

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Implying fairness into the employment contract

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The employment contract

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- Foundation of employment relationship
- Freedom and sanctity of contract
- Express terms regarded as reflective of mutual intention and role of court limited
- Criticised as an inappropriate vehicle for delivery of fairness
- Law of contract can no longer be regarded as autonomous in new constitutional dispensation
- Implied terms used to infuse contract with constitutional values of fairness and reasonableness
- Continues to play significant role

Relational contracts

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- Long-term evolving personal contracts
- Ongoing co-operation mandatory
- Obligations and expectations evolve
- Inadequacy of express terms
- Classical contract theory inapplicable
- Implied terms necessary to give expression to mutual obligations

Implied terms

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- Implied from facts (tacit terms)
 - Unexpressed actual or imputed intention/business efficacy
 - Officious bystander test
- Implied from law
 - Unexpressed provision irrespective of parties intention (naturalia)
 - Consensus not necessary
 - Source legislation, common law, precedent, collective agreement
 - Policy considerations responsible for implication of terms

Public policy

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- Represents legal convictions of community
- Shaped by Constitutional values
- Role of *ubuntu*
- Balancing of dignity and freedom
- *Barkhuizen v Napier* 2007 (CC)
 - Public policy relied upon to challenge contractual provision
 - Imports notion of reasonableness, justice and fairness and sufficiently flexible
 - Inequality of bargaining powers
- Judicial creativity- new law based on policy considerations

Role of Constitution and statute

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- *“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.”*
- Constitutionalisation of common law
- Section 23 of Bill of Rights
- Section 8(3) - court must apply or if necessary develop the common law to give effect to a right in the Bill of Rights, to the extent that legislation does not do so
- Section 39(2) - when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights
- Section 173 - inherent powers of the High Court and by inference the Labour Court to develop the common law, taking into account the interests of justice

Case law

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- *Old Mutual v Gumbi and Boxer Superstores Mthatha & another v Mbenya*
- Right to a pre-dismissal hearing constitutes an implied term of the contract (extension to substantive unfairness?)
- Implied right to pre-transfer hearing in *Member of the Executive Council, Department of Roads & Transport, Eastern Cape & Another v Giyose (2009)*
- *Transman (Pty) Ltd v Dick and Another (SCA) 2009* - “right of every employee to a pre-dismissal hearing is implied at common law”
- Traditional divide between lawfulness and fairness eroded
- *Mohlaka v Minister of Finance and others(2009)* - “LRA imputes the right to fair labour practices as a term of every contract of employment”

Mutual trust and confidence

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- Employer and employee required to conduct themselves in a manner that is not likely to damage or destroy the employment relationship
- Guards against the employer's abuse of power
- Recognition of behavioral standards and commitments arising out of the employment relationship.
- United Kingdom - recognized by the Courts at the highest level
- *Malik and Mahmud v Bank of Credit and Commerce (in liquidation)*
 - Impact of employer's behavior objectively determined
 - No reasonable and proper cause, conduct to damage rel of trust and confidence
- Extended to manner of suspension of an employee, exercise of an employer's discretion, changes to employee benefits policies, employer's actions in snatching a bargain from their employee and workplace practices resulting in an employee's psychiatric illness amongst others
- Evolution of commercial contract to relational contract

Fair dealing

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- Broader obligation of fair dealing
- Employer to take positive steps to secure fair treatment of employee
- Respect legitimate expectations of the other party
- Employer to act reasonably and fairly towards employee in exercise of discretionary powers
- *BG plc v O'Brien* (exclusion from employer's enhanced retrenchment package); *Scallly v Southern Health and Social Services Board* (failure to disclose the employee's right to purchase added years of pensionable service)

In South Africa

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- *Murray v Minister of Defence* (SCA 2008)
- Claim for contractual damages for constructive dismissal
- *“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 that the LRA does not cover.”*
- Constitution imposes ‘a *continuing obligation of fairness* towards the employee on . . . the employer when he makes decisions affecting the employee in his work’. Obligation has both procedural and substantive dimension and is encapsulated in the constitutional right to fair treatment in the workplace.
- Contract takes form of social compact - parties acquire rights and assume obligations shaped by Constitutional principles



- *Mogothle v Premier of the Northwest Province (LC 2009)*
applicant suspended without hearing
- Van Niekerk J held that *Boxer, Gumbi* and *Murray* highlight mutual obligation of trust and confidence, contractual right to fair dealing binds all employers, may be enforced both in relation to substance and procedure, and exists independently of any statutory protection
- Must be guided by the unfair labour practice and unfair dismissal jurisprudence
- devastating personal and social consequences caused by unfair suspension undermines obligation of fair dealing
- Suspension appropriate when employee likely to interfere in progress of investigation or repeat misconduct-substantively unfair as no evidence to suggest that applicants continued presence at work would jeopardize investigation
- Procedurally unfair as not afforded a hearing.
- open-textured nature of obligations of fair dealing and mutual trust and confidence, interpreted on a case-by-case basis and imbue judiciary with discretion.

Express terms of contract

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- Express terms prevail over implied terms
- Conflict between express and implied terms may result in express term subjugated to considerations of reasonableness and fairness
- *Erasmus & Others v Senwes Ltd & Others* and *MISA/SAMWU obo members v Madikor Drie (Pty) Ltd*
- Considerations of fairness elevated over sanctity of contract.
- Cf *Buthelezi v Municipal Demarcation Board*

Judicial creativity

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- Legal formalism – contract to be interpreted and applied free from judicial discretion
- Section 39(2) and open textured nature of fair labour practices
- Elevating standards over rules, judicial activism responsible for changing face of common law and for influencing legal developments
- Use of implied terms to import fairness and equity and create new *naturalia*
- Judges make value judgments yet ambit of discretion curtailed by guiding values of Constitution, public policy and reasonableness

Jurisdictional issues

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- Jurisdictional uncertainty
- Dual jurisprudence and concerns re legal certainty, forum shopping and undermining of legislative intent
- Civil courts continue to accept jurisdiction over contractual breaches
- *Makhanya v University of Zululand (SCA May 2009)* confirmed that *Chirwa* cannot be interpreted as divesting the High Court of its ordinary jurisdiction to enforce contracts of employment, a right conferred by s77(3) of the BCEA.
- *Tsika v Buffalo City Municipality(2009)*- civil courts (together with Labour Courts) retain common law jurisdiction to entertain claims for breaches of contract of employment
- *Mogothle v Premier of the Northwest Province and others (2009) - Chirwa* judgment could not be understood as excluding the right of employee to pursue contractual claim in Labour Court (ito s77(3) of BCEA) or through civil courts
- *Nakin v MEC, Department of Education, Eastern Cape Province & another* - the coherence of labour law jurisprudence not 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 to fair labour practices'

Conclusion

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- Contract of employment evolved to import considerations of fairness
- Relational nature requires interests of both employer and employee to be protected in order to perpetuate mutual cooperation
- Implied terms relied upon to infuse employment contract with constitutional values, using mechanism of public policy
- Implied obligations of fair dealing and mutual trust and confidence
- Paradigm shift