

# "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 1)

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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 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

It is trite that employment relationships in South Africa are very heavily regulated by means of labour legislation. One of the primary objects of such legislation is to infuse the individual employment relationship and collective labour relations with fairness, something that was traditionally not highly prized by the common law of contract, and which seldom featured in the application of its sometimes archaic and one-sided rules and principles. The labour legislation was passed in order to give effect to the right to fair labour practices as guaranteed in section 23 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*). And our courts, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights.<sup>1</sup> Our courts are obliged, in applying the Bill of Rights and in order to give effect to a right in the Bill, to apply or if necessary develop the common law to the extent that legislation does not give effect to that right.<sup>2</sup>

All of this is trite, but some issues regarding the role of the common law of contract in the context of the employment contract are not. One such issue, which will be the focus here, is the role of good faith and good faith dealing in the contractual relationship between employer and employee. Allied to this is the role of fairness, or equity, in this relationship, something that in recent years has increasingly also engaged the attention of general contract law scholars as well as the courts.

In this piece (which is in three parts)<sup>3</sup> I will revisit a debate that raged a few years ago in the academic literature and the courts, and which seems to have died down of late, although remaining extremely relevant to our system of labour law and of labour dispute resolution. More ambitiously, I hope that this piece will rekindle the debate on an issue which I believe is potentially important for the development of our employment law in the constitutional dispensation. In fact, I believe that the issue under discussion here may be a central (and indispensable) string to the bow of the constitutional guarantee of fair labour practices, and would contribute greatly to the achievement of the vision of the drafters of both the *Constitution* and our labour legislation. I

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\* Van Staden and Smit 2010 *TSAR* 712.

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<sup>1</sup> Section 39(2) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*).

<sup>2</sup> Section 8(3) of the *Constitution*.

<sup>3</sup> Also see Louw 2018 (21) *PER / PELJ* Parts 2 & 3.

will track the development of the notion of an implied "duty of fair dealing"<sup>4</sup> in the employment contract, a supposed source for fairness in employer/employee relations, which derives from the common law rather than the labour legislation. This exposition will cover developments in case law (primarily in a line of judgments by the Supreme Court of Appeal (SCA), which were rendered in the decade before this court was stripped of its jurisdiction in labour law matters<sup>5</sup>) as well as academic commentary. Ultimately, I will argue in favour of the recognition of such a duty as a form of constitutional development of the common law relating to the employment contract, based on the labour law cases and commentary to be considered, as well as on related developments regarding the role of substantive equity in the broader law of contract, outside of employment law.

But I need to include one important disclaimer: Despite the focus here on the role of the common-law employment contract, this piece is not intended (primarily) to revisit the debate on the "jurisdictional quagmire" caused by the dual avenues for labour disputes arising from either the employment contract or in terms of the labour legislation. The primary source of such a system of dual avenues for employment disputes is section 77(3) of the *Basic Conditions of Employment Act 75 of 1997* (BCEA), which provides as follows:

The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

In the context of unfair dismissal and unfair labour practice disputes, section 195 of the *Labour Relations Act 66 of 1995* (LRA) provides as follows:

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

These provisions, read separately and in conjunction, clearly show that contractual rights arising from the common law remain enforceable, and that civil courts may adjudicate disputes about such rights even though such disputes would emanate from the employment relationship. While some continue to criticise the failure of the legislature to remove the concurrent

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<sup>4</sup> In the words of Cameron JA (as he then was) in *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 5 (hereafter the *Murray* case).

<sup>5</sup> The *Constitution Seventeenth Amendment Act* of 2012 amended s 168(3) of the *Constitution*. Section 168(3) now provides as follows: "(a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament."

jurisdiction provisions from the labour legislation (arguing in favour of exclusive jurisdiction for the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Courts in all employment-related matters),<sup>6</sup> I will proceed from the premise that the approach of the SCA in *Makhanya v University of Zululand*<sup>7</sup> on the jurisdiction of civil courts in disputes arising from the contract of employment has largely settled the issue.<sup>8</sup> Conduct by a party to the employment relationship or an event (for example, the termination of employment) may give rise to more than one cause of action, either under the common law of contract or in terms of the labour legislation, and the civil courts retain jurisdiction to consider breach of contract claims related to an employment contract (as the SCA confirmed in a line of cases).<sup>9</sup> When such a contract-based claim is brought before the civil courts, it is not a question of whether the court enjoys jurisdiction, but rather of whether the claim is good or bad in law (that is, whether the claimed cause of action exists). Accordingly, my focus will be on the more substantive question relating to the content of the common-law contract of employment, rather than on jurisdiction in contract-based claims emanating from the employment relationship.<sup>10</sup>

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<sup>6</sup> See eg Van Eck and Mathiba 2014 *ILJ* 863.

<sup>7</sup> *Makhanya v University of Zululand* 2009 30 *ILJ* 1539 (SCA) (hereafter the *Makhanya* case).

<sup>8</sup> Even though some commentators have continued to forcefully criticise the currently still-existing situation of dual avenues for employment-related disputes – see Du Toit 2010 *ILJ* 21.

<sup>9</sup> *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) (hereafter the *Fedlife* case); the *Makhanya* case; *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) (hereafter the *McKenzie* case).

