

"The Common Law is ... not what it used to be"*: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 3)



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Abstract

This piece, which is in three parts, will revisit the importation of fairness into the employment contract (outside and independent of the fairness-based provisions of our labour legislation) by a line of Supreme Court of Appeal (SCA) judgments during the 2000s. This process culminated in the recognition of an "implied duty of fair dealing" in the common-law employment contract. This piece will discuss such developments, will argue that such an implied duty still forms part of our law (despite the apparent consensus in the literature that the SCA turned its back on such earlier judgments), will critically examine some of the arguments for and against the recognition of such a duty, and will then consider the issue within the broader context of the role of good faith and fairness in our general law of contract.

Keywords

Common-law employment contract; labour legislation; good faith; fairness; implied duty of trust and confidence; implied duty of fair dealing; constitutional development of the common law; right to fair labour practices; breach of the employment contract.

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1 Introduction

Part 1 of this piece examined the line of cases before the Supreme Court of Appeal (SCA) in the period between 2003 and 2010 which involved constitutional development of the common-law employment contract in order to import notions of fairness into the employment relationship. The high point of such development came in the judgment of Cameron JA in *Murray v Minister of Defence*,¹ with the express recognition of an implied duty of fair dealing between employers and employees. In Part 2 of this piece I examined the SCA's purported backtracking on such development of the common law by Wallis AJA in *SA Maritime Safety Authority v McKenzie*,² and I argued that *McKenzie* has in fact not resulted in a wholesale rejection of the duty of fair dealing, as is commonly supposed to be the case.

In this final part, Part 3, I will examine some of the main arguments for and against the continued recognition of such an implied duty of fair dealing as a mechanism which may run parallel to the scheme of fairness contained in the labour legislation in order to ensure the optimum pursuit of the constitutional guarantee of fair labour practices as contained in section 23 of the Bill of Rights. In this part, I will consider the following:

- whether the labour legislation sufficiently gives effect to the right to fair labour practices in all cases;
- the argument that recourse to common-law remedies in cases of dismissal, especially, is inappropriate, on the grounds that an unlawful dismissal (a breach of the employment contract) would automatically be an unfair dismissal, and would necessitate a claimant to bring its case under the unfair dismissal provisions of the *Labour Relations Act*;
- the argument that the recognition of common-law remedies for (especially) dismissal circumvents the legislative dispute resolution scheme and amounts to the judiciary's usurping the role of the

* Van Staden and Smit 2010 *TSAR* 712.

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¹ *Murray v Minister of Defence* 2009 3 SA 130 SCA (hereafter the *Murray* case).

² *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) (hereafter the *McKenzie* case).

legislature (and in the process ignoring or negating the policy considerations behind the legislative scheme);

- the argument against the recognition and utilisation of common-law remedies because such recognition would allow employees to "double-dip" in the labour fora and the civil courts; and
- the fact that the duty of fair dealing should provide protection to employees and employers alike.

Thereafter, in section 3 below I will consider the relevance of developments regarding the role of good faith and substantive fairness in the broader context of the general law of contract. In section 4 below I will summarise the discussion and arguments contained in parts 1-3 of this piece, and conclude.

2 The main arguments for (and against) the recognition of the common-law duty of fair dealing

Courts have increasingly moved away from the traditional notion that the availability of protection to employees in terms of the labour legislation depends on the existence of a (valid) contract of employment. In the light of the broad definition of "employee" in the legislation, the focus has shifted to the presence of an employment relationship.³ This development was also echoed in the latest round of amendments to the *Labour Relations Act* 66 of 1995 (LRA).⁴ The legislative protection mechanisms (such as, primarily, the prohibition on unfair labour practices and unfair dismissals) are there in order to give effect to the right to fair labour practices in the Bill of Rights. And the courts have given a broad interpretation to the application of this right to "everyone", including those persons not in a contractual relationship.⁵

In the light of this lesser emphasis on the existence of a contract and the broad approach to the application of the constitutional right to fair labour

³ *Discovery Health v Commission for Conciliation Mediation and Arbitration* 2008 7 BLLR 633 (LC); *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 7 BLLR 705 (LAC) (hereafter the *Kylie* case).

⁴ See, for instance, the deletion of the words "a contract of" in s 186(1)(a) of the *Labour Relations Act* 66 of 1995 (the LRA) ("Dismissal" means that an employer has terminated employment with or without notice") as effected by the *Labour Relations Amendment Act* 6 of 2014.

⁵ See the *Kylie* case para 21, with reference to *South African National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC) paras 28-30: "Even if a person is not employed under a contract of employment, that does not deny the "employee" all constitutional protection. This conclusion is reached despite the fact they "may not be employees in the full contractual sense of the word" but because their employment "in many respects mirrors those of people employed under a contract of employment."

practices,⁶ it would be strange to have a situation where the pervasive constitutional standard of fairness would not be available to those persons who are party to an employment contract, merely because a contract exists and the traditional emphasis of the rules of contract law is on the lawfulness of parties' conduct as opposed to fairness. We have only one system of law, which is grounded in the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*). The opponents of the constitutional development of the common law in order to import fairness into the contract of employment will cite the wording of section 8(3) of the *Constitution*, and explain that such development is not necessary or apt because the labour legislation already gives effect to the right to fair labour practices and the common law thus need not be developed.⁷ But this argument is premised on the assumption that the legislation sufficiently gives effect to the constitutional right. And this may not always be the case. In those instances where claimants can show that the legislation does not protect them (or does not sufficiently protect them), those archaic common-law rules would need to be interpreted or developed to import the same constitutional standard of fairness that is applied to those other persons deemed to be in an employment relationship *sans* a contract of employment, in order to give substance to the notion that there is only one system of law under the *Constitution*⁸ as well as the constitutional imperative to ensure equality before the law and equal protection for all under the equality clause.

⁶ The Constitutional Court recently expanded on this trend to broaden access to fair labour practice protection even in the absence of a contract of employment. Froneman J observed as follows in *Pretorius v Transnet Pension Fund* (CC) unreported case number CCT95/17 of 25 April 2018 para 48: "Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment."

⁷ The view of Wallis JA in the *McKenzie* case paras 35-37.

⁸ As per Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44: "I cannot accept [the] contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control." See the discussion in section 2 in Part 1.

2.1 *Some employees may (and do) fall through the legislative cracks*

I would submit that there is ample room for holding that the labour legislation does not always protect an employee sufficiently in order to give full effect to the constitutional right to fair labour practices. And this may apply also to employees who are covered by the legislation (unlike the claimant in *Murray*).

One area, of course, where this may be the case is in respect of unfair labour practices. The codification of unfair labour practices in section 186(2) of the LRA limits its application to a specific number of unfair employer practices relating to specific forms of employment conduct related to specified issues. Unfair conduct by an employer, which does not fall under this strict categorisation, would not provide recourse to a remedy for an unfair labour practice. One example is that of the physical transfer of an employee to another workplace.⁹ Transfers of employees are not listed in section 186(2), and as long as such unfair conduct relating to transfer does not involve a demotion¹⁰ or disciplinary action¹¹ or an occupational detriment other than dismissal in contravention of the *Protected Disclosures Act* 26 of 2000,¹² it would not allow such an employee to access the unfair labour practice provisions of the LRA. One can surely imagine that a scenario may eventuate where an employer may unfairly, and with an improper motive, present, as a *fait accompli*, an employee with a decision to transfer him or her in circumstances that may, for example, significantly impact on the employee's lifestyle or family responsibilities. If the LRA does not protect such an employee, surely the common-law duty of fair dealing should provide a basis in terms of which the employee may access a court to obtain an order for specific performance or an award of damages?

Another area where the legislation may have left a lacuna which could deprive an employee of protection for unfair employer conduct is in respect of the maximum working time provisions of the *Basic Conditions of Employment Act* 75 of 1997 (BCEA). The provisions regarding ordinary hours of work as regulated by section 9 of the BCEA¹³ do not apply to certain employees. Section 6 excludes such provisions from applying *inter alia* to

⁹ See, for instance, *MEC, Department of Road & Transport, Eastern Cape v Gijose* 2008 29 ILJ 272 (E) (hereafter the *Gijose* case).

¹⁰ Section 186(2)(a) of the LRA.

¹¹ Section 186(2)(b) of the LRA.

¹² Section 186(2)(d) of the LRA.

¹³ "Section 9(1) Subject to this Chapter, an employer may not require or permit an employee to work more than— (a) 45 hours in any week; and (b) nine hours in any day if the employee works for five days or fewer in a week; or (c) eight hours in any day if the employee works on more than five days in a week."

senior managerial employees and employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work. Again, one can imagine that the employer of such employees may very well unfairly demand draconian working hours which may be very detrimental to such employees and/or their families. Again, the duty of fair dealing would provide recourse in such circumstances.

Other scenarios may conceivably present; for example, unfair employer conduct that falls short of constituting unfair discrimination (even under the extended protection provided against unfair discrimination on arbitrary grounds by the *Employment Equity Act* 55 of 1998 (EEA)) and which also does not fit into the niche of an unfair labour practice. Or consider the scenarios suggested by Bosch regarding psychological harm to an employee arising from persistent, generally abrasive and abusive conduct by an employer, which does not amount to victimisation under the LRA.¹⁴ In all of these cases the implied duty of fair dealing could bring satisfactory relief to employees who may fall through the legislative cracks (and, importantly, this would include recourse to an order for specific performance, which could assist in the maintenance of employment relationships and further the objectives of the labour legislation). Its recognition through the constitutional development of the common-law contract would not fall foul of section 8(3) of the *Constitution*, where the relevant legislation does not sufficiently give effect to these employees' right to fair labour practices.¹⁵

¹⁴ Bosch 2006 *ILJ* 46 remarks as follows: "The LRA 66 of 1995 provides that an employee who is subjected to employer conduct that renders a continued employment relationship intolerable may terminate the contract of employment and claim to have been unfairly dismissed. But the LRA provides no remedy for the employee who is subjected to abusive conduct while he or she is still employed, unless perhaps he or she is being prejudiced by the employer for exercising a right conferred by the LRA. Neither do other pieces of labour legislation, barring instances of discrimination. It is not clear why an employee should have to wait until the employer's conduct becomes intolerable and terminate the contract of employment before he or she is in a position to seek redress against an abusive employer. It would be far more satisfactory for the employee to deter employer abuse by bringing a claim for damages for breach of the implied term of trust and confidence during the course of the employment relationship, or better yet claim damages and request the LC or High Court (HC) to make an order of specific performance requiring the employer to act in compliance with the implied term."

¹⁵ In fact, I would suggest that Du Toit would agree that such a constitutional development of the common law may be an appropriate way to address the relevant hiatus in the legislation: "Constitutional scrutiny' ... does not necessarily mean that a provision of the LRA which fails to give effect to the right to fair labour practices in all its aspects in any given context is *per se* invalid. Rather, it may reveal a hiatus which can be remedied by developing the common law or relying on the constitutional right itself." *Du Toit* 2008 *SALJ* 104.

It is suggested that the need for the implied duty of fair dealing is well illustrated in the above cases, where legislative protection may fall short of the constitutional standard, but I will go out on a limb and argue that the recognition of this duty should not be limited only to those cases. I believe that *Murray's* duty of fair dealing should be deemed to form part of *all* employment contracts (as Cameron JA clearly stated). The consequence of this would be – and this statement is, of course, controversial – that this duty should also be accessible to employees who may be protected under the legislation and may have access to the unfair dismissal and unfair labour practice provisions of the LRA. In order to explain this view, I need to deal with some of the arguments of those who are critical of such a duty in these contexts and who propose a single and exclusive legislative regime for unfair dismissal and unfair labour practice disputes. I will deal with these arguments in sections 2.3 and 2.4 below, before returning (in section 2.5) to another reason why we should recognise the common-law duty of fair dealing.

