

# Defining Fairness in Dismissals of Unauthorised Foreign Nationals

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## Abstract

It is trite that if a person's employment is prohibited by law it is not possible for such a person to perform his or her work lawfully. However, people are employed despite failing to comply with statutory requirements. One such class of persons consists of unauthorised foreign nationals. This arises in circumstances where they are employed without work permits or where their work permits expire during employment. The Labour Court in *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) has affirmed that the absence of a valid work permit does not invalidate the contract of employment, thereby endorsing the fact that unauthorised foreign nationals are regarded as employees. While the Labour Court has confirmed that unauthorised foreign nationals are subject to labour law protection, notably the right not to be unfairly dismissed, it is irrefutable that employers are permitted to dismiss such employees. However, these dismissals must be fair. Unfortunately, there is no clarity on what constitutes a fair dismissal in such circumstances. Although the CCMA relying on the decision of *Discovery Health* is substantially unanimous in finding that unauthorised foreign nationals have the right to utilise the unfair dismissal machinery sanctioned in the *Labour Relations Act* 66 of 1995, its decisions are plagued with inconsistency when it comes to determining fairness. Furthermore, no specific guidance has been forthcoming from the Labour Court. Considering the fact that migration to South Africa is rife, resulting in many foreign nationals being employed, this is an important aspect of the law. Therefore, this article explores the substantive and procedural fairness requirements of such dismissals. Having clarity of the legal requirements that apply will aid the fair treatment of foreign nationals who face dismissals due to the absence of valid work permits. This is significant, as South African labour law places a high premium on the fair dismissal of all employees. Apart from being legislated in the LRA, this right is also a constitutional imperative.

## Keywords

Unauthorised foreign nationals; unfair dismissal; dismissal on grounds of operational requirements; dismissal on grounds of incapacity; dismissal on grounds of misconduct; *Immigration Act*; substantive fairness; procedural fairness.

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## 1 Introduction

Migration has become a common phenomenon across the world<sup>1</sup> and South Africa is no exception.<sup>2</sup> Approximately 4.2 million foreign nationals live in South Africa, constituting about 7.2% of the country's population.<sup>3</sup> With the increase in the number of foreign nationals living in the country, there is likewise an uptake in the employment of foreign nationals. Despite the strife that has arisen due to increased competition for resources such as jobs, among others,<sup>4</sup> there is no bar to the employment of foreign nationals, as long as they are authorised to work in the country.<sup>5</sup>

The challenge arises when foreign nationals are employed without possessing the necessary work permits.<sup>6</sup> In other instances, permits expire during the course of employment.<sup>7</sup> The Labour Court ("LC") in *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) (hereafter *Discovery Health*) has affirmed that the absence of a valid work permit does not invalidate the contract of employment with the foreign national, thereby endorsing the fact that unauthorised foreign nationals are

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<sup>1</sup> Norton 2010 *ILJ* 1543.

<sup>2</sup> Norton 2010 *ILJ* 1521.

<sup>3</sup> Migration Data Portal 2019 [https://migrationdataportal.org/?i=stock\\_perc\\_&t=2019&cm49=710](https://migrationdataportal.org/?i=stock_perc_&t=2019&cm49=710). Also see Worldometers 2019 <https://www.worldometers.info/world-population/south-africa-population/>, which provides that South Africa's population is standing at just over 58 million.

<sup>4</sup> Heleta 2019 <https://africasacountry.com/2018/10/how-many-immigrants-live-in-south-africa>; and Newham 2019 <https://www.dailymaverick.co.za/article/2019-09-05-south-africas-problems-are-not-caused-by-foreigners>. These articles explain the violence that was perpetrated against foreign nationals in 2008 and in early 2019.

<sup>5</sup> Section 19 of the *Immigration Act* 13 of 2002 (hereafter the *Immigration Act*) makes provision for the granting of work permits to foreigners if certain requirements are met. Also see Bosch 2006 *ILJ* 1347.

<sup>6</sup> See the following cases: *Mandah v Augusta Bay Guest House CC* (CCMA) (unreported) case number WEGE 1090-12 of 13 June 2012 (hereafter *Mandah*); and *Joel v Metal and Engineering Industries Bargaining* (LC) (unreported) case number JR 318/15 of 24 November 2017 (hereafter *Joel*).

<sup>7</sup> See the following cases: *Turzyniecka v National Health Laboratory Services* (CCMA) (unreported) case number KNDB8399-15 of 21 June 2016; *Pennell v Delevere Investments South Africa (Pty) Ltd* (LC) (unreported) case number C1009/2014 & C330/2015 of 21 April 2017 (hereafter *Pennell*); and *Chivaka v Leisure Hotels (Pty) Ltd* (CCMA) (unreported) case number WECT12852-13 of 16 September 2013 (hereafter *Chivaka*).

regarded as employees.<sup>8</sup> However, it is trite that if a person's employment is prohibited by law it is not possible for such a person to perform his/her work lawfully.<sup>9</sup> Thus, the employer is entitled to dismiss the employee,<sup>10</sup> provided that the dismissal is fair.<sup>11</sup> Unfortunately, there is a lack of clarity on what constitutes a fair dismissal under such circumstances. While the Commission for Conciliation Mediation and Arbitration (the "CCMA") relying on the decision of *Discovery Health* is substantially unanimous in finding that unauthorised foreign nationals are employees,<sup>12</sup> there is no unanimity on what constitutes a fair dismissal.<sup>13</sup> Furthermore, no specific guidance has been forthcoming from the LC. Therefore, this article explores the substantive and procedural fairness requirements of such dismissals. The article proceeds by discussing the legal prohibition on the employment of foreign nationals. Thereafter, the principles laid down in *Discovery Health* are briefly set out. The article then explores the fairness requirements set out in the *LRA* and analyses judgments and awards

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<sup>8</sup> *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) (hereafter *Discovery Health*) para 54. The right of an individual employed without a valid work permit to enforce any claim that he/she may have in terms of any statute or employment relationship against his or her employer is provided for in the *Employment Services Act* 4 of 2014 (hereafter the *ESA*).