<sup>10</sup> I am generally in agreement with the sentiments expressed by Froneman J in *Nakin v MEC Department of Education, Eastern Cape Province* 2008 6 SA 320 (Ck), in support of the role of the civil courts in developing constitutionally-compliant labour jurisprudence: "The coherence of an emerging labour and employment jurisprudence is not primarily or necessarily determined by its development in one exclusive forum, but rather by the degree to which it gives proper expression to the constitutional entitlement of everyone, in terms of section 23(1) of the Constitution, to fair labour practices. Approached from that perspective the question that needs to be asked is whether the coherence of employment law has gained or lost from administrative law insights relating to employment in the public sector, or from the development of the common-law contract of employment to incorporate in its fabric some aspects of the constitutional right to fair labour practices. Opinions may differ on this, but my own view is that developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law. If that is the case, does it matter as a matter of substance rather than form where the development takes place, in the civil courts or in the labour court? For example, the incorporation of the right to a pre-dismissal hearing as part of a constitutionally developed common-law contract of employment in *Gumbi* and even the further extension of the common-law contract of employment to include a right to a pre-transfer hearing for public employees in *Giyose* are in my respectful judgment, positive rather than negative developments. The way in which those developments came about and could be channelled in future,

Having mentioned that the debate regarding fairness in the common law employment contract appears to have died down, and also having referred to the opposition from some quarters to the continued role of the civil courts in hearing contractual claims deriving from employment contracts, it needs to be stressed that these issues are not moot, not by a long chalk. Parties to employment contracts still take contract-based claims to the courts with varying degrees of success – compare *South African Football Association v Mangope* (a claim for damages for the unlawful breach of a fixed-term employment contract),<sup>11</sup> *Ramabulana v Pilansberg Platinum Mines* (a claim for an order for specific performance in the form of reinstatement to enforce a contractual right to a pre-dismissal hearing),<sup>12</sup> *KwaZulu-Natal Tourism Authority v Wasa* (a claim for damages for the breach of contract under the BCEA),<sup>13</sup> and *Randwater v Stoop* (a claim for damages by an employer

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might also allay much of the fear about the adverse consequences of forum-shopping and the potential to create two parallel systems of law in the employment field ... [A]s far as the development of the common-law contract of employment in accordance with the Constitution is concerned, the beneficial insights have mostly been flowing to the civil courts from developments in the Labour Court and from the concretisation of fair labour standards in labour legislation and general employment practices, not the other way round. The recognition of a contractual pre-dismissal right in *Gumbi* is again a good example. Development of the common law to bring it in line with the constitutional ethos may often follow legislative advances which pave the way for such new thinking. To insulate the development of the common-law contract of employment by compartmentalising and narrowing not only the constitutional right upon which such development might occur, but also to state that any such development may not occur in the general courts of the land in addition to specialised courts, runs counter to the constitutional objective of ensuring that the judiciary in general has a duty to play its part in effecting the constitutional transformation of our society." As regards the policy considerations behind the specialist dispute resolution scheme as established in terms of the labour legislation, and the potential impact of *Chirwa v Transnet* 2008 4 SA 367 (CC) on the question whether the legislature's intention with its establishment was to oust the jurisdiction of the civil courts in labour matters, see also the following from the judgment of Van Niekerk J in *Mogothle v Premier of the Northwest Province* 2009 30 ILJ 605 (LC) para 25: "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 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."

<sup>11</sup> *South African Football Association v Mangope* 2013 34 ILJ 311 (LAC).

<sup>12</sup> *Ramabulana v Pilansberg Platinum Mines* 2015 36 ILJ 2333 (LC).

<sup>13</sup> *KwaZulu-Natal Tourism Authority v Wasa* 2016 37 ILJ 2581 (LAC).

against an employee).<sup>14</sup> The contractual element of the employment contract and contractual remedies for the breach of such contracts have survived the establishment of legislative rights and remedies. Labour lawyers should not underestimate the role of the common law of the employment contract, and it bears close and constant consideration in the context of the regulation of the employment relationship.

This piece is in three parts. The section (section 2) that follows in this part, Part 1, will briefly sketch the broader context for the topic under discussion here, which is very much concerned with the interaction between the main sources of our labour law within the one system of law introduced by the *Constitution*. In section 3 I will examine the judicial pronouncements and academic opinions on the subject of good faith and the duty of fair dealing in the employment contract. It will cover the main SCA judgments on this issue, which include *Fedlife Assurance Ltd v Wolfaardt* and *Murray v Minister of Defence*. In Part 2, I will critically consider the SCA's judgment in *SA Maritime Safety Authority v McKenzie*, which has commonly been interpreted (in my view, wrongly) as having brought an end to the importation of terms regarding fairness into the employment contract.<sup>15</sup> I will then consider where we currently are following *McKenzie*. In Part 3 I will discuss some of the perceived deficiencies of the labour legislation (specifically the LRA and the BCEA) in sufficiently giving effect to all employees' right to fair labour practices, and I will also engage with some of the most popular arguments against the recognition of an implied duty of fair dealing in the employment contract and explain why we need it. Throughout, I will argue in favour of the recognition of such a duty as a necessary development of the common law of the employment contract in line with section 8(3) of the Bill of Rights in order to give effect to the constitutional right to fair labour practices. I will conclude with a discussion of the reasons for the recognition of such a duty of fair dealing. In section 3 of Part 3 I will then examine the issue in the context of developments regarding the role of good faith and substantive fairness in the broader, general law of contract, and its implications for the employment relationship. Section 4 in Part 3 will summarise the discussion in parts 1-3 and conclude.

