Unit 5

Identification and conclusion of a contract of employment

Learning objectives

At the end of this unit, you should be able to:

- Explain the importance of identifying the type of contract of service
- Define the concepts “employer” and “employee” in terms of the Labour Act, as amended
- Briefly discuss the purpose of Section 128 of the Labour Act, as amended
- Compare the main distinguishing features of the locatio conductio operarum and the locatio conductio operis
- Identify the type of contract of service by applying the different tests devised by our Courts
- List the requirements for validity of a contract of employment
- Explain the meaning of the concept “essentialia”
- Name the essentialia of a contract of employment
- Name and explain the requirements for a valid employment agreement
- Discuss the difference between fixed term – and indefinite term or permanent contracts of employment
- Discuss the impact of Section 128C (Presumption of indefinite employment) of the Labour Act, as amended
- List the different ways in which a contract of employment can be lawfully terminated
- List the different reasons for which a contract of employment can be lawfully terminated
- Apply the contents of this unit to solve problems

Additional reading


1. **INTRODUCTION**

A very important fact of our modern lives is that most people must work. The majority of Namibians are either employees or employers, but few realise that the employment relationship is based on a contract and that this type of contract is one of the most important to be concluded in a person’s life.

The employer and employee are linked to each other by means of an employment contract. When parties enter into an employment contract, they each incur certain rights and duties. The most important duty on the part of an employee is to supply his/her services/labour and the corresponding right is to receive remuneration in return. The contract of employment can thus briefly be defined as a reciprocal agreement in terms whereof one party (the employee) places labour potential at the disposal and under the control of another (the employer) in exchange for remuneration.

The parties to the contract should understand the sources of law regulating the contract of employment; the *essentialia*; the nature of the
employment relationship and the respective rights and duties of the parties, as well as the ways in which the contract can be terminated.

2. IDENTIFYING THE EMPLOYMENT CONTRACT

In order to determine the legal principles applicable to any contract, it should first be categorised as a certain type of contract, such as a contract of employment.

In terms of both the common law and applicable legislation, a person can deliver a service in return for payment in two different ways, i.e. either as employee where the person places his or her services at the disposal and subject to the authority and control of the employer in exchange for payment or as an independent contractor who works for or renders a service to another in exchange for payment.

The most important reasons why it is so important to be able to identify a contract as being a contract of employment are summarised in Table 1 below:

<table>
<thead>
<tr>
<th>Contract of employment</th>
<th>Independent contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Employer can be held vicariously liable for the delicts of the employee.</td>
<td>Employer cannot be held vicariously liable for the delicts of the independent contractor.</td>
</tr>
<tr>
<td>2. Labour legislation is applicable to this type of contract.</td>
<td>Labour legislation is not applicable to this type of contract.</td>
</tr>
</tbody>
</table>

Therefore, when confronted with a labour law problem, the first step is to establish whether the parties to the contract are in fact “employer” and “employee” within the meaning of the applicable legislation and/or common law.
2.1 Identifying the contract in terms of the applicable legislation

2.1.1 Definition of employer

In section 1 of the Labour Act\textsuperscript{1}, an "employer" is defined as “any person, including the State and a user enterprise referred to in section 128(1) who –

(a) employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
(b) permits an individual to assist that person in any manner in carrying on or conducting that person’s business;”

In terms of the new section 128(1)\textsuperscript{3} of the Labour Act, a "user enterprise" means a legal or natural person with whom a private employment agency places individuals, while a "private employment agency" is defined as being any natural or juristic person, which provides one or more of the following labour market services:

- for matching offers of and applications for employment without the private employment agency becoming a party to the employment relationship which may arise there from; or
- engaging individuals with a view to placing them to work for an employer, which assigns their tasks and supervises the execution of those tasks; or
- other services relating to job-seeking that do not set out to match specific offers of and applications for employment, such as providing of information.\textsuperscript{4}

2.1.2 Definition of employee

Section 1 of the Labour Act defines an “employee” as “…an individual, other than an independent contractor, who works for another person…”