2.2 Unlawful equals unfair (and means that a claimant must utilise the legislative scheme)

One argument favoured by opponents of the recognition of a common-law duty of fair dealing is that unlawfulness and unfairness overlap to such an extent that any claim based on unlawfulness (that is, the breach of such an implied term) would invariably be concerned with unfairness. Thus, when the claim involves the termination of an employment contract, it would automatically have to be brought as an unfair dismissal claim under the LRA. Froneman AJA, in his minority judgment in *Fedlife Assurance Ltd v Wolfaardt*,¹⁶ was of the opinion that breach of contract claims brought by a claimant relying on the unlawful termination of their employment contract would invariably involve the fairness of a dismissal, and that a claim for relief would thus invariably need to be brought in terms of the statutory unfair dismissal scheme of the LRA. This, he argued, was based on the fact that unlawful conduct by an employer would invariably also be unfair:

I am of the view that the common law contract of employment must ... give some form of expression to that fundamental right not to be unfairly dismissed. As soon as the common law does give some expression to that right, I have the same kind of difficulty as Nienaber JA had in *National Union of Metalworkers of SA v Vetsak Cooperative*, namely to conceive how an unlawful dismissal would not also be an unfair dismissal. And if such a dismissal is unfair any dispute about it falls squarely within the opening words of section 191(1) of the Act. In short, one of the demands of the Constitution on our common law of employment is that it includes a right to a fair dismissal. Dismissal upon an

¹⁶ *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) (hereafter the *Fedlife* case).

unlawful breach of contract by an employer is an unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal.¹⁷

Jafta AJA shared this view – that unlawfulness would inevitably equate to unfairness – in *Buthelezi v Municipal Demarcation Board*,¹⁸ where he held that a breach of contract by an employer automatically equated to an unfair dismissal:

I conclude that the respondent had no right in law to terminate the contract of employment between itself and the appellant. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal.

I would suggest, however, that the veracity of this generalisation is questionable. Nugent JA, in the majority opinion in *Fedlife*, seemed to indicate that not all cases of unlawfulness would necessarily constitute unfairness.¹⁹ And Froneman J later appeared to contradict his earlier view as expressed in *Fedlife*.²⁰ It is submitted that there may very well be instances

¹⁷ Froneman J in the *Fedlife* case; para 14 of the minority judgment.

¹⁸ *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) (hereafter the *Buthelezi* case). For further support of this view, but which might rather cynically impute questionable motives to claimants in such cases, also see Van Eck and Mathiba 2014 ILJ 867-868: "In a minority dissenting decision [in *Fedlife*], Froneman AJA, in our view correctly, held that a common-law termination dispute is about an unfair dismissal and therefore it should be dealt with in accordance with the provisions of the LRA, which would exclude the High Court from entertaining the matter. More often than not the election between either the Labour Court or the High Court was based on strategic (or forum shopping) purposes rather than being founded on substantive underlying reasons which justified the coexistence of these courts."

¹⁹ Nugent JA said the following in the *Fedlife* case, para 27 of the majority judgment: "A dispute falls within the terms of the [LRA] only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair is quite coincidental for that is not what the employee's claim is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone does not fall within the terms of the [LRA] (even assuming that the termination constituted a 'dismissal' as defined in [the LRA])."

²⁰ In the *Giyose* case para 29 Froneman J appeared to contradict his own view expressed earlier in the *Fedlife* case, when (in the process of recognising the constitutional development of the common-law employment contract to include an implied right to a pre-transfer hearing) he remarked as follows regarding the nature of the claim where unfairness arises in breach of an implied term regarding a fair procedure: "In *Gumbi* the recognition (as a developed part of the common-law contract of employment) of a pre-dismissal right to a hearing was based on considerations of fairness arising inter alia from the constitutional right to fair labour practices. The issue in dispute in *Gumbi* concerned the procedural fairness of a dismissal. *Gumbi* and *Boxer Superstores* thus appear to be authority for the proposition that the common-law contract of employment may be developed to bring it in line with the constitutional right to fair labour practices, but once a right is recognised in this manner the nature of its breach becomes a matter of contractual unlawfulness, not of legislative fairness under the LRA."

where a practical scenario might present where an employer acts in breach of contract (unlawfully), but its conduct is nevertheless fair in the circumstances or, conversely, where the employer's unfair conduct is not in breach of the contract (that is, it is not unlawful). One such scenario presented in *Buthlezi*, where the employer purported prematurely to terminate a fixed-term contract of employment for operational requirements, while the contract did not make provision for premature termination. Even though such a termination may be a breach of the terms of the contract (that is, unlawful), would the justification of genuine operational requirements not mean that such a breach does not constitute unfairness (and an unfair dismissal in terms of the Act)? Cohen provides two further examples of instances where an unlawful termination of a contract of employment may not necessarily be unfair, or where a fair termination may be unlawful:

[I]t cannot be assumed that in all circumstances an unlawful dismissal will be unfair. While the Labour Courts have sanctioned a departure from the procedures and sanctions stipulated in disciplinary codes in appropriate circumstances and have made a finding of procedural fairness in this regard, a deviation from these procedures may constitute an unlawful contractual breach if they are incorporated into a contractually agreed disciplinary code. It is thus conceivable that an unlawful breach of an employment contract, actionable in the civil courts, may nonetheless satisfy the procedural fairness requirements of the LRA. Similarly the fair dismissal of an employee for poor work performance, in compliance with the procedures identified in the Code of Good Practice: Dismissal, has been held to be fair but unlawful where the contractually required notice was not given. Such poor performance was not regarded as materially breaching the contract and as a result did not justify the summary termination of the employment contract.²¹

I would suggest that the above generalisation, the automatic equation of unlawfulness and unfairness, does not provide a strong argument against the recognition of an implied duty of fair dealing in the present context. The reasoning followed by Froneman J in *Fedlife* (quoted above) and Jafta AJA in *Buthlezi*, which purports to conflate unlawfulness and unfairness in this way in order to bring all dismissal claims under the auspices of the LRA's unfair dismissal scheme, would in the context of a claimant bringing a dismissal claim to court as breach of contract to my mind run contrary to what Nugent J expressed in *Makhanya v University of Zululand*.²²

[A] claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called 'characterising' the claim. Where that word is used to mean 'describing the distinctive character of' the claim that is before the court, as a fact, then its use is unexceptionable. But when it is used

²¹ Cohen 2007 SA Merc LJ 28.

²² *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA) (hereafter the *Makhanya* case).

to describe an alchemical process that purports to convert the claim into a claim of another kind then the word is abused. What then occurs, in truth, is not that the claim is converted, but only that the claimant is denied the right to assert it.²³

I would submit that this "alchemical conversion" is precisely what happened in the above two judgments, by way of semantics, with the outcome being that these judges would disallow the respective claimants their right to assert the contractual claim.

If one accepts that there may be cases where a claimant genuinely possesses more than one cause of action, as explained in *Makhanya*, why should forum-shopping be as heavily frowned upon as it is by some in the legal fraternity? Surely, the role of good lawyers is to pursue the optimum relief for their clients in the face of an actionable wrong, and where relying on one cause of action as opposed to another would bring better relief (for example, greater compensation for harm suffered, or a speedier avenue to relief) claimants should not be prevented from exercising their rights under law. I would suggest that some of the criticisms that have been expressed by opponents of labour dispute forum-shopping are motivated partially by frustration at the legislature for failing to remove perceived ambiguities in the legislation (in the context of the labour fora/civil courts jurisdictional debate referred to in the introduction to this piece). But until such time as the legislature decides to remove the possibility of dual causes of action and access to the civil courts in employment-related matters, this is the law.²⁴ And, after all, section 34 of the *Constitution* entrenches the fundamental right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Unless and until such time as the legislature steps in to deprive claimants of their common-law rights, these

²³ Per Nugent J, in the *Makhanya* case para 72.

²⁴ See the following, as per Langa CJ in *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 177 (hereafter the *Chirwa* case): "The concern of forum-shopping is a valid one. It is, as this Court has recently implied, undesirable for litigants to pick and choose where they institute actions in the hope of a better outcome. However, while forum-shopping may not be ideal, section 157(2) of the LRA as interpreted in *Fredericks* confers concurrent jurisdiction to decide a claim concerning the right to administrative justice in the labour context on two courts. The possibility of forum-shopping is an unavoidable consequence of that legislative decision. There have been calls for legislative intervention to alter that decision and those calls are not without merit. But unless and until the call is heeded, the meaning of section 157(2) is set."

rights remain available even though a common-law claim may arise in the context of employment. This complies with the *Constitution*.²⁵

A final point to make is that the accuracy of the previously-expressed notion that as soon as a claimant's complaint regarding a dismissal relates to its unfairness "any dispute about it falls squarely within the opening words of section 191(1) of the [LRA]"²⁶ is also questionable. Froneman J said this because at the time the common law was taken to concern itself with the lawfulness of a dismissal (was it a breach of the contract?) while only the LRA provided for testing its fairness. But in the wake of *Murray*, a dismissal could constitute a breach of the employment contract as a result of its unfairness. The employer's unfair conduct would be in breach of its implied duty of dealing fairly with the employee. And the opening words of section 191 of the LRA ("If there is a dispute about the fairness of a dismissal ... the dismissed employee ... may refer the dispute in writing" to a bargaining council or the CCMA) does not, to my mind, exclude the possibility of referring a breach of contract claim to a court, which entails a dispute about the fairness of a dismissal as a result of a claimed breach of the duty of fair dealing.

2.3 The intention of the legislature and the policy reasons behind the legislative unfair dismissal (and unfair labour practice) scheme

Another argument brought against the recognition of the implied duty of fair dealing by its opponents is based on the separation of powers between the legislature and the judiciary, and the policy grounds behind the statutory unfair dismissal scheme contained in chapter VIII of the LRA. The argument goes that courts should adjudicate individual disputes on the facts before them and leave the consideration of labour relations policy to the democratically elected legislature. Wallis AJA, in *McKenzie*, devoted significant attention to this. He referred to the English case of *Johnson v Unisys Ltd*,²⁷ where the majority of the law lords held that it would be inappropriate to allow an employee to recover damages for breach of contract (breach of the implied term of trust and confidence) arising from a dismissal, as this would circumvent the statutory scheme for unfair dismissal protection, which scheme exists because of policy reasons. The High Court of Australia

²⁵ Cameron JA observed as follows in the *Chirwa* case para 65: "We must end where we began: with the Constitution. I can find in it no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them."

²⁶ Froneman J in the *Fedlife* case para 14.

²⁷ *Johnson v Unisys Ltd* 2001 UKHL 13 (hereafter the *Johnson* case).

similarly held that the implication of an implied duty of trust and confidence in the employment contract in that jurisdiction is a job for the legislature and not for the courts.²⁸ Du Toit has written forcefully about the policy objectives of the labour legislation and decries the usurping of the legislature's role by the judiciary in the line of SCA cases referred to earlier:

[C]ommon-law judges are being invested with considerably broader discretion than that permitted by the LRA in fashioning precedent-setting remedies in areas of immense socio-economic sensitivity and importance. The process of judicial law-making (for that is effectively what it amounts to) is complicated further by the adversarial nature of the process: disputes are argued by parties who are out to score points and win their case, with little or no thought for longer-term social goals. Judges are left to make critical decisions based on their personal interpretation of open-ended contractual rights and duties, such as 'fair dealing' or 'trust and confidence', much as the Industrial Court was at large to give meaning to the meaning of 'unfair labour practice'. It does not seem right.²⁹

I would suggest that the role of the courts in this context may be less problematic when considered against the backdrop of the constitutional duty placed on the courts to develop the common law where necessary. Du Toit³⁰ and others³¹ have argued that such development of the common law in cases such as *Fedlife* and *Murray* was not necessary, in the light of the LRA's extensive regulation of unfair dismissal and unfair labour practices. But this determination should be made with due consideration of the relevant objectives of the legislation and the reasons behind its specific rights protection scheme, as well as the continued role of the common law in the light of the Bill of Rights (as referred to in section 2 of Part 1). This raises the issue of the interaction between the intention of the legislature with the promulgation of labour legislation and the traditional role of the common law of contract, within the contested space of the employment relationship:

²⁸ As the majority of the court held in *Commonwealth Bank of Australia v Barker* 2014 HCA 32 paras 40-41 (hereafter the *Barker* case): "The complex policy considerations [around the implication of an implied duty of trust and confidence] mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves ... Importantly, the implied duty of trust and confidence ... is directed, in broad terms, to the relationship between employer and employee rather than to performance of the contract. It depends upon a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law. It should not be accepted as applicable, by the judicial branch of government, to employment contracts in Australia."

²⁹ Du Toit 2010 *ILJ* 41.