<sup>9</sup> Du Toit *et al Labour Relations Law* 472. See further *Armaments Corporation of South Africa (SOC) Ltd v Commission for Conciliation, Mediation and Arbitration* 2016 5 BLLR 461 (LC) (hereafter *Armaments Corporation of South Africa*) para 21. In *Discovery Health* para 13 the following statement made by the commissioner during the arbitration was quoted by the LC: "While it seems to me to be obvious that an employer cannot be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him that does not mean that the protections afforded to employees by the Act cannot apply to such foreigners prior to decisions being made in this regard."

<sup>10</sup> Du Toit *et al Labour Relations Law* 472. In *City of Johannesburg v Independent Municipal & Allied Trade Union* 2019 40 ILJ 1191 (LAC) (hereafter *City of Johannesburg*) paras 13 and 42. Two ambulance officers dismissed for neglect of a patient, which led to the patient's death, were reinstated by an arbitrator. However, at the time of reinstatement their registration as ambulance officers with the Health Professions Council was suspended. As they were not legally permitted to work due to the suspension of their registration, the employer refused to reinstate them. The LAC found the employer's refusal to be justified due to the impossibility of performance of the reinstatement.

<sup>11</sup> Section 185(a) of the *Labour Relations Act* 66 of 1995 (hereafter the *LRA*) states that every employee has the right not to be unfairly dismissed.

<sup>12</sup> See cases such as *Mandah* para 19; *Chivaka* para 22; *Peters v Compendium Insurance Group (Pty) Ltd* (CCMA) (unreported) case number KNDB3796-15 of 7 May 2015 (hereafter *Peters*) para 6.11; and *Masuta v Lake Smith & Partners* (CCMA) (unreported) case number KNDB17003-17 of 18 March 2018 (hereafter *Masuta*) para 20. However, it is evident from cases such as *Joel* paras 1, and 11-12 that there are still commissioners who find that termination of employment due to the absence of a work permit does not constitute a dismissal.

<sup>13</sup> See the discussion in 5.1-5.2 below.

dealing with the dismissal of unauthorised foreign nationals. Drawing from this, findings and conclusions are made.

## 2 The legal prohibition

The *Immigration Act* regulates the admission of foreigners into the country.<sup>14</sup> One of the many aspects regulated by the Act is the employment of foreigners. Section 38 states that:

- (1) No person shall employ -
  - (a) an illegal foreigner;
  - (b) a foreigner whose status does not authorise him or her to be employed by such person; or
  - (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

An obligation is placed on employers not to employ illegal foreigners and to establish the status of or citizenship of those employed.<sup>15</sup> If an employer fails to comply with its obligations, the employer shall be guilty of an offence and on conviction liable to a fine or to imprisonment.<sup>16</sup> The ESA gives effect to section 38 of the *Immigration Act* by prohibiting the employment of a foreign national who does not possess a valid work permit.<sup>17</sup>

It is clear from the above that the employer has a duty to verify that a foreign national who it intends to employ has the necessary authority to work in the country. Where foreign nationals are employed, employers are under an obligation to monitor the expiry of permits that authorise work in the country. Therefore, the employer must ensure that the foreign national has the necessary authority to work in the country at all times. If an employer takes a foreign national into employment without his/her having the necessary authorisation,<sup>18</sup> or keeps the employee after becoming aware of an expired or invalid work permit, the employer will be in contravention of the *Immigration Act* and the ESA.

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<sup>14</sup> Preamble to the *Immigration Act*.

<sup>15</sup> Section 38(2) of the *Immigration Act*.

<sup>16</sup> Section 49(3) of the *Immigration Act*.

<sup>17</sup> Section 8 of the ESA.

<sup>18</sup> As explained in s 8 of the ESA "an employer may not employ a foreign national within the territory of the Republic of South Africa prior to such foreign national producing an applicable and valid work permit, issued in terms of the *Immigration Act*".

To prevent such a situation from arising, it is important that employers understand what is expected of them. Having clarity of the legal requirements that apply will ensure the fair treatment of foreign nationals who face dismissal due to the absence of valid work permits. This is significant, as South African labour law places a high premium on the fair dismissal of all employees. This right apart from being legislated in the LRA is also a constitutional imperative.<sup>19</sup>

### **3 Established workplace rights of unauthorised foreign nationals**

The rights of a foreign national who did not possess a work permit authorising him to work in the country came under the spotlight in the LC decision of *Discovery Health*. Here, the services of an Argentinian national (Mr Lanzetta), who was employed as a call centre agent by Discovery Health on 1 May 2005, was terminated on 4 January 2006 as his work visa had expired.<sup>20</sup> The termination was effected through the issuance of a letter to the employee.<sup>21</sup>

Following receipt of the letter, Mr Lanzetta lodged an unfair dismissal dispute at the CCMA.<sup>22</sup> The employer contested the CCMA's jurisdiction to hear the matter contending that the applicant was not an employee in terms of the LRA, as the expiration of his work visa invalidated his contract of employment. It argued that in the absence of a valid contract of employment, the applicant did not qualify as an employee and was therefore not entitled to the protections provided for in the LRA.<sup>23</sup>

The CCMA found that it had jurisdiction to consider the dispute.<sup>24</sup> While the CCMA accepted the respondent's argument that the contract was invalid, it found that there was still an employment relationship between the parties. Essentially, it decided that an employment relationship can exist in the absence of a contract of employment as such a relationship "transcends contracts".<sup>25</sup>

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<sup>19</sup> Section 23 of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).

<sup>20</sup> *Discovery Health* paras 2 and 5.

<sup>21</sup> *Discovery Health* para 10.

<sup>22</sup> *Discovery Health* para 11.

<sup>23</sup> *Discovery Health* para 3.

<sup>24</sup> *Discovery Health* para 14.

<sup>25</sup> *Discovery Health* para 13.