A definition of an “independent contractor” has now been added and means “a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual’s business, undertaking or professional practice.”\textsuperscript{5}

\textsuperscript{1} As amended by S 1 of the Labour Amendment Act.
\textsuperscript{2} As amended by S 1 of the Labour Amendment Act.
\textsuperscript{3} S 6 of the Labour Amendment Act substitutes section 128 of the Labour Act 11 of 2007
\textsuperscript{4} S 1 of the Employment Services Act 8 of 2011, as amended
\textsuperscript{5} S 1 of the Labour Amendment Act. In terms of the common law, this type of service included the building, manufacturing, repairing or altering of a thing within a specified time. The definition of an independent contractor in terms of the Labour Act, as amended, now includes services rendered by a professional person, such as a medical doctor, legal practitioner, engineer or architect. A contract for the delivery of professional services was previously referred to as a contract of mandate.
2.1.3 Protection of individuals placed at a user enterprise by a private employment agency\(^6\)

In order to protect persons who are placed by so-called labour hire companies, the new section 128 of the Labour Act provides, among others, that an individual (except an independent contractor) who is placed by a private employment agency at a user enterprise, shall be the employee of the user enterprise and the user enterprise shall be the employer of such person. Such person would therefore be entitled to all the rights afforded to employees in terms of the Labour Act; s/he must be employed on not less favourable conditions of employment as those who perform the same or similar work or work of equal value and the same employment policies and practices of incumbent employees must be applicable to them.\(^7\)

2.1.4 Presumption as to who is an employee

Section 128A (Presumption as to who is employee)\(^8\) provides that an individual who works for or renders a service to any other person, is presumed, until the contrary is proved, to be the employee of that other person if any one or more of the following factors is present:

- The manner of work is subject to the control of that other person;
- The hours of work are subject to the control or direction of that other person;
- The individual's work forms an integral part of the organisation;
- The individual has worked for that other person for an average of at least 20 hours per month over the past three years;
- The individual is economically dependent on that person for whom s/he works or renders services to;
- The individual works or renders services to that other person;
- Any other prescribed factor.

2.1.5 Deeming individuals as employees

Section 128B (Deeming individuals as employees)\(^9\) further allows the Minister, subject to certain conditions, to deem any individual to be an employee for the purposes of the Labour Act.

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\(^6\) S 128 of the Labour Act, as amended.

\(^7\) S 6 of the Labour Amendment Act. A user enterprise who contravenes this part of the Act commits an offence and is liable to a fine not exceeding N$ 80 000 or imprisonment of a period not exceeding two years or both. The Act provides for a possible exemption by the Minister, on application by the user enterprise, supported by both the private employment agency and the affected employee. If such exemption is granted, both the private employment agency and the user enterprise are deemed to be the employer of such individual and they are jointly and severally liable for contraventions of the Labour Act.

\(^8\) S 7 of the Labour Amendment Act amends S 128 of the Labour Act.

\(^9\) S 7 of the Labour Amendment Act amends S 128 of the Labour Act.
2.2 Identifying the contract in terms of the common law

The common law distinguishes between a contract of employment (*locatio conductio operarum*); work acceptance contract (or independent contractor contract, also known as the *locatio conductio operis*) and the contract of mandate (services by a professional person)\(^\text{10}\).

The main distinguishing characteristics of the contract of employment and work acceptance contract are set out in Table 2\(^\text{11}\) below:

<table>
<thead>
<tr>
<th><strong>Locatio conductio operarum</strong></th>
<th><strong>Locatio conductio operis</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Contract of employment</td>
<td>Work acceptance contract</td>
</tr>
<tr>
<td>2. Employer has authority and control over the employee.</td>
<td>Contractor does not work under the authority and control of the employer.</td>
</tr>
<tr>
<td>3. Employer will supervise the rendering of the service by the employee; will prescribe what work should be done how and when.</td>
<td>Contractor works independently, but must comply with the terms of the contract. Contractor decides what work should be done and how it should be done. Contractor decides when the work will be done, but must do it within the time specified or within a reasonable time if no time was specified.</td>
</tr>
<tr>
<td>4. Terminates upon expiration of period of service entered into.</td>
<td>Terminates on completion of the specified work or on production of the specified result.</td>
</tr>
<tr>
<td>5. The employer will provide the tools to enable the employee to render the service.</td>
<td>Contractor uses his/her own tools to complete the work.</td>
</tr>
</tbody>
</table>

**EXAMPLE**

Nampost hires the services of a driver to transport parcels on route to and from Katima Mulilo. Most probably, the driver will be engaged in terms of a contract of employment (*locatio conductio operarum*). The driver will be obliged to place his/her labour potential at the disposal of Nampost and will be paid a wage (remuneration) for doing so.

Conversely, suppose one of the Nampost delivery trucks breaks down and the services of a mechanic are required to do the necessary repairs, the person contracted for this purpose would be regarded as an independent contractor (*locatio conductio operis*) providing a service in return for payment (unless Nampost employs their own mechanics for this purpose).

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\(^\text{10}\) As mentioned before, the definition of an independent contractor in terms of the Labour Act (as amended) now includes services rendered by a professional person. Therefore, the concept of an independent contractor will replace the common law contract of mandate.

\(^\text{11}\) As summarised in *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC)
2.2.1 Different tests to apply to identify the type of contract of service in terms of the common law

Though the distinguishing characteristics, as set out in Table 2 above, may seem easy to apply to a practical setting, the identification of the type of contract of service has always been one of the most difficult questions in our law. The reason being that, in our modern society, where large numbers of employees have special skills and training, the employer may have little control over the manner in which the employee performs tasks.

The element of control is thus less pertinent and obvious than it had been in the past and for this reason our Courts have formulated a number of tests for drawing the distinction.

These tests are known as the control -, organisation - and multiple test (also referred to as the dominant impression test):

(a) The control test

This test requires a look into the question as to whether the employer has some form of control and supervision over the employee. Though, in cases where the employee provides a highly skilled service, where control (especially the method of work) and supervision would not be feasible, this test becomes less useful. Nevertheless, even if the employee exercises an independent, specialised professional discretion it could still be a contract of employment. The mentioned unique skill may be the exact reason why the employer employed the particular person in the first place. The control test therefore did not provide a conclusive answer in all situations and the Courts then started to experiment with another test, known as the organisation test.

(b) The organisation test

Applying this test, one should ask the question as to whether the employee’s services form an integral part of the employer’s business or organisation, i.e. to what extent is the employee integrated into the workplace. Some examples of indicating factors of integration are whether the employee is provided with an office and equipment; whether the employee belongs to the pension fund, medical aid fund, etc., and/or whether the employee is entitled to any type of leave in terms of the contract. This test does not prescribe to what extent the work must be part of the organisation before an individual is integrated in it. The degree of integration is thus not specified. As a result, this test also seems to be inadequate.
(c) The multiple test (also known as the dominant impression test)

Here the relationship is viewed as a whole and a conclusion is drawn from the entire picture. This test is based on the view that an employment relationship has certain peculiar characteristics. The dominant impression gained after applying certain criteria, could result in a finding of the existence of a contract of employment. Included in these criteria, one finds the requirements of control and integration (control – and organisation tests). The multiple test could thus be regarded as an umbrella test, since it includes the first two tests in addition to other criteria, devised by our Courts over a period of time.

In terms of the multiple test, the person agrees expressly or impliedly that, in the performance of that service, s/he will be subject to the other’s (employer) control in a sufficient degree to make that other, the master. The right of suspension, discipline and dismissal forms an integral part of the right of control and supervision.

In order to determine the degree of integration into the business (organisation test), factors such as the supply of capital assets, entitlement to benefits (pension, medical aid, housing, transport, etc.) and other basic conditions of employment such as leave entitlement shall be considered.