³⁰ In *Du Toit* 2008 *SALJ* 95-133; Du Toit 2010 *ILJ* 21.

³¹ See the judgment of Pillay J in *Mohlaka v Minister of Finance* 2009 30 *ILJ* 622 (LC).

Contract law enforces the voluntarily made obligations between parties by awarding damages should they renege. Statutory regulation imposes mandatory obligations on employers to comply with minimum entitlements of employees. Compliance with the latter is determined by industrial tribunals, rather than courts, and it addresses policy of broad public interest, rather than the interests of contracting individuals.³²

A primary objective of the LRA and other labour legislation is to promote and advance social justice.³³ The BCEA does this, for example, through the provision of a floor of rights to employees in respect of their basic terms and conditions of employment. The LRA, for example, does this by providing a scheme for unfair dismissal remedies. These protections are there primarily to address the plight of vulnerable workers (see, for example the role of the earnings threshold in respect of employees' entitlement to protection under certain provisions of the legislation), in order to protect such vulnerable workers against exploitation arising from the employer's superior bargaining power, and to promote social justice for these workers. In *Fedlife* Nugent J made it clear that the introduction of the legislation does not mean that those more fortunate, less vulnerable employees have thus automatically lost their pre-existing rights under the common law of contract. The common law still, and validly (also in our constitutional dispensation) has the role of holding contracting parties to their bargains. This includes not only the negative aspect of protecting a party against a breach of the contract by the other party, but also the positive aspect of promoting the pursuit of each party's interests under the contract (mindful of the interests of the other party). In the light of the universal coverage of the constitutional guarantee of fair labour practices, the relational nature of the employment contract and the dignity of work (and especially the important role that gainful employment plays in allowing persons to access material benefits including food and housing, financial services, social security and socio-economic advancement), it is submitted that an implied duty of fair dealing in the employment relationship must be taken to be a *naturalium* of the bargain between the contracting parties.

Wallis AJA relied heavily on the judgment of the House of Lords in *Johnson*, and the sentiments expressed there regarding the untenable position of allowing persons protected by legislation from circumventing the statutory scheme for disputes based on the protections offered by such legislation. Wallis AJA concluded this line of reasoning by referring to Du Toit's following view:

³² Wahlstrom-Schatt *Dismissal of the Implied Term of Mutual Trust* 10.

³³ See, generally, Matlou 2016 *SA Merc LJ* 544.

To infer the existence of a common law right duplicating the statutory right is to call into question the purpose of enacting the statutory right.³⁴

This reference to the overlapping of statutory and common-law remedies is a key argument of opponents of the recognition of an implied common-law duty of fair dealing, which raises the issue of the separation of powers between the legislature and the judiciary, and the proper role of the legislature (as opposed to the courts) in formulating and implementing universally-applicable labour law policy as against the adjudication of individual disputes on the peculiar facts before a court.³⁵ As Wallis AJA put it in *McKenzie*: "[T]he courts must be astute not to allow the legislative expression of the constitutional right [to fair labour practices] to be circumvented by way of the side-wind of an implied term in contracts of employment."³⁶ In other systems, where courts have turned their face against the recognition of implied terms of this nature, this argument frequently held sway (see *Johnson*³⁷ in the UK, *Wallace v United Grain Growers*³⁸ in Canada, and *Commonwealth Bank of Australia v Barker*³⁹ in Australia). Of course, it bears saying that there are two

³⁴ Du Toit 2008 SALJ 96-97, as referred to in the *McKenzie* case para 35.

³⁵ Du Toit 2008 SALJ 118 observes the following regarding the interaction between these sources of law: "Legislation, as every lawyer knows, may amend the common law or leave it unamended. To leave it at that, however, is to misunderstand the role of legislation in a constitutional dispensation. Legislation is the product of deliberate policy, informed by constitutional imperatives and values, setting out to mould, supplement or replace common-law rules in the light of those values as well as governmental duties and socio-economic objectives derived from the Constitution. The LRA, in particular, was drafted with careful reference to the requirements of the Constitution and international law, following intensive negotiation between government, business and labour. The protection of employees against unfair termination of employment, balanced by the employer's right to terminate fairly, is a particularly sensitive aspect of the right to fair labour practices. In the result 'unfair dismissal', to all intents and purposes, has been placed on a par with fundamental breach of contract, accompanied by specific, and no less carefully crafted, remedies."³⁶ *McKenzie* case para 33.

³⁷ The *Johnson* case para 2, per Lord Nicholls: "On this appeal the appellant seeks damages for loss he claims he suffered as a result of the manner in which he was dismissed ... But there is an insuperable obstacle: the intervention of Parliament in the unfair dismissal legislation. Having heard full argument on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law."

³⁸ *Wallace v United Grain Growers* 1997 3 SCR 701 paras 75-76.

³⁹ The *Barker* case para 40, where the majority held as follows: "The complex policy considerations encompassed by [the implication of the term of trust and confidence] mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the

very important differences between the South African situation and the above jurisdictions. South African courts are enjoined (and, in fact, obliged) by section 39(2) of the Bill of Rights to develop the common law in line with the Bill of Rights, where necessary to give proper effect to fundamental rights. Also, South Africa is rather unique in respect of the inclusion of an express fundamental right to fair labour practices in its Bill of Rights, which, in the context of section 39(2), would strengthen the case for judicial activism (where required) in developing and expanding the role of fairness under the common law.

Essentially, these arguments appear to implicate the principle or theory of judicial deference to the other branches of government, in this case the legislature, in furtherance of the separation of powers. Commentators (and some judges) argue that the legislature is better placed to determine and set policy, and courts should refrain from treading on such policy determinations in the course of deciding individual cases on an *ad hoc* basis. But judicial deference has been criticised. Brand, for example, is critical of deference showed by the courts in cases involving socio-economic rights,⁴⁰ while Klaasen has criticised deference in cases involving judicial review in public litigation.⁴¹ There may be merit to the idea that the legislature is best placed to deal with broad labour relations and socio-economic development policy. But I think that our system of labour law might require more active participation from the judiciary in respect of the development of law (even where this occurs, of course, in the context of individual cases). In section 2 of Part 1 I referred to what I believe to be the rather unique nature of our labour law. Within the "one system of law" it is a system where the common law has survived more robustly than in some other branches of law (such as administrative law). And within the constitutional context of a constitutional duty on courts to develop this common law in line with the Bill of Rights, coupled with the unique constitutional entrenchment of fairness in the right to fair labour practices, it seems that the courts have a special role to play, which is one that may require them to be less deferential to the legislature. Be that as it may, even if one were to require the courts to defer to the legislature in respect of the determination of policy, this leaves the question of what the actual legislative intention behind such a policy-based framework

implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves."

⁴⁰ Brand 2011 *Stell LR* 614.

⁴¹ Klaasen 2015 *PELJ* 1901-1929.

(specifically, here, in the context of protection against unfair labour practices and unfair dismissal in the LRA) really is.

This is something that I believe the SCA in *McKenzie* did not sufficiently consider. Mention was made above of the central thread of the labour legislation in seeking to protect and promote the rights of vulnerable employees. This is found in various provisions whose application are made subject to the level of earnings of targeted employees; in the statutory presumption of who is an "employee" (which is aimed at assisting lower-earning workers to obtain the protection of the legislation); in provisions, regulations and sectoral determinations targeting vulnerable employees in sectors where collective bargaining may be less prevalent; and in provisions providing special protection to vulnerable employees engaged on fixed-term contracts or in atypical employment (for example, employees placed with clients by temporary employment services), to mention but a few examples. In the context of the right not to be unfairly dismissed, the intention of the legislature in enacting this statutory right was to bring protection to vulnerable workers who would, under the common law, otherwise be subjected to the superior bargaining power of the employer, the potential exploitation of such superior power by the employer, the vagaries of common law principles which focus on the lawfulness of the termination of a contract rather than its fairness and, significantly, the lack of resources to take a case to the courts. But in *Fedlife* Nugent J reminded us that there is another class of employees who may be less vulnerable to employer exploitation and who (continue to) enjoy pre-existing common-law rights to claim for damages or other contractual remedies in cases of breach of contract by their employers:

A right not to be unfairly dismissed finds its application pre-eminently in circumstances in which the employee has no contractual security of employment. While it is understandable that the legislature wished to enhance the security of that class of employees I can see no reason why it should have exacted a prejudicial *quid pro quo* from another class of employees entirely in order to do so. In my view there is simply no logical or conceptual connection between the rights that have been afforded on the one hand and those that are said to have been abolished on the other.⁴²

In his minority judgment in the Constitutional Court in the seminal contract law case of *Barkhuizen v Napier*,⁴³ Sachs J declared that "the rich, too, have rights". In the context of consumer protection (specifically, regarding the use of confusing and misleading standard form contracts filled with legalese and

⁴² The *Fedlife* case para 20 of the majority judgment.

⁴³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter the *Barkhuizen* case).

fine print) he stated the following, which I believe is apt also in the context of the legal protection of the rights of employees *vis a vis* their employers:

[T]he fact that consumer protection is specially important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers. If, in our new constitutional order, the quality of public policy, like the quality of mercy and justice, is not strained, then the wealthy must be as entitled to their day in court as the poor.⁴⁴

This may prove an unpopular argument,⁴⁵ but I would suggest that the existence of the (policy reasons behind the) statutory scheme regulating unfair dismissals does not have to prove such an insuperable barrier to recognising that all employees – but particularly less vulnerable employees ("the rich") – retain their common-law rights in cases of dismissal, contrary to the findings in *McKenzie* and in *Johnson*.

The first pillar of this argument is based on the presumption against legislative alteration of the existing law (the common law in this case) when interpreting a statute which is less than clear, as well as the presumption against the deprivation of existing rights, as considered in *Fedlife*. Nugent J made it clear that the LRA contains no clear indication that the intention of the legislature in formulating the statutory unfair dismissal scheme was to change the availability of recourse to common-law remedies, or to deprive such employees of the existing right to claim contractual remedies for breach by the employer. As Nugent J pointed out, section 195 of the LRA, in fact, expressly provides that an order or award of compensation in consequence of an unfair dismissal is "in addition to and not a substitute for any other amount to which the employee is entitled in terms of ... [a] contract of employment."⁴⁶ And it should be noted that, despite the earlier academic and judicial debate regarding the desirability of the continued availability of contractual remedies alongside the legislative remedies, this section of the Act was not amended by the legislature in the spate of significant legislative

⁴⁴ The *Barkhuizen* case para 149.

⁴⁵ Du Toit, for one, is critical of separate systems of labour dispute resolution in respect of their implications for access to justice: "[T]he majority judgment in *Fedlife* flies in the face of established principles of constitutional interpretation ... and the system by which the legislature sought to give effect to the right to fair labour practices. In effect, it allows litigants to circumvent that system at will. Worse, it may inadvertently have laid a basis for separate systems of labour dispute resolution: one for the rich and one for the poor. Common-law remedies can only be pursued by employees who have access to the resources to litigate in the courts; for the vast majority of employees the system created by the LRA offers the only redress." Du Toit 2010 *ILJ* 26.

⁴⁶ The *Fedlife* case, para 19 of the majority judgment.

amendments in the past few years following *McKenzie* and the line of earlier cases that grappled with the "jurisdictional quagmire".

That being said, the availability of common-law remedies may indeed be a spectre not unlike an ephemeral desert mirage for vulnerable, low-earning employees who lack the resources to pursue expensive breach of contract claims in court (as opposed to the speedy, inexpensive and more accessible forum of the CCMA). But certain employees – for example, senior executives on lucrative fixed-term contracts – may have the resources to pursue their common-law claims, with the possibility of receiving more in the form of compensation for harm caused by means of an award of contractual damages. Providing a straitjacket to restrict these latter employees, by ensuring that they have recourse only to LRA rights and remedies, would take away from this class of employees the rights they enjoyed under the common law, which Nugent J says would be wrong. The presumptions referred to in his judgment would surely militate against this, as would the foundational principle of our law of contract, *pacta sunt servanda*, which still largely enjoys its hegemonic position in contract law in our constitutional dispensation.