On review, the LC focused on two aspects.<sup>26</sup> The first was whether the contract of employment was indeed invalidated by the absence of a valid work permit. The second was whether the applicant could be considered an employee in the event that the contract of employment was invalid.<sup>27</sup>

In respect of the first aspect, the court came to the conclusion that the contract of employment was valid.<sup>28</sup> This was based on the fact that the right to fair labour practices is a fundamental right.<sup>29</sup> Therefore, the interpretation of legislation that impacts on a fundamental right must be done in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>30</sup> The court explained that section 38 of the *Immigration Act* must be interpreted in a manner that does not limit the constitutional right to fair labour practices.<sup>31</sup> The court found that awarding section 38(1) of the *Immigration Act* an interpretation that invalidates a contract of employment where a foreign national does not have the necessary permit to be employed could result in such a person's being severely disadvantaged.<sup>32</sup> The court concluded by saying that:

... far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s 23 (1) of the Constitution which is to give effect, through the medium of labour legislation, to the right to fair labour practices.<sup>33</sup>

The court went on to consider what the position would be in the event that the contract of employment was invalid. It stated that the definition of employee in the LRA is not rooted in a contract of employment.<sup>34</sup> Considering this definition, the court explained that the enquiry into

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<sup>26</sup> *Discovery Health* para 19.

<sup>27</sup> *Discovery Health* para 19. Also see Govindjee and Van der Walt 2008 *Obiter* 543.

<sup>28</sup> *Discovery Health* para 34.

<sup>29</sup> *Discovery Health* para 29.

<sup>30</sup> Section 39(2) of the Constitution.

<sup>31</sup> *Discovery Health* para 30. This principle was endorsed by the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) 105. In interpreting s 197 of the LRA the court emphasised that the provisions of the LRA must be construed in a manner that gives effect to s 23 of the Constitution. It explained that when constitutional rights are given effect to by legislation, such legislation is subject to constitutional scrutiny to ensure that it is consistent with the Constitution.

<sup>32</sup> In *Discovery Health* para 30 it was stated that "an unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if *Discovery Health's* contention is correct, she would be without a remedy in terms of labour legislation."

<sup>33</sup> *Discovery Health* para 31.

<sup>34</sup> *Discovery Health* para 49.

whether Mr Lanzetta is an employee or not is based on two questions. Firstly, did he work for Discovery Health and secondly, was he entitled to receive remuneration. As the answers to both these questions were in the affirmative, the court reasoned that even if the contract was invalid, Mr Lanzetta qualified as an employee.<sup>35</sup>

The LC decision, which has been followed in subsequent cases,<sup>36</sup> undoubtedly provides valuable legal protection to foreign nationals.<sup>37</sup> It cements the fact that foreign nationals, despite not having valid work permits, are considered to be employees and are entitled to the legal protection against unfair dismissal sanctioned in the LRA.

The broadening of protection against unfair dismissal is also apparent from the decision of *Kylie v CCMA* 2010 10 BCLR 1029 (LAC) (hereafter *Kylie*). Here, the Labour Appeal Court ("LAC") held that the CCMA has jurisdiction to consider an unfair dismissal claim lodged by a sex worker.<sup>38</sup> It explained that the fact that illegal work is being performed does not detract from that individual's constitutional right to fair labour practices as enshrined in section 23, and the concomitant right not to be unfairly dismissed as operationalised in the LRA.<sup>39</sup>

While *Discovery Health* provides protection to individuals who perform work illegally, *Kylie* extends this protection to employees performing illegal work.

It is very clear that foreign nationals who work without valid work permits are recognised as employees and that dispute resolution bodies have the jurisdiction to consider unfair dismissal disputes lodged by them. However, what is unclear is what constitutes a fair dismissal under such

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<sup>35</sup> *Discovery Health* para 50. See further Le Roux 2009 ILJ 55.

<sup>36</sup> *Southern Sun Hotel Interest (Pty) Ltd v CCMA* (LC) (unreported) case number C255/09; C362/09 of 21 June 2011 (hereafter *Southern Sun*) paras 16 and 27 explains that the *Discovery Health* decision has clarified that an illegal foreigner is an employee and is protected in terms of the LRA. See further *Ndikumdavy v Valkenberg Hospital* 2012 8 BLLR 795 (LC).

<sup>37</sup> Norton 2009 ILJ 68.

<sup>38</sup> *Kylie v CCMA* 2010 10 BCLR 1029 (LAC) (hereafter *Kylie*) para 44.

<sup>39</sup> *Kylie* paras 54-55. The LAC at para 39 considered the finding in *S v Jordan* (*Sex Workers Education and Advocacy Task Force as Amici Curiae*) 2002 6 SA 642 (CC) where it was found that the criminalisation of sex work in the *Sexual Offences Act* 23 of 1957 is constitutional. However, it concluded that this does not deny a sex worker the protections provided for in the Constitution.

circumstances. This was not dealt with in *Discovery Health*<sup>40</sup> and is the primary question sought to be addressed in this article.

#### 4 The requirements of a fair dismissal

Section 185 of the LRA states that every employee has the right not to be unfairly dismissed. Section 188 gives substance to this right by prescribing that a dismissal will be unfair if the employer cannot prove that the dismissal was effected for a fair reason and in accordance with a fair procedure.<sup>41</sup> Section 188 goes further to specify that the LRA recognises only three reasons for a fair dismissal. These are dismissals based on the conduct of the employee, the capacity of the employee and the operational requirements of the employer.<sup>42</sup> In addition, section 189 of the LRA provides more detail on the fairness requirements that apply to dismissals based on operational requirements.

The fairness imperatives contained in the LRA are not limited to sections 188 and 189. Firstly, the Code of Good Practice: Dismissal provides further particulars regarding the standards of fairness relevant to conduct and capacity dismissals.<sup>43</sup> The LRA requires that any person considering whether a dismissal has been effected in accordance with the standards of substantive and procedural fairness must take into account the Code of Good Practice: Dismissal.<sup>44</sup> Secondly, the Code of Good Practice: Operational Requirements addresses the obligations of employers in effecting these dismissals.<sup>45</sup>

It is clear from a reading of the LRA that there are two aspects that must be assessed in considering whether a dismissal is fair. The first is substantive fairness, while the second is procedural fairness. As stated by Grogan,<sup>46</sup> substantive and procedural fairness are independent requirements for a fair dismissal. Thus, in deciding whether an employee has been fairly dismissed, the decision maker must evaluate whether the employer has upheld the standards of fairness, both substantive and procedural, as imposed by section 188 of the LRA.