In addition to the indicators of control and integration, factors such as those listed below could indicate the existence of a contract of employment, rather than a work acceptance contract (also known as the contract of an independent contractor):

♦ The worker is not allowed to work for another;
♦ The worker is obliged to perform the work personally;
♦ The worker is required to devote a specific time to his or her work;
♦ The method of payment, i.e. for time worked and not based on a particular result.

Hence, the multiple or dominant impression test, which is often the standard test used by our Courts, not only looks at one factor (control or integration), but rather a number of factors or indicators.

As mentioned in paragraph 2.1.4 above, Section 128A of the Labour Act creates a presumption that, until the contrary is proved\textsuperscript{12}, an individual who works for or provides a service to another, is to be considered an employee of that other person, if at least one of a list of factors is present. The aforesaid list includes the questions of control and integration.

\textsuperscript{12} This means that it is a rebuttable presumption.
For the purposes of common law, the multiple (or dominant impression) test is the most authoritative test for determining whether a person is an employee or an independent contractor. Therefore, it is accepted that our Courts will apply this test where the presumption as to whether a person is an employee is challenged.

2.2.2 Namibian case law

The Namibian cases discussed below illustrate that the Courts consider each case on its own facts and merits in order to determine whether a person is in fact an employee or independent contractor. A Court must have regard to the substance of the relationship, rather than the contractual form or designation used. In some cases, it is not even possible to decide either way on a balance of probabilities, in which event the Court ruled such relationship to be sui generis (of its own kind).

**Paxton v Namib Rand Desert Trails (Pty) Ltd** 1996 NR 109 (LC)

The Court emphasised the importance of the element of control in an employment relationship, by observing as follows: “Although the exercise of control has been watered down to ‘being an important yardstick for testing’ but not ‘decisive’, it seems to me that it remains a very important yardstick and perhaps even an indispensable one when deciding the issue of who is an ‘employee’ in the context of the provisions of the Namibian Labour Act.”

The Court also considered the fact that the person was remunerated by means of commission and held that, although not necessarily decisive, it could be a very strong indication that results, rather than the rendering of personal services, were required. The Court then ruled that the person was an independent contractor, in particular for those services for which she was remunerated.

**Hannah v Government of the Republic of Namibia** 2000 NR 46 (LC)

The Court had to rule as to whether a Judge of the High Court is in fact an employee of the State. It was held that the Judge is not an employee due to the fact that there is no supervision and control by the State over the judicial function of Judge. The Court held that it is not only the absence of supervision and control that should be considered, but the prohibition of any interference with a Judge in the execution of his or her duties, as guaranteed in the Namibian Constitution. It was therefore difficult to reconcile an employer-employee relationship with judicial independence. With regards to the control the State had as to the times when Judges worked, the place where they worked, their vacations, as well as factors such as their pension and medical contributions, deductions for income tax on a PAYE basis, it was held to be peripheral to a Judge’s functions and do not really assist to determine the relationship between the parties, but only served to indicate that a Judge’s position is sui generis.
The emphasis was therefore placed on the indicating factor of control, as a very important yardstick.

**Engelbrecht and Others v Hennes** 2007 (1) NR 236 (LC)

The Court had to rule whether deputy messengers were employees, agents or independent contractors. The Court found that the contracts between the parties contain elements of both employment agreements and that of agency and was thus not able to determine with certainty whether they were employees, agents or independent contractors. It then continued to examine every feature of the relationship between the parties to determine whether the dominant impression was such that it could be described as an employer-employee relationship. It was observed that the contracts between the parties could not be judged in isolation, but must be assessed in the social context in which they were concluded, having regard to the relevant legislation.

The Court considered factors such the nature of the task, the freedom of action, the magnitude of the contract amount, the manner of payment, the power of dismissal, the circumstances under which the payment of the reward may be withheld, control, supervision, subjection to the order of others. With regards to the factor of control, the Court observed that it may be a matter of ‘extreme delicacy’ to decide if the extent of control in a particular case was such, considered in the context of the other factors mentioned, as to constitute an employment contract.

