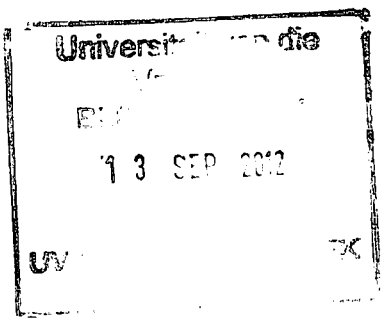
THE EQUITABLE FOUNDATIONS OF SOUTH AFRICAN LABOUR LAW : AN HISTORICAL AND COMPARATIVE STUDY

NEVILLE CLOETE

ad majorem gloriam Dei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THE EQUITABLE FOUNDATIONS OF SOUTH AFRICAN LABOUR LAW: AN HISTORICAL AND COMPARATIVE STUDY

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Declaration

I, the undersigned Neville Cloete, declare that the work contained in this study for the degree of Doctor of Laws at the University of the Free State is my own independent work, and that I have not previously, in its entirety or in part, submitted this work to any university for a degree. I furthermore cede copyright of this thesis to the University of the Free State.

Signed at Bloemfontein on the 30th Day of January 2012

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NEVILLE CLOETE

ACRONYMS

AJ	*Acta Juridica*
BCEA	Basic Conditions of Employment Act
BCLR	Butterworth Constitutional Law Reports
BLLR	Butterworth Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEPPWAWU	Chemical, Energy, Paper, Printing, Wood& Allied Workers Union
COSATU	Congress of South African Trade Union
CWIU	Chemical Workers Industrial Union
DENOSA	Democratic Nursing Organization of South Africa
EEA	Employment Equity Act
EL	Employment Law
EPCA	Employment Protection (Consolidation) Act
ERA	Employment Rights Act
FAWU	Food and Allied Workers Union
HC	High Court
HG	Hooge Raad
HOSPERSA	Health and Other Service Personal Union OF South Africa
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMATU	Independent Municipal and Allied Trade Union
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LQR	Law Quarterly Review
NAPTOSA	National Professional Teachers Organization of South Africa
NEHAWU	National Education Health and Allied Workers Union
NEWU	National Entitled Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
POPCRU	Police and Prisons Civil Rights Union
PPWAWU	Paper Printing Wood and Allied Workers Union
PSA	Public Servants Association of South Africa
SACCAWU	South African Commercial, Catering and Allied Workers Union
SACTWU	South African Clothing and Textile Workers Union
SACWU	South African Chemical Workers Union
SADTU	South African Democratic Teachers Union
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
SALR	South African Law Reports
SAMWU	South African Municipal Workers Union
SAPU	South African Police Union
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeinse Hollandse Reg
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir Suid Afrikaanse Reg

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THE EQUITABLE FOUNDATIONS OF

SOUTH AFRICAN LABOUR LAW : A COMPARATIVE STUDY

SUMMARY

From the dawn of Western civilization, philosophers and jurists grappled with the nature and role of equity in jurisprudence. The Aristotelian theory of equity, as expounded in the Nicomachean Ethics, eventually emerged as the enduring equity paradigm in Western juridical thought. Aristotle taught that equity is an inherent and indispensable part of law. Law can never exist without, or ignore equity.

However, even Aristotle and his followers admitted that the notion of equity is fraught with difficulty, hence they never provided any definition of equity. To Aristotle, it sufficed to state that equity was an inherent part of the virtue of justice, to be applied where law in the strict sense failed, such application always to be according to the circumstances of each case.

The Roman jurists eagerly embraced the Aristotelian paradigm, regarding equity as a *virtus* or virtue – the virtue of *living honestly, giving everyone his due,* and *causing injury to nobody.*

The Greco-Roman virtue theory of fairness aimed at the ideal of human perfection. Equity involved not simply the performance of objectively existing duties, but also the subjective and personal attribute of a virtuous disposition.

The great Roman Dutch jurists were ardent adherents of Aristotelian doctrine. They emphasised that, with custom, equity was part of the unwritten law. Unlike law in the strict sense, equity was a matter best left to judicial discretion. There is a need for equity as the Legislator cannot by means of antecedent statute of general application provide fair solutions to the infinite variety of cases that present themselves for adjudication on a daily basis. In such situations, the equitable judge should consider and adjudicate the case before him, taking into account all relevant circumstances.

Cicero, the Roman jurist, handed down a well-known adage to posterity, namely ***summum ius summa iniuria*** – *the highest or best law often allows for the worst forms of injustices or unfairness.*

Hugo Grotius attached great significance to the *conscienability* attribute of fairness. He emphasised that the judge takes an oath of office to the effect that he would act according to the dictates of his conscience.

An equitable judgment was a reasoned judgment, devoid of anything *capricious, arbitrary* or *whimsical.* It was a judgment infused by *reason.* Even a conscionable judgment was a *reasoned* judgment. Already in the 13th century Thomas Aquinas, the prime authority for Grotius and others in this regard, wrote that *conscience* was a judgment of *reason.*

Influenced by the Biblical doctrine of the Fall of Man, the Roman Dutch jurists recognised the fact that at times, the reason of man was a sullied or muddled reason, hence they insisted on *recta ratio*, or *sana ratio* – literally *sound reason*. Sound reason required judicial *impartiality, personal disinterestedness,* and all other factors which modern labour law would require of a good judge or adjudicator.

For various reasons, mainly historical, there is a dearth of direct textual authority on Roman and Roman Dutch labour law. A complete picture of the labour law of this epoch is unavailable. By means of textual analysis, criticism, and harmonization, we managed to form a still incomplete but bigger picture of Roman and Roman Dutch labour law. Our conclusion in this regard is that both systems knew a comprehensive equitable labour law regime, much as we currently have in South African law under the Constitution, 1996, and the Labour Relations Act, 1995. The common law of labour was therefore not devoid of equitable principle.

So for instance, in sharp contrast with the English and American common law of dismissal which embraced the principle of employment at will, classical Roman Dutch law required *lawful* and even *fair reasons* for dismissal. Whereas in English and American Common law a judge was incompetent to inquire into the reasons for dismissal, such reasons being legally irrelevant, the very essence of

the judicial function in Roman and Roman Dutch law was to investigate the lawfulness, reasonableness and fairness of such reasons.

Unlike English and American common law where a dismissed employee could at most be awarded token damages in the form of the equivalent of the wage he would have earned had the notice period been complied with by the employer, the relief for unlawful, unreasonable and unfair dismissal in Roman and Roman Dutch law was a substantial relief in the form of damages representing the wage that would have been earned during the remaining period of service.

In Roman Dutch law, a contract of service and all its terms as such, were void if it violated *fairness, good faith* or *morality.*

Modern Dutch law built further upon these cornerstones of the common law, and adopted these requirements as the foundations of its most comprehensive principle of employment law, namely the *good employer-good employee* imperative.

But despite the comprehensive equitable regime which formed the hallmark of the common law of labour, unsavoury doctrines such as employment and dismissal at will, forfeiture of wages already earned by some categories of dismissed workers, indivisibility of labour and token or notice damages where the required notice of dismissal had not been given, incrementally infiltrated early South African labour law through erroneous judicial recognition and application. But it was not these doctrines as they appeared in some old Dutch urban placaats and by-laws that served as the sources of judicial inspiration in this regard. These were specifically disavowed in cases like ***Spencer***. At the early stages of the development of a unique South African system of labour law proper, it was rather English common law that served as judicial precedent. Equity played no role in such precedent.

Even today, the application of equity in employment related issues is foreign to English law. The prime English statute governing dismissal disputes, namely the Employment Rights Act of 1996, is the only English piece of legislation making provision for the application of fairness, but its field of application is limited to *unfair dismissal* disputes. The concept of unfair labour practice remains foreign to English law.

Equity also remains virtually unknown to American employment law. The National Labor Relations Act of 1935 introduced the concept of unfair labour practice, but its area of application is largely limited to collective labour law, namely the relationship between employers and representative trade unions, union membership and the like. The employment and dismissal at will principle is still in full force in America. Only in 11 States has judicial creativity introduced implied contractual terms to the effect that good faith and fair dealing should govern the employment relationship. Even this move is relatively feeble, isolated and quite casuistic, and has made little inroad on employment and dismissal at will.

As indicated earlier, unsavory doctrines such as employment and dismissal at will, forfeiture of wages earned, token damages in respect of the notice period of dismissal and the like, were nor derived from Roman Dutch Law, but rather from English law as described above.

Such was the position when the Industrial Conciliation Act, 1956 was amended in 1979, directly as a result of the Report of the Wiehahn Commission, which first identified the need for a comprehensive equitable regime in South African labour law.

As a direct result of the recommendations of the Wiehahn Report, the erstwhile Industrial Court was also introduced by the 1979 Amendments. There seems to be a general consensus amongst labour lawyers today that the Industrial Court performed pioneering work and that it left a rich jurisprudential heritage of equity in labour matters. The drafters of the 1995 Labour Relations Act made ample use of this heritage, and rightly so, we submit. But the drafters also consulted foreign legislation. This was a prudent thing to do, even though it seems that some of the textual deficiencies in the 1996 LRA could be traced back to such legislation. It also appears as though the political and constitutional junctures which obtained at the time that the 1995 LRA was drafted, left their mark on the text of the LRA. It is not an indelible mark however. Although the eventual LRA text was a political and ideological compromise somewhat hurriedly constructed, it is still an impressive document.

Such deficiencies that still do occur in the text, need to be addressed by legislative intervention. The problem in this regard seems to exist mainly in the

form of shortcomings in the definitions of unfair labour practices, and to a lesser extent, unfair dismissal, resulting in the LRA text not giving adequate expression to the more general right to fair labour practices as enshrined in s 23 of the Constitution.

The jurisdictional conundrum often resulting in forum shopping amongst litigants has been largely addressed by the Constitutional Court in cases like **Gcaba**. The same applies to the traditional differentiation or discrepancy between the status and rights of public sector as opposed to private sector employees. However, it is still desirable that the legislature address these issues again and harmonise them as much as possible with the tenets of s 23 of the Constitution and the guidance given by the Constitutional Court in this regard.

Both legs of South African labour law, namely the common law of employment and the statutory scheme enshrined in s 23 (1) of the Constitution, as given effect to by the LRA, 1995, give recognition to and a role for equity to fulfill.

The common law of employment assigns a supplementary, tempering, moderating and correctional role to equity, whereas the statutory scheme raises equity to the sublime status of ultimate yardstick for the resolution of labour disputes.

In this statutory scheme, fairness and fairness alone serves as the final determinant of the fairness of labour practices, including dismissal.

The common law has virtually reached a ceiling of development as far as employment fairness is concerned. S 23 (1) of the Constitution as given effect to by the LRA, 1995, constitutes that ceiling.

In ***SA Maritime*** the SCA held that the common law cannot be developed to the extent where it recognizes an implied term of fairness in contracts of employment. The rationale for this decision was that such development would intrude onto the terrain of the statutory scheme, and was therefore not intended by the legislator. A development of this nature should best be left to the legislature, the courts argued since ***SA Maritime***. English persuasive jurisprudence such as ***Johnson v Unisys*** played a pivotal role in this regard, as it will without doubt do in the foreseeable future.

The obvious vehicle to be used by the Legislature for this purpose is appropriate amendment of the LRA. We have noted that although a progressive piece of legislation, the LRA suffers from many deficiencies in its quest to give effect to the imperative contained in s 23 (1) of Constitution, namely the right of everyone to fair labour practices.

Hopefully the legislature will take note of ***SA Maritime*** and cases in similar vein, and come forward with the necessary and desired amendments to the LRA so as to take it to its next level of alignment with s 23 (1) of the Constitution.