The second pillar of the argument is based squarely on the constitutional guarantee of fair labour practices, which applies to "everyone" (including less vulnerable employees - "the rich"). Wallis AJA in *McKenzie* referred to section 8(3) of the *Constitution* and held that development of the common law to recognise an implied term not to be unfairly dismissed was not necessary, as the LRA already gives effect to the constitutional right. Coupled with the reasoning in this judgment that such an implied term would simply duplicate the LRA protections, this raises the question whether the LRA protections duplicate this less vulnerable class of employees' pre-existing common-law rights, or whether in fact they provide for something less. The answer seems to be clear; it is the latter. Much was made in *McKenzie* (as in *Johnson*) of the policy considerations behind the statutory unfair dismissal schemes (in South Africa and the UK respectively), which led *inter alia* to the capping of compensation in unfair dismissal disputes. Although contractual damages are decided on a case-by-case basis, at least in principle the capping of statutory compensation constitutes a limitation of the potential compensation a claimant under the common law could be awarded by way of contractual damages. The legislation has curtailed the potential remedy for those claimant employees who might realistically have access to the common-law remedies. Is this justifiable on the basis of the policy considerations referred to in these judgments? As stated above, the intention of the legislature in fashioning the unfair dismissal provisions of the LRA appears to have been primarily the objective of protecting vulnerable employees who would

otherwise lack real and effective access to common-law remedies. There is little if any evidence of a legislative intention to punish those employees who have the resources to pursue the exercise of their existing common-law rights. If the policy consideration of promoting economic development and employment by curtailing large awards of damages against employers is invoked here, surely this is something that a court could (and would) consider in arriving at the quantum of an award for damages?

I am not arguing for a potentially unfairly discriminatory system which would provide greater protection to the rich than it does to the poor. An implied duty of fair dealing – including an implied term not to be unfairly dismissed – should be available to all employees. But the LRA scheme provides a better and more accessible avenue for the vulnerable employee, which is in line with the objectives of the Act. It might sound harsh, but this would reflect a reality in society in respect of access to resources, as well as in respect of access to the law. By way of analogy, on a rather prosaic level: the rich may enjoy the benefits of an expensive cell phone contract (such as lower data rates and bundles, and free calls), while the pay-as-you-go option provides a mechanism for the poor to access services which may be more basic but get the job done. Are the LRA rights and remedies relating to unfair labour practices and unfair dismissal the legislative equivalent of the R10 airtime voucher? And, if so, is it problematic, for the purposes of the law, that there exists alongside it an expensive cell phone contract which may be inaccessible to the poor and accessible only to a select few who have the means to afford it? I know that this line of reasoning might sound insensitive to the plight of the poor and of vulnerable, low-earning workers. Du Toit criticises the majority judgment in *Fedlife* and the parallel system of contractual employment disputes which it sanctioned. One point of criticism for the author is this disparity between the position of vulnerable and less vulnerable employees:

Common-law remedies can only be pursued by employees who have access to the resources to litigate in the courts; for the vast majority of employees the system created by the LRA offers the only redress ... [T]he majority view in *Fedlife* [was] that it would be "bereft of any rationality" to "confine" an employee whose fixed-term has been unlawfully terminated "to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194" of the LRA. "Bereft of any rationality" or not, the LRA in giving effect to s 23(1) of the Constitution deliberately limits compensation for unfair dismissal to these "limited and entirely arbitrary" amounts. The question here is not whether it behoves any court to be quite so dismissive of the constitutional scheme which it is bound to uphold. The point is rather that it accentuates the inequality being created between different classes of litigants - in effect, between more and less generous remedies based on litigants' access to resources. Truly vulnerable workers on fixed-term contract hardly benefit from the theoretical possibility of

pursuing claims for contractual damages in the High Court (HC) or the Labour Court (LC).⁴⁷

This may well seem, and may very well be, grossly unfair. But would such disparate access to recourse in law (vulnerable workers follow the LRA avenue, while other employees may be able to afford to go the common-law route, with better prospects of compensation for harm suffered) be unconstitutional? Would this be unequal protection before the law, if the inequality is not as a result of the law itself (both classes, after all, enjoy the same rights) but rather as a result of the sad socio-economic realities in our deeply unequal society? When Du Toit points out that truly vulnerable employees hardly benefit from the theoretical possibility of pursuing contractual claims in court, does this not ignore the fact that this was also the pre-constitutional, pre-LRA and pre-*Fedlife* position? Are both these classes of employees, on balance, not better off in the constitutional dispensation? And, I would suggest, this highlights the actual intention of the legislature behind the statutory unfair dismissal and unfair labour practice schemes. In the House of Lords in *Johnson* Lord Hoffman quoted Judge Ansell in posing the following question:

[T]here is not one hint in the authorities that the ... tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework?⁴⁸

The short answer in the context of the LRA, I would suggest, is that the legislature recognised the inaccessibility of existing common-law remedies to vulnerable employees, and the statutory scheme was set up to provide access to a new raft of remedies in a speedy and inexpensive manner. The intention was to broaden access to justice but, as Nugent JA held in *Fedlife*, there is no evidence in the LRA that broadening access to justice in this way was intended, as a *quid pro quo*, to curtail the existing rights of the more fortunate class of less vulnerable employees who were not in need of such a new legislative scheme to begin with. In her minority judgment in the case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* Lady Hale explained the intention behind the legislative scheme for unfair dismissal in the UK:

There is no reason at all to suppose that, in enacting the Industrial Relations Act 1971, Parliament intended to cut down upon or reduce the remedies available to employees whose employers acted in breach of their contracts of employment. Quite the reverse. Parliament intended to create a new statutory remedy for unfair dismissal which would supplement whatever rights the

⁴⁷ Du Toit 2010 *ILJ* 26-27.

⁴⁸ The *Johnson* case para 57.

employee already had under his contract of employment. Parliament did that because most employees had very few rights under their contracts of employment. In particular, although many employees had a reasonable expectation that they would stay in their jobs unless and until there was a good reason to dispense with their services, most of them had no legal right to do so. The 1971 Act gave them the right not to be dismissed without what appeared at the time to be a good reason, determined after a fair process. They were to be compensated, within modest limits, not principally for their hurt feelings but for the loss of their job. That the main target of the new jurisdiction is the loss of the job is borne out by the later inclusion of the remedy of reinstatement.⁴⁹

Lady Hale continued to observe that there was no intention on the part of the legislature to interfere with the contractual rights of those employees who could show a "right to the job" (that is, who could rely on an express term to be dismissed for just cause, or tenured employees), and explained that the ratio of *Johnson* should be limited and understood in terms of the very specific "territory which Parliament had occupied" by means of the labour legislation:

[In *Johnson*] the House of Lords was persuaded that the common law implied term [of trust and confidence], developed for a different purpose, should not be extended to cover the territory which Parliament had occupied. In fact, the territory which Parliament had occupied was the lack of a remedy for loss of a job to which the employee had no contractual right beyond the contractual notice period. Parliament occupied that territory by requiring employers to act fairly when they dismissed their employees. But there was and is nothing in the legislation to take away the existing contractual rights of employees. There was and is nothing to suggest that Parliament intended to limit the entitlement of those few employees who did and do have a contractual right to the job, the right not to be dismissed without cause.⁵⁰

The legislature in South Africa similarly intended to provide a special protection scheme for the most vulnerable workers. We find this not only in the unfair labour practice and unfair dismissal provisions of the LRA, but also in its collective bargaining scheme. The vast majority of trade union members in South Africa are lower-earning employees. The less vulnerable, high-earning employees tend not to be significantly unionised. This again shows that the LRA cannot provide a one-size-fits-all solution to these different classes of employees, but the system that it provides (in conjunction with the supplementary avenue of access to common-law remedies) is one that seems, upon reflection, to provide largely satisfactory coverage on the basis of a (possibly somewhat eclectic) collection of swings and roundabouts. The champions of the rights of vulnerable employees are the accessible dispute resolution system of the CCMA and trade unions. Less vulnerable employees are largely able to take care of themselves without union intervention, and

⁴⁹ *Edwards v Chesterfield Royal Hospital NHS Foundation Trust and Botham v Ministry of Defence* 2011 UKSC 58 para 111 (hereafter the *Edwards* case).

⁵⁰ The *Edwards* case para 121.

the contractual remedies (and also access to the civil courts) serve to balance things out on the scales of ensuring access to protection against unfair labour practices and access to effective remedies for wronged complainants.

Who are these vulnerable workers? As I write this, I do not have accurate information to hand to determine the proportion of employees who earn below the earnings threshold in the labour legislation.⁵¹ But there are clues that point to the fact that the vast majority of employees earn below the threshold. Based on a compilation of their *Quarterly Labour Force Surveys* for 2014, Statistics South Africa estimated that 60% of workers in South Africa earned R4 200 a month at that time.⁵² And an online report in January 2017 compared the national average annual wage to that of top CEOs in South Africa, with an unsettling conclusion:

'While CEOs in South Africa make far less on average than their American counterparts, their salaries were 541 times more than the average income in their own country,' Quartz reported on Thursday. 'It took CEOs in South Africa just over seven hours to make \$13 194 (R180 251), which is the country's average yearly wage. Assuming Monday, January 2, was a public holiday and they started work at 07:30 on Tuesday, January 3, CEOs in South Africa clocked in the annual average wage by 15:00 that day.'⁵³

Does the intention of the legislature behind the relevant provisions of the labour legislation reflect these disparities between different classes of employees? If so, does the failure of the legislature to amend the legislation subsequent to *Fedlife*, *McKenzie* and the other SCA judgments considered here in order to remove the possibility of common-law claims in employment matters (and/or to abolish the duty of fair dealing) indicate an acknowledgement of the fact that the legislation cannot provide a one-size-fits-all system for protecting these different classes of employees?

We need to interrogate the clues found in the legislation. Mention has already been made of the intention that clearly manifests in various provisions of the legislation to target vulnerable employees (something that has been only more clearly displayed in the eventual 2015 amendments, such as the new section 198A and 198B provisions in the LRA dealing with atypical employment (workers placed by temporary employment services) and fixed-term contracts). A further indication may be found in the ultimately abandoned attempts by the legislature to further distinguish between vulnerable and non-

⁵¹ Set at the time of writing at R 205 433.30 per annum.

⁵² From a report dated 23 March 2016, Africa Check 2016 <https://africacheck.org/reports/do-60-of-south-african-workers-earn-less-than-r5000-a-month/>.

⁵³ From a report on Fin24: Fin24 2017 <https://www.fin24.com/Economy/ceos-in-sa-will-earn-your-annual-salary-in-7-hours-20170106>.

vulnerable employees in respect of unfair dismissal, in the 2010 and 2012 *Labour Relations Amendment Bills*. The *Labour Relations Amendment Bill, 2010* suggested the insertion of a section 187A in the Act, with the following provisions:

Limitation on application of Chapter VIII 187A.

An *employee* earning in excess of an amount determined by the *Minister* by notice in the *Gazette*, may not refer labour *disputes* in respect of the provisions of sections 185, 186, 188, 189, 189A and 197 to the CCMA.

A media release published in December 2010 briefly explained the objective of the proposed new section 187A as follows:

Other amendments proposed include ... the exclusion of employees earning more than a specific amount from referring their labour disputes to the CCMA with a view to ensuring that 'vulnerable employees' are not prejudiced by the volume of complaints from those who can afford to approach the courts.⁵⁴

The proposed new section 187A was not included in the Labour Relations Amendment Bill, 2012, but this latter Bill was even more ambitious in proposing a special dismissal regime for non-vulnerable employees through the insertion of a new section 188B in the Act (also subsequently abandoned in the 2014 amendments to the LRA). The actual text of the proposed section 188B is not included in the version of the 2012 Amendment Bill which was available online at the time of writing⁵⁵, but the following, from the memorandum of objects of the Bill, deserves to be quoted here in full:

Insertion of section 188B of Act 66 of 1995

This section is inserted to create more flexibility for employers in dealing with the dismissal of high earning employees. It does so without detracting from the rights of these employees not to be dismissed for reasons that would be automatically unfair under section 187, or their rights to seek redress for unfair labour practices defined in section 186. At the heart of the change is the disproportionate cost, complexity, and impact on an employer's operations of procedures to terminate the employment of high earning employees in circumstances where the reason for doing so may not fall clearly and neatly within the fair reasons for dismissal specified in section 188(1)(a)(i) and (ii). By

⁵⁴ See DoL 2010 <http://www.sabinetlaw.co.za/labour/articles/labour-bills-published-comment>. The Food and Allied Workers Union, in its submission to the Department of Labour on the Labour Relations Amendment Bill, 2010, submitted the following: "Proposed section 187 A. We are concern (*sic*) about the insertion of this section as it has the potential of denying access to the CCMA by certain employees. We propose that the threshold be not less than [R]500 000 alternatively such employee to be charged a particular fee when they refer matters to the CCMA." From the FAWU submission: FAWU 2010 http://www.fawu.org.za/docs/news/2011/amenment_acts.pdf.