## 2 The rules of the game in the new legal order

The introduction of the constitutional dispensation has of course fundamentally and irrevocably altered all aspects of our legal system. This is

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<sup>14</sup> *Randwater v Stoop* 2013 34 ILJ 579 (LAC).

<sup>15</sup> Van Niekerk and Smit *Law@Work* 98.

evident in labour law as much as it is in other branches of law. And this is especially relevant for the present purposes in evaluating the interaction between legislation and the common law (and the *Constitution*). O' Regan J, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>16</sup> expressed the nature of such interaction in the context of administrative law:

In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, the question of the relationship between the common law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action — the common law and the Constitution — but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from [the *Promotion of Administrative Justice Act* 3 of 2000, or PAJA] and the Constitution itself. The *grundnorm* of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. 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.<sup>17</sup>

The same undoubtedly applies to the interaction between the common law of the employment contract and the labour legislation (for example, the LRA). The touchstone for evaluating such interaction in the present context is the issue of fairness.

Fairness, we were told by Cameron J, Froneman J and Majiedt AJ in *South African Police Service v Solidarity obo Barnard*,<sup>18</sup> "is a foundational constitutional value". In fact, it is "one of the core values of our constitutional order",<sup>19</sup> and "it is a standard the Constitution recognises in the specific context of employment practices".<sup>20</sup> Most significantly, our *Constitution* takes the unique step of entrenching a fundamental right to fair labour practices in the Bill of Rights. In respect of the importance of section 23, this fundamental right must be taken as constituting one of those few core rights which directly reflect specific underlying constitutional values (such as section 9's reflection of the underlying value of equality, and section 10's reflection of the

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<sup>16</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) (hereafter the *Bato Star* case).

<sup>17</sup> *Bato Star* case para 22.

<sup>18</sup> *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) (hereafter the *Barnard* case).

<sup>19</sup> Per O' Regan J in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 221.

<sup>20</sup> *Barnard* case para 98.

underlying value of human dignity). The right to fairness as reflected in section 23 is also directly constitutive of the more general underlying value system of *Ubuntu* (which will be referred to in greater detail in Part 3, in the context of the developing law of contract).

Of course, under one system of law, fairness must also find expression in the law which derives its force from the *Constitution*, that is, in both the labour legislation and the common law. The key labour statutes, the LRA, the BCEA and the *Employment Equity Act* 55 of 1998 (EEA) are all very fundamentally concerned with importing fairness into the employment relationship, throughout its various phases. The EEA significantly does so at the stage where no employment relationship exists (yet), by protecting even applicants for employment from unfair discrimination. During the existence of the employment relationship, all three statutes provide in various ways for the fairness of labour practices and the conduct of an employer towards its employees. The prime example, of course, is the concept of unfair labour practices as defined in section 186(2) of the LRA, but other examples abound. Compare the "floor of rights" provided for in the BCEA, which regulate terms and conditions of employment (such as working hours, leave and other issues). And the LRA concerns itself specifically with fairness at the termination of the employment relationship, by means of the unfair dismissal provisions contained in chapter VIII of the Act.

Which then poses the question, considering the "one system of law" principle, of the extent to which fairness plays (or should play) a role under the common law. Is fairness to be the exclusive domain of the legislation? Does the fact that the legislation so significantly deals with fairness mean that there is little or no room for fairness also to feature through the mechanism of (development of) the common law? I am no expert on administrative law, so I am not sure, but I would suggest that the common law in that field has been more significantly eclipsed by the consolidation of constitutional principles in legislation (PAJA) than is the case with labour law. The labour legislation frequently refers to the contract of employment, and there is general consensus that "the contract of employment and statutory labour law ... together, form the heart of individual labour law".<sup>21</sup> Accordingly, O' Regan J's reference in the dictum quoted above from *Bato Star* to the "extent to which the common law remains relevant" would be overstated in the context of labour law. The common law is definitely still very relevant.

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<sup>21</sup> *Du Toit* 2008 SALJ 95.



I refer here to the "development of the common law", because the traditional understanding, of course, is that the common law of contract gave little if any weight to considerations of fairness.<sup>22</sup> Parties were constrained in their conduct towards each other by the notion of lawfulness. This position prevailed for many years and was one of the major reasons for judicial and legislative intervention in our labour law (the former, predominantly in the form of the erstwhile Industrial Court's fairness-based jurisprudence, which was established even before the advent of the *Constitution*). But the *Constitution*, in its mission to transform all our law in its image, does not constrain itself to calling only on the legislature to give effect to the Bill of Rights (as it does in the text of some of the fundamental rights, such as sections 9(4), 23(5), 23(6), 25(5), 26(2), 27(2), 32(2) and 33(3)). Maybe significantly, it does not contain such a call to the legislature in the text of section 23(1), as confirmed recently by the Constitutional Court.<sup>23</sup> It also places a constitutional duty on the courts, which "in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right",<sup>24</sup> and bearing in mind that in such development of the common law the courts must "promote the spirit, purport and objects of the Bill of Rights".<sup>25</sup> Clearly the common law also has a significant role to play in ensuring that all the different sources of law which make up the one system of law give effect to the constitutional rights and values. And in the present context, this means that the common law also has a role to play in importing fairness into the employment relationship. After all, when compared to other branches of law, our labour law aims to give effect not only to constitutional values, but to an actual constitutional right to fairness – this is unique not only compared to labour law regulation in other jurisdictions, but it is also unique in comparison with other branches of our own law, which lack the express constitutional entrenchment of fairness.<sup>26</sup>

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<sup>22</sup> As confirmed recently by Zondo J in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC) para 79 (hereafter the *Gaoshubelwe* case): "Labour legislation, including the LRA, was a response, in part at least, to the inequity against workers inherent in the common law employment relationship. Labour legislation was intended to bring about a better dispensation which would seek to protect and promote the interests of both employers and employees. In other words, labour legislation sought to bring about a new employment regime between employers and employees that would seek to strike a balance between the interests of employers and those of employees."