In conclusion, a brief outline of the insights we have gained since the inception of the Industrial Court, and even prior to that auspicious event, into the nature and role of equity in South African labour law.

We subscribe to the view espoused by virtually all labour courts, but especially the Constitutional Court, that it seems to be undesirable to provide a definition of *equity* or *fairness*. The nature and role of *fairness* are dichotomous: on the one hand is *fairness* a relatively familiar concept in daily use, not only in the labour courts as such, but in virtually all courts of law. At times, the concept is consciously and deliberately applied during the course of judicial activity, while it sometimes fulfills its role quietly, unobserved and without any recognition. Fairness is sometimes derissen by sceptics – mostly ignorant – while it is more often eagerly embraced by realists, i.e. those who have come to the realization that strict legal principle is sometimes hopelessly insufficient for the resolution of legal disputes, and that equity has an inherently supplementary role to fulfill in all legal practice. Moreover, in labour law such role is not merely supplementary, but pivotal. Unfair labour practice and unfair dismissal disputes are ultimately resolved by application of the criterion of equity alone, and nothing else.

But despite the healthy disinclination of the courts to provide an attempted definition of equity, some *theory of equity* seems to be steadily developing. This fledgling theory is torn between the opposites of strict law and the traditional need for legal certainty on the one hand, and the inherent flexibility which is the hallmark of equity on the other. A theory of equity should not be confused with a definition of equity. In fact the very theory is predicated on the versatility, flexibility and adaptiveness of the notion of equity – attributes not readily accommodated by definition.

It is for this reason that we have entitled the section of this study dealing with this theory merely as "factors informing equity". This is to emphasise that no attempt is made at all to provide a *numerus clausus* or closed list of factors to be taken into account by the presiding official applying equity. In fact such a closed list will probably never be developed. The labour courts appear to be alive to the unique opportunity that the open-ended, flexible and indeterminate concept of equity provides them for the fulfillment of the ideal enshrined in s 23 (1) of the South African Constitutional, namely *fair labour practices.*

CHAPTER I

INTRODUCTION

As the title to this work suggests, our aim is to investigate the fundamental nature and role of equity in South African labour law. We have deliberately avoided the use of the word *'fairness'* in the title. The reason for that is that *'fairness'* often has a popular connotation which differs from what is intended to be the subject-matter of this study. In popular parlance the word *'fairness'* is often used in a loose a-juridical sense, such as *'he has had his fair share of problems'*, or *'it is not fair that some people have more than others.'* The word 'equity' suffers to a lesser extent from similar vicissitudes of meaning, as it is more of a legalese nature than the popular *'fairness'*. This does not mean that equity does not have various nuances and shades of meaning even in legalese. On the contrary, even amongst jurists there is often intense controversy concerning the correct and proper use of the term. Jurists from legal systems or jurisdictions such as the English Common Law family may use the word equity in a number of senses that one would for instance not encounter amongst jurists from the Civil Law Systems of the world, especially the Continental Systems. This phenomenon will be explained during the course of our investigation. At this stage it suffices to say that the word equity, as used in this work, refers to *'fairness in law'* or *'fairness according to law'.* No further attempt at definition will be made at this stage. The real role and meaning of equity according to law will be the subject of intensive consideration in the chapters of this work that follow.

Our study investigates the nature and role of equity in labour law in general, including both the South African common law of employment and the statutory fairness regime introduced by the Labour Relations Act, 1995, and its predecessors. Where appropriate, various deficiencies and shortcomings in both the common law and the statutory regime are highlighted. Most labour lawyers, human resource practitioners, trade unions and other interested groups or

persons have rightfully heralded the introduction of the statutory labour fairness regime by the 1979 amendments to the Labour Relations Act, 1956, as well as the Labour Relations Act, 1995, as one of the most profound developments – even paradigm shifts – that South African law ever experienced. We are in agreement with this view. However, in welcoming the new fairness regime, some have expressed harsh criticism of the common law, as though it had been, and still is, devoid of any notion of fairness in regard to labour relations. We show in this study that this is far from being the case. In order to do so, we have undertaken a fairly extensive investigation of the common law principles pertaining to this issue.

In our view, the adoption of the statutory fairness regime – as much as there was a need for it – has resulted in too much exuberance and elation amongst some labour lawyers. This has to some extent blinded them to the many and varied shortcomings of this statutory scheme. We examine this scheme closely, and attempt to identify such deficiencies, and to show in which respects the statutory scheme contained in the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997 and the Employment Equity Act, 1998 fall short of the noble but elusive ideal enshrined in s 23(1) of the Constitution, namely the right of everyone to fair labour practices.

It will be noted that such deficiencies and shortfalls that do occur in the statutory scheme, mostly relate to the definition and scope of what constitutes unfair labour practices and unfair dismissal, as well as the relief that has been made available or denied in respect of unfairness in this regard. Problems relating to what could be called the jurisdictional fragmentation of labour disputes, resulting in a confusing conundrum as regards the choice of the appropriate forum to access for the purpose of enforcing labour fairness, are also microscoped.

There seems to be a perception amongst some labour lawyers that the statutory scheme was intended by the legislature to be a wholesale replacement of the common law principles relating to employment relations. With respect, this view

is erroneous. The Supreme Court of Appeal decided in ***Fedlife***[1] that the statutory scheme did not abrogate these common law principles. In ***Gcaba***[2] the Constitutional Court confirmed that the statutory scheme does not destroy causes of action but adds to it. The effect of these decisions was that the common law still remains as relevant as ever in labour relations. In fact, in certain circumstances, litigants may prefer to institute a common law action for damages, rather than utilize the equitable remedies offered by the statutory scheme, the reason being that in the case of the latter, remedies or relief have either been financially capped, or otherwise substantially restricted. The compensation obtainable for unfair dismissal under the statutory scheme may for instance be substantially less than the common law damages for wrongful dismissal.

The title to this study also refers to an historical and comparative approach. This is in line with the almost universal trend towards globalization, a process which is not limited to economics and politics for instance, but which holds significant implications for legal studies as well, especially for the study of labour law. Where appropriate, reference has therefore been made to the Conventions and Recommendations of the primary source of international labour law today, namely the International Labour Organization (ILO).

But in order to do justice to the comparative element in the title to our work, a number of national or domestic legal systems had to be examined in depth for the purpose of determining whether equity plays some significant role in the labour law of these systems, and if so, whether there is any correlation between such equity and that applied in South African labour law, both from a common law and a statutory scheme perspective.

The choice of these foreign systems was not arbitrary. Our investigation of Roman law for instance, proved indispensible, as that legal system serves as arguably the greatest example of the triumph of equity in Western legal culture.

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1 ***Fedlife Assurance Ltd v Wolfaardt*** 2001 22 ILJ 2407 (SCA); ***Buthelezi v Municipal Demarcation Board*** 2004 25 ILJ 2317 (LAC); **Grogan *Dismissal*** (2010) 349 et seq.
2 ***Gcaba v Minister of Safety and Security*** 2009 30 ILJ 2623 (CC)

We make an extra effort to demonstrate how many of the equitable principles espoused by Roman law are still fruitfully applied in modern South African labour law. We proceeded to show the relevance of the second leg of South African common law by devoting a full chapter to Roman Dutch law. Needless to say, the equitable principles of Roman labour law were eagerly embraced by Roman Dutch law, and transmitted via that system to South Africa. Roman Dutch law as expounded by **Voet**, **Grotius** and others, remains indispensible to the study of South African labour law, both in its common law form and in its statutory garb.

Modern Dutch labour law is a great and illustrious edifice, erected on the foundations of Roman Dutch law, but with groundbreaking innovations added, such as the *good employer-good employee imperative* and the comprehensive principle of bona fides, which form both the fountain-head and the parameters of equity in that legal system.

But no legal system, with perhaps the exceptions of Roman and Roman Dutch law, has exerted such a pervasive and lasting influence on our labour law as English employment law. English judicial precedent is not only referred to on a daily basis in our labour courts for its persuasive value, but is often confidently relied on, and sometimes readily adopted as the basis for further development of South African labour law.

In this regard the Supreme Court of Appeal case of ***SA Maritime Safety Authority***[3] for instance springs to mind, as it was in that case that English jurisprudence on the question whether there was a need for the Constitutional development of our common law of contract so as to incorporate an implied term of fairness, played a pivotal role.

Another example of English doctrine that was espoused in South Africa for a considerable period of time is the so-called *'reasonable employer'* test for assessing the fairness of dismissal. It took nothing less than an overruling judgment of the Constitutional Court to set aside the entrenchment of this

3 ***SA Maritime Safety Authority v McKenzie*** 2010 31 ILJ 529 (SCA)

principle by the Supreme Court of Appeal and other courts, thus eradicating it from the foundations of South African labour law. This development took place in the benchmark judgment of ***Sidumo***.[4]

The pernicious doctrine of employment at will is yet another reason for our choice of English law from a comparative point of view. The tenets of this doctrine entail that an employer could lawfully dismiss certain kinds of employee for any reason, even for bad reason or for no reason at all. This importation from English employment law was, unlike the doctrine of the reasonable employer test, not eliminated from our labour law by judicial innovation or creativity. It tenaciously persisted until the Legislature made use of the axe in the form of the Labour Relations Act, 1995, and the Basic Conditions of Employment Act, 1997.

There are a number of reasons why American law has been included in this study. American labour law applies in the biggest and most powerful economy and perhaps labour market in the world. Over and above that, there is also the question as to how American law deals with certain doctrines that it inherited from English law, such as the notorious doctrine of employment and dismissal at will. There remains the further, but crucial question whether American law recognises general principles of equity that temper the harsh effects of this doctrine, and ameliorate the inherited strict principles of English common law in other respects.

Our study concludes with a consideration of South African law. Apart from an investigation of the role of fairness in the common law and the statutory sections of South African law, we also consider the very notion and contextualization of equity itself. Consideration is given to the declared disinclination of the courts to provide a definition of equity, which has been characterized as one of the most elusive and enigmatic notions in labour jurisprudence.

The notion of equity is also considered in its Constitutional context, especially against the backdrop of s 23(1) of the Constitution, and statutes adopted to give

4 ***Sidumo v Rustenburg Platinum Mines Ltd*** 2007 28 ILJ 2405 (CC)

effect to this provision, namely the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997 and the Employment Equity Act, 1998.

Of crucial importance is the relationship between equity and the so-called Constitutional values enshrined in the Constitution, such as life, dignity, equality, security of person, and security of employment. Other burning issues relating to the application of equity in South African labour law are also explored, such as the relationship between equity and lawfulness, public policy, morality, the boni mores, judicial precedent and the employer's prerogative – all within the context of the Constitutional imperative of fair labour practices for everyone.

We attempt to show that much is to be learnt from the common law and the foreign law systems that we investigated. The main – if not the sole - aim of such an exercise should always be the harmonization of the whole of our labour law, but especially the statutory regime, with s 23(1) of the Constitution. It goes without saying that that would be a never-ending, organic process of realizing the ideal of comprehensive fairness in our labour dispensation.

A brief word concerning the methodology adopted in this study. Both legs of the study, namely *equity* on the one hand, and *labour law* on the other, can never operate in isolation in any legal system. A legal system generally forms an organic whole. For this reason we have commenced each of our chapters with an examination of the general principles of equity that apply in a particular legal system, not only in labour law, but in law generally. This we followed up by a brief outline of the general labour law principles applicable in that legal system, and finally, an integrative consideration of the equitable principles underlying the labour law of such a system. Only in this way could we do justice to the subject of investigation and the title to this work.

The reference systems used in this work are those of the ***Journal for Contemporary Roman Dutch Law*** and the ***Journal For Juridical Science*** for the footnotes and the bibliography respectively.