⁵⁵ DoL 2012 <http://www.labour.gov.za/DOL/downloads/legislation/bills/bill/LRA%20bill16d-2012.pdf>.

way of example, an employer may reasonably and fairly wish to replace a senior executive to secure a change in tone and culture within the leadership team, because the executive does not fit or no longer fits within the leadership team, because internal or external circumstances have changed, or because the employer wants to embark on a new direction for the business or enterprise. These reasons do not comfortably fall within the reasons for dismissal specified in section 188, but are widely recognised as legitimate reasons to replace senior employees. In addition, senior executives in practice exercise the role of employer in many respects, and usually occupy a special position of trust in relation to the employer. The uncertainty created by the application of section 188 in these situations leads to significant inflexibility and inefficiency at the top levels of a business or state enterprise. At the same time, the cost of asserting discipline and performance standards at senior levels is notoriously difficult to manage, and conflict at this senior executive level that results from efforts to terminate employment imposes significant constraints, measured in cost and efficiency, on both public and private sector employers. *The primary rationale for providing statutory protection against unfair dismissal, and for providing remedies for unfair dismissal as a species of unfair labour practice, is the inequality of bargaining power between employer and employee. Providing uniform protection against unfair dismissal to lower skilled or lower paid employees, on the one hand, and highly skilled or highly paid executives, on the other, fails to recognise the significant difference in bargaining power that employees in these categories have in negotiating employment contracts and in dealing with their employers during employment. Senior executives and highly paid employees are generally able to influence to a material extent the terms on which they are engaged, and to make decisions about whether and on what terms to take up employment with a particular employer. A number of comparable foreign jurisdictions exclude the application of dismissal protection to senior executive or highly paid employees.* The amended section opts to apply the new provisions to employees earning above a specified remuneration threshold rather than by reference to their status or role within the employer's enterprise. This approach will avoid the need for disputes about whether employees fall inside or outside an identified class of employee, that may give rise to costly collateral litigation. It is intended that the remuneration threshold will be a relatively high threshold, in excess of R1 million per annum, with the actual threshold to be determined by the Minister from time to time taking into account the considerations set out in subsection (4) of the new section. The amendments do not preclude the termination of employment of high earning employees summarily or on shorter notice where this is justified applying the provisions of section 188. In that event these employees, like all others, will be entitled to exercise the remedies provided by the LRA. *Where employers elect, however, to give the minimum period of notice or any longer period provided for in the contract of employment, this will be deemed to be fair for the purposes of section 188, though it would not affect any claim brought under section 187. The amendments seek to draw a fair balance between the rights and economic interests of employers, enabling employers to achieve efficiency and flexibility at senior levels, and the rights and interests of highly paid employees, who remain protected against arbitrary or summary action.* A transitional provision will make the new regime applicable to existing contracts of employment of employees earning above the threshold after two years. This will provide all

parties with an opportunity to reconsider and, where necessary, to renegotiate the terms of the employment relationship during that period.⁵⁶

Comment at the time (posted online on *Labourguide*) explained the apparent intention behind this proposed provision as follows:

The Minister also proposed distinguishing between higher and lower income earners in cases of dismissal. In instances where an employee earning above the threshold prescribed by the Minister (likely to be in the region of R1 million) is dismissed, that dismissal shall be deemed to be for a fair reason and effected in accordance with a fair procedure if the employer gives the employee notice (being notice in writing equal to three months or a longer period as specified in the employee's contract of employment) or pays the employee in lieu of such notice. Arguable (*sic*), although this amendment will not deprive higher paid employees of the right to challenge their dismissals, it will mean that these employees, rather than their employers, will bear the onus to prove that the dismissal was unfair, potentially making it very difficult for higher earning employees to prove that they have been unfairly dismissed.⁵⁷

As already said, this proposed section 188B was abandoned in the subsequent LRA amendments in 2015. But this and the earlier proposed new section 187A are clearly indicative of an understanding on the part of the legislature that the positions of vulnerable employees and of high-earning, less-vulnerable employees are vastly different and may require a differential approach not only to the applicable unfair dismissal scheme but also to access to dispute resolution. And each of these two proposed new provisions was not a once-off anomaly; the proposals appeared in multiple iterations of the amendment Bills.

The above-quoted section from the memorandum of objects to the 2012 amendment Bill (and especially the sections marked in italics) reflect a legislative acknowledgement of the unique position of high-earning employees. They generally enjoy greater equality of bargaining power with their employers; they enjoy a greater degree of autonomy in the formulation of their terms and conditions of employment; they are, due to the first two characteristics, less open to potential exploitation by their employers; and they enjoy greater power to access the courts in unfair dismissal and other disputes. And such a proposed limitation or qualification of high-earning employees' access to the right not to be unfairly dismissed would suggest that the legislature had in mind that these employees may often be able to

⁵⁶ From the Labour Relations Amendment Bill: DoL 2012 <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf>. Emphasis added.

⁵⁷ From a piece by Vatalidis and Workman-Davies Date Unknown <http://www.labourguide.co.za/most-recent/1457-proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act?highlight=WyJ3b3JrcGxhY2UiXQ>.

access common-law rights if the legislative protection is so limited. Is this not why section 77(3) of the BCEA and section 195 of the LRA have not been amended to date to exclude access to common-law claims? The suggestion that the legislative intention with the Chapter VIII provisions of the LRA was to provide new rights and remedies for especially vulnerable employees (without the intention to punish another class of employees by depriving them of existing (for example, common law) remedies) came to the fore in the majority judgment of Nugent JA in *Fedlife*. It also appeared in the majority judgment of van der Westhuizen J in *Gcaba v Minister for Safety and Security*:

[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. *Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.*⁵⁸

Many commentators have expressed reservations regarding the overlapping of jurisdiction of the labour courts and the civil courts, including fears of forum-shopping and the development of parallel systems of law which would lack coherence and, in essence, destroy the fabric of labour law as a discrete field of law.⁵⁹ These sentiments were echoed in *Johnson* and in *McKenzie*.

But I believe that the legislature's establishment of a system of protection for vulnerable employees, which co-exists with the existing common-law regime (which is more accessible to non-vulnerable employees) is not necessarily a bad thing. This would simply imply that there is one system of law, but it caters, realistically, for differently-placed claimants by providing a system whereby claimants can pursue the most appropriate and effective remedy in the(ir) circumstances. Those persons who may enjoy the privileged position of being in an equal bargaining position with their employer must, in terms of *pacta sunt servanda*, be held to their contracts. As the Labour Appeal Court held in *Vermooten v Department of Public Enterprises*, "[w]here the parties are in a relatively equal bargaining position and consciously elect one

⁵⁸ *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 73. Emphasis added.

⁵⁹ See, for example, the discussion in Visser and Reid *Private Law and Human Rights* 409-412.

contract or relationship over another, the legal effect should be given to their choice."⁶⁰ Absent a sham relationship or the intention by the parties to act *in fraudem legis*, parties are free to contractually structure their relationship to exclude the application of the labour legislation. As also held in *Vermooten*, the parties may "consciously and deliberately [elect] to structure their relationship as one other than an employment relationship. It is permissible to do this."⁶¹ Is this stance by the LAC not consistent with an understanding of the protective scheme of the labour legislation being geared towards retaining the ability for parties who are suitably placed to elect to avoid the legislative scheme and rather float their boat on other grounds (for example, the common law of contract)? If one may validly contract out of the protection of the legislation, why should one be chastised for "forum-shopping" when electing to pursue (existing) common-law remedies in cases where the employment relationship has soured due to conduct by the employer? Is the *McKenzie* view of the universal and compulsory application of the statutory unfair dismissal scheme consistent with this? Does it give sufficient effect to *pacta sunt servanda* and the freedom of contract (which would include the freedom to choose the appropriate legal route to follow in order to pursue a breach of contract claim, if the claimant is suitably placed to have access to such remedies)? In the case of those employees and employers who may be on an equal footing in relation to bargaining power, does a system that restricts an employee (who may be able to pursue a large damages award) to a rather arbitrary, statutorily capped compensation claim not provide recalcitrant employers with a form of moral hazard – a safety net for unfair conduct that would otherwise be more realistically punishable? And is this view in line with the true intention of the legislature?

A major problem, of course, is establishing what the true intention of the legislature is. I have made mention of the view expressed by various parties as to the need to promote the legislature's choice of establishing the labour forums under the LRA as the exclusive route for employment-related disputes; a "one-stop shop" for labour-specific dispute resolution and adjudication by labour law specialists.⁶² Ngcobo J, writing in *Chirwa* (in the context there of the dual causes of action relating to "LRA rights" on the one hand, and the claimed violation of constitutional rights on the other) was in support of this view, based on the primary objectives of the LRA:

⁶⁰ *Vermooten v Department of Public Enterprises* 2017 38 ILJ 607 (LAC) para 26 (hereafter the *Vermooten* case).

⁶¹ The *Vermooten* case para 25, with reference to *Universal Church of the Kingdom of God v Myeni* 2015 9 BLLR 918 (LAC). Also see Benjamin 2004 ILJ 797.

⁶² As per Skweyiya J in the *Chirwa* case para 47.

While section 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. *The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA.* In my view the only way to reconcile the provisions of section 157(2) and harmonise them with those of section 157(1) and the primary objects of the LRA, is to give section 157(2) a narrow meaning. The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case "for practical considerations". What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.⁶³

But apart from the objectives of the LRA mentioned there (listed in the Preamble to the Act as objectives number 6 and 7, respectively), what about the overarching objective of the Act – listed as objective number 1 – namely, to give effect to the constitutional right to fair labour practices? If the intention of the legislature is to be distilled from the objectives of the legislation as reflecting the legislature's view on the required form of legislative protection, arising from negotiations between social partners in the process of the formulation of such legislation, then surely it is apt to ask whether those provisions of the legislation which have been interpreted by our courts as not standing in the way of the recognition of jurisdiction for the civil courts in respect of common-law claims (such as section 195 of the LRA and section 77(3) of the BCEA) are not also reflective of a legislative intention which, primarily, is to give effect to the right to fair labour practices. And the best way to give full effect to such a right is to recognise a more robust scheme to bring employment-related claims, which scheme includes legislative respect for the continued recognition of pre-existing common-law rights. I believe this is what Van Niekerk J was implying in *Mogothle v Premier of the Northwest Province*:

My conclusion that *Chirwa* does not have the effect of confining an employee only to the remedies provided by the LRA (thus precluding an employee from seeking to enforce any contractual remedy) does not fly in the face of the policy reasons that underpin the concern, expressed in the judgments of the majority

⁶³ *Chirwa* case paras 123-124. Emphasis added.

of the Constitutional Court in *Chirwa*, to protect the integrity of the system of conciliation, arbitration and adjudication within specialist structures, a system agreed to by the social partners, after a careful balancing of competing interests. The BCEA, enacted some two years after the LRA, is just as much the product of negotiation by the social partners, and the Act represents as much of a finely balanced compromise as the LRA. When the social partners agreed to the terms of section 77(3) of the BCEA, they acknowledged that disputes concerning contracts of employment had not been eclipsed by the LRA, and that this court ought appropriately to be conferred with powers to determine contractual disputes, concurrently with the civil courts.⁶⁴

Where legislation establishes a statutory scheme for claims which supersede the existing common-law scheme, it does so expressly. In the labour law context this is what the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (COIDA) does. Further afield, this is also what the *Road Accident Fund Act* 56 of 1996 (RAF Act) does. These statutes take away a potential claimant's common-law rights and replace them with a statutory scheme and statutory compensation funds, and they do so expressly (and may do so by expressly reserving the retention of certain, specified claims under the common law (as in the RAF Act, section 21(2)). Which raises the question whether section 191 does this with unfair dismissals, by expressly or by necessary implication removing a potential claimant's common-law remedies for a breach of an employment contract. According to the majority of the court in *Fedlife*, this is not the case. And when one adds the legislative acknowledgement of a need to differentiate between vulnerable employees and high earners – with the apparent intended purpose of reserving the CCMA dispute resolution route for those most in need of its specific benefits (as is evident from the 2010 and 2012 amendment Bills referred to above) – it is submitted that there is little if any basis for implying that the Chapter VIII unfair dismissal scheme (and, specifically, the wording of section 191 LRA) excludes possible common-law claims, even in cases of (unfair) dismissal.