<sup>23</sup> *Pretorius v Transnet Pension Fund* (CC) unreported case number CCT95/17 of 25 April 2018 para 51.

<sup>24</sup> Section 8(3)(a) of the *Constitution*.

<sup>25</sup> Section 39(2) of the *Constitution*.

<sup>26</sup> Section 33 of the Bill of Rights provides a guarantee of administrative action that is, amongst other things, procedurally fair. Section 35(3) provides accused persons with a right to a fair trial. The section 23 right to fair labour practices is much more

When one considers the law of contract generally<sup>27</sup> and other specific forms of contracts (such as the contract of sale, consumer contracts, insurance contracts, building contracts, etcetera) it is pertinent to note that none of these contracts exist and function in a milieu that is governed by a discrete constitutional right to fairness. This to my mind throws the role of fairness in the common law of the employment contract into sharp relief. The development of the common law (and how this is accomplished by the judiciary) is the focus of this piece, specifically in respect of one prime mechanism through which such development takes place, namely the importation of terms (regarding fairness) into the employment contract.

A detailed exposition of the meaning and nature of implied terms (and the *naturalia* of a contract) is beyond the scope of this piece. Essentially, this piece will consider one specific such implied term, namely an implied duty of fairness (or fair dealing), which places a duty on the contracting parties to conduct themselves within certain parameters of equity and to refrain from unfair conduct which might harm or destroy the relationship between the parties. A breach of such an implied term would be a breach of contract, and may lead to contractual remedies (such as an order for specific performance or a claim for contractual damages). The implied term is one that, unlike a tacit term which derives from the actual but unexpressed intention of the parties, is implied by the working of the law (that is, it is an externally-imposed term of the contract, which may be implied for a number of reasons – for example, in order to give business efficacy to the contract, or to promote the public interest, or to give effect to the spirit, purport and objects of the Bill of Rights). Implied terms which appear in certain nominate contracts (such as contracts of sale, consumer contracts or contracts of employment) form the *naturalia* of such a contract.<sup>28</sup> They automatically apply to such a contract, irrespective of the intention of the parties (that is, irrespective of whether or not the parties chose to expressly include such terms), although they can sometimes be excluded by the parties by agreement (usually by means of an exemption clause – compare the *voetstoots* clause in the contract of sale). However, some *naturalia* may not be open to exclusion by agreement of the parties (compare sections 49(1) and 51(1) of the *Consumer Protection Act* 68 of 2008). The implied duty of fair dealing in the employment contract, it will be argued in this piece, is one of the *naturalia* of that contract, and its purported exclusion by the parties would be against public policy and

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comprehensive, guaranteeing fairness in probably the broadest imaginable range of practices and conduct covered by labour law.

<sup>27</sup> See the discussion in Part 4.

<sup>28</sup> See Van Huyssteen, Lubbe and Reinecke *Contract* 9.124.

unconstitutional (as it constitutes a term implied by law in order to give effect to the Bill of Rights, and specifically the constitutional right to fair labour practices, as will be discussed below). This piece will focus on the cases where the courts (specifically the SCA) have embarked on such development of the common law through the recognition of this role for fairness in the employment context.

There are, however, two significant qualifications in respect of the role of the courts in developing the common law in this way. The first is the principle of constitutional avoidance. The second relates to judicial deference to the legislature in giving effect to constitutional rights. And I would suggest that both of these principles are important for the purposes of the topic under discussion here. In a nutshell, constitutional avoidance forbids a claimant to rely directly on a constitutional right if legislation is in place which gives effect to that right. *In casu*, this relates to claimants being constrained to bring claims in terms of the relevant provisions of the labour legislation (for example, section 185 of the LRA in the case of an unfair dismissal) rather than directly through recourse to the constitutional right to fair labour practices. Constitutional (or judicial) deference relates to the courts' sensitivity to the constitutional principle of the separation of powers in order to respect the legislature's role in giving effect to constitutional rights.<sup>29</sup> In essence, how judicial deference features in the present context is that opponents of the development of the common law employment contract in order to include notions of fairness frequently criticise such judicial development on the grounds that it ignores or negates the policy considerations behind the fairness provisions of the legislation (and thus circumvents legislative protection contrary to the legislature's intention). It is especially in the context of (unfair) dismissal that this issue arises, and where critics have been vocal about the need for claimants to follow the route of the legislative dispute resolution and adjudication system rather than to bring claims for breach of contract before the civil courts. This last will be specifically considered in Part 3.