CHAPTER II

ROMAN LAW

2.1. EQUITY AND LAW IN GENERAL

Roman jurisprudence was not only thoroughly acquainted with the concept of equity,[5] but regarded it as an indispensible part of law.[6]

Cicero[7] made it clear that when *equity* is ignored, the very *principle of legality* is threatened.[8] Equity, far from being a breeding ground for rash, ill-considered arbitrary action alien to law, is in fact the very bedrock of the principle of legality, and any contravention of equity is a violation of this principle.[9]

Equity and law as concepts may not be co-extensive, but are without a doubt integrated and inextricably interwoven. Equity is not immanent to law, but inherent to it. So is what is good and equitable – the so-called ***bonum et***

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5 Referred to in the sources as **aequitas**. On the etymological derivation of the word, see **Mcgregor, *"Aequitas – Billijkheid – Rede"*** 1938 2 THRHR 1. The concept of equity was used by the Romans in a number of senses and with quite a few nuances, such as *fairness, goodness, benignness, reasonableness, evenness, levelness, convenience, favourableness, suitability etc;* See also **Schiller *Roman Law: Mechanisms and Development*** s.a. 551; **Van Zyl D H *Justice and Equity in Greek and Roman Legal Thought*** (1991) 106 et seq; **Van Zyl *Justice and Equity in Cicero*** (1991) 148 et seq.

6 **Van Zyl *Justice and Equity in Cicero*** (1991) 149; **Schiller *Roman Law*** 551-2 maintains that although the Romans had a few abstract notions of fairness, the equitable aspect thereof was never predominant as in English equity. He observes that even Cicero sometimes understood under the term equity the whole sphere of law. On the eventual fusion of the equitable and the strict systems of law, see **Sohm *The Institutes: A Textbook of the History and System of Roman Private Law*** (Transl: Ledlie J C) (1907) 72.

7 ***Pro Caecina*** 65-75; **Van Zyl *Justice and Equity in Cicero*** (1991) 158; See **Lacey and Wilson *Res Publica: Roman Politics and Society according to Cicero*** (1970) 87-90; **Levy *"Natural Law in Roman Thought"* Gesammelte Schriften. Wolfgang Kunkel and Max Kaser** (1963) 3; **Van Zyl *Justice and Equity in Greek and Roman Legal Thought*** (1991) 107.

8 **Bretone *Tecniche e Ideologie dei Giuristi Romani*** (1982) points out that in ***Pro Caecina*** 27 77 – 78, Cicero *"loda la prudentia di Aquilio, che non separo mai la ratio iuris civilis dall' aequita'....." praises the wisdom of Aquilius who never separates the sense (ratio) of the civil law from equity".* **Van Leeuwen *Censura Forensis*** 1 1 11 (Transl. **Schreiner W P**) (1883) 9 states that the meaning of the word *lex* has been explained by Cicero as having been derived from *legenda* or *eligenda*, which implied a *choice* for the good and the equitable.

9 In ***Pro Sestio*** (In defense of Sestius) 91-92 **Cicero** draws a distinction between a life of primitive barbarity and a civilized one on the basis of the rule of law or the principle of legality. See **Lacey *Res*** Publica (1970) 206.

aequum.[10] Equity is a species of the genus of law.[11] Law is the ***fons aequitatis***.[12] Cicero emphasises that equity is not based on mere "*opinion*" , i.e. arbitrariness or capriciousness, but that it derives from some kind of "*innate force*" ***(innata vis)*** as it were. Examples of innate forces that inform equity are the virtues of ***justitia, religio, pietas, gratia, vindicatio, observantia,*** *and* ***veritas***.[13]

In ***Pro Cluentio***[14] Cicero states that the laws are the ***"foundation stone of liberty and the source of all equity."*** Again, equity and law are not juxtaposed. In stead, law becomes *the source* of equity.

It is by Cicero that the age-old and hallowed adage or aphorism was handed down to posterity: ***summum ius summa iniuria***:[15] The best law may breed the highest forms of injustice and unfairness. This principle has been hailed to this very day by the most prominent of jurists as pre-eminent.[16]

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10 **Levy** ***Natural Law*** (1962)18; **Cicero** commented on the *ius civile* (Auctor ad Herrennium 2 13 19): **"Constat igitur ex his partibus: natura, lege, consuetudine, judicato, aequo et bono, pacto."** Thus equity or the good and the equitable takes its place alongside statute as a source of Roman civil law. **Auctor** ***Rhetorica ad Herennium*** II 13 20 states that the **bonum et aequum** relates to truth and common interest. **Schiller** ***Roman Law*** 555.

11 **"Ius civile.....in legibus senatus consultus, rebus judicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate constistat" -** *"The civil law consists of legislation, senateconsults, judicial precedent, authority of the jurisprudents, magisterial edicts, custom and equity"*- **Cicero** ***Topica*** 5 28. **Van Zyl** ***Justice and Equity in Cicero*** (1991) 89 n 353. The Ciceronian view echoes that of Aristotle Nicomachean Ethics Bk Vi - See **Farrar & Dugdale** ***Introduction to legal Method*** (1990) 261**; Vinogradoff** ***"Reason and Conscience"*** **in The Collected Papers of Paul Vinogradoff** (1928) **Fisher H A L** (ed.) 192 197

12 ***Pro Cluentio*** 53 14 6. See also **Van Zyl** ***Justice and Equity in Cicero*** (1991) 150.

13 These are religion, love/piety, thankfulness, self-preservation, diligence, and truth. **Van Zyl** ***Justice and Equity in Cicero*** (1991) 41.

14 ***In Defense of Cluentius*** 146; **Lacey & Wilson** ***Res Publica*** (1970) 91; **Salmond** ***Jurisprudence*** (1947) 83.

15 ***De officiis, libri tres*** *1522* 1 33 transl D **C Coornhert**; cf. **Wiarda** ***De toenemende invloed van algemene ongeschreven rechtsprincipes als goede trouw, billijkheid, betamelijkheid, verkeersopvatting, enz.*** **Op de grenzen van komend recht** 1983 314. By virtue of this adage, Cicero intended to convey the idea of the inherent dichotomy between strict law and equity. The stricter the law, the better the chance of a serious injustice being committed against an individual in a concrete given situation. Law has to be tempered by equity. The full Ciceronian text states: ***"Existunt etiam saepe iniuriae calumnia quadam et nimis callida sed malitiosa iuris interpretatio. Ex quo illud 'Summum ius summa iniuria' factum est tritum sermon proverbium." -*** *"We often find injuries existing in the most calumnious and very callous but malicious interpretation of the law. The well known proverb 'The highest law, the most severe injustice' is derived from this fact."*; **Schiller** ***Roman Law*** s.a. 550

16 **Van Eikema Hommes** ***"De rol van de billijkheid in de rechtspraktijk"*****. Uit het Recht: Rechtsgeleerde Opstellen aangeboden aan mr. P J Verdam** (1971) 41; **Spruit J E :** ***Van Apeldoorn's Inleiding tot de Studie van het Recht*** (1985) 13.

Despite the synthetic and symbiotic relationship between law and equity, Cicero sounds a warning that when a particular law is at odds with equity, the answer is the enactment of a different law, rather than disobedience to the existing one.[17] The rationale behind this is that *"the laws are the mind and souls of the state, the basis of the wisdom and will of the community."* In other words, Roman subjects should subject their own individual and subjective view concerning the fairness of the law to that of the objective wisdom and will of the Roman state, as expressed in its laws.[18]

The 'Papinian definition'[19] of the equitable law reads:[20] *" The praetorian law is that which the praetors introduced to assist,*[21] *to supplement or to correct the strict civil law for the sake of the greater public good."*[22] It is noteworthy that this definition deals with equity[23] and law as such[24] on a footing of equality or equal worth.

Marcellus confirms that even though it was by no means easy to change or amend a legal act performed with due solemnity: ***"tamen ubi aequitas evidens poscit, subveniendum est."*** , meaning that when equity evidently so demands, the judge should grant some relief.[25]

In Roman law there was a natural and healthy dichotomy between strict law and equity which persisted to modern times, sometimes resulting in misplaced

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17 ***Pro Cluentio*** 155; **Lacey & Wilson *Res Publica*** (1970) 93.

18 ***Pro Cluentio*** 146-150; **Lacey & Wilson *Res Publica*** (1970) 91.

19 The definition of the praetorian law or the equitable law formulated by **Papinian** in D 1 1 7 1

20 D 1 1 7 1 ***"Ius praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam" ;*** **Hahlo & Kahn *The South African Legal System and its Background*** (1968) 134

21 A good example of assistance is the granting of *restitutio in integrum* by the praetor. See for instance D 4 6, more particularly D 4 6 26 where Ulpian states that restitution would be granted whenever equity so suggests. See transl. of **Watson A *The Digest of Justinian*** (1975) *loc.cit.*

22 See also D 39 2 35 **"Haec aequitas suggerit, etsi jure deficiamus" –** *"This is suggested by fairness, even though our law is deficient";* It is for this reason that **Sir Henry Maine Ancient Law** 1861 III defined equity as a set of legal principles, entitled by their inherent superiority to supersede the older law – see **Stein *The Character and Influence of the Roman Civil Law*** (1973) 19.; **Vinogradoff *"Aristotle on Legal Redress"*** (1908). **The Collective Papers of Paul Vinogradoff** (1928) 1-2.

23 Praetorian law

24 Strict law

25 D 50 17 183. The idea that a Judge who applies equitable principles in order to find a solution to a dispute not directly resolved by the application of a rule of law, is often referred to in the Roman law texts.

scepticism. This is not a problem or phenomenon peculiar to modern law. As can be expected, this interaction between the strict and the equitable law was a regular occurrence in the Roman courts. In these courts, as in our own, litigants often relied on the intercession of the equitable law in an attempt to escape the adverse effects of the strict law. Conversely, they often relied on the strict law in attempting to evade equity.[26] **Modestinus** ascribes a tempering and benign role to the ***'benignitas aequitatis'*** (benign influence of equity)[27] when stating that this concept *'does not admit of a stricter and more severe interpretation in matters healthily introduced for the sake of human utility.'*[28]

The principles expounded in the Papinian definition[29] above were derived from natural law. By *'assisting, 'supplementing'* and *'correcting'* the strict law, the honorary law or the *law of equity*, through the application of natural reason, supplemented the lacunae and deficiencies inevitable in a strict legal system, and more particularly its statutes.[30] Of great significance however, is the fact that this honorary system of equitable law could "correct" (rectify or improve) the strict law. This was done by the magistrates (praetors) granting so-called ***actiones in factum***, or rights of action based on facts analogous to those covered by the

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26 We have a vivid example of such a case handed down to us by Cicero in his ***Pro Caecina*** (Defense of Caecina) before the Roman Court of Hundreds. Cicero's opponent, Piso, appeals to the letter of the law, claiming that he could not have acted unlawfully, as he had not "ejected" Caecina from a certain premises, but had merely "refused him entry". Cicero points out to Piso that the latter's reliance on the famous Roman jurist Scaevola was misplaced and ill-conceived, as Scaevola had failed to carry the day in a similar case before that very same court *"for the very reason that the letter of the law was not consistent with the principles of equity."* ***Pro Caecina*** is not only useful in providing us with a practical example of the role of equity in Roman law, but also elucidating concerning the general force of equitable principles and the consistency of their appeal to the practical Roman lawyer. It furthermore pictures a scenario not unlike those in modern courts where opposing parties, appealing to either the letter of the law or the principles of equity, may be derisive of whatever system is unfavorable to their case. See **Lacey** & **Wilson** ***Res Publica*** (1970) 93

27 **Buckland and McNair** ***Roman Law and Common Law*** (1965) XVI suggest that the term *benignitas* crept into legal terminology as a result of oriental influence which gradually replaced sound classical Roman jurisprudence. Fairness and justice, the ideal of the classical lawyer, were replaced by a ***benignitas*** with no stable content. It has to be noted however, that Modestinus does not use the term ***benignitas*** in isolation. He refers to ***benignitas aequitatis*** or the benign influence of **aequitas**, which is something beyond doubt. Cf. **McGregor** ***Aequitas*** 1938 2 THRHR 3 who is of the opinion that the idea of ***benignitas*** should be totally banished from legal terminology. This view cannot be shared by us, provided the term ***benignitas*** is properly understood and contextualized as in the above Modestinus text.