Du Toit, it seems, would disagree in respect of the primacy of the protection of employees in the legislature's intentions behind the statutory scheme. He argues that *Fedlife* (and the other cases that have sanctioned the existence of a parallel common-law avenue for employment disputes) lost sight of (or simply ignored) the true purpose behind the legislation. He argues that modern labour law is no longer premised only on the protection of vulnerable employees against employers' exploitation of disparities in bargaining power, but that our labour law system is now aimed at protecting other, broader interests:

⁶⁴ *Mogothle v Premier of the Northwest Province* 2009 30 ILJ 605 (LC) para 25.

[T]he "purpose" set out in s 1 of the LRA is considerably broader than the traditional conception of the role of labour law. The central objective of the Act is encapsulated as "[advancing] economic development, social justice, labour peace and the democratisation of the work-place", and the means of doing so is "by fulfilling the primary objects of this Act". The "primary objects", in turn, cover a wide spectrum of socio-economic activities, ranging from regulation of the right to fair labour practices (which applies to employers as well as employees) and giving effect to South Africa's obligations in terms of various conventions of the International Labour Organization to promoting the effective resolution of labour disputes. This multifaceted purpose is clearly far broader than the single objective of employee protection. It is, however, in line with the contemporary understanding of labour law as an aspect of labour market regulation in the widest sense. Given the challenges of pursuing socio-economic development in an increasingly integrated world economy, policy-makers are compelled to take a holistic view of the various inter-related processes on which such development depends, including the factors by which labour markets are determined. At the same time, South Africa's constitutional dispensation necessitates a rights based approach in pursuing these objectives; that is to say, the fundamental rights of all people, both as individuals and as social actors, need to be defined vis-à-vis one another and protected in the process. In adjudicating issues which impact on socio-economic development, it follows that courts need to be alive to the (often complex) purposes of the laws which they are interpreting.⁶⁵

Du Toit finds in this a basis for criticising the courts' fashioning of common-law remedies which may allow parties to circumvent the statute. In effect, the argument seems to go, the courts are being criticised for elevating employee protection over other objectives of the legislature, including economic development, the promotion of social justice and the balancing of the interests of employers and employees. But, I would point out, eight years after Du Toit expressed these views the legislature has not stepped in to curb the development of this parallel common-law system for employment disputes (or, as the author calls it, a "parallel regime of judge-made employment law dictated by the vagaries of the cases that happen to come before courts and the views of the judges who happen to preside")⁶⁶ – or, for that matter, to abolish the recognition of an implied common-law duty of fair dealing. One can surely infer from such legislative inaction a lack of a legislative intention to upset the applecart. If the judicial development of the common law in the cases referred to truly runs counter to the purpose of our labour law and the intention of the legislature, one would expect that the legislature would have acted, and acted decisively. But yet, we wait.

⁶⁵ Du Toit 2010 *ILJ* 39-40.

⁶⁶ Du Toit 2010 *ILJ* 42.

2.4 Another bite at the cherry? Employees double-dipping in the CCMA and the civil courts

An argument sometimes raised by opponents of common-law claims for employment-related disputes (and which would apply also to claims based on a breach of the implied duty of fair dealing) is that employees should not be able to forum-shop in order to "double-dip" once a compensation award has been rendered by the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court. In essence, the spectre of uncapped potential breach of contract-based damages awards in addition to statutory compensation (along with the spectre of employers being faced, potentially, with protracted contractual claims which prescribe only after three years)⁶⁷ is raised in defence of the purported exclusive nature of the legislative unfair dismissal scheme.

But this argument lacks substance. It is a principle of the law of contractual damages that the calculation of damages in a breach of contract claim must proceed with caution in order to ensure that the plaintiff should not be over-compensated. For example, where a plaintiff claims for damages in order to remedy the defendant's poor workmanship on the plaintiff's property (that is, damages to put the property in the state it ought to have been in) the plaintiff cannot at the same time refuse to pay the contract price for the work.⁶⁸ In any claim before a court where the claimant has already been awarded compensation in the CCMA (and the defendant would invariably bring this to the court's attention) a court would be able to discount such an award in order to ensure that over-compensation by means of a damages award does not occur. There is little reason to fear that those who appear before the labour tribunals may have "a possible second bite in common law", as referred to in *Johnson v Unisys*.⁶⁹ The courts retain their role of ensuring that a claimant receives neither more nor less than such damages that may be proven to have arisen from a defendant's breach of the contract (and the courts have gone to some lengths to explain that this is a painstaking process which should not involve conjecture and guesswork, especially where a damages claim includes damages for the prospective loss of future income).⁷⁰

Of course, damages awarded in a breach of contract claim differ from compensation awarded in an unfair dismissal or unfair labour practice claim. Compensation must be "just and equitable", according to section 194 of the

⁶⁷ Du Toit 2010 *ILJ* 25.

⁶⁸ Bradfield *Christie's Law of Contract* 658.

⁶⁹ *Johnson v Unisys Ltd* 2001 UKHL 13.

⁷⁰ See *South African Football Association v Mangope* 2013 34 *ILJ* 311 (LAC).

Labour Relations Act 66 of 1995 (LRA), and is in the form of a *solatium* in order to console the employee for the violation of a right, rather than compensation for quantified financial loss.⁷¹ An employee does not have to prove loss in order to be awarded statutory compensation, whilst loss must be proven in a breach of contract claim for damages.⁷² Damages for breach of contract are awarded for quantified patrimonial loss, and non-patrimonial loss cannot be recovered by means of a breach of contract claim.⁷³ Accordingly, awarding damages for a breach of contract after an earlier compensation award does not amount to "double-dipping". Just as Nugent JA held in *Makhanya v University of Zululand*⁷⁴ that the defences of *res iudicata* and *lis pendens* cannot apply in respect of a common-law breach of contract claim on the one hand, and a claim based on "LRA rights" on the other (because these are different and separate causes of action), the relief claimed and/or awarded for these different claims in the relevant fora is also different.

⁷¹ As it was explained by Waglay JP in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* 2015 36 ILJ 2989 (LAC) paras 22-24: "The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA. Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer ... There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action (ie action *injuriarum*) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant."

⁷² *KwaZulu-Natal Tourism Authority v Wasa* 2016 37 ILJ 2581 (LAC) paras 32-33.

⁷³ *Administrator, Natal v Edouard* 1990 3 SA 581 (A); Van Huyssteen, Lubbe and Reinecke *Contract* 401-402.

⁷⁴ *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA) (hereafter the *Makhanya* case).

2.5 A double-edged sword: The reciprocal nature of the implied duty of fair dealing

A final reason for recognising the implied duty of fair dealing is that it would provide protection not only to employees but also to employers. While it is settled law that "everyone" enjoys the constitutional right to fair labour practice, and that this includes employers,⁷⁵ it is also accepted that employers cannot bring unfair labour practice claims under the LRA against their employees.⁷⁶ Whether employers may thus directly access the constitutional right seems to be an open question. The development of the common law to give effect to employers' right to fair labour practices in the absence of protection under the LRA would seem to be the appropriate basis for employers to access the right. And I would suggest that such constitutional development of the common law is already reflected in *Murray's* duty of fair dealing.

While Cameron J's formulation of the implied duty in *Murray* focussed on the employer's duty towards its employees (in the context of the constructive dismissal claim at hand there), it is clear that this is a mutual duty resting on both employers and employees. This mutual duty constitutes the constitutional development of the existing common-law duty of trust and confidence as recognised in *Council for Scientific & Industrial Research v Fijen* and elsewhere.⁷⁷ The mutuality of the application of the duty also reflects the relational nature of the employment contract (as well as "the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in [the case of a contract] those of the respective contracting parties.")⁷⁸ Accordingly, employees must be taken to also have a duty to deal fairly with their employers, in the interests of the maintenance of the employment relationship. Part of this duty is reflected in the employee's common-law duty of good faith towards their employer. But it is suggested that the duty goes further than merely, for example, the requirement that the employee must refrain from misconduct. The duty of fair dealing should provide employers with additional recourse to breach of contract claims in the

⁷⁵ *National Education, Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC).

⁷⁶ *National Entitled Workers Union v CCMA* 2007 28 ILJ 1223 (LAC).

⁷⁷ As it was put in *Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18 (A) 20B-D: "[O]ur law is the same as that of English law, namely that in every contract of employment there is a duty that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties ... A reciprocal duty also rests on the employee."

⁷⁸ As per Nkabinde J in *Botha v Rich* 2014 4 SA 124 (CC) para 46 (hereafter the *Botha* case). See the discussion in section 4 below.

event that the employee acts unfairly towards the employer or the employer's interests.

One example of how the duty of fair dealing could be utilised by an employer would be the scenario which presented in *Buthlezi v Municipal Demarcation Board*⁷⁹ (referred to earlier).⁸⁰ The Labour Appeal Court (LAC) there found that an employer who purported to retrench an employee employed on a fixed-term contract had unfairly dismissed the employee, on the basis that the purported retrenchment constituted a breach of contract under the common law (in terms of which an employer could lawfully cancel the contract only if the contract made provision for this or if the employee had committed a material breach of the contract). The LAC's judgment in *Buthlezi* was rather strange. As mentioned earlier, Jafta J equated the unlawfulness of the employer's breach to unfairness, in finding an unfair dismissal, which is questionable. More fundamentally, it appears strange that the LAC, after the employee had chosen to assert its LRA rights by claiming relief for an unfair dismissal, decided the case on the basis of the common-law principles of breach of contract. The judgment has been criticised.⁸¹ However, my point is that *Buthlezi's* factual scenario provides an example of a situation where unfairness towards the employer could be addressed through recourse to the duty of fair dealing. In *Buthlezi* the employer had genuine operational reasons for the termination of the contract, which, in terms of the LRA, would point to the substantive fairness of the dismissal. However, the court elevated lawfulness over fairness (while also conflating lawfulness and fairness) to trump the employer's interests. Cohen explains:

In the court's opinion the unlawful breach of the employment contract rendered the dismissal substantively unfair and the rights of the employer fairly to dismiss employees for operationally justifiable reasons were subjugated to the interests of sanctity of contract. By elevating considerations of lawfulness over fairness, an unfair distinction was made between fixed-term contract employees, who, in the court's view, could not be fairly retrenched during a fixed-term contract and indefinite period employees who face the prospect of fair and lawful dismissal if genuine operational requirements are found to exist. The court declined to develop the common law in accordance with s 39(2) of the Constitution as, in the court's view, the common-law right to enforce a prematurely terminated fixed-term contract was not in conflict with the spirit, purpose and objects of the Bill of Rights. What the court failed to appreciate is that the right to sanctity of contract is not a constitutionally entrenched right but falls under the general protection afforded by the right to dignity, unlike the right to fair labour practices which unambiguously requires the fair treatment of both parties to the employment relationship. The employer's right to dismiss fairly for operational

⁷⁹ *Buthlezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) (hereafter the *Buthlezi* case).

⁸⁰ In section 2.3 in Part 3.

⁸¹ See *Du Toit* 2008 SALJ 114-115; Cohen 2009 ILJ 2271.

requirements, which has been recognized and entrenched by the LRA, ought to have been factored into the court's assessment of the fairness of the premature termination. Had statutory and constitutional values been imported into the contract so as to protect both parties' rights to fair labour practices and fair dealing, as was successfully done in *Gumbi, Murray and Mogothe*, the courts would have been better equipped to assess the overall fairness of the dismissal in the light of the circumstances and effect of the breach.⁸²

While the court in *Buthlezi* should have considered the merits of the claim on the basis of what it was, an LRA claim, and held that genuine operational requirements would make the dismissal substantively fair irrespective of whether or not there may be a breach of contract under the common law, if the employee had instead brought such a breach of contract claim to the Labour Court or a civil court the employer should have been able to rely on the duty of fair dealing to deflect the claim. I would submit that it would be unfair to the employer to allow recourse for the employee in circumstances where the employer has acted fairly. After all, such fair conduct by the employer would have no implications under the *Constitution of the Republic of South Africa*, 1996 for the employee's right to fair labour practices, nor under the LRA (whereby the existence of genuine operational requirements would make the dismissal substantively fair).