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<sup>40</sup> *Discovery Health* paras 34 and 55.

<sup>41</sup> Section 188(1)(a-b) of the LRA.

<sup>42</sup> Section 188(1)(a) of the LRA.

<sup>43</sup> Schedule 8: Code of Good Practice: Dismissal as contained in the LRA.

<sup>44</sup> Section 188(2) of the LRA.

<sup>45</sup> Code of Good Practice: Dismissal based on operational requirements as contained in the LRA.

<sup>46</sup> Grogan *Dismissal* 119.

## 5 Dismissal of unauthorised foreign nationals: an evaluation of case law

### 5.1 Substantive fairness

Notwithstanding the provisions of the LRA, which sets out the three reasons for which a dismissal will be considered fair, there is a tendency for employers to simply terminate employment when employees do not have valid work permits. In other words, the dismissal is not based on any of the three recognised grounds. This is exactly what transpired in the cases of *Mandah*, *Peters*, and *Chitote v Styrocup (Pty) Ltd* case number WECT461-18 of 29 March 2018 (CCMA) (hereafter *Chitote*).

In other cases, the employer has attempted to classify the termination on grounds of either misconduct or incapacity. In *Southern Sun* a Seychelles national was subjected to a disciplinary hearing and subsequently dismissed for being unable to lawfully tender her services as her study permit had expired and she had been unable to obtain a subsequent permit.<sup>47</sup> In *Chivaka* a Zimbabwean national employed as a storeman was dismissed following a disciplinary hearing for failing to produce a valid work permit after his original permit expired.<sup>48</sup> Contrarily, in *Amankwah v Menzies Aviation (SA) (Pty) Ltd* case number GAJB13296-17 of 30 October 2017 (CCMA) (hereafter *Amankwah*) a Ghanaian national who was unable to acquire a valid work permit<sup>49</sup> was subjected to a hearing on the basis of incapacity due to his inability to work without a work permit.<sup>50</sup> He was subsequently dismissed for incapacity.<sup>51</sup>

The CCMA has been rather inconsistent in determining substantive fairness in such dismissals. In cases like *Mandah*, *Peters*, and *Chitote* the dismissals were found to be fair, despite the fact that they were not based on any of the permissible grounds.<sup>52</sup> In *Manda*, although the commissioner discussed the three recognised grounds of dismissal provided for in the LRA, the employer's failure to rely on any of these grounds did not affect

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<sup>47</sup> *Southern Sun* paras 4-5.

<sup>48</sup> *Chivaka* para 7.

<sup>49</sup> *Amankwah v Menzies Aviation (SA) (Pty) Ltd* (CCMA) (unreported) case number GAJB13296-17 of 30 October 2017 (hereafter *Amankwah*) paras 5-6.

<sup>50</sup> *Amankwah* para 5.

<sup>51</sup> *Amankwah* para 2.

<sup>52</sup> *Mandah* para 23; *Peters* para 6.16; and *Chitote v Styrocup (Pty) Ltd* (CCMA) (unreported) case number WECT461-18 of 29 March 2018 (hereafter *Chitote*) para 22.

the substantive fairness of the dismissal.<sup>53</sup> On the other hand, in *Peters* and *Chitote* the commissioners did not make mention of these three recognised grounds. In *Peters* no reason was given for the finding of substantive fairness, whereas in *Chitote* substantive fairness was based on the fact that the employee failed to obtain his permit despite being given a sufficient opportunity to do so.<sup>54</sup>

In *Masuta* a contrary approach was followed. Here, as in the above-mentioned cases, the dismissal was based on the fact that the employee did not have a work permit.<sup>55</sup> However, in this case the dismissal was found to be substantively unfair by virtue of the fact that the employer had failed to dismiss the employee for one of the reasons outlined in the LRA.<sup>56</sup> This was despite the fact that there was adequate evidence to show that the employer had acted reasonably and had provided the employee with a sufficient opportunity to obtain his work permit.<sup>57</sup>

Another area of inconsistency arising from the decisions of the CCMA is the discord in the categorisation of such dismissals in cases where the recognised grounds of dismissal have been taken into account. In *Chivaka*, although the employee's failure to obtain a valid work permit was dealt with as an act of misconduct by the employer,<sup>58</sup> the commissioner found that the correct categorisation was a dismissal based on operational requirements.<sup>59</sup> In *Masuta* the commissioner found that it was difficult to classify the employee's failure to obtain a valid work permit as an act of misconduct.<sup>60</sup> Instead, the commissioner found that the situation could have been dealt with as incapacity or as operational requirements.<sup>61</sup> Despite *Chivaka* and *Masuta* supporting the fact that a dismissal under these circumstances could be for operational requirements, this was ruled out in *Warikandwa v Westpack Lifestyle Vaal cc* case number GAVL5026-17 of 29 January 2018 (CCMA) (hereafter *Warikandwa*). Here the commissioner found that the definition of operational requirements in section 213 of the LRA does not cater for dismissals of such a nature.<sup>62</sup> In

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<sup>53</sup> *Mandah* paras 18 and 21.

<sup>54</sup> *Chitote* paras 21-22.

<sup>55</sup> *Masuta* para 41.

<sup>56</sup> *Masuta* para 42.

<sup>57</sup> *Masuta* paras 34 and 36.

<sup>58</sup> *Chivaka* para 7.

<sup>59</sup> *Chivaka* para 24.

<sup>60</sup> *Masuta* para 39.

<sup>61</sup> *Masuta* para 40.

<sup>62</sup> *Warikandwa v Westpack Lifestyle Vaal cc* (CCMA) (unreported) case number GAVL5026-17 of 29 January 2018 (hereafter *Warikandwa*) para 11.