28 D 1 3 25

29 D 1 1 7 1

30 **Gibbon** ***History of the Decline and Fall of the Roman Empire*** (1995) iv Xliv describes the role of the Roman jurists of the Ciceronian era who collaborated with the magistrates to make this process possible.

strict law, as well as ***actiones utiles*** and fictitious actions to litigants to a law suit.[31] These actions were said to have been ***"actiones in bonum et aequum conceptae"***, or literally, "*conceived in goodness and equity.*"[32] In his **Codex** (AD 543), Justinian explicitly lent precedence to the pre-eminent principles of equity above the rigidity of the strict law.[33]

The Papinian definition of the praetorian law should not only be evaluated in terms of its formal role, which was to moderate, supplement and rectify the strict law as explained above. It should also be appreciated in terms of its substantive and inherent contents, which clearly have a ***moral*** foundation. The reason for the introduction of the equitable law, according to Papinian, was the value of ***the greater public good***, or in more familiar parlance, public interest. In effect, the text conveys the logic that through the moderation of the strict law by the equitable and rational influence of the law of nature, both individual citizen and the public in general derive benefit.

When the texts refer to '***actiones in bonum et aequum conceptae'*** (as they frequently do), the ***aequum*** or equity is valued on a par with the ***bonum.*** An equitable action is given to one party to a lawsuit against the other for the very reason that equity or fairness is considered to be *goodness* in the circumstances of the particular case. Thus, ultimately, the end or object of the equitable law was simply *goodness* or perhaps the public good.[34]

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31 **Riccobono** argued that aequitas was identified with common experience, empirical practical wisdom. Where imperfection in the law existed, or where the legal rules became separated from life, equity stepped in by means of magistrates such as the praetor, to re-establish the equilibrium - See **Schiller *Roman Law*** 553-4.

32 **Sohm Institutes** (1907) 80 points out that the praetorian law, as it appeared in the edict, was strictly speaking not *law.* It was the power involved in the right to allow or disallow actions and other legal remedies that virtually raised it to the position of law. The edict was the main instrument through which victory was obtained over the strict law by the equitable law.

33 C III 1 8: ***"...placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti iuris rationem"*** – *"...In all matters, the pre-eminent sense of justice and equity is to be preferred to the strict law."* Cf. D 50 17 90; ***"...in omnibus quidem, maxime tamen in jure, aequitas spectanda est."***- *"In all matters, but especially so in law, equity should be observed.";*Cf. **Salmond *Jurisprudence*** (1947) 83; **McGregor *Aequitas*** (1938) 2 THRHR 1; **Hahlo and Kahn *The South African Legal System*** (1968) 135; **Wiarda *De toenemende invloed*** 1983 322

34 See Chapt. VII hereunder

From a general survey of the texts of the Justinianic code, it would appear that the general public good was certainly an important ultimate consideration in applying the principles of the equitable law. However, such application in practice almost invariably occurred under the *specific practical circumstances of a given case*, where there was a conflict of interests that could not be resolved through the application of some (general) rule of the strict law.[35] Practical jurisconsults were consulted who rendered equitable opinions.[36]

Celsus[37] for instance, is renowned for having used a number of 'equitable formulae'[38] that we find widespread throughout the text of the **Corpus Iuris**. These include phrases such as ***'...bonum et aequum est...';***[39] ***'...vir boni arbitru...'***[40]***;*** ***'...aequius esse videtur...';***[41] ***'...aequissimum est...;***[42] ***'...de bono et aequo...';***[43] ***'Celsus...naturali aequitate motus putat...';*** [44] ***'...Putat Celsus...quae sententia habet rationem...'***[45]***;*** ***'...aequum est enim...';***[46] ***'bonus judex varie ex personis causis constituet'*** [47]

Moreover, Celsus defines the very nature of law and justice as the ***"ars boni et aequi"***- *the art of the good and the fair.*[48] In fact, **Celsus**[49] provides us with an

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35 This is based on the Aristotelian view of equity, as explained above.

36 On the practical, casuistic and inductive approach of Roman jurisprudence, see **Kunst *Historische Ontwikkeling van het Recht*** (1969) par 15

37 Fl.c. AD 100. On the contribution of **Celsus** to the development of equity jurisprudence, see **Kunkel *Romische Rechtsgeschichte*** (1964) 81 107; **Kunkel *An Introduction*** (1973) 117

38 Author's expression. These were not, strictly speaking, officially recognised formulae.

39 *"It is good and fair"*

40 *"A man of good judgment"*

41 "It *seems to be fairer..."*

42 *"It is most fair that..."*

43 *"concerning the good and the fair..."*

44 ***"Celsus****...moved by natural equity, considered..."* ; D 12 4 3 7

45 D 14 5 4 5 *"Celsus thinks that...and this opinion seems to be rational..."*

46 *"...for it is just fair that..."*

47 *"...the good judge..."*; D 6 1 38. For more of these texts see D 6 1 38; D 45 1 91 3; D 12 1 32; D 22 3 12; D 27 8 7; D 37 6 6; D 4 8 21; D 4 8 23; D 7 1 13 3; D 8 5 19; D 11 1 11 8; D 12 4 3 7; D 14 5 4 5; D 19 1 13 17; D 21 2 29 pr

48 On the meaning of ars in this context, see **Stein *The Character and Influence of the Roman Civil Law*** (1973) 8; **Ins 1 1 *De justitia et de jure*; D 1 1 *De justitia et de jure***. **Ulpian** cites the following definition of law and justice by Celsus: ***"Iuri operam daturum prius nosse oportet, unde nomen juris descendat. est autem a justitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi."***; **Huber: *Jurisprudence of my Time*** 1939 1 1 1 (Transl. **P Gane**), emphasises that the word *ars* in this context refers to the art of *doing* what is good and just.

excellent example of a jurist with an acute sense of the just and the equitable, in preference to the strict law and even legal science as such, which he contends, often stray in matters of this nature.[50]

To Celsus the jurist is a *sacerdos* – a juridical priest – who professes the ***bonum et aequum*** and who serves the law: one who discerns the fair from the unfair, the licit from the illicit.[51] Centuries later, these views were echoed by the famous Roman Dutch jurist, **Johannes Voet**.[52]

From a perusal of the Celsian formulae it appears that the term ***aequitas*** in its various forms and applications was most often associated with the ***bonum*** or the good. In one text[53] the jurist Paul specifically contends that ***aequitas*** and the ***bonum et aequum*** are inherent elements of law, and more specifically of the law of nature.[54]

Such an important role did the equitable law play in Roman society, and such was its esteem, that the Roman jurist **Marcian** described it as the ***"viva vox"*** - the "living voice" of the civil law.[55]

It is interesting to know that the work in which Celsus provided us with this definition remains unknown. **Wiarda *De toenemende invloed*** 1983 319 citing **Pitlo *Evolutie in het privaatrecht*** (1969) 54, reminds us that the word *aequitas* as it appears in the Roman texts, is one that has been repeated 'millions of times'.

49 Even the most renowned of Roman jurists fondly and often referred to him with great respect for his views on equity amongst others, as "Celsus ***adolescens***" or the *"youthful Celsus"*. For example see D 45 1 91 3

50 **Paulus** cites **Celsus** in his ***Seven Books of Commentary on Plautus*** in D 45 1 91 3, and adds that **Julian** is in agreement with **Celsus**. The text concerns a concrete problem posed by the law of obligations. We will not fully ventilate the problem here but simply examine the clear distinction that **Celsus** draws between the preeminence of equity compared to law or rather the science of law: ***"...esse enim hanc quaestionem de bono et aequo: in quo genere plerumque sub auctoritate juris scientiae perniciose, inquit, erratur"*** – *"He (Celsus) contends that this question after all concerns the good and the equitable, in which area grievous errors are committed in the name of the science of law..."*.

51 D 1 1 1

52 ***Commentarius ad Pandectas*** 1 1 8

53 D 1 1 2

54 ***"Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. Altero modo, quod omnibus aut pluribus in quaqua civitate utile est, ut est ius civile."*** – *"Law is known in many senses: in one sense that which is always equitable and good is called law, like in the case of natural law. In another sense, law is that which is useful amongst all or many states, as is the case with the civil law."* ;**McGregor *Aequitas*** (1938) 2 THRHR 7

55 D 1 1 8. Civil law is used here in its broad sense as the law of the Roman state (**civitas**) and not in the narrow sense of the formalistic **ius civile**.

Paulus[56] states that one of the many senses in which the term law (ius) is used, is "*.....**id quod semper aequum et bonum est ius dicitur, ut est ius naturale**" – "that which is always equitable and good, such as natural law".*

The Digest specifically and expressly gave pride of place to equity in the Roman legal system. Those tasked with the application of law always had to strive to be equitable: *"**Quotiens aequitatem desiderii naturalis ratio aut dubitatio iuris moratur, iustis decretis res temperenda est**" – Whenever considerations of natural reason or doubt of law delays equity, the situation should be tempered by just decree"*[57].

There are a few texts in the ***Corpus Iuris***, containing general maxims on fairness that have been relied upon by South African courts (even in employment related cases) to an extent much greater than the texts on Roman employment law as such, which we consider hereunder. These texts are **D 50 17 90** which states that equity is to be considered in all matters, but to the fullest extent in legal matters, and[58] **D 12 6 14**: It is naturally fair that no-one should be enriched at the expense of another.[59] The influence of these texts on the development of South African labour law will be considered later in this work.[60]

2.2 BRIEF OUTLINE OF LABOUR LAW

Having established the significance of fairness in Roman law in general, we now proceed to investigate its role in labour law.

The Digest commences its title on the contract of letting and hiring[61] with the statement that it is a contract that derived from the law of nature and the *ius*

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56 D 1 1 11

57 D 50 17 85 2; **Stein *"The Development of the notion of 'Naturalis ratio"*** (1975) **Watson (ed.) Daube Noster** 305 315 criticises this text for the 'Byzantine love for vagueness' that it exhibits, in contrast with the confident handling of the term *aequitas* by the classical lawyers; **Hahlo & Kahn *The South African Legal System*** (1968) 134.

58 ***"In omnibus quidem....."***See **Hassan Khan v Immigration Officer** 1915 CPD 661; **Salmond *Jurisprudence*** (1947) 84.

59 ***"Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem."*** See **Spencer v Gostelow** 1920 AD 617.

60 See Chapt VII infra.

61 D 19 2 1 ***Locati Conducti;*** C IV 65 ***De locato et conducto.***

gentium, not based on verbal formalities but deeply rooted in consensus, like purchase and sale.[62] This already provides significant insight into the equitable paradigm within which Roman employment law found application, for we have seen earlier that the jurists defined the law of nature virtually as fairness per se.[63] In Roman law the contract of employment was one of three species of the genus of contracts known as letting and hiring – ***locatio conductio.***[64] These species were ***locatio conductio rei*** in terms of which one person (the ***locator)*** agreed to give to another (the ***conductor***) for use, a thing such as a slave or house, while the latter agreed to pay a recompense.[65] In the case of ***locatio conductio operis*** we have an agreement where one person (the ***conductor***) agreed with another (the ***locator***) to produce a certain effect or result, such as building a house or making a dress in return for the payment of a recompense.[66] ***Locatio conductio operarum*** was entered into where the locator undertook to

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62 D 19 2 1 "***locatio et conductio cum naturalis sit et omnium gentium, non verbis, sed consensus contrahitur, sicut emptio et venditio";*** **Watson** ***Contact of Mandate in Roman Law*** 1961 18; **Smit v Workmen's Compensation** 56E-F.