The recognition of the reciprocal working of the duty of fair dealing would assist employers to enforce their right to fair labour practices. And it would be in line with Du Toit's call⁸³ (above) for the courts to consider not only employee protection as the primary intention of the legislature in formulating the labour legislation, but also the broader objectives of the legislation, which include ensuring fairness for both employers and employees, the promotion of social justice, and the promotion of economic development.

3 Developments regarding the appropriate role of good faith (and fairness) in the law of contract more generally

The employment contract is a specific form of contract that has certain unique features that distinguish it from other commercial contracts. But it is a contract, and many rules and principles of the common law of contract are applicable to it. In this light and in the context of this piece, it remains to consider the potential impact of developments regarding the role of good faith and substantive fairness in broader contract law on the employment contract. I would suggest that not only is this a fruitful exercise because of the fact that the employment contract remains rooted in general contract law, but also

⁸² Cohen 2009 *ILJ* 2289-2290.

⁸³ In section 2.3 in Part 3.

because – I would submit – fairness plays an especially important role in labour law. Some may argue that this last is largely irrelevant, as the fairness mechanisms we see in labour law primarily derive from special legislative intervention rather than the common law regulating the contract. They may also argue that the common law of contract and labour legislation are two separate devices for the regulation of the employment relationship, although others would argue that in this context "contract and statute ... have become inextricably intermingled",⁸⁴ and "[c]ontractual rights operate alongside statutory rights as instruments for achieving the objects of the LRA".⁸⁵ Be that as it may, I believe that fairness has a special role in the employment context not only because of the legislative intervention; our Bill of Rights demands that the parties to this relationship act fairly towards each other, as is evident from the guarantee of fair labour practices, which applies to both employees and employers. If most if not all conduct between the parties which occurs within this relationship constitutes "labour practices", then surely the contract which forms the port of entry into and the bedrock of this relationship should be characterised by fairness. While the courts have as yet been slow to import any meaningful role for fairness in the broader law of contract, courts should be more open to recognising a special role for fairness in the employment contract.⁸⁶

What is the current state of our common law of contract in respect of the role of fairness in the validity or enforcement of a contract or contractual provision? This may seem a simple question, but its answer necessitates a brief exposition of developments in the past twenty years or so. Much has been written by academics and other commentators on the role of substantive

⁸⁴ *Du Toit* 2008 SALJ 96.

⁸⁵ *Du Toit* 2008 SALJ 131.

⁸⁶ Pillay J, in *Mohlaka v Minister of Finance* 2009 30 ILJ 622 (LC) paras 32-33, hinted at the fact that developments in the broader law of contract are relevant also to the employment contract, especially where such developments are in line with the constitutional values and the purposes of the labour legislation which governs this relationship: "Not all contracts of employment favour employees. For many security guards, cleaners and other low-skilled employees, fixed-term contracts of short duration are their only means of being employed. Most low-skilled workers must want security of tenure. However, their circumstances force them to agree to short terms of employment or to face unemployment and poverty. The common-law test for duress is so high that such employees can seldom successfully avoid the limited duration clauses of their contracts to claim employment on indefinite terms. However, *Barkhuizen v Napier* [2007] 7 BCLR 691 (CC) kindles the debate about whether fixed-term contracts of employment aimed at circumventing the LRA are consistent with constitutional values and whether upholding such contracts is compliant with ILO obligations ... This is a question for another time." On the influence of *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter the *Barkhuizen CC* case) and the courts' stance on public policy in contract law, and more generally on employment contracts, see Cohen 2012 *Acta Juridica* 84. Also see Matlou 2016 *SA Merc LJ* 551-552.

equity in our law of contract, especially in the constitutional dispensation. Claims by proponents of a more robust role for equity into a system founded upon the principles of freedom of contract and of *pacta sunt servanda* have centred on specific areas in which the notion of fairness could evolve, particularly the role of good faith and public policy in contract law. All of this has been advanced in the light of the courts' constitutional duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights.

A starting point for the desired process of evolution is the role of good faith in contracts. Many have decried the Supreme Court of Appeal's apparently conservative stance on the role of good faith, as illustrated by a line of judgments where this court refrained from developing a role for good faith as a more independent or free-floating ground to challenge the validity of a contract or its enforcement. The view expressed in *South African Forestry Co Ltd v York Timbers*⁸⁷ has been defended on a number of occasions by this court, relegating good faith to an underlying principle of our law of contract, which functions mainly in order to flesh out more concrete "black letter law" principles but falls short of providing direct recourse to a contracting parties who may claim unfairness or bad faith conduct by their contractual counterparts. Some commentators have preferred to find space for the development of the common law in the role of public policy in contract law,⁸⁸ and there is a hint of room for manoeuvre in this regard in the Constitutional Court's seminal judgment in *Barkhuizen v Napier*.⁸⁹ Despite these calls for law reform, the SCA has stuck to its guns (which, one commentator believes, is reflective of a particular ideology which was given substance to in terms of a deliberate strategy of this court)⁹⁰ throughout an increasingly long line of well-known cases, which include *Brisley v Drotsky*,⁹¹ *Afrox Healthcare Bpk v Strydom*,⁹² *Napier v Barkhuizen*,⁹³ *Bredenkamp v Standard Bank of South Africa Ltd*,⁹⁴ *Maphango v Aengus Lifestyle Properties*,⁹⁵ and *Potgieter v Potgieter*.⁹⁶ Detailed consideration of these judgments and the SCA's views as expressed there is beyond the scope of this piece, but it has been attempted elsewhere.⁹⁷ I will focus, rather, on indications from the highest

⁸⁷ *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA).

⁸⁸ See Barnard-Naudé 2008 CCR 1-54.

⁸⁹ *Barkhuizen CC* case.

⁹⁰ Barnard-Naudé, 2017 *Acta Juridica* 247.

⁹¹ *Brisley v Drotsky* 2002 4 SA 1 (SCA).

⁹² *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

⁹³ *Napier v Barkhuizen* 2006 4 SA 1 (SCA).

⁹⁴ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA).

⁹⁵ *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

⁹⁶ *Potgieter v Potgieter* 2012 1 SA 637 (SCA).

⁹⁷ Louw 2013 *PELJ*.

court that the conceived notions of the role of good faith in contracts may require judicial intervention in terms of the development of the common law (which has come under fire by judges of the SCA, writing in their academic capacity).⁹⁸ Barnard-Naude, in fact, believes the views expressed in the more recent Constitutional Court judgments are indicative of the emergence of good faith as the "master-signifier" of our law of contract (displacing freedom of contract and *pacta sunt servanda* from this role).⁹⁹

Again, detailed discussion of the relevant Constitutional Court judgments is beyond the scope of this piece, so I focus briefly only on the gist of the views on the role of good faith as expressed by Moseneke DCJ and Yacoob J (in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹⁰⁰) and Nkabinde J (in *Botha v Rich*). In *Everfresh*, which concerned a contractual agreement to negotiate the extension of a lease agreement, the appellant contended that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. Yacoob J expressed the following views in his minority judgment regarding the role of good faith in our law of contract:

Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.¹⁰¹

Yacoob J found the inspiration for these views on a robust role for good faith in the constitutional value system of *Ubuntu*:

The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone. It may be said that a

⁹⁸ Brand 2016 *Stell LR* 238; Wallis 2015 *SALJ* 940.

⁹⁹ Barnard-Naudé 2017 *Acta Juridica* 247.

¹⁰⁰ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) (hereafter the *Everfresh* case).

¹⁰¹ *Everfresh* case para 22.

contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.¹⁰²

Moseneke DCJ, in writing the majority judgment, appeared to concur (although this was *obiter*):

Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness, and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith. I however conclude that it is unnecessary to decide the merits of any of these difficult questions now.¹⁰³

Although these comments were made in the context of an agreement to negotiate (where good faith has a specific role to play),¹⁰⁴ it is clear that the sentiments expressed probably have much broader implications for the role of good faith in contracts more generally. And Nkabinde J, in *Botha*, seemed to build on this new "ideology" on the role of good faith when she said the following (in the context of the application of section 27 of the *Alienation of Land Act* 68 of 1981, and the role of reciprocity between the contracting parties' obligations in the context of the provision):

To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Corporation* it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. This accords with the requirements of good faith ... The Act seeks to ensure fairness between sellers and purchasers. Its provisions are in accordance with the

¹⁰² *Everfresh* case paras 23-24.

¹⁰³ *Everfresh* case paras 73-74.

¹⁰⁴ See, generally, McKerrow 2016 *Stell LR* 308

constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. *Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.*¹⁰⁵

Some have criticised these rather loose and *obiter* remarks by Constitutional Court judges as creating uncertainty in our law of contract in the light of the established jurisprudence regarding the role of good faith, reasonableness and fairness in this context.¹⁰⁶ Be that as it may, all indications are that our law of contract is poised for an overhaul in line with these sentiments (which, as observed, at least one commentator believes are indicative of a new ideology informing our contract law, emanating from the Constitutional Court),¹⁰⁷ which would augur a greater role for good faith and a concomitant expansion of the scope for notions of substantive equity to be infused into private contracts.

In this context it is my contention that these developments should spill over into the common-law employment contract. The employment contract is, after all, a contract. Those who may view the exclusive role for fairness in this context as provided for by the supplementary provisions of labour legislation which imports notions of fairness into the employment relationship would be well advised to consider that this would reflect a rather paternalistic view which would undervalue the role of the parties and the emerging conception of mutual duties to respect the dignity and interests of the respective parties in our constitutional milieu. No longer can the parties' bargain be described simply as grounded in a regulatory regime (the common law) which concerns itself only, or predominantly, with lawfulness as opposed to fairness (as alluded to in *Fedlife Assurance Ltd v Wolfaardt*).¹⁰⁸ An understanding of the constitutionally developed common law as providing a scheme whereby the autonomy of the parties to the employment contract is fettered not only from "the outside" (by labour legislation) but is also circumscribed from within by the common law – shaped by constitutional values – would be more in line with the spirit of the Bill of Rights. And the views expressed by the Constitutional Court judges in the cases referred to above are eminently

¹⁰⁵ *Botha* case paras 45-46. Emphasis added.

¹⁰⁶ See, for example, discussion in Bradfield *Christie's Law of Contract* 21-23.

¹⁰⁷ Barnard-Naudé 2017 *Acta Juridica* 247.

¹⁰⁸ By Froneman J in *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) para 3 of his minority judgment (hereafter the *Fedlife* case).

relevant and surely especially applicable to such a fundamentally relational contract as the employment contract.¹⁰⁹ When one considers the extremely apt basis for such a recognition for the role of fairness (and good faith) as is provided by the common-law duty of trust and confidence – and its development to provide for a duty of fair dealing as per *Murray* – the employment contract may provide the ideal vehicle for achieving the vision of those proponents of a constitutionally transformed law of contract which worships at the altar of the principles of *Ubuntu* and of the "politics of friendship"¹¹⁰ in private contracts. The employment contract, as developed to the point recognised in *Murray*, may in fact be a poster child for the ideal that the constitutionally transformed (or transforming) law of contract is striving towards, which would be the achievement of the recognition of mutual respect and co-operative conduct in contracting, subject to an objective, ethical standard of fair dealing that is rooted in the *boni mores* and reflective of our constitutional values.¹¹¹ It seems rather ironic that the SCA, which has been so lambasted by contract law scholars for its conservative stance in developing the role of good faith and substantive equity in contract law, is the very court that has come out much more forcefully in promoting access to contractual remedies relating to fairness in the employment contract (in cases such as *Fedlife, Old Mutual Life Assurance Co. SA Ltd v Gumbi*,¹¹² *Boxer Superstores Mthatha v Mbenya*,¹¹³ and *Murray v Minister of Defence*,¹¹⁴ and culminating, of course, in *Murray*). This may be due to the fact that its judgments have been informed by the specific fundamental right to fair labour practices which applies to the employment relationship, while in contract law cases there is no constitutional right (or value) of fairness more generally. Be that as it may, at the very least I do not believe that the employment contract can be immune from the broader developments regarding fairness in our law of contract,¹¹⁵ and I can find nothing in the currently ongoing development of our general law of contract that would gainsay the recognition of an implied duty of fair dealing in the employment contract.