*Amankwah* the dismissal of the employee on grounds of incapacity was found to be fair.<sup>63</sup>

It is apparent that conflicting approaches have been followed by the CCMA. There is also no direct guidance from the LC.<sup>64</sup> The only decision that provides some assistance is *Joel*. Here the employee was employed without a work permit for about five years. When the issue of a work permit was raised by the employer, the employee was given merely three days to acquire the work permit. He was refused permission to return to work when he was unable to obtain the permit despite his efforts to do so, and the employer had refused to assist him with documentation.<sup>65</sup> He was told never to come back.<sup>66</sup> The LC found that the dismissal was both substantively and procedurally unfair.<sup>67</sup> However, the court did not in any detail discuss the requirements for fairness. It stated only that the reason for dismissal was the employee's failure to secure a work permit.<sup>68</sup> Although the LC did not discuss the three grounds of dismissal recognised in the LRA, it declared it unfair to dismiss an employee on the grounds that they do not possess a work permit. This implies that one of the recognised reasons for dismissal prescribed in the *LRA* should have been utilised.

## 5.2 Procedural fairness

In *Mandah*, even though the dismissal was not effected on the grounds of misconduct or on any of the permissible grounds, the dismissal was held to be procedurally unfair as the employer had made no attempt to convene a disciplinary hearing.<sup>69</sup> Similarly in *Peters*, even though the dismissal was substantively fair despite it not being on any of the permissible grounds, the commissioner frowned upon the fact that the termination had been

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<sup>63</sup> *Amankwah* paras 2, 5 and 31.

<sup>64</sup> The LC in *Southern Sun* paras 6 and 17 was not required to pronounce on the fairness of the dismissal. Instead, it had to decide whether the employee had been subjected to an unfair labour practice on the grounds of suspension for the months that she had not been allowed to work. In *Joel* para 1 the main question to be determined by the LC was whether the bargaining council commissioner had been correct in finding that the applicant had not been dismissed as he had rendered himself unemployable as a result of his failure to secure a work permit. In *Pennell* paras 3.8 and 32 it was not the dismissal of the employee that was before the court but rather the outstanding payment of certain monies allegedly owed to the employee at the time of his dismissal.

<sup>65</sup> *Joel* para 11.

<sup>66</sup> *Joel* para 11.

<sup>67</sup> *Joel* para 16.

<sup>68</sup> *Joel* para 14.

<sup>69</sup> *Mandah* para 24.

effected without holding any form of hearing.<sup>70</sup> Therefore, the dismissal was found to be procedurally unfair.<sup>71</sup> The dismissal in *Masuta* was likewise found to be procedurally unfair as a proper procedure (presumably in line with one of the permissible grounds) had not been followed.<sup>72</sup> Procedural unfairness was also the result in *Warikandwa*, as the employer had failed to follow the procedure set out in item 4 of the Code of Good Practice: Dismissal.<sup>73</sup> This item details the procedure that must be applied in dismissals for misconduct. It is perplexing that the commissioner faulted the employer for failing to follow this procedure, yet it found that the dismissal did not relate to the applicant's conduct.<sup>74</sup>

The holding of a disciplinary hearing in *Chivaka* was held to be procedurally fair even though the dismissal was found to be for operational requirements and not for misconduct. Fairness was based on the fact that the employee had been afforded an opportunity to state his case.<sup>75</sup> The commissioner in *Amankwah* did not discuss what constitutes procedural fairness. However, he accepted that the dismissal of the employee on the grounds of incapacity was both substantively and procedurally fair. It is presumed that the finding of procedural fairness was based on the fact that it was common cause that a hearing had been held and the employee confirmed that he had been given an opportunity to state his case.<sup>76</sup>

In *Joel* the court did not specifically discuss its reasons for finding procedural unfairness. However, two important aspects were highlighted. The first, was the refusal of the employer to assist the employee with documentation that could have aided him in obtaining his work permit.<sup>77</sup> The second was the employer's stance of telling the employee not to come back after giving him only three days to secure the permit.<sup>78</sup> Factors such as these contributed to the LC's finding of unfairness.

## 6 Providing the panacea

It is apparent from the above discussion that there is no consistent stance taken in addressing such dismissals. Furthermore, these dismissals are

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<sup>70</sup> *Peters* paras 6.13-6.14.

<sup>71</sup> *Peters* para 6.16.

<sup>72</sup> *Masuta* para 42.

<sup>73</sup> *Warikandwa* para 12.

<sup>74</sup> *Warikandwa* para 11.

<sup>75</sup> *Chivaka* para 28.

<sup>76</sup> *Amankwah* para 21.

<sup>77</sup> *Joel* para 11.

<sup>78</sup> *Joel* para 11.

not reliably defined within the permissible grounds of a fair dismissal. In order to determine how the dismissal of an unauthorised foreign national should be dealt with, it is important to consider the ambit of the existing three grounds of dismissal.

### **6.1 Dismissals for conduct**

Dismissals for conduct arise where there is a contravention of a workplace rule or standard.<sup>79</sup> There are a number of factors which must be considered by adjudicators in determining whether the misconduct that gave rise to the dismissal can be substantiated as a fair reason for the dismissal. Firstly, it must be considered whether the employee contravened a rule or standard regulating conduct in the workplace.<sup>80</sup> Secondly, where a rule or standard was contravened, the adjudicator has to consider whether the rule or standard was valid or reasonable;<sup>81</sup> whether the employee was aware of the rule or standard;<sup>82</sup> whether the rule or standard was consistently applied by the employer to other employees;<sup>83</sup> and whether the dismissal of the employee for contravening the rule or standard was an appropriate sanction.<sup>84</sup>

Turning to procedural fairness, the most fundamental element is that the employee must be allowed the opportunity to state a case in response to the misconduct allegations.<sup>85</sup> As stated in *Avril Elizabeth Home for the Handicapped v CCMA* 2006 27 ILJ 1644 (LC) (hereafter *Avril Elizabeth Home*) the Code of Good Practice requires that there must be dialogue and an opportunity for reflection before a decision to dismiss is taken.<sup>86</sup>

Dismissals for conduct commonly occur in cases of theft, fraud, assault, gross insubordination, sexual harassment, and racism, among others.<sup>87</sup>

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<sup>79</sup> Grogan *Dismissal* 119.