63 See e.g. the reference to **Paulus** in D 1 1 11 referred to earlier.

64 The name reflects the bilateral and perhaps the consensual nature of the contract, as well as the fact that the parties had to render different and distinct performances. It is analogous to the contract of sale – **emptio venditio**. **Buckland** ***A Text-book of Roman Law from Augustus to Justinian*** (1963) 498; **Thomas** ***The Institutes of Justinian*** (1975) 236 observes that this classification was simply for the purposes of ease of exposition.; **Joubert** ***"Die Kontraktuele Verhouding tussen Professionele Man en Klient"*** (1971) **Acta Juridica** 9 11.

G 3 142 and Inst 3 24 pr draw attention to the remarkable similarities between the contract of hire and that of sale.

G 3 142 states: "**Locatio autem et conductio similibus regulis constitutur; nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi"** – "*Hire is governed by rules similar to those of sale; for unless a definite reward be fixed, there is held to be no contract of hire*" – (**Zuluta's Transl.**);

Inst 3 24 pr is cast in similar language; **Van Warmelo** ***Inleiding tot die Studie van die Romeinse Reg*** (1971) 302 par 880.

The similarities between hire and sale apply even more to the hire/sale of things than of services.

65 **Schultz** ***Classical Roman Law*** (1950) 542; **Sanders** ***The Institutes of Justinian*** (1917) 369.

The following definition of the employment contract in Roman law was formulated by **Joubert JA** in the locus classicus of **Smit v Workmen's Compensation Commissioner** 1979 1 SA 51 (A) 56-7. The learned judge described it as "*a consensual contract whereby a labourer, workman or servant as employee (locator operarum) undertook to place his personal services (operae suae) for a certain period of time at the disposal of an employer (conductor operarum) who in turn undertook to pay him the wages or salary (merces) agreed upon in consideration of his services*"; See also **Grogan** ***Workplace Law*** **(**2007) 3 n 6.

66 **Sanders** ***The Institutes of Justinian*** (1917) 369. In **Smit v Workman's Compensation Commissioner** 56-7, **Joubert JA** provides the following definition of this contract: It was a consensual contract whereby the workman as employee for hire (**conductor or redemptor operis**) undertook to perform or execute a particular piece of work or job as a whole (**opus faciendum**) for the employer as letter or lessor (**locator operis**) in consideration for a fixed money payment; **Van Warmelo P** ***An Introduction to the Principles of Roman Civil Law*** (1976) 184 par 484.

personally render services of a certain kind, such as domestic services for instance, to the ***conductor*** in return for the payment of an agreed remuneration.[67] The parties were free to fix the amount of remuneration. As is to be expected, a customary wage in respect of certain kinds of service probably developed in time.[68] Such a wage was probably payable where a wage had not been agreed upon. It was a moot point whether a contract of employment could be established where the parties agreed that a third person would determine the remuneration. In regard to the contract of sale, this was an issue debated at length between the ancient jurists, but finally positively determined by **Justinian,**[69] who explicitly adopted the same principle in respect of ***locatio conductio***.[70] This probably included the employment contract.

In Roman law, as in the Roman labour market, the employment contract, and the employment relationship to which it gave rise, were overshadowed by the institutions of slavery,[71] the patron-client relationship between an ex-master and the ex-slave to whom the master had given freedom (the so-called *iura patronatus)*, and that of the independent contractor. It is for this reason that there is a dearth of sources and authority on the employment contract as such.[72]

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67 Ibid. **Sanders *The Institutes*** (1917) 369; **Sohm *Institutes of Roman Law*** (1907) 404; **Kaser *Roman Private Law*** (1980) 183 (Transl. **R. Dannebring**); **Thomas *Institutes of Justinian*** (1975) 235.

68 We have an example of an edict issued by **Justinian** at the height of the bubonic plague endemic in Constantinople (544 AD), in which he stated:

*"It is therefore our decision to forbid such covetous greed on the part of everyone.....In the future no businessman, workman, or artisan in any occupation trade, or agricultural pursuit shall dare to charge a higher **price** or **wage** than that of the **custom prevalent from antiquity"*** (my emphasis). See **Rosen *Justinian's Flee: Plague and the Birth of Europe*** (2008) 272. The learned author cites as source the translation of **Thurman *The Thirteen Edicts of Justinian*** (Edict 6: On Regulation of Skilled labour)

It is not clear whether **Edict** 6 cited above applied to both *locatio conductio operis and operarum.* We submit that it probably applied to both forms of labour. The text makes clear reference to both price (independent contractor) and wage (workman).

69 Inst 3 23 1.

70 Inst 3 23 1 **"Quod ius cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere" – "***The law that we have adopted in the case of sale , would not be absurd if applied to letting and hiring alike.***"**

71 **Brassey *Employment Law*** (1998) A I correctly points out that the law of lease was used as a framework for a set of (employment) rules that were surprisingly elaborate for a society in which services were mostly provided by slaves. See also ***Smit v Workmen's Compensation Commissioner*** 1979 1 SA 51 (A) 51

72 Joubert JA, refers to this in ***Smit v Workmen's Compensation Commissioner*** 51: *"...Moreover the dearth of textual authority on **locatio conductio operarum** renders it very difficult to ascertain the legal characteristics of this contract with precision and certainty."*

This state of affairs was aptly summarised by **Joubert AJ**[73] in one of the few cases on the subject in these words:

*"I must draw attention to the fact that very little textual authority on **locatio conductio operarum** is to be found in the **Corpus Iuris Civilis**.[74] This state of affairs must be attributed mainly to the fact that slave labour was of greater importance to the Romans than the free labour and that **locatio conductio operarum** accordingly played a much less significant function in Roman law than in our modern law".*[75]

The employment contract, by which free Romans bound themselves to perform manual work, was entered into only rarely.[76] Slavery, the *iura patronatus* and independent contractors provided ready sources of labour. A slave could be used not only to perform the work of its master, but could also be "hired" out to perform the work of another. As the slave was in the same position as a "chattel" or a "thing", the hiring out of his services by his master to a third party would not amount to an employment contract or even the contract of an independent contractor, but would be classified as ***locatio conductio rei*** or the hiring out of a thing.[77] The contract was established not between the slave and the third party, but between the slave-master and the third party. Such third party obtained the *usufruct* of the hired slave.[78]

Molenaar ***Arbeidsrecht*** (1953) 20 points out that *"In de wetgeving treffen wij over de rechten en verplichtingen van de handenarbeid verrichtende Romein niet veel meer aan dan dat de overeenkomst, die hij met een werkgever tegen loon afsloot, de naam droeg van locatio conductio operarum."*

73 ***Smit v Workmen's Compensation Commissioner*** 57 A-C.

74 **Buckland** ***A Textbook of Roman Law*** (1963) 505 n 1; ***Van Oven Leerboek van Romeinsch Privaatrecht*** 279.

75 **Kaser** ***Roman Private Law*** (1980) 185; **Moyle Imperatoris Justiniani Institutionum Libri Quattuor** 442; **Van Oven** ***Leerboek*** 279 - 280.

76 **Van Oven** ***Leerboek*** 279-280; **Molenaar** Arbeidsrecht (1953) 20; **Schultz** contends that the classical law of labour seems a *'poor thing'* compared with modern standards, doing little more than reflecting the needs of life. This is ascribed to vastly different socio-economic conditions existing at the time. Modern problems of labour law could hardly arise at a time where slavery provided the bulk of labour and where contracts with free workers were not as ubiquitous as today.

77 See G 3 146 for a discussion whether the hiring of gladiators amounted to sale or hire in the sense of **locatio conductio rei**: Those that were killed were regarded as sold whereas the wounded were deemed to have been hired. In either case we are dealing with the hiring/selling of a thing. The contract of hire relating to a slave was known as **locatio servi** - D 19 2 42 43 45; 1 60 7; **Buckland** ***A Textbook of Roman Law*** (1963) 504, confirms that it is difficult to classify **locatio servi** as anything but **locatio rei** and that only the contracts of freemen were **locatio operarum**. See D 19 2, 19 9; D 22 2; D 38 157. **Van Warmelo** ***An Introduction to the Principles of Roman Civil law*** (1976) par 479; **Smit v Workmen's Compensation Commissioner** 56-7

78 **Inst** 2 9 pr; **Sanders** ***The Institutes of Justinian*** (1917) 157

Interestingly, the bona fide possession of a free person was recognized in Roman law. Whatever such free person obtained through the means of his bona fide putative master, or through his own labour, belonged to such putative master.[79] The institution of slavery occupied a unique and anomalous position universally, and Roman law was no exception. Roman law ascribed the introduction of the practice of slavery to the ***ius gentium***, where it found universal recognition as a result of the necessities of warfare and the subjugation of conquered nations to captivity. However, the Roman jurists admitted that this practice was in reality contrary to the dictates of natural law, according to which all men are (originally) born free.[80] Ulpian does not only point out the original ***freedom (libertas)*** with which man was endowed, but furthermore recognizes the ***equalitas (equality)*** of men in the eyes of the law of nature, as compared with the civil law. [81] Thus it can be safely claimed that liberty and equality were fundamental values recognized and protected by Roman labour law. The jurist **Paul** wrote: ***"Libertas inaestimabilis res est."***[82] **Gaius** held the view that ***"Libertas omnibus rebus favorabilior est."***[83]

It is to be noted however that the treatment of slaves, being the property of their owners, was not entirely devoid of *fairness*, *justice* and *mercy*.[84] As regards their work requirements, there is authority for stating that slaves had to be accorded the *same treatment* (although not the same status) as *hired servants*.[85]

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79 **Inst** 2 9 **pr ; Inst** 2 9 4; **Sanders *The Institutes*** (1917) 157-163

80 **Inst 1 2 2 *"Ius autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates secutae et servitudes, quae sunt juri naturali contrariae jure enim naturali ab initio omnes hominess liberi nascebantur." –*** *"The law of nations is for that matter common to the entire human race. Nations have established certain laws, as occasion and human necessity demanded: however wars arose, and in their wake followed captivity and servitude, which is contrary to the law of nature, for in that law, all humans were initially born free."*

81 D 50 17 32 ***"Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quis, quod ad ius naturale attinet, omnes hominess aequales sunt."***

82 **D 50 17 106**.

83 **D 50 17 122**.; **Cicero *Res publica*** XXXII stated that since justice is the bond that holds society together, and is the same for all, there can be no justice without equality. If we cannot agree to equalize men's wealth, and since equality of innate ability is impossible, the legal rights of at least those in the same common wealth ought to be equal. Cf. **Lewis *The new Rights of Man*** (2003) 92.

84 **Van Zyl *Justice and Equity in Cicero*** (1991) 58, relying on **Cicero *De Off.*** 1 13 41, points out that justice had to be observed in the treatment of slaves as they were to be dealt with as hired servants.