I will argue in section 3 below in favour of the judicial development of the common law in the SCA judgments. But in the process, the evaluation of the very specific question of the recognition of an implied duty of fair dealing in

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<sup>29</sup> Klaasen explains it as follows: "The Constitutional Court subscribes to a standard of 'deference' in judicial review. The principle of deference concerns the function of the judge in mediating between the law and legislative and executive politics. The principle recognises the need to protect the institutional character of each of the three arms of government in a manner that will prevent their ability to discharge their constitutional role being undermined." Klaasen 2015 *PELJ* 1901.

the employment contract will undoubtedly raise more general questions regarding our labour law landscape and especially the interaction between the sources of law, particularly legislation and the common law. This issue of the interaction of rights and remedies from these sources is crucial to an understanding of our single system of law subject to the *Constitution*, in order to give effect to the Bill of Rights. And, to my mind, such a conception of a single system eschews a parochial "rating" of common law and legislative rights and remedies, and rather calls for an inclusive and unifying understanding of how different sources of law may – or *must* – collectively (and in a supplementary manner) pursue the achievement of constitutional objectives. As Kollapen AJ recently observed:

The inclusion of labour rights in the Bill of Rights signalled a significant and seismic development in the recognition of the rights of workers. However, in much the same way, the Bill of Rights recognises the existence, on equal footing, of a host of other rights and it does so not on the basis that rights are hierarchical but rather on the basis that they are interdependent, interwoven and mutually reinforcing.<sup>30</sup>

As already said, the debate about an implied term of fairness in the employment contract appears to have died down of late, and I will call for it to be reopened and re-energised. And I believe that this also calls for further debate on the broader issue of the continuing interaction between legislation and contract.

### **3 "Fair dealing" in the common law employment contract: the courts and academic commentary**

South African courts recognise the existence of an implied term of trust and confidence in the employment contract like that recognised in a number of other common-law jurisdictions.<sup>31</sup> In the United Kingdom (UK) case before

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<sup>30</sup> In the *Gaoshubelwe* case para 150.

<sup>31</sup> Certainty about the status of judicial recognition (and the exact content) of this implied term seems to differ from jurisdiction to jurisdiction. In the UK, the implied duty was clearly recognised in *Malik v Bank of Credit and Commerce SA* 1998 AC 20 (HL) (hereafter the *Malik* case), but the scope of the duty was limited in *Johnson v Unisys Ltd* 2003 AC 518 (HL) to exclude matters relating to the termination of the employment contract (dismissal). There is case authority in support of recognising the duty in Singapore (see Chandran 2015 *S Ac LJ* 31-54), Hong Kong, New Zealand and Malaysia (see Chandran 2015 *S Ac LJ* 46). In Canada, the courts appear to have come short of recognising such a duty in line with the UK position (the majority of the court in *Wallace v United Grain Growers* 1997 3 SCR 701 declined to recognise an implied term not to be unfairly dismissed), but the courts have given content to an implied duty on Canadian employers to treat employees with decency, civility, respect, and dignity, which duty may especially be implicated in cases of employer bullying (see Doorey 2005 *Queen's LJ* 500-559). In Australia, the High Court rejected recognition of such a duty in *Commonwealth Bank of Australia v Barker* 2014 HCA 32.

the House of Lords of *Malik v Bank of Credit and Commerce International SA*,<sup>32</sup> Lord Nicholls of Birkenhead formulated the content of this duty as imposing an obligation that an employer "would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".<sup>33</sup> Cohen explains the *raison d'être* and working of this duty as follows:

Whilst the law has traditionally recognised the employee's duty to serve the employer loyally and faithfully, modern thinking accepts that this obligation assumes a mutual dimension in terms of which both employer and employee are required to conduct themselves in a manner that is not likely to damage or destroy the employment relationship. This obligation is referred to as the obligation of mutual trust and confidence or fair dealing. In terms of this obligation contracting parties are required to have regard to the interests of the other party without subjugating their own, in recognition of the fact that the continued and harmonious relationship between employer and employee is imperative for the successful fulfilment of the employment contract. By imposing a broad set of behavioural standards for employers and employees the implied obligation forms both a 'core common law duty which dictates how employees should be treated during the course of the employment relationship' and a rule of construction in terms of which all the obligations of the contract can be interpreted and understood. The implied obligation of mutual trust and confidence thus ensures that the employer's interests in deriving the maximum benefit from his or her business are equitably balanced against the interests of the employee in being treated fairly.<sup>34</sup>

In *Council for Scientific & Industrial Research v Fijen*<sup>35</sup> the then Appellate Division recognised that this common-law duty also forms part of the South African employment contract.<sup>36</sup> As Bosch points out, the court held that the duty is reciprocal and the court suggested that it was more a *naturalia contractus* than an implied term (that is, it is not derived from the intention of the parties or inferred from the facts, but rather a term implied *ex lege*, which

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<sup>32</sup> The *Malik* case.

<sup>33</sup> *Malik* case 35.

<sup>34</sup> Cohen 2012 *Acta Juridica* 94-95.

<sup>35</sup> *Council for Scientific & Industrial Research v Fijen* 1996 17 ILJ 18 (A) (hereafter the *Fijen* case).

<sup>36</sup> At the *Fijen* case 20B-D the court held as follows: "It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent' party to cancel the agreement. On this basis our 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. This duty may be breached without the intention to repudiate the contract. It is sufficient if the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. A reciprocal duty also rests on the employee. However, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from *naturalia contractus*."

arises due to the existence of an employment contract).<sup>37</sup> Bosch in fact suggests that the term should be viewed as an *essentialium* of the employment contract, as without it the contract would not be one of employment. With reference to Barmes,<sup>38</sup> Cohen describes the impact of the mutual duty as follows (highlighting the importance of this duty in the context of the employment contract as a relational contract):

[T]he implied obligation of mutual trust and confidence is responsible for the recognition of behavioural standards and commitments arising out of the employment relationship. In terms of this obligation contracting parties are required to have regard to, yet not subjugate their own interests to, the interests of the other party. This is in recognition of the fact that the continued and harmonious inter-relationship of the employer and employee is imperative for the successful fulfilment of the employment contract.<sup>39</sup>