¹⁰⁹ See Cohen 2012 *Acta Juridica* 84.

¹¹⁰ Barnard-Naudé 2008 *CCR* 1-54.

¹¹¹ See the discussion in Louw 2013 *PELJ* 69 *et seq.*

¹¹² *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA).

¹¹³ *Boxer Superstores Mthatha v Mbenya* 2007 5 SA 450 (SCA).

¹¹⁴ *Murray* case para 5.

¹¹⁵ See, for example, Matlou 2016 *SA Merc LJ* 551-553.

4 Conclusion

In this piece I have argued for the (continued) recognition of an implied common-law duty of fair dealing in the employment contract. The grounds for such recognition can be summarised as follows:

- Our courts recognise, and have for some time recognised, that the common-law employment contract contains an implied duty of trust and confidence. Bearing in mind the relational nature of the employment contract, as well as developments in the law of contract more generally, this duty is in line with the constitutional notion of a contract as imposing mutual duties of respect on contracting parties. It is in line with the constitutional value system, which embraces Ubuntu.
- In *Murray* the SCA unequivocally stated that the implied duty of trust and confidence must be considered to have been developed, in line with the constitutional guarantee of fair labour practices, to constitute an implied duty of fair dealing in all employment contracts.
- In *SA Maritime Safety Authority v McKenzie*¹¹⁶ the SCA purported to backtrack on *Murray* by holding that the common-law employment contract does not contain an implied term to the effect that an employer will not unfairly dismiss an employee. However, *McKenzie* failed to overturn *Murray* for a number of reasons. The first reason is that the ratio of *McKenzie* was different from that of *Murray*, in that the claimed basis for the implied term differed significantly in these two cases. In *Murray* the source of the implied duty of fair dealing was the sec. 23 right to fair labour practices. In *McKenzie* the claimed source of the implied term not to be unfairly dismissed was the legislative unfair dismissal scheme contained in Chapter VIII of the LRA. The second reason is that Wallis AJA in *McKenzie* appeared to misconstrue the clear wording of Cameron JA's judgment in *Murray*, and dismissed the clear ratio of the latter case without proper consideration of its implications. The third reason is that, even if *McKenzie* did have the effect of backtracking on *Murray*, it did so only to a limited extent, by creating a "*McKenzie* exclusion zone" to *Murray's* implied duty of fair dealing, by excluding dismissals from its purview and by retaining a general duty of fair dealing relating to employer conduct short of dismissal. But this, I have argued, is untenable, as it would have the

¹¹⁶ *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) (hereafter the *McKenzie* case).

paradoxical effect of allowing employers to forum-shop in a manner that would be detrimental to the employee's job security, would not be conducive to the maintenance of employment relationships, and would thwart the intention of the legislature in giving effect to the right to fair labour practices through the means of protective labour legislation.

- The argument that dismissals should be excluded from the application of a duty of fair dealing, and that any dispute about the unlawfulness of a dismissal would invariably involve a claimed unfair dismissal and would have to be decided in terms of the legislative unfair dismissal scheme is also not convincing. It is wrong to automatically equate unlawfulness with unfairness, and attempts to do so would fly in the face of *Makhanya's* warning that claims should not be mischaracterised in order to change the nature of the claim and exclude it from the purview of the civil courts (and both *Makhanya's* and *Fedlife's* recognition that the civil courts retain their jurisdiction to hear breach of contract claims if the lawfulness of a dismissal is being challenged).
- The argument against employees being afforded the opportunity to "double-dip" by claiming both compensation from both the CCMA or the Labour Court and also claiming contractual damages for breach of contract does not hold water. It ignores the fact that the relief sought is different (contractual damages for proven patrimonial loss, as opposed to legislatively-mandated compensation as a *solatium*), and also ignores the fact that courts are duty-bound in awarding contractual damages to ensure that a claimant is not over-compensated for the other party's breach of contract.
- It is also questionable whether the frequent calls based upon legislative policy considerations to exclude from the civil courts breach of contract claims relating to dismissal, in order to give effect to and promote the legislative unfair dismissal dispute resolution scheme as a specialist scheme are convincing. The legislature has failed to address the purported problem through the amendment of the relevant legislative provisions, which clearly evinces that there is no legislative intention to outlaw recourse to the civil courts in breach of contract claims relating to an employment contract. Also, our courts have to date not dealt sufficiently with the question of the actual legislative intent behind the establishment of the LRA's unfair dismissal scheme, and it is apparent that the scheme was set in place in order to protect vulnerable employees without any apparent intention to take away pre-existing rights from less vulnerable employees.

Accordingly, the implied duty of fair dealing still exists in the common-law employment contract. And there are good reasons for its continued recognition:

- While some may argue that *Murray's* constitutional development of the common law was unnecessary in respect of employment relationships covered by the LRA, it is questionable whether the LRA in every case sufficiently gives effect to claimants' right to fair labour practices. Some employees slip through the cracks, and examples of these were discussed above. In these cases, there is a clear role for a constitutionally developed common law which can act as a backstop and provide a cause of action based on fairness, in line with the legislature's intention to infuse the employment relationship with fairness. And the courts are constitutionally obliged to develop the common law in this respect where the legislation fails to give sufficient effect to a claimant's right to fair labour practices (or other constitutional rights).
- But such a role for the implied duty of fair dealing is not limited only to the exceptional cases of employees who may find themselves insufficiently protected by the legislation. The implied duty should be recognised as applying to *all* employment contracts.
- The argument against the recognition of such an implied duty of fair dealing as allowing claimants to circumvent the specialist labour dispute resolution forums and thereby making a nonsense of the policy considerations behind the legislative unfair labour practice and unfair dismissal scheme is not convincing. Having examined the apparent legislative intention behind the legislative scheme, it emerges that it is possible to discern legislative recognition of the differences between vulnerable and less vulnerable employees, and to assert that the legislative intention behind the LRA employee protection scheme was primarily to provide protection for vulnerable employees who may lack access to common-law claims. Furthermore, there is no clear sign in the legislation of a legislative intention to deprive employees of pre-existing common-law rights (in fact, the obverse seems to be the case), and *Fedlife* and *Makhanya* have confirmed the continued availability of common-law causes of action in the employment context. In fact, this was endorsed by the majority of the court (by way of van der

Westhuizen J) in *Gcaba v Minister for Safety and Security*.¹¹⁷ Also, the legislature has to date steadfastly failed to address criticisms against forum-shopping in employment disputes by amending provisions such as sec. 195 of the LRA and sec. 77(3) of the *Basic Conditions of Employment Act 75 of 1997* (BCEA). This would be very surprising, following the judicial views on this issue expressed in cases such as *Chirwa v Transnet*¹¹⁸ and *Gcaba*, if one were to assume, without more, that the legislature shares such views.

The current position is that the SCA in *Murray* recognised that all employment contracts are subject to an implied common-law duty of fair dealing. This recognition has been criticised by some and supported by others. It may very well be that Cameron JA in that case would have been well-advised to elaborate on various aspects of such a duty (such as its exact scope), and that *Murray* constitutes a "big bang judgment"¹¹⁹ which can lead to uncertainty in the law. What I should like to see is for the debate to resume, and for the courts to view themselves not only as being bound by *Murray* (until it is overturned by the LAC or the Constitutional Court) but also as being duty-bound to flesh out the exact application and scope of its duty of fair

¹¹⁷ *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 73 (hereafter the *Gcaba* case), where he observed as follows: "[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."

¹¹⁸ *Chirwa v Transnet* 2008 4 SA 367 (CC).

¹¹⁹ As Benjamin 2009 *ILL* 762 remarks: "[I]n *Bato Star* Judge O' Regan warns that "the extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution." A "case-by-case" approach would have led the court in *Murray* to fashion relief for an employee unprotected by labour legislation. Instead, the court articulates a new principle applicable to all employees. One of the reasons for advocating a "case-by-case" approach is the uncertainty caused by "big bang" judgments [such as *Murray*] ... How wide is the "a duty of fair dealing at all times" it establishes? The judgment gives no answer, presumably because it was not necessary to grapple with these issues to grant *Murray* relief. Employers find themselves in much the same position as they did after 1979 when the Industrial Conciliation Act was amended to establish an industrial court with wide powers to determine unfair labour practices. Anecdotal evidence indicates that the first beneficiaries of the trilogy are employer labour lawyers whose clients are anxiously seeking their advice as to whether particular decisions that they are making or have made may violate the duty of fair dealing."

dealing. In this way we will have a system of labour law which reflects the central importance of fairness in both its legislation and its common law. And while the consequences of this – including the perceived anomalous situation of the co-existence of concurrent legislative and common-law remedies for unfair dismissal, which so upset members of the House of Lords in the UK (and some commentators closer to home) – might worry some, I would suggest that such anomalies may be a necessary extension of our unique, constitutionally-entrenched right to fair labour practices. This right, or rather its interpretation by our courts, seems to be evolving and expanding, and this I believe is of extreme importance in considering both the development of the common law and the role of the legislature in giving effect to the right. Du Toit observed the following in respect of the fact that the LRA's failure to cover all potential unfair labour practices in its definition of the concept does not mean that the statute is unconstitutional:

Where the LRA (or any other statute) fails to provide a means of enforcing a constitutional right, the common law should be applied or developed to do so; and, if this cannot be done, the constitutional right may be relied upon directly. 'Constitutional scrutiny' therefore does not necessarily mean that a provision of the LRA which fails to give effect to the right to fair labour practices in all its aspects in any given context is per se invalid. Rather, it may reveal a hiatus which can be remedied by developing the common law or relying on the constitutional right itself.¹²⁰

And the Constitutional Court, in a recent judgment which called for an expansive understanding of the application of and recourse to the section 23 right, seemed to indicate a greater potential role for the common law as well as the possibility of greater access to direct recourse to the right:

The principle of subsidiarity was recently considered by this Court in *My Vote Counts*. Neither the majority nor minority judgments in that case are directly on point because the issue involved a provision of the Constitution that required Parliament to act. Section 23(1) lacks that requirement. A decision by Parliament not to cover the entire field would not fail to fulfil a duty in the Constitution. A fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient.¹²¹

Accordingly, the legislature is not viewed as the exclusive purveyor of fair labour practice protection, and claimants may be given greater direct access to the constitutional right in those cases where the legislature has failed to act. Does this not also foreshadow the common law's playing in future a more robust role in the pursuit of giving effect to the right to fair labour practices?

¹²⁰ Du Toit 2008 SALJ 104.

¹²¹ Per Froneman J in *Pretorius v Transnet Pension Fund* (CC) unreported case number CCT95/17 of 25 April 2018 para 51.

After all, as observed in the dictum quoted above, the fact that section 23(1) does not expressly call on the legislature to act must be read along with the express duty placed on the courts, in section 39(2) of the Bill of Rights, to develop the common law – in this case in order to give effect to the right to fair labour practices through the recognition of an implied duty of fair dealing.

The opponents of the development of the common law to import fairness into employment relations are to my mind devaluing the role of the common law as part of the Constitution's single system of law. This may be due to modern labour lawyers' having a distrust of the archaic common law as opposed to the (possibly "less woolly") modern, post-constitutional labour legislation. But this might ignore the fact that "the common law is not what it used to be" and has been (and is being) substantially re-shaped with the infusion of constitutional principles by judges engaged, quite rightly and legitimately, in "constitution-making".¹²² In the process of such devaluation, it might also offend against the principle of the separation of powers by establishing a hierarchy within which the legislature is elevated above the judiciary in setting the tone for the shape that constitutionally-mandated fairness will have in employment relations in future.

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List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	Constitutional Court Review
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
DoL	Department of Labour
EEA	Employment Equity Act 55 of 1998
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
PELJ	Potchefstroom Electronic Law Journal
RAF Act	Road Accident Fund Act 56 of 1996
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UK	United Kingdom