85 ibid

Moreover, the treatment of slaves compared favourably in many respects to that of freed persons or freeborn persons, as far as fairness and humaneness are concerned.[86] Whereas **Aristotle** had metaphorised the slave into a "*living tool*", **Chrysippus** and the Stoic Roman jurists regarded him as a "*wage-earner hired for life*".[87]

Apart from slavery as a ready and available source of labour, there was the labour resource of ex-slaves ***(libertini)***. These were persons to whom freedom had been given, often subject to the condition obliging them to render life-long loyalty, care and services to the ***patronus*** or ex-master. An oath taken by the slave upon obtaining his freedom provided the necessary binding force to the new social and juridical relationship between the patron and himself. A legal action (the *actio locati conducti)* was not available to the freedman in return for his services to the patron. Between patron and freedman there was in fact a contract in existence, but it was a unilateral one, onerous to the freedman only.[88]

This relationship of patronage was regulated by the so-called ***jura patronatus*** or the law of patronage. The Digest does not contain much in this regard, but the **Codex Justinianus** does.[89] The ***jura patronatus*** cannot be viewed through the same lens as the principles pertaining to the ordinary employment contract. The reason for this is that the basis of this relationship was the special oath of allegiance in terms of which service was rendered, which did not apply in the case of the ordinary employment relationship. Important in this regard is **C 6 3 1** which states that work that were outstanding at the time of manumission of the ***libertus*** had to be rendered, unless otherwise agreed with the patron. Recompense could however not be claimed in respect thereof. **C 6 3 12** makes it clear that the ***jura patronatus*** was based on ***reverentia***.[90] **C 6 6 8** (AD 287)

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86 **Molenaar *Arbeidsrecht*** (1957) 20-21 explains the plight of the freeborn.
87 **Sabine *A History of Political Theory*** (1937) 163-173; He points out that **Chrysippus** and **Cicero** were closer to **Emmanuel Kant** than to **Aristotle** in believing that man should be treated as an end , and not as a means; **Smith and Weisstub *The Western Idea of*** Law (1983) 346
88 **Molenaar *Arbeidsrecht*** (1957) 21
89 C 6 3 **De operis libertorum**
90 Cf. C 64 **De obsequiis patronis praestundis**, more particularly C 6 6 3 for the notion of **obsequum** or reverence;

even provides "***nec patronae tuae obsequiis refragari te fas est***" - *It is a divine command not to undermine obedience to your patron*"[91]

Third in line in the industrial and economic labour market of Rome, was the service rendered by the independent contractor. As has been noted earlier, it was not regulated by the employment contract, but by a separate contract, namely that of ***locatio conductio operis*** or of the independent contractor, as it is still known in modern law.[92]

Certain categories of professionals fell into a separate labour category by virtue of the fact that they were seen as rendering so-called ***artes liberales*** or intellectual services. [93] Land surveyors, [94] doctors, [95] notaries [96] and advocates[97] are examples. The services rendered by these professionals were regarded as monetarily inestimable. For that reason, at least in the early law, no action or claim was granted to these professionals for recovery of any remuneration. With the efflux of time, the situation changed so that they were given an ***honorarium,*** so called to distinguish it from the ***salarium*** or ***merces*** – the salary or wage – which the non-professional employee earned.[98] Under the ***extra ordinaria cognitio*** procedure, they were afforded an action for the enforcement of their claim in respect of an honorarium.[99] The contract in terms of which this kind of service is rendered is known in modern law as that of agency or mandate. It is not governed by the ordinary employment contract or relationship.[100]

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91 For a more complete discussion of the contents and ambit of the **iura patronatus,** see **Van Warmelo *'n Inleiding tot die Studie van die Romeinse Reg*** (1971) par 131

92 **Du Plessis and Fouche *A Practical Guide to Labour Law*** (2006) 9

93 The so-called **operae liberales**

94 **agrimensores**

95 **medici**

96 **notarii**

97 **advocati**

98 D 11 6 1 pr; D 50 13 1; **Van Warmelo *An Introduction to the Principles of Roman Private*** Law (1976) par 478.

99 The *actio mandati*

100 **Du Plessis and Fouche *A Practical Guide to Labour Law*** (2006) 10. The mandatory undertakes to perform specific acts on behalf of his mandator, but unlike the ordinary worker or employee, does not fall under the control of the mandator. D 17 1 1 makes it clear that the reason why peculiar principles, such as non-payment of a **pretium** or remuneration governed the contract of mandate, is that it originated in the highly respected and time honoured virtue (**"officio"**) of **"amicitia"** or friendship. A mandate, because of the very

A mandatarius who violated his mandate, and thus the trust placed in him was smitten with ***infamia.***[101]

Some work, e.g. that of a professor of philosophy or of law was considered too dignified for even an honorarium.[102] Only work which "*locari solet*"[103] qualified for the employment contract. This normally meant physical or manual work.[104]

From the above outlining of the sources of labor in Roman law, it should be apparent why the ordinary employment contract – the contract between two freeborn or freed persons for the provision of paid labour - occupied such an obscure and virtually insignificant position in Roman law. Only with the abolition of slavery in modern times, the outbreak of the French Revolution, and the advent of the Industrial Revolution, did the employment contract begin to expand its ambit, so much so , that it is in modern times by far the predominant source of labor.

Apart from the mutual considerations of services and remuneration which were due in terms of the contract, the employment relationship was furthermore regulated by the concept of ***culpa***, which generally meant fault or blameworthiness in the form of ***culpa levis in abstracto.***[105] This means that the employee had to take care of the property, affairs and interests of the employer with the diligence of a ***bonus paterfamilias*** – the highest degree of care, possibly.[106] In fact, **Inst 3 24 5** refers to ***diligentissimus paterfamilias –*** the most diligent of ***paterfamilias***- as the yardstick for the conduct of the ***locator*** or

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nature of the services involved, was not given to a stranger the trustworthiness, diligence and consciencousness (or the lack thereof) of whom was unknown. In stead, it was given to a trusted and reliable person. Where there was in fact an agreement on remuneration for discharge of the mandate, the contract would not be that of mandate, but one of **locatio conductio.** The Digest text does not state whether such a contract was that of employment or of the independent contractor. We submit however that judged by the specific nature of the task to be performed in terms of mandate, **D 17 1 1** has the contract of the independent contractor in mind. It could also be a so-called *contractus innominatus.*

101 **D 3 2 1**; **Sanders *The Institutes*** (1917) 377. A person branded with **infamia** lost one of the most cherished of Roman characteristic attributes, namely his **existimato** or esteem: Such person could not act as a witness, receive public honours or bring a public prosecution.

102 **D 50 13; 1 4 5**; **Buckland *A Textbook of Roman Law*** (1963) 504 n 2

103 This refers to *'work usually hired out'.*

104 **D 19 5 5 2**; **Buckland *A textbook of Roman Law*** (1963) 504

105 **Van Warmelo *An Introduction to the Principles of Roman Civil Law*** (1976) 184 par 484.

106 **Van Warmelo *'n Inleiding*** (1971) 261-2 par 775

hired workman. If one of the parties could not, or would not perform, this was regarded as ***culpa***, and the other party could hold him liable. Incompetence or gross inexperience on the part of an employee would render him ***culpa*** or liable. [107] The general principle applied to such cases was ***"imperitia culpae adnumeratur"*** – "Incompetence or gross inexperience is equated with blameworthiness." The employee furthermore had a general duty, within the employment relationship, to look after the general employment interests of the employer, and could be held liable on the basis of ***culpa levis in abstracto***.[108]

One of the hallmarks of Roman employment law which still plays a significant role in modern South African law, is the element of control. An employer was entitled to exercise work related control and supervision over the employee, and to issue lawful and reasonable instructions, which the employee was obliged to execute.[109]

In the event of the death of the employer before the services had been rendered or completed, the employee was entitled to his full remuneration for the duration of the entire period of the contract. It would seem as though the estate of the employer was held to the terms of the contract. If the employee had succeeded in obtaining alternative employment, he would not be entitled to remuneration. [110] But the rules were different in the event of the death of the employee before completion of his contractual term. As the contract was a personal one, binding the employee personally, the contract terminated upon his death.[111] His estate was not rendered liable for outstanding incomplete work. As has already been noted, such employee's estate became entitled only to remuneration for services already rendered.

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107 ***Smit v Workmen's Compensation Commissioner*** 56-7 refers to D 19 2 9 5
108 Ibid.
109 ***Smit v Workman's Compensation Commissioner*** par 61; **Brassey *Employment Law*** (1998) B1-1
110 D 19 2 19 9; D 19 2 19 10; D 19 2 38 pr ***"Qui operas suas locavit, totius temporis mercedem accipere debet, si per eum non stetit quo minus operas praestit. Advocati quoque, si per eos non steterit, quo minus causam agant, honoraria reddere non debent."*** *"A man who leases out his labour should receive wages for the entire term if he is not responsible for his labour not being rendered. 1. Likewise, advocates should not return their fees if they are not themselves responsible for their not pleading a case."*
111 **Van Warmelo *An Introduction*** (1976) par 484.

2.3 EQUITY IN LABOUR LAW

It has been noted that there is a dearth of authority on the Roman employment contract generally.[112] This applies with even greater force in regard to the question whether ***aequitas*** or ***fairness*** played any role in the employment relationship between the parties. Judged by the application of the concept of fairness in other contractual and institutional contexts by the Romans, we submit that this question should be answered in the affirmative. The employment contract, being consensual by nature, originated in the ***ius gentium*** (the law of nature), which was infused by fairness.[113] If it could be shown that equity found application in contracts in general and more specifically in the contract of *locatio conductio,* it may safely be assumed that the same would in all probability apply in the case of the *locatio conductio operarum* or the ordinary contract of employment.

The whole of the Roman law of obligations was suffused by the notion of equity: ***"Item in his contractibus alter alteri obligatur in id, quod alterum alteri ex bono et aequo praestare oportet"*** – *"In the case of these (consensual) contracts, one party has to perform for the benefit of the other according to the demands of the good and the fair."*[114]

D 6 3 31 pr also seems to be emphatic: ***"Bona fides quae in contractibus exigitur aequitatem summam desiderat."*** – *"Good faith, which is exacted in matters of contract, requires the highest degree of equity."*

In this text we have three essentials for the existence of an equitable regime in Roman labour law, comprised in one sentence: *contract, good faith* and *equity*.

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112 One of the few, and also the most authoritative South African cases on Roman employment law is ***Smit v Workmen's Compensation Commissioner*** 1979 1 SA (A) 51, 56. The court furthermore explains with reference to **Buckland *A Text-Book*** (1963) 505, **Van Oven *Leerboek van Romeinsch Privaatrecht*** 279, **Kaser *Roman Private Law*** (1980) 185 and **Moyle *Imperatoris Justiniani*** 442, the reasons for the dearth of authority on Roman labour law, which it ascribes to the institution of slavery, which made an abundance of labour available. This obviated the need for a developed system of labour law.; See also on the labour supply in Rome : **Molenaar *Arbeidsrecht*** (1953) 14 et seq.; **Brassey *Employment Law*** (1998) A1: 1

113 See the Pauline text in **D 1 1 11** referred to earlier.

114 **Inst 3 22 pr**; For a discussion of the text, see **Wiarda J *"De toenemende invloed van algemene ongeschreven rechtsprincipes"* Op de grenzen van komend recht** 1983 320. The learned author points out that the principle enshrined in the text remains preserved in art. 1134 3 of the French Civil code of 1804, and art 1374 3 of the Dutch Civil Code of 1838.

Commenting on this text, modern Dutch writer **Wiarda**[115] points out its lasting influence from antiquity into the twentieth century and beyond. The phrase "in *hoge mate onbillijk"* which had been incorporated into the new Dutch Civil Code in existence at the time that Wiarda wrote, had its origin in this very same text of Roman law. In our chapter on modern Dutch law that follows,[116] we note that the whole of the modern Dutch law of obligations, including employment law, is subject to the principles of *equity* and good *faith*. Modern Dutch law also expressly subjects the employer-employee relationship to a strict *goodness* regime, thus giving effect to the claim of the Roman jurists that the equitable is the good and the good is the equitable.[117]

Moreover, it would not be far-fetched to assume that D 6 3 31 pr probably played a role in Roman employment law and relations similar to that played by s 23(1) of the South African Constitution – the right to fair labour practices.