The courts (including the SCA<sup>40</sup> and the Labour Appeal Court<sup>41</sup>) and academic commentators<sup>42</sup> have subsequently confirmed the recognition of the implied term of trust and confidence in *Fijen* and its application to employment contracts. However, even in the light of the judicial recognition of this implied term in employment contracts, the debate about the continued availability of common-law remedies in employment disputes (outside of the legislative scheme of labour rights) seemed to throw a spanner in the works in the mid-to-late 2000s. Employers faced with breach of contract claims resorted to raising special pleas regarding the jurisdiction of the civil courts to hear such matters (especially in cases involving the termination of employment by an employer). Recourse by claimants to the mutual duty of trust and confidence as an implied term of the employment contract would be problematic if the courts were to follow a line of diminishing the role of the contract in favour of access, exclusively, to the legislative remedies. The SCA was called upon to provide clarity on this by considering the proper role for the civil courts and the common law of contract in the context of employment-related disputes in the light of the extensive legislative regulation of this relationship.

In *Fedlife* the majority of the SCA, by way of Nugent AJA, confirmed that the codification of rights and remedies relating to unfair dismissal in Chapter VIII of the LRA did not deprive employees of their common-law remedies in the

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<sup>37</sup> Bosch 2006 *ILJ* 28.

<sup>38</sup> Barmes 2007 *ILJ (UK)* 41.

<sup>39</sup> Cohen 2009 *ILJ* 2282.

<sup>40</sup> The *Murray* case.

<sup>41</sup> See *Jooste v Transnet Ltd t/a South African Airways* 1995 16 *ILJ* 629 (LAC); *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* 2014 35 *ILJ* 656 (LAC).

<sup>42</sup> See Bosch 2006 *ILJ* 28; Van Jaarsveld 2007 *SA Merc LJ* 204.

event of the termination of employment by an employer (in that case, in the specific context of the premature termination of a fixed-term contract). The court's exposition of the "dual avenues" of labour disputes (disputes to enforce "LRA rights", such as the right not to be unfairly dismissed or the right not to be subjected to unfair labour practices, on the one hand, and disputes based on the breach of contract under the common law, on the other hand) is less important for the present purposes. What is important for this discussion is that both the majority and the minority in *Fedlife* saw fit to include statements regarding the constitutional development of the common law of the employment contract in respect of the importation of fairness into the contract, outside of the influence of the provisions of the labour legislation. Nugent AJA had the following to say:

The clear purpose of the legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice or summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair. That position was perhaps ameliorated with the adoption of the Interim Constitution in 1994 which guaranteed to every person the right to fair labour practices in s 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). *Thus it might be that an implied right not to be unfairly dismissed was imported into the common law employment relationship by s 27(1) of the Interim Constitution (and now by s 23(1) of the present Constitution) even before the 1995 Act was enacted.*<sup>43</sup>

Froneman AJA, in his minority judgment, expressed similar sentiments on the subject:

In my view the Constitution has a material impact on [the] particular conceptual distinction between the proper domain of contract and that of the statute, namely that the former has little to do with fairness, whilst only the latter has (I must emphasize that I am dealing only with the contract of employment and labour legislation – what effect the Constitution may have on the law of contract generally, or other legislation, is not relevant for present purposes). Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. *It seems to me almost incontestable that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the constitutional right to fair labour practices (amongst others), the courts would have been obliged, in my view, to develop the common law to give expression to this constitutional right in terms of section 39(2) of the Constitution. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remains.*<sup>44</sup>

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<sup>43</sup> The majority judgment of Nugent AJA (Howie JA, Mpati JA and Marais JA concurring) in the *Fedlife* case paras 13-14. Emphasis added.

<sup>44</sup> Froneman AJA's minority judgment in the *Fedlife* case para 4. Emphasis added.

Both these statements relate to the importation of fairness into the common-law contract, derived from the fair labour practice guarantee in the *Constitution*. While both refer specifically to the right not to be unfairly dismissed, by definition they would also apply to the right not to be subjected to unfair labour practices (of which unfair dismissal is arguably the worst form). Accordingly, both statements would appear to allude, more broadly, to a right to fair treatment in employment, something that would appear to be a natural evolution of the implied duty of trust and confidence in the constitutional dispensation. Nugent AJA expresses the view that such an importation of fairness into the common law by way of the *Constitution* might already have taken place before the enactment of the LRA. Froneman AJA, on the other hand, stresses that such a development of the common law would have had to be undertaken by the courts had the LRA not been enacted. Both see this process as inevitable. What is of particular interest is that Froneman AJA adds that "[t]o the extent that the [LRA] might not fully give effect to and regulate [the section 23 right to fair labour practices], that obligation on civil courts remains". More will be said on this later, in the discussion of the role of constitutional avoidance and judicial deference in this context.<sup>45</sup>

Following *Fedlife*, the SCA continued along the path of recognising the importation of fairness into the common-law employment contract under the influence of the *Constitution*. Whilst what had been said in this regard in *Fedlife* (as quoted above) had been couched in rather speculative language, this court now started to make more definite pronouncements on the issue. In *Old Mutual Life Assurance Co SA Ltd v Gumbi*<sup>46</sup> Jafta JA stated that "It is clear ... that coordinate rights [to the right to a pre-dismissal hearing under the old LRA] are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2)) to harmonise the common law into the Bill of Rights (which itself includes the right to fair labour practices)."<sup>47</sup> *Gumbi* was followed a fortnight later by the SCA's judgment in *Boxer Superstores Mthatha v Mbenya*,<sup>48</sup> where Cameron JA (relying on *Gumbi*) held that "the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing ... This means that every employee now has a common

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<sup>45</sup> In section 2.3 in Part 3. See, generally, discussion in Bosch 2008 *Stell LR* 374.