In the Court’s view, factors that were indicative of an employment relationship, included a discretionary annual bonus payable; they must regard themselves as on duty 24 hrs per day; the right to be disciplined or dismissed; cell phone allowance; social security deductions. Among the factors that are contrary to an employment relationship were the deduction of costs relating to office expenses; transportation at own costs; no paid leave (although leave had to be approved by the messenger); work not allocated on a daily basis. Neutral factors, in the Court’s view, included payment by way of commission; no membership of medical aid or pension fund; income tax deductions and the fact that they had to report every weekday 08h00-09h00 to check for documents.

**Swarts v Tube-O-Flex Namibia (Pty) Ltd** (LCA 51/2012) [2013] NALCMD 8 (27 March 2013) – unreported

The appellant is a shareholder and director of the respondent. After his retirement he was asked to stay on and continued with sales in the position of sales director for about six years. His commission was calculated with reference to a percentage of all the respondent’s sales in respect of which a certain gross profit percentage had been achieved and not with reference to his own sales. His remuneration was designated as director’s fees in the books of the respondent and he was not registered at the Social Security Commission as an employee. He was subject to the control of the respondent’s managing director and could be disciplined by the latter. He was provided with a motor vehicle and cell phone for the purposes of conducting sales. His working hours were not regulated as was the case with other employees and he was not required to be in attendance at designated hours, but he did not engage in any sales or employment for any other entity. He did not take or claim annual leave and took time off and attended to sales at his own discretion.

The arbitrator relied on the factual circumstances surrounding the arrangement between the appellant and respondent and ruled that the appellant is not an employee of the respondent.
Meatco Corporation of Namibia v Pragt (LCA 43-2011) [2014] NALCMD 44 (27 October 2014) – unreported

The appellant orally engaged the respondent as a marketing consultant during April 2008. He was paid N$ 35 000 per month in consultation fees on presentation of an invoice. While this agreement was still in force, the appellant’s canning manager was suspended. The respondent was then transferred into the position of canning manager with overall responsibility for the canning department. During this time, he assisted with the day to day running of the canning department and organised the staff. He acted as supervisor when the suspended manager returned to work and assessed the latter’s work performance, completed assessment reports and approved the latter’s leave application. The respondent took daily instructions from the factory manager and fell under the latter’s supervision and control. The appellant did not at any stage deduct PAYE or social security contributions from the respondent’s remuneration.

The arbitrator found that the respondent was an employee of the appellant.

3. CONCLUSION OF A CONTRACT OF EMPLOYMENT

In general, a contract can be defined as an agreement entered into by two or more persons (a person cannot conclude a contract with him- or herself) with the serious intention of bringing about an obligation, provided that certain requirements must be met in order for this obligation to be valid.

A contract of employment comes into existence as soon as one person agrees to work for another (the parties must agree on the type of work to be performed) in return for payment (called remuneration). Apart from a few exceptions, the law does not require a formal written contract; it can even take the form of a simple letter of appointment. The problem, however, with a verbal agreement is that the terms of the contract may be disputed by one or both of the parties and it is thus advisable that a written contract be concluded. Employers often wish to argue that they did not sign a written contract of employment, thus they can terminate the employment relationship at will, but this is incorrect.

A contract of employment is thus not a social agreement, but an agreement which is enforceable in law, i.e. the parties have the serious intention to create legal obligations. All contracts, including the contract of employment, must comply with certain requirements in order to be regarded as valid.
4. REQUIREMENTS FOR A VALID CONTRACT OF EMPLOYMENT

The contract of employment is concluded in terms of common law principles. The common law therefore also determines whether or not the contract is valid. The following requirements must be met for a contract of employment to be regarded as valid.

4.1 Consensus

The parties must reach consensus. Consensus can only be reached if the parties have a serious intention to create legal obligations and they are in agreement about the same subject or thing.