In fact D 6 3 31 pr 1 is even wider and more comprehensive in scope than s 23 (1). It does not apply to employment contracts only, but extends to consensual contracts in general.

It may very well be conceded that the Digest text, unlike s 23 (1), does not specifically refer to "labour practices". However even in modern law, labour practices usually only become subject to law upon the conclusion of an employment contract, which is still the threshold for the existence of the employment relationship.[118]

More important however, is that upon careful and skillful interpretation – which the Digest text demands – it would seem that the text basically states two notionally distinct yet related concepts. Firstly it states that *good faith* is required in (the conclusion etc) of contracts (***"bona fides.....in contractibus exigitur"***). This could refer to the motivations, terms, conclusion etc of the

115 **Wiarda *De toenemende invloed*** 1983 321
116 Chapter V
117 See 2 6 and 2 7 above.
118 **Jacobs**, a modern Dutch labour lawyer aptly describes the employment contract as the *'entrance ticket* 'To the employment relationship – **Jacobs *Labour law in the Netherlands*** (2004) 36.

contract as a legal act per se, although the meaning is probably much wider than that. It could very well also refer to such issues as the effects and consequences of the contract, or its method of compliance or performance.

However, if the first part is read in conjunction with the second (***"aequitatem summam desiderat"***), the scope of the complete text certainly becomes much more comprehensive. It becomes reasonable to conclude that matters such as the effects – at least insofar as these are foreseeable, - as well as performance in terms of the contract, and even the reasons for and method of termination of employment, i.e. dismissal, are probably all comprehended in the text. A proper and careful interpretation of the second part clearly shows that equity, in this context, is closely related to *bona fides.* The contract demands or exacts (*exigitur*) bona fides, but it is bona fides, that demands or requires (*desiderat) aequitas.*[119]

In G IV 61 it is explicitly stated that in *bona fide* actions, the judge is allowed complete discretion in deciding what is due to the plaintiff on the basis of *equity and justice.*[120]

The praetor's remedy, made available by him to both ***locatores*** and ***conductores,*** i.e to either of the wronged parties to a contract of hire against the counter-party, was the ***actio locati*** and the ***actio conducti*** respectively. These formulae demonstrate that the relations between the parties to all contracts of ***locatio conductio***, including the employment contract, were governed by a regime of ***bona fides*** as well as the ***aequum et bonum,*** which we have seen in D 6 3 31 above, meant application of the highest degree of equity between the parties. **Otto Lenel**[121] has rendered us the following reconstruction of the praetor's formula used in the *actio locati conducti:*

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119 See **Kunkel** ***An Introduction*** (1973) 91 where it is pointed out that in this way the law was adapted.....to meet the requirements of a developing economy and of a refined legal instinct oriented to the principles of contractual good faith (*fides*) and equity (*aequitas*); Cf. **Kunkel** ***Romische Rechtsgeschichte*** (1964) 88

120 **De Zulueta** ***The Institutes of Gaius*** (1953) 260; **Kunkel** ***An Introduction*** (1973) 91; **Kunkel** ***Romische Rechtsgeschichte*** (1964) 88.

121 ***Das Edictum Perpetuum*** (1956) par 111; **Schultz** ***Classical Roman Law*** (1950) 546

"Since Aulus Agerius has hired to Numerius Negidius the usufruct of his land (to construct a house, or to render his services), condemn, judge, Numerius Negidius to whatever ought to be done or given to ***Aulus Agerius*** *for that reason according to the dictates of good faith."*[122]

From the above, it is clear that Roman employment law was inherently governed by equitable principles, including good faith. The **praetor's** formula did not state that the terms of the contract itself had to be equitable. The parties had to *perform* in accordance with good faith and equitable considerations.[123]

Judged by the wide and inclusive aspects of the language employed in the formula one can come to the conclusion that Roman labour law was subject to a *comprehensive regime of equity.* On this basis, the praetor's formulae instructed the judge to condemn the guilty party to an employment relationship to actually and physically do, perform or render to the wronged party whatever was required by the dictates of good faith and fairness. Such judicial condemnation was particularly apt in the case of the employment contract, for the judge could order the performance of an actual piece of work according to the terms of the agreement, such as the construction of a building, the physical performance of manual labour, the payment or return of remuneration, the payment of alternative or perhaps even additional remuneration, or whatever would satisfy the demands of good faith and fairness in the circumstances.

It is important to note that the praetor's formula and the judicial order that gave effect to it, do not simply purport to be the formal means of enforcement of the agreement between the parties. They are not about specific performance only. The formula does not instruct the judge to condemn to whatever has been agreed, but rather to what he, the judge, finds just and equitable after consideration of the facts. It is for the same reason that the formula does not speak of what *has* to be done or rendered in terms of the agreement, but rather

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122 ***"Quod Aulus Agerius Numerio Negidio fundum fruendum (domum faciendam, operas suas) locavit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex bona fide, eius judex Numerium Negidium Aulo Agerio condemnato..."***

123 **Stein** ***The Character and Influence of the Roman Civil Law*** (1973) 25

of what *ought* (*oportet)* to be performed *ex bona fide et aequitate* – on the basis of good faith and equity.

Inst 3 24 5 – a rare text - is of great value since it deals not only with the terms and conditions of the contract of hire or of the employment contract, but also with omissions therein:

"Conductor omnia secundum legem conductionis facere debet et, si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare" – *"The hirer ought to do everything according to the law of hire, and if anything has been omitted in the law, he ought to perform according to the dictates of goodness and equity"*

Sander's less literal translation substitutes ***"law" (lege***) for ***"terms of hiring."***[124]

Thomas's translation substantially agrees with that of **Sanders.**[125] Our translation is more literal, as it refers to "law" instead of the "terms of hiring".

But whichever translation one prefers, the fact remains that in **Inst 3 24 5** we have direct authority for the proposition that, ultimately, the hirer had to act fairly towards the labourer. The text does not contain a ***"vice versa"***. This is not really of any consequence since the contract was bilateral and consensual by nature and based on mutual ***bona fides***. This boils down to both parties having to observe fairness in their respective performances.

Our more literal translation of **Inst** 3 24 5 has this advantage (compared to the more liberal ones of **Sanders** and **Thomas**), that a contract of hire was a very simple matter, concluded as soon as the parties agreed to its *essentialia*, namely the work to be done, the remuneration and the contractual term.[126] Once so agreed the parties had to act *secundum lege*, i.e. according to the law (***lege***) of hire, which incorporated equity.

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124 **Sanders *The Institutes of Justinian*** (1917) 370

125 **Thomas *The Institutes*** (1975) 235

126 **Inst 3 24 pr** ***".....sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit" –"*** *in the same way the contract of hire is understood to have been concluded as soon as the remuneration has been fixed"*

On the other hand the more liberal translations emphasise the "*terms of hiring*" rather than the "*law of hiring,*" thereby lending primacy to the principle of *pacta sunt servanda*.[127]

The following text seems to be virtually direct authority for the proposition that Roman employment law was governed by equity in much the same way as South African law is, in terms of s 23(1) of the Constitution:[128]

"Likewise, in the case of these contracts [such as sale, hire, partnership and mandate], one party is obliged to perform in respect of the other according to the dictates of goodness and fairness".

The text is **G. Inst** III 137 (more or less 160 AD) that was incorporated by **Justinian** in D 44 7 (***De obligationibus et actionibus***) 2 3. As consensual contracts had been recognized by the praetor centuries before Gaius put pen to paper, it can be accepted that the legal principle involved here had been long established by the time that **Gaius' *Institutes*** was written.[129]

One can assume that the text was inspired by the praetorian edict in view of its references to consensual contracts and the principles of fairness.[130]

The text is significant for our purposes from at least three perspectives: In the first place it states in so many words that in terms of all consensual contracts (introduced by the praetor) parties are bound to perform (***"praestare oportet"***) in accordance with the principles of goodness and of fairness (***ex bono et aequo***). ***Bono*** could in this context be accorded the narrower meaning of *good faith.* But the term had a much wider connotation than that. ***Bona fides*** is a

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127 On **pacta sunt servanda**, see **Van Eikema Hommes *"De rol van de billijkheid in de rechtspraktijk"* 'Uit het recht'** (1971) 36.

128 ***"Item in his contractibus [sc. in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis] alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet."***

129 The praetor was active since 242 B.C. His work culminated in the ***Edictum Perpetuum*** of about 130 AD.; **Van Warmelo *en Betekenis van die Romeinse Reg*** (1965) 76

130 On the role of the praetor, see **D 1 1**; **D 1 2 2 28; G** IV 11; **Kunst *Historische ontwikkeling van het recht*** (1969) 207; **Van Warmelo *Oorsprong en Betekenis van die Romeinse Reg*** (1965) 22, 56 et seq; **Lawson *"A common Law Lawyer looks at the Civil Law"* Smith and Weisstub** (1983) 327; **Guarino *L'Esegesi delle fonti del diritto romano*** (1968) 592 et seq. **Gibbon *The History of the Decline and Fall of the Roman Empire*** (1995) IV XLIV 799 et seq. **Hahlo and Kahn *The South African Legal System*** (1968) 14; **Kunkel *Romische Rechtsgeschichte*** (1964) 75 81 et seq.; **Sohm *The Institutes*** (1907) 72; **Lenel *Das Edictum Perpetuum*** (1956); **Spiller *A Manual of Roman Law*** (1986) 8.

term regularly mentioned in the texts of the Corpus Iuris expressly and by name, as we have pointed out earlier, and one can assume that if Gaius or Justinian had in mind such narrower signification, the term ***bona fides*** or its variant ***ex bona fide*** would have been used. However, in this context reference is made to ***bonum*** or goodness in its wider sense of the morally good. This would include performance in good faith. In the previous text that we considered, namely D 6 3 31 pr we noticed that the terms good faith, goodness and fairness were in any case used synonymously. The ***aequo*** that the present text makes reference to is of course ***aequitas*** or equity.

In the second place, the contract of letting and hiring is specifically included in the category of transactions which are said to require performance in terms of goodness and fairness. The letting and hiring of services was a sub-species of letting and hiring in general and as such sub-species is not expressly or otherwise excluded by the text, it can safely be assumed that the principles of good faith and fairness applied to the employment relationship.

Thirdly, and perhaps most importantly, is the fact that the text applies directly and immediately to *performance* in terms of the contract. It is not simply the terms or provisions of the employment contract *per se* that are dealt with here. Strictly speaking, these are not covered by the text at all, except indirectly in the sense that the parties had to act in good faith and in fairness even in entering into a contract. But the real significance of the text lies in its express and specific reference to *performance*. Performance pertains to continual compliance by the parties with their respective contractual obligations, namely the rendering of service by the employee, and the payment of the wage by the employer and related matters.