<sup>46</sup> *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA) (hereafter the *Gumbi* case).

<sup>47</sup> *Gumbi* case para 5.

<sup>48</sup> *Boxer Superstores Mthatha v Mbenya* 2007 5 SA 450 (SCA) (hereafter the *Boxer Superstores* case).



law contractual claim – not merely a statutory unfair labour practice right – to a pre-dismissal hearing."<sup>49</sup>

Less than a year later, the SCA's trend of recognising the constitutional development of the common law to import fairness into the employment relationship continued in *Murray*, which involved a common-law claim of constructive dismissal brought by an employee who was not covered by the LRA. (As the plaintiff was a member of the SA National Defence Force, he was excluded from the ambit of the Act.<sup>50</sup>) In the absence of LRA protection the parties agreed in argument that the plaintiff was entitled to rely directly on the Bill of Rights (the section 23 right to fair labour practices, and the section 10 right to dignity). Cameron JA, however, believed that direct reliance on the relevant fundamental rights was not necessary:

However, it is in my view best to understand the impact of these rights on this case through the constitutional development of the common law contract of employment. *This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover. This case involves the particular application of that duty where the employee terminates the contract of service.*<sup>51</sup>

Here we find the single most direct and I would suggest unequivocal<sup>52</sup> acceptance by the SCA of the recognition of an implied duty of fair dealing in the common-law employment contract, derived from the constitutional right to fair labour practices.<sup>53</sup> The wording is interesting, especially the last part of the highlighted section above. Section 8(3) of the Bill of Rights obliges courts to constitutionally develop the common law to the extent that legislation does not give effect to a particular fundamental right. Some would argue (as Wallis AJA later did in *McKenzie*)<sup>54</sup> that the enactment of the LRA, and more specifically Chapter VIII of the Act, obviates the need for the development of the common law, as the Act already gives effect to the section 23 right and imports fairness into the employment relationship.<sup>55</sup> But this

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<sup>49</sup> *Boxer Superstores* case para 6.

<sup>50</sup> Section 2 of the *Labour Relations Act* 66 of 1995 (hereafter the LRA).

<sup>51</sup> *Murray* case paras 5-6. Emphasis added.

<sup>52</sup> As Van Niekerk J agreed, in the *Mogothle* case para 24.

<sup>53</sup> As Paul Benjamin states in respect of the import of this dictum, "*Murray* contains the broadest statement of the impact of the Constitution on the contract of employment." See Benjamin 2009 *ILJ* 758.

<sup>54</sup> See the discussion in Part 2.

<sup>55</sup> Also see *Mohlaka v Minister of Finance* 2009 30 *ILJ* 622 (LC).

would seem to ignore the clear wording of Cameron JA's dictum, which I will repeat here for the sake of clarity:

This contract has *always* imposed mutual obligations of confidence and trust between employer and employee ... the common law of employment must be held to impose on *all* employers a duty of fair dealing at all times with their employees – *even those the LRA does not cover*.

It is clear that Cameron JA was of the opinion that the constitutional development of the common law to imply a duty of fair dealing is not confined only to cases where the LRA does not apply, and that the development which he declares has already taken place is universal in its application to employment contracts (including those covered by the LRA). And the judgment in *Murray* served to concretise and expand on the earlier notion of the importation of fairness into the common law. While *Gumbi* and *Boxer Superstores* involved recognition, very specifically, of an implied right to a pre-dismissal hearing, *Murray* grounded the importation of fairness in the implied duty of trust and confidence, while expanding its application and scope to equate to a much broader duty of fair dealing which permeates the entire relationship.

The Labour Court, in *Mogothle v Premier of the Northwest Province*, followed the judgment of Cameron JA in *Murray*. Van Niekerk J considered the findings of the respective courts in *Boxer Superstores*, *Gumbi* and *Murray*, and concluded as follows:

[T]he SCA has unequivocally established a contractual right to fair dealing that binds all employers, a right that may be enforced by all employees both in relation to substance and procedure, and which exists independently of any statutory protection against unfair dismissal and unfair labour practices ... As controversial as the judgments in *Gumbi*, *Boxer Superstores* and *Murray* might be as a matter of law or policy, they unequivocally acknowledge a common-law contractual obligation on an employer to act fairly in its dealings with employees. This obligation has both a substantive and a procedural dimension. In determining the nature and extent of the mutual obligation of fair dealing as between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed over the years.<sup>56</sup>

A further hint at judicial acceptance (by the SCA) that such a development of the common-law contract in line with Cameron JA's view above has taken

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<sup>56</sup> The *Mogothle* case paras 24, 30. The Labour Court later rejected these views in *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province* (CJHB) unreported case number 1886/2013 of 5 September 2013.

place can be found in Nugent JA's following statement in *Denel (Pty) Ltd v Vorster*.<sup>57</sup>

If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly, it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect.<sup>58</sup>

And, of course, bearing in mind Froneman AJA's earlier-quoted dictum in *Fedlife*, the civil courts retain the ongoing obligation to develop the common law to the extent that the LRA does not fully give effect to the right to fair labour practices. It will be argued later that there are cases where the Act fails in this regard, and that the common law provides the vehicle to address such cases in line with the section 23 right.