<sup>80</sup> Item 7(a) of the Code of Good Practice: Dismissal in the LRA. See further Van Niekerk and Smit *Law@work* 304; and Du Toit *et al Labour Relations Law* 444.

<sup>81</sup> Item 7(b)(i) of the Code of Good Practice: Dismissal in the LRA. See further Van Niekerk and Smit *Law@work* 304.

<sup>82</sup> Item 7(b)(ii) of the Code of Good Practice: Dismissal in the LRA. See further Van Niekerk and Smit *Law@work* 304.

<sup>83</sup> Item 7(b)(iii) of the Code of Good Practice: Dismissal in the LRA. See further Van Niekerk and Smit *Law@work* 305.

<sup>84</sup> Item 7(b)(iv) of the Code of Good Practice: Dismissal in the LRA. See further Du Toit *et al Labour Relations Law* 445.

<sup>85</sup> Item 4(1) Code of Good Practice: Dismissal in the LRA. See further Du Toit *et al Labour Relations Law* 456.

<sup>86</sup> *Avril Elizabeth Home for the Handicapped v CCMA* 2006 27 ILJ 1644 (LC) (hereafter *Avril Elizabeth Home*) 1654A.

<sup>87</sup> See for example *Edcon Ltd v Pilemer* 2010 1 BLLR 1 (SCA); *Stokwe v Member of the Executive Council: Department of Education Eastern Cape* 2019 JOL 40796

They have essentially to do with the bad conduct or behaviour of the employee, which is why they are referred to as fault dismissals.<sup>88</sup> In other words, it is the wilful conduct of the employee that gives rise to the dismissal.

Possessing a valid work permit is a requirement of employment and it is the duty of the employer to ensure that employees comply with this and other requirements during the recruitment process. If an employer hires an employee who does not have a valid work permit, the employee cannot be said to be misbehaving or misconducting him/herself. In instances where an employee's permit expires during the course of employment and he/she is unable to renew the permit, this similarly does not constitute misconduct. Therefore, disciplinary proceedings will be inappropriate. The only circumstances in which it will be fair to charge an employee with misconduct is if the employee produces a fraudulent work permit. In such a case, the employee can be dismissed for dishonest or fraudulent conduct.

## **6.2 Dismissals for Incapacity**

Dismissals for capacity arise due to an employee's inability to perform his/her job.<sup>89</sup> Although the Code of Good Practice: Dismissal only discusses incapacity relating to ill health or injury and poor performance,<sup>90</sup> it is trite that there are other situations that can lead to incapacity.<sup>91</sup> The LAC in *Samancor Tubatse Ferrochrome v MEIBC* 2010 8 BLLR 824 (LAC) (hereafter *Samancor*) explained that incapacity extends beyond ill health and poor work performance.<sup>92</sup> Therefore, it found that the dismissal of an

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(CC); *TMT Services & Supplies (Pty) Ltd v CCMA* 2019 40 ILJ 150 (LAC); *Campbell Scientific Africa (Pty) Ltd v Simmers* 2016 37 ILJ 116 (LAC); *South African Revenue Service v CCMA* 2017 1 BLLR 8 (CC); and *City of Cape Town v Freddie* 2016 37 ILJ 1364 (LAC).

<sup>88</sup> As explained by Grogan *Dismissal* 213 "the distinguishing characteristic of workplace misconduct is that the employees concerned were responsible for their actions. In this respect, dismissals for misconduct are distinguishable from dismissals for incapacity or dismissals for the operational requirements of the employer, in which the employee was not in any sense at fault.

<sup>89</sup> Grogan *Dismissal* 468 states "that the code deals only with incapacity arising from ill health or injury does not necessarily mean that inability to perform for other reasons cannot be brought under this head."

<sup>90</sup> Item 9-11 Code of Good Practice: Dismissal in the LRA.

<sup>91</sup> Van Niekerk and Smit *Law@work* 331 discusses forms of incapacity other than ill health and poor performance. See further Du Toit *et al Labour Relations Law* 462, 472. *Solidarity v Armaments Corporation of SA (SOC) Ltd* 2019 40 ILJ 535 (LAC) (hereafter *Solidarity*) para 24 is also of relevance.

<sup>92</sup> *Samancor Tubatse Ferrochrome v MEIBC* 2010 8 BLLR 824 (LAC) (hereafter *Samancor*) para 10.

employee as a result of his incarceration constituted a dismissal for incapacity as he was unable to render performance.<sup>93</sup>

In the recent decision of *Solidarity*, the LAC agreed that the dismissal of an employee for being refused security clearance, which clearance was a requirement of employment, falls within the ambit of a dismissal for incapacity.<sup>94</sup>

Dismissals under such circumstances are regarded as dismissals for the supervening impossibility of performance.<sup>95</sup> This arises when an employee is unable to perform the job that he/she has been employed to do. One of the causes of such impossibility is the non-fulfilment of a legal requirement needed to perform the job, such as the failure to obtain a security clearance. Similarly, in *City of Johannesburg* the suspended registration of ambulance officers with the Health Professions Council resulted in their impossibility of performance, as it is a requirement for ambulance officers, like other health professionals, to be registered.<sup>96</sup> The need to possess a work permit would fall into a similar category.

In *Samancor* the LAC stated that the employee should have been given a fair opportunity to present his case prior to the decision to dismiss being taken.<sup>97</sup> The mere provision of a letter informing him of the decision and the reasons for the decision was insufficient and did not comply with the requirement of procedural fairness.<sup>98</sup> Similarly, in *Armaments Corporation of South Africa* the issuance of a termination letter to the employee for failing to obtain security clearance<sup>99</sup> was found to be procedurally unfair.<sup>100</sup>

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<sup>93</sup> *Samancor* paras 13-14. The SCA in *National Union of Mineworkers v Samancor Ltd* 2011 32 ILJ 1618 (SCA) paras 10, 12 and 13 despite faulting the review test employed by the LAC, agreed that incapacity can include imprisonment. See also Lechwano 2013 ILJ 38 and 46.