“Agreement” implies that parties enter into employment contracts freely and voluntarily. No person can be forced to enter into a contract of employment. This idea finds expression in Article 9 of the Namibian Constitution as well as in Section 4 of the Labour Act.

It is imperative for the parties to reach consensus on the essentialia of the contract. The essentialia of a contract are those terms that the law provides as essential to place the contract in a particular class or category, for example, contract of purchase and sale, contract of employment and so forth.

The essentialia of a contract of employment are the nature of service and remuneration. The parties are free to agree to any type of work to be performed, provided that it is within the limits of the law and not against good morals. With regards to remuneration, the parties are likewise free to agree to any amount; however, it is important to note that there are certain legally prescribed minimum wages in certain industries. The essentialia of a contract of employment shall be discussed in more detail in the study units below.

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13 For more detail, refer to Unit 7 of this guide.
EXAMPLE
If one person believes that he/she is being employed as a mechanic and the other is under the impression that he/she is taking in a cleaner, there is no consensus and therefore no contract.

4.2 Contractual capacity

Both parties must have contractual capacity. Contractual capacity means the ability to enter into contracts, i.e. the ability to be the bearer of rights and duties, and is usually determined by referring to the age of the respective contracting parties. Other important factors that diminish contractual capacity include mental illness and intoxication. In terms of the common law, a child under the age of 7 (seven) years (known as an infans), an insane person and an intoxicated person have no capacity to act. They can perform no juristic acts and cannot enter into contracts themselves. The guardian or parent of the infans or the curator of the insane person must do it on their behalf. Whereas, a child between the ages of 7 (seven) and 21 (twenty-one) years (soon to be changed to 18 years\(^\text{14}\)) can enter into a valid contract with the assistance of his or her guardian. See discussion on child labour restrictions in par. 5 below.

4.3 Lawfulness

The conclusion of the contract and the obligations in terms of the contract must be lawful.

EXAMPLE
It would not be valid to employ someone as a prostitute or a person who is an illegal immigrant or a receiver of stolen goods who employs a number of pickpockets.

4.4 Possibility of performance

The performance of the parties’ obligations in terms of the contract must be possible.

\(^\text{14}\) S10 of the Child Care and Protection Act 3 of 2015
EXAMPLE

If, at the time of the conclusion of the contract of employment, the factory where the employee would have been employed had burnt down without the owner being aware of the event at the time, such a contract would be void due to objective impossibility of performance.

4.5 Formalities

“Formalities” relate to the outward, visible form that the agreement must take in order to be a valid, enforceable contract, i.e. the contract must be in writing and signed by the respective parties. As a general rule, there are no formalities that have to be complied with in the case of employment contracts, but there are a few exceptions to this rule, for example, the contracts of candidate legal practitioners, apprenticeship contracts and the employment contract of a domestic worker.

The employer of a domestic worker is also required to explain (or arrange to be explained) the provisions of the contract in a language that the domestic worker understands.\textsuperscript{15}

It is important to mention again that it is always better to have a written contract of employment so that both parties know what their respective obligations are in terms of the contract.

5. CHILD LABOUR RESTRICTIONS

Article 15: NC: Children’s rights
Section 3: Labour Act: Protection and restriction of child labour

Since the age of a contracting party has an important influence on the contractual capacity of such person as well as the lawfulness of a contract, it is an opportune time to include a discussion on the important topic of child labour from the perspective of the Namibian Constitution and Labour Act respectively.

\textsuperscript{15} GN 258 (Wage order in terms of section 13 of the Labour Act), published in GG (Government Gazette) No. 5638 dated 24 December 2014.
Although a child over the age of 7 (seven) years may conclude a valid contract with the assistance of his/her guardian, there is a statutory limitation on the minimum age at which a child may legally start working in Namibia, which is 14 (fourteen) years.\footnote{S 3(2) of the Labour Act.}

The \textbf{Namibian Constitution}\footnote{Article 15(2)} provides that children are entitled to be protected from economic exploitation. Children under the age of 16 (sixteen) years may not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development.