Academic writers have been divided on the issue of the recognition of a common-law duty of fair dealing in the employment contract. Proponents such as Cohen<sup>59</sup> and Bosch<sup>60</sup> have argued in favour of such recognition with reference to the relational nature of the employment contract and the significant reach of the implied term of trust and confidence, which already enjoys recognition by the courts. Others, such as Du Toit, are less enthusiastic about an implied term incorporating fairness in the employment contract:

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.<sup>61</sup>

Du Toit mainly laments the dual avenues of labour dispute resolution established by the SCA, and his apparent critical stance towards the recognition of a duty of fair dealing should probably be read in that context. Benjamin is critical of the duty of fair dealing for a number of reasons. Firstly, he is of the opinion that the relevant SCA judgments, which dealt with the importation of fairness into the common-law contract (*Gumbi*, *Boxer Superstores* and *Murray*), were too brief in their consideration of the legislative scheme of labour law regulation.<sup>62</sup> More specifically, he poses the

<sup>57</sup> *Denel (Pty) Ltd v Vorster* 2004 4 SA 481 (SCA) (hereafter the *Denel* case).

<sup>58</sup> *Denel* case para 16.

<sup>59</sup> See Cohen 2009 *ILJ* 2271; Cohen 2010 *SA Merc LJ* 417.

<sup>60</sup> See Bosch 2006 *ILJ* 28.

<sup>61</sup> Du Toit 2010 *ILJ* 41.

<sup>62</sup> He remarks: "While *Murray* is more detailed in its discussion of the evolution of labour law [than *Gumbi* and *Boxer Superstores*], this is more or less confined to the evolution

question whether such a general formulation of a duty of fair dealing was intended to cover all aspects of the employment relationship (which, he suggests, would blur the line between interest and rights disputes, and ignore or negate the fact that the legislature chose only to enshrine protection against specified forms of unfair conduct by employers in the legislation).<sup>63</sup> Secondly, he believes that the notion implicit in such a duty of fair dealing, namely the focus on the fairness of employer's conduct *vis a vis* employees, is out of step with "the factor that dominated [the SCA's] considerations in *Sidumo* — the importance of being fair to employers. The SCA does not find it necessary to ask what the impact of the duty of "fair dealing" is on the "function of management".<sup>64</sup> Of course, the SCA's judgment in *Sidumo* did not survive scrutiny by the Constitutional Court. And this last point would seem to ignore the fact that *Murray's* duty of fair dealing is a reciprocal duty, which may also protect employers from unfair employee conduct (something I will return to in Part 3). All in all, it seems that Benjamin's criticism of *Murray's* duty of fair dealing relates more to the rather glib way in which the SCA came to the formulation of such an important concept (without evidence of the detailed consideration of policy considerations regarding (the) labour dispute resolution system(s) and the extent to which it is desirable that laws should regulate the employment relationship), while at the same time the author also expresses the more positive view that such a duty could be harnessed to assist the plight of vulnerable workers ("[t]he trilogy [of *Gumbi*, *Boxer Superstores* and *Murray*] may therefore provide an opportunity for inventive litigation on behalf of the vulnerable and unprotected workers outside of the LRA as well as those employed by labour brokers (temporary employment services)").<sup>65</sup>

This academic commentary preceded the SCA's oft noted "final say on the matter" in 2010. This occurred in *SA Maritime Safety Authority v McKenzie*.

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of constructive dismissal, the specific ground on which *Murray* sought relief. A more comprehensive examination of the LRA's legislative schema should have been undertaken before articulating a duty of fair dealing in such all-encompassing terms." Benjamin 2009 *ILJ* 760.

<sup>63</sup> He remarks: "The assumption underlying *Murray* that every decision made by an employer must be procedurally and substantively fair is not an accurate description of the current labour law regime: numerous categories of decisions — those that do not involve dismissal, a specified unfair labour practice or a prohibited act such as discrimination — are beyond the scope of legal regulation. This is the distinction between disputes of right which are resolved by adjudication and disputes of interest which are resolved through negotiation (whether collective or individual) and industrial action (if collective bargaining fails). Does the new duty of fair dealing extend to both categories of rights?" Benjamin 2009 *ILJ* 759-760.

<sup>64</sup> Benjamin 2009 *ILJ* 759.

<sup>65</sup> Benjamin 2009 *ILJ* 764.

## 4 Conclusion to Part 1

In Part 2 of this piece I will critically evaluate the *McKenzie* judgment, in order to determine whether it overturned the *Murray* judgment in respect of its recognition of the constitutionally-developed common-law duty of fair dealing. I will then pose the question of where we are currently, after *McKenzie*, in respect of the role of fairness in the employment relationship under the common-law employment contract.

In Part 3 I will consider arguments for and against the recognition of the implied duty of fair dealing, and I will conclude the evaluation after considering the issues within the broader context of the role of good faith and substantive fairness in the general common law of contract.

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## **List of Abbreviations**

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act 55 of 1998
ILJ	Industrial Law Journal
ILJ (UK)	Industrial Law Journal (United Kingdom)
LRA	Labour Relations Act 66 of 1995
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
Queen's LJ	Queen's Law Journal



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S Ac LJ	Singapore Academy of Law Journal
SA Merc LJ	South African Mercantile Law Journal
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