<sup>94</sup> *Solidarity* para 28. See also *Armaments Corporation of South Africa* paras 6, 12, 13 and 29.

<sup>95</sup> Van Niekerk and Smit *Law@work* 254 explains that the principle of the supervening impossibility of performance applies to employees who are absent from work for long periods due to detention or imprisonment. See further Du Toit *et al Labour Relations Law* 461-462.

<sup>96</sup> *City of Johannesburg* paras 13 and 42.

<sup>97</sup> *Samancor* para 16.

<sup>98</sup> *Samancor* paras 16-17.

<sup>99</sup> *Armaments Corporation of South Africa* para 13.

<sup>100</sup> *Armaments Corporation of South Africa* para 45.

The common thread in respect of dismissals for incapacity, regardless of the type of incapacity, is that an employee must be given an opportunity to make representations prior to a decision to dismiss being taken.<sup>101</sup>

### **6.3 Dismissals for operational requirements**

In understanding dismissals for operational requirements, the starting point is to consider the definition of this concept. Section 213 of the LRA defines operational requirements as those based on the economic, technological, structural or similar needs of an employer.<sup>102</sup> A fair reason for dismissal on the grounds of operational requirements is one that falls within the ambit of this definition. Item 1 of the Code of Good Practice: Operational Requirements seeks to give further context to this definition. The Code explains that economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to the introduction of new technology resulting in the redundancy of existing jobs, while structural reasons lead to the redundancy of posts following the restructuring of the enterprise.

In a practical context, operational requirements arise in a situation where a company experiencing financial losses may decide to introduce new technology and restructure some of its services in order to become economically viable or improve such viability.<sup>103</sup> As explained by Grogan,<sup>104</sup> economic constraints can be experienced due to a drop-in demand for products. This essentially leads to less production and therefore the need for fewer workers.

Notwithstanding the above, operational requirement dismissals were found to be warranted in circumstances that are not typical of such dismissals. In *SA Transport & Allied Workers Union v Khulani Fidelity Security Services*

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<sup>101</sup> The Code of Good Practice: Dismissal items 10(1) and (2) in the LRA refers to the procedure that must be followed in cases of incapacity for ill health/injury and poor performance. An important procedural requirement that arises in the case of ill health and injury is an investigation into all possible alternatives to dismissal. Furthermore, the employee must be allowed an opportunity to state a case. As per items 9(b)(i)(ii) and (iii) of the Code of Good Practice: Dismissal, in instances of poor performance, the employer must consider whether the employee was aware of the performance standard that he/she was unable to meet, whether the employee was given a fair opportunity to meet the performance standard and whether dismissal was an appropriate sanction. It is commonplace that before dismissing an employee for poor work performance, the employee must be given an opportunity to state a case.

<sup>102</sup> See further Du Toit *et al Labour Relations Law* 473.

<sup>103</sup> Le Roux *Retrenchment Law* 50. See further *First National Bank v CCMA* 2017 38 ILJ 2545 (LC) (hereafter *First National Bank*) para 79.

<sup>104</sup> Grogan *Dismissal* 481.

(Pty) Ltd 2011 32 ILJ 130 (LAC) (hereafter *Khulani*) employees were dismissed for operational requirements as a result of failing a polygraph test, the passing of which was a requirement for continued employment.<sup>105</sup> Due to the fact that the test was designed to ensure that people of integrity were employed as baggage handlers in order to minimise the risk of theft, these dismissals were linked to the operational requirements of the business.<sup>106</sup> In *Tiger Food Brands v Levy* 2007 28 ILJ 1827 (LC) (hereafter *Tiger Food Brands*) serious violence was perpetrated against managerial staff.<sup>107</sup> Due to the fact that the employer could not identify the perpetrators, it sought to dismiss a group of employees who may have been involved in the violence, for operational requirements.<sup>108</sup> The LC had to determine whether this constituted an operational requirement.<sup>109</sup> It came to the decision that it did,<sup>110</sup> but acknowledged that the employer could have held a collective disciplinary hearing for the alleged perpetrators.<sup>111</sup> The court further stated that its decision does not give the employer a licence to dismiss based on operational requirements for any misconduct, but that a decision would depend on the facts of the case.<sup>112</sup>

It is because of cases like these that the dividing line between operational requirements and other grounds of dismissal is said to be thin.<sup>113</sup> However, in *First National Bank* the LC was implicit in its finding that the dismissal of an employee who does not comply with a statutory requirement for employment is a dismissal for incapacity and not for operational requirements.<sup>114</sup> Here, the employee worked as a financial services representative and in terms of the Financial Advisory Intermediary Services Act the employee had to be a fit and proper person, which required that specific examinations had to be passed.<sup>115</sup> The employee was unable to comply with this legislative requirement and was subsequently dismissed for incapacity. However, the CCMA found that this

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<sup>105</sup> *SA Transport & Allied Workers Union v Khulani Fidelity Security Services (Pty) Ltd* 2011 32 ILJ 130 (LAC) (hereafter *Khulani*) 132-133.

<sup>106</sup> *Khulani* 135-136.

<sup>107</sup> *Tiger Food Brands v Levy* 2007 28 ILJ 1827 (LC) (hereafter *Tiger Food Brands*) paras 8-9.

<sup>108</sup> *Tiger Food Brands* para 9.

<sup>109</sup> *Tiger Food Brands* para 15.

<sup>110</sup> *Tiger Food Brands* para 30.

<sup>111</sup> *Tiger Food Brands* para 33.

<sup>112</sup> *Tiger Food Brands* para 39.

<sup>113</sup> Du Toit *et al Labour Relations Law* 473.

<sup>114</sup> *First National Bank* paras 85-90.

<sup>115</sup> *First National Bank* paras 10-14.

did not qualify as an incapacity dismissal but rather as a dismissal for operational requirements.<sup>116</sup>

The LC overturned this decision on the basis that a dismissal for operational requirements does not include instances where an employee can no longer be employed due to a statutory prohibition.<sup>117</sup> The LC made the following important points. Firstly, that provisions such as section 189(3)(d) of the LRA demonstrate the inapplicability of this procedure to the dismissal of an employee who is not legally permitted to be employed.<sup>118</sup> This section states that the written notice issued by the employer inviting the other party to consult on the intended dismissals must contain information about the proposed method of selecting the employees to be dismissed.