But if there still remains some doubt about the existence of an equity regime governing Roman labour law, it is suggested that D 19 2 19 8-10 which we will discuss next should be conclusive. Doubt may perhaps be expressed on the basis

of the argument that even though G III 137 above [131] does state that contractual performance is governed *ex bono et aequo*, it makes no express mention of the *employment contract* as such, and only refers to letting and hiring in general. The first and logical response to that would be that the text relates to *all* contracts of letting and hiring, including that of *locatio conductio operarum* as it does not expressly or by implication exclude the latter. In fact, logically it is more probable than not that it includes the employment contract in the regime of equity rather than exclude it, if by such exclusion a higher premium is placed on the hiring of a thing than on the service of a human being.[132]

G.IV.61 and IV.62 confirm that contracts of employment were *bona fide* transactions where good faith (and thus an equity regime) applied.[133] In the case of *bona fide* actions the judge had a free and equitable discretion to order whatever the claimant was entitled to in terms of the dictates of the good and the equitable.[134]

However, **D 19 2 19 8-10** should expel any remaining doubt in this connection:

*" **Cum quidam exceptor operas suas locasset, deinde is qui eas conduxerat decessisset, imperator Antoninus cum divo Severo rescripsit ad libellum exceptoris in haec verba: 'Cum per te non stetisse proponas, quo minus locatas operas Antonio Aquilae solveres, si eodem anno mercedes ab alio non accepisti, fidem contractus impleri aequum est**".*[135]

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131 D 44 7 2 3

132 **Wiarda"*De toenemende invloed van algemene ongeschreven rechtsprincipes*"** 1983 320 draws attention to the citation of G iii 137 by the French jurist **Jean Domat** (1625 - 1696) ***Les loix civiles dans leur ordre naturel*** *(The civil law according to the natural order)* 1689 - 1697 (in five parts): Premiere partie (Des engagemens) 1 12 (Bonne *foi entiere en toute sorte des conventions)* who points out that this text applied to all kinds of Roman law contracts.

133 G iv 62 ***Sunt autem bona fide judicia haec : ex exemplo venditio, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae"*** - *"The bona fide actions are for example those of sale, hiring, unauthorized agency, mandate, deposit, fiducia, partnership, tutorship and wife's dowry"* - (Zulueta's translation).

134 G iv 61: *"**In bona fidei autem iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi quantum actori restitui debeat**"- "For in good faith disputes, the judge is permitted a free discretion, based on the good and equitable, of estimating the amount that has to be restored to the plaintiff"*

135 **Watson *The Digest of Justinian.* T. Mommsen** and **Paul Kruger (eds)** (1975) Vol. II - *"It is obvious that an action on hire passes also to the {lessee's} heir. When a scribe leased out his own labour and his employer then died, the Emperor **Antoninus** together with the deified **Severus** replied by rescript to the scribe's petition in these words" : "Since you alleged that you are not responsible for your not providing the labour you leased to **Antoninus Aquila**, it is fair that the promise {of wages} in the contract be fulfilled if during the year in question you received no wages from anyone else."*

A scribe whose employer has passed away addresses a libellus to the emperor for redress. [136] A rescript is returned stating the position, which is determined by *good faith* and *equity*. In terms of these, he would be regarded as having discharged his duty towards the deceased, if he had not accepted any payment from another hirer of his services within the same year. Thus, the evidence is conclusive that equitable principles generally and comprehensively applied in Roman labour law. The rescript is not about the services of a slave, a freedman, a professional man or an independent contractor. It concerns the employment contract of an ordinary freeborn or free employee as we know it in modern times.[137]

If one considers all abovementioned texts together with Ins. III XXIV 5, it becomes unmistakably clear that the principles of the ***aequum et bonum*** applied to all contracts of letting and hiring, including the employment contract.[138]

Even in post-classical Roman Law as contained in the ***Codex*** of **Justinian**, we have a few imperial rescripts dealing with the contract of *locatio conductio* in general (i.e. including the hiring of things) which presuppose the fundamental criterion of *bona fides* and *fairness.*[139]

"***Papinian*** *as well, in the Fourth book of his Replies, wrote that when an imperial legate died, staff members were owed their salary for the remainder of the term only if they did not serve as staff members with others later in this term".* – **Watson *The Digest*** (1975) II.

136 This probably happened through the praetor.

137 "**operas suas locasset**"

138 ***"Conductor omnia secundum legem conductionis facere debet et si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare. Qui pro usu aut vestimentorum aut argenti aut jumenti mercedem aut dedit aut promisit, ab eo custodia talis desireratur, qualem diligentissimus paterfamilias suis rebus adhibet" –*** *"The hirer ought to do everything according to the law of hire, and if anything contained in the law has been omitted, the hirer has to supply it according to the good and the equitable. He who has either given or promised a sum for the use of garments or silver or beasts of burden, is required to keep the same kind of custody of those things as the most diligent paterfamilias would show in regard to his own things."*

It is only logical that if the hirer was required to care for hired things most diligently, he certainly had to deal with an employee whose services he hired in the same way. In such case 'most diligent' treatment would probably translate to fair treatment.

139 See C 4 65: "***bona fide***"; C 4 65 4: "***fidem***"; C 4 65-7: "***fidem***"; C 4 65 8: "***bona fidem***"; C 4 65 9: "***bona fidei iudicio ei quod placuit parere cogitur***"; C 4 65 15; "***rupta conventionis fide placuit***"; C 4 65 17: "***bona fidei***"; C 4 65 21: "***De Contractu bonae fidei habito propter hoc solum***".

In A D 293 the emperors ***Diocletian*** and ***Maximian*** issued a rescript that read: "***Circa locationes atque conductiones maxime fides contractus servanda est*** – *In matters relating to letting and hiring the highest form of contractual (good) faith should be observed*".

A rare text in the *Codex* which impacts directly on our subject matter, is C 4 65 22.[140]

"Si hi, contra quos supplicas, facta locatione temporis certi suas tibi locaverint operas, quatenus bona fides patitur, causa cognita competens judex conventionem servari iubebit"

"If those against whom you supplicate us have entered into a fixed term contract in terms of which they hire out their service to you, a competent judge, having heard the case, will order the agreement to be observed to the extent allowed by good faith".

In this single text, we have a comprehensive summary of virtually the whole of the Roman law relating to the employment contract and practice: reference is made to a fixed term, as employment contracts had to be for a specified period of time; the service that is discussed here is also not that of the independent contractor; the plural (*operas*) indicates that we are dealing with the ordinary employment contract; the principle of *pacta sunt servanda* is carefully observed, subject however to the overriding criterion of good faith. We even find reference to a judge with jurisdiction who must have heard the matter before ordering compliance with the agreement according to the dictates of good faith. This was evidently to ensure procedural fairness in the form of *audi alteram partem.*

2.4 CONCLUSION

In the texts and authorities discussed above, we find compelling evidence to justify the following conclusions:

Roman employment law was subject to a comprehensive equity regime; Performance had to be fair and good, in the discretion of the judge, irrespective

140 This is a rescript by the emperors **Diocletian** and **Maximian** to **Papinian**, arguably the most renowned classical jurist.

of the terms and conditions of the employment contract; Equity trumped contractual provisions when it concerned performance;

Equity and reason were regarded as immutable, unchanging and eternal values at virtually all stages of legal development, except the archaic and perhaps early periods of Roman Law. Equity and reason were fundamental values of Roman jurisprudence, observed by magistrates, jurists and Emperors alike;

Equity was not regarded as foreign or immanent to law but as a species of the *genus* law. As such, a law or employment contract could not dispose of equity;

Equity consisted in the first place in the will (voluntas) to act fairly and secondarily in external action or the consequences and effects of freely willed action; Reason or reasoning is the art or process of giving effect to an equitable will; Human virtue determined whether the will or action was morally depraved or good;

Modern criticism to the effect that Roman employment law knew no equity, is unjustified.

CHAPTER III

ROMAN-DUTCH LAW

3.1 EQUITY AND LAW IN GENERAL

In the preceding chapter we noted that equity was regarded as inherent to Roman law, and particularly so to Roman employment law. Here we consider the extent to which Roman notions of equity, or equity in general, formed part of Roman Dutch law.[141] Thereafter we will consider Roman Dutch employment law in greater detail.

Academic writers, and even the Roman Dutch jurists themselves, were not always in agreement as to the degree of authority to be accorded respectively to Roman law on the one hand, and to indigenous Dutch law on the other.

Nathan[142] for instance saw Roman Dutch law largely as a body of *Roman law* as it existed in Justinian's time, with such modifications as were introduced by general Dutch statutes, placaats or customs. A closer consideration of the views of the most authoritative Roman-Dutch jurists themselves, casts some light on the issue.

Hugo Grotius[143] describes the place and status of Roman law and equity in the Dutch legal system of his time as follows: In the pre-Roman era judges had to apply general laws, privileges, customs and by-laws applicable to given factual situations. When these were lacking, the judge had to follow *"...de beste reden nae hare wetenheid ende bescheidenheid"* - *"...best reason according to his*

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141 On the historical process of the reception of Roman law into Dutch law, see **Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming*** (1935) 76 et seq; **De Blecourt *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht*** (1950) **Fischer H F W D** (ed); **Nathan The Common Law of South Africa** (1904) 27 et seq.

142 **The Common Law of South Africa** (1904) 7

143 ***Inleidinge tot de Hollandsche Rechtsgeleertheyd*** (1625). In this work, use will mainly be made of the Dutch text as it appears in **R W Lee *The Jurisprudence of Holland*** (1926). Where we deem it expedient the author will provide his own translation. Otherwise Lee's English translation is used.

conscience and discretion."[144] Care has to be taken to avoid the conclusion that when Grotius refers to *conscience* and *discretion*, he introduces arbitrariness or mere subjectivity into the notion of law or equity. [145] Deciding a matter according to conscience generally meant that the judge had to decide the matter under oath of impartiality and fairness.[146] Again we note that fairness and justice were not simply regarded as objective rules or standards external to the judge or decision maker. The *animus* or mental state of mind of the administrator of justice had always been highly relevant in Roman law,[147] and remained so in Roman Dutch law.

To the Roman and Dutch jurists it was inconceivable that a judge with a mind affected by prejudice, partiality, arbitrariness or capriciousness could properly be said to administer justice or fairness, even if his judgment happened to be objectively but coincidentally "correct", "just" or "fair".[148]

Under influence of **Aquinas**,[149] *conscience* had become the ultimate judge in matters pertaining to moral fairness.[150] Aquinas had defined *conscience* as the *judgment* of *reason* on the moral correctness or turpitude of a human act.[151] As

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144 **Lee *The Jurisprudence of Holland*** (1926) 11, translates this as "*...the path of reason according to their knowledge and discretion.*" The ancient judges were placed under oath before performance of this function.

145 **McGregor *"Aequitas"*** (1938) 2 THRHR 6-7. He points out that it is an unavoidable fact that the subjective use of reason and discretion do play a role in the description of the objective. But in reality something external to and independent of mere subjectivity is addressed. McGregor uses the term *quasi-zelfstandig,* i.e *quasi self-existent/independent* in this regard. It is submitted that the influence of Canon Law in respect of matters of conscience is a clear example.

The concept of *discretion* is one that modern lawyers are thoroughly familiar with. It undoubtedly does not involve arbitrariness, although a necessary subjective element is undeniable.

146 **Van der Keessel *Praelectiones*** (1961 – 1975) 1 2 22

147 Cf 2 8 and 2 9 above.

148 Cf 2 7 where "**voluntas**" in Roman law was discussed with special reference to **Aristotle *Ethics*** 5 8; **Paton *The Moral Law*** (2005) Pref. viii.

149 **Salmond *Jurisprudence*** (1947) 84; **Vinogradoff *"Sources of Law"* Collected Papers** (1928) vol II 471.

150 **Vinogradoff *"Reason and Conscience"*** (1928) 196-7; **Hahlo & Kahn *The South African Legal System*** (1968) 135; **Pollock *The Transformation of Equity*** (1993) 293-5; ***Bryce Studies in the History of Jurisprudence*** (1901) 158.

151 ***Summa Theologica*** (1979) Ia IIae 19 5 Here Aquinas states that reason, or the thinking mind, is man's only natural guide in moral matters. The judgment of reason on the morality of a proposed act is *conscience*. When the will acts in conformity with this moral judgment, the act is