been recited, it is clear that the contract specifically provides for a termination of the plaintiff's services within the two years period of employment fixed in clause 2 thereof.[60]

On the face of the above statement, it is submitted that the court in *Manson Holdings* correctly noted the position of the common law that a fixed-term contract may not be lawfully terminated prematurely at the will of either party thereto. In that case, the court upheld the premature termination of the fixed-term contract solely by reason of the application of clause 9. The effect of clause 9, it is submitted, was that the parties had introduced a proviso to the fixed tenure of the contract. This meant that whilst the parties agreed that the contract would run for two years, either party could, by giving a 90 day notice to the other, terminate the contract earlier than two years. This limitation did not include the obligation to provide reasons for the giving of the notice. The parties thus expressly agreed that the fact of giving the due notice was in itself sufficient to bring the contract to a premature end. Likewise, in the *James Molosankwe* case, the parties had agreed on three months' notice of termination. The proviso for early termination similarly did not encompass the obligation to provide reasons for the giving of the notice. In this regard, it will appear that the *James Molosankwe* case was decisive just on a proper construction of the contract of employment, without the need to resort to the common law.

CONCLUSION

The underlying difference between a contract of employment for a fixed period, and one for an unspecified period, is the fixing of the lifetime of the former. Whereas in the latter type, the contract will run indefinitely and may at common law be terminated at anytime on notice without the need for proving breach, the fixing of a time frame in the former type, carries with it

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[60] At 448D–E.

an implied term between the parties that all things remaining equal, ie if there is no breach, the contract will run the full term specified. Parties to a fixed-term contract of employment, therefore, plan their affairs on this understanding, hence at common law liability attaches to a party that terminates such contract without breach. The unqualified statement made by the Court of Appeal in *Rakhudu*, and as was applied by the High Court in *First Sun* is, therefore, not the correct position under common law regarding termination of fixed-term contracts of employment. One is reminded in this regard, of the legendary proclamation by Justice Robert H Jackson, who, when speaking of what he considered a liberal disposition by the US Supreme Court to issue orders of *certiorari*, much to the unconcealed displeasure of the lower courts, said '[t]here is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.'[61] It is hoped that the Court of Appeal of Botswana also embraces this golden truth, and will, when the opportunity next presents itself, seize the moment to set the record straight.[62]

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61 In *Brown v Allen* 344 US (1953) at 540.

62 The Court of Appeal is not bound by its previous decisions and may on reason depart from the ratio in *Rakhudu*. For a discussion on this point see Fombad 'Highest courts departing from precedents: the Botswana Court of Appeal in *Kweneng Land Board v Mpofu and Norong*' 2005 *UBLJ* 128.