Secondly, if such cases are allowed to be treated as an operational requirements dismissal, almost any dismissal could be for operational reasons, "as an employer cannot afford for operational reasons to employ an employee who is guilty of serious misconduct or is incapacitated."<sup>119</sup>

Thirdly, it is appropriate to draw the line between operational requirements and incapacity where an employer realises the need to restructure its business as opposed to a situation where the employer cannot employ an employee because a statutory provision prohibits such employment.<sup>120</sup>

Fourthly, with incapacity the focus is on the qualities of the employee, while with operational requirements it is on the employer and its decisions relating to its business.<sup>121</sup>

The arguments advanced by the LC are indisputable, considering the wording of section 189 of the LRA. A substantial emphasis is placed on the need to consult with the affected employees.<sup>122</sup> The purpose of consultation is to engage in a meaningful joint consensus-seeking process.<sup>123</sup> The aim is to reach consensus on a number of aspects, notably measures to avoid dismissals; minimising the number of

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<sup>116</sup> *First National Bank* para 52.

<sup>117</sup> *First National Bank* para 85.

<sup>118</sup> *First National Bank* para 85.

<sup>119</sup> *First National Bank* para 86.

<sup>120</sup> *First National Bank* para 87.

<sup>121</sup> *First National Bank* para 88.

<sup>122</sup> Item 3 Code of Good Practice: Operational Requirements in the LRA. See further s 189(1) of the LRA; and Du Toit *et al Labour Relations Law* 481.

<sup>123</sup> Section 189(2)(a) of the LRA. See further *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Ltd* 2019 40 ILJ 87 (CC) para 39.

dismissals; changing the timing of dismissals; and mitigating the adverse effects of the dismissals.<sup>124</sup>

In establishing procedural fairness adjudicators must assess whether the employer has complied with its obligations of notifying the employees about the proposed dismissals and thereafter consulting with them in an attempt to reach agreement.<sup>125</sup> As articulated by the LAC in *Havemann*,<sup>126</sup> consultation must be genuine and must be conducted with the purpose of seeking alternatives to dismissal, the ultimate goal being to avoid dismissal if reasonably possible.<sup>127</sup>

If one considers the extensive consultation process that must be embarked upon in effecting such dismissals, the type of information that must be disclosed,<sup>128</sup> and the objective of consultation, the arguments advanced by the LC in *First National Bank* cannot be faulted.

It is therefore concluded that dismissals due to the non-possession of a work permit do not suitability fall into this category of dismissal.

#### **6.4 Defining fairness in the dismissal of unauthorised foreign nationals**

Having discussed the three permissible grounds of dismissal, it has become evident that neither misconduct nor operational requirements are the correct grounds under which a dismissal for non-possession of a valid work permit can be effected.

The possession of a valid work permit is a legal requirement for employment. There is also established authority for the fact that where an employee is unable to comply with a statutory requirement, this amounts to incapacity based on the impossibility of performance. Hence, the consequences of the non-possession of a valid work permit equally result

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<sup>124</sup> Section 189(2)(a) of the LRA. See further item 3 Code of Good Practice: Operational Requirements in the LRA.

<sup>125</sup> *Havemann v Secequip* (LAC) (unreported) case number JA91/2014 of 22 November 2016 (hereafter *Havemann*) para 30.

<sup>126</sup> *Havemann*.

<sup>127</sup> *Havemann* para 31.

<sup>128</sup> Section 189(3) of the LRA requires the employer to issue a written notice to consult, which must disclose sufficient information to the other party about the reasons for the proposed dismissals. This includes information regarding the alternatives considered by the employer prior to proposing the dismissals; the number of employees likely to be affected and their job categories; the proposed method for selecting the employees to be dismissed; the time when the dismissals are likely to take effect; the proposed severance pay; and the total number of employees employed.

in the impossibility of performance. Therefore, the most suitable categorisation of a dismissal under these circumstances is a dismissal based on capacity.

Considering that the substantive reason for such a dismissal is concluded to be incapacity, the employer must ensure that the dismissal for incapacity is procedurally fair. This requires that prior to taking a decision to dismiss the employer inform the employee about the intended dismissal and the basis for the intended dismissal. Importantly, the employee must be invited to make representations before a final decision is taken. In other words, he/she must be afforded an opportunity to be heard. However, prior to this stage of the process, the employer should give the employee a reasonable time to secure his/her work permit and should provide reasonable assistance. This requires that the employer must have a mechanism in place, which monitors the expiry of the work permits of all its foreign nationals. Within a reasonable time prior to the expiry of the work permit (two to three months), the employer should start communicating with the employee. This communication must:

- a) remind the employee about the date of expiration of his/her work permit;
- b) make it clear that it is the employee's responsibility to renew the work permit;
- c) inform the employee that he/she should timeously approach the employer if documentation is required and that the employer will assist to provide documentation that is within its means to provide; and
- d) clearly state what the consequences will be if the employee fails to renew the permit timeously.

If the employee fails to comply, a notice to attend an incapacity hearing should be issued to the employee. At the hearing, the employee should be given an opportunity to make representations. After considering the representations, the employer should decide whether or not to dismiss on the grounds of incapacity.

## **7 Conclusion**

It is the responsibility of employers to ensure that they employ foreign nationals who are legally permitted to work in the country. In other words,

work permits must be requested and validated. If this is done, it will eliminate the need to dismiss non-complying employees at a later stage.

However, where the need arises to dismiss a foreign national for the non-possession of a valid work permit, the requirements set out in the LRA must be adhered to. This requires that no employee must be unfairly dismissed. There are two components to a fair dismissal, which are substantive and procedural fairness. Substantive fairness will be complied with if the dismissal is effected on the grounds of incapacity. The procedure as highlighted above should be followed to achieve procedural fairness.

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## List of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
ESA	Employment Services Act
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act