The \textbf{Labour Act} further provides that children under the age of 18 (eighteen) years may not perform the following categories of work (unless permitted by the Minister in terms of regulations):

\begin{itemize}
\item Night work, i.e. between the hours of 20h00 and 07h00;
\end{itemize}

On any premises where:

\begin{itemize}
\item Work is done underground or in a mine;
\item Construction or demolition takes place;
\item Goods are manufactured;
\item Electricity is generated, transformed or distributed;
\item Machinery is installed or dismantled; or
\item Any work related activities that may place the child’s health, safety, or physical, mental, spiritual, moral or social development at risk.\footnote{Note the correspondence with Article 15 (2) of the Namibian Constitution. Domestic work also falls into this category of work.}
\end{itemize}

\begin{itemize}
\item A person under the age of 18 (eighteen) years may not be employed as a domestic worker.\footnote{GN (Government Notice) 257 (Regulations in terms of section 135 of the Labour Act), published in GG (Government Gazette) No. 5638 dated 24 December 2014.}
\end{itemize}

It is an offence for any person to employ, or require or permit, a child to work in any circumstances in contravention of Section 3 of the Labour Act. A person who is convicted of such offence is liable to a fine not exceeding N$ 20 000 or to imprisonment for a period not exceeding 4 (four) years, or to both the fine and imprisonment.
6. THE PARTIES TO A CONTRACT OF EMPLOYMENT

The two parties in a contract of employment are the employer and employee. The employer may be a natural person or juristic person (legal entity), while only an individual or natural person qualifies as employee.

For the purposes of the prohibition of discrimination in employment, protection is extended to, among others, the person applying for a particular occupation or job, even though such person is not an employee yet or has not concluded an agreement with the employer.

7. CONTENTS OF A CONTRACT OF EMPLOYMENT

When parties enter into a contract they normally give expression to their common intention by some form of conduct. The conduct usually consists in expressing the terms of the contract in words, either orally or in writing. However, there are also tacit or silent terms that are incorporated into a contract by either the Courts; or by operation of law; or by the conduct of the parties. A term is also known as a provision or clause in a contract. It obliges a party to act in a specific manner; or not to do a specific act; or it qualifies (limits) the contractual obligations. A further discussion on the terms and conditions of a contract of employment follows in Unit 6 of this guide.

8. COMMENCEMENT AND DURATION OF A CONTRACT OF EMPLOYMENT

An employment contract starts either from the moment the parties have reached consensus on its essential terms or a date for commencement can be stipulated in the contract. The contract can be concluded either for a fixed term (the parties are free to agree to any specified term, except for the lifetime of the employee) or for an indefinite period (also referred to as a permanent contract). The parties may also agree that the employee should serve a probationary period. Probation is a period during
which a supervisor evaluates the skills and progress of a newly hired worker. The probation period will depend on the type of business and is usually stipulated in the employer’s workplace policies. 20

As is the case in other contracts, the employment contract may be made subject to a condition; for example, the employee should successfully complete a specified training course within six months after appointment.

8.1 Fixed term contract

A fixed term contract expires at the end of the period due to effluxion of time and there is no need to give any notice of termination.

Unless expressly stated otherwise, a fixed term contract may not be terminated without good cause before the period agreed to have expired. Neither the employer, nor the employee is thus allowed to terminate the contract without a valid reason before the period has expired. Serious breach of contract, insolvency of the employer or supervening impossibility of performance serve as examples of valid reasons for premature termination.

The fixed term contract may be renewed, either expressly or tacitly (by the conduct of the parties), on the same terms as the original contract. If the contract was entered into for one year, it automatically expires at the end of the year; however, if the employee continues to work for the employer and the employer not only allows the employee to continue working, but also continues to remunerate the employee, the contract has been renewed tacitly on the same terms and conditions.

Section 5(2) of the Labour Act prohibits discrimination against any individual on certain stated grounds in any employment decision. An employment decision includes “security of tenure”22, which means that it may be seen as discrimination on one of the mentioned grounds if a certain position justifies a permanent appointment, but the employer decides to offer the employee a fixed term contract.23 Another interpretation of “security of tenure” is the legitimate expectation of the renewal of a fixed term contract. If the employee could have had the legitimate expectation that his or her contract would be renewed for a further period, s/he could have a claim based on discrimination. Normally, the person who has been performing the work could also expect to be given the new contract. If, under the first contract, the employee did not

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20 See further discussion below.
21 Section 30(1) of the Labour Act specifically provides certain minimum periods of notice in cases where “… a contract of employment may be terminated on notice.…”
22 Section 5(1)(b)(iv) of the Labour Act.
23 See discussion on S 128C of the Labour Act in par. 8.2 below.
perform to the satisfaction of the employer, such employee should be warned that his or her contract shall not be renewed because of, for example, poor work performance, otherwise s/he may expect the contract to be renewed.

8.2 Presumption of indefinite employment

Section 128C (Presumption of indefinite employment) of the Labour Act\textsuperscript{24} provides that an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term, or the employee is appointed in a managerial position. The Act, however, does not clarify on what criteria the “justification” must be evaluated and it also does not specify the meaning of “managerial”. However, it would not be justified to place a person on a fixed term contract merely to make sure that the person is able to perform, i.e. to test the competency of such employee. It would, however, be justified if a person is temporarily appointed to replacing an employee who is on leave (for example, maternity leave, sick leave or study leave).

8.3 Indefinite term or permanent contract

The indefinite term or permanent contract stipulates the date of commencement, but does not give a date on which the contract will terminate. The employee can thus expect to remain in the job until s/he resigns, becomes incapacitated, dies or retires, unless the employer has, in the interim, sufficient grounds to dismiss him or her.

8.4 Probation period

It is important to note that the Labour Act does not provide a definition for a probationary employee. This does not mean that it is not allowed to subject an employee to a probationary period, as it is an acceptable lawful practice for an employer to establish the competency of an employee. Many employers are, however, under a misconception of the concept of probation. It must be emphasised that employees on probation are permanent (indefinite term) employees or permanent part-time (fixed term) employees, even while they are on probation. The only differences are that they will be assessed more frequently than employees who have already proved their competence, coupled with the fact that it is normally easier to terminate the contract of employment of a probationary employee on the basis of poor work performance, otherwise known as incompetence.

An employee on probation should consequently receive the same treatment as any other employee in relation to the termination of services,

\textsuperscript{24} S 7 of the Labour Amendment Act amends S 128 of the Labour Act
i.e. the requirements of substantive and procedural fairness to be complied with. The latter concepts will be discussed in more detail in the Labour Law 1B guide.

9. TERMINATION OF A CONTRACT OF EMPLOYMENT

9.1 Lawful ways of termination of a contract of employment

A contract of employment can be lawfully terminated in the following ways:

♦ expiry of the term of service or on completion of the specified task (fixed term contract) – no need to give notice of termination

♦ notice of termination (indefinite term contracts)

♦ summary termination (no notice period applicable)

♦ by mutual agreement

9.2 Lawful reasons for termination of a contract of employment

A contract of employment may be terminated lawfully for the following reasons:

♦ death or insolvency of the employer (only the death of a natural employer)

♦ death or insolvency of the employee (as a general rule, the insolvency of an employee will not justify the termination of a contract of employment, but there are exceptions\textsuperscript{25})

♦ dissolution of a partnership

♦ misconduct of employee

♦ incompetence of employee

♦ incapacity of employee

♦ breach of contract by either party

\textsuperscript{25} For example, if it is a stipulated condition in the contract of employment or where an insolvent person is prevented from occupying or practicing a particular profession.
♦ on account of the re-organisation, transfer, reduction or discontinuance of the business for economic or technological reasons

♦ supervening impossibility of performance

A detailed discussion on the termination of a contract of employment shall follow in the Labour Law 1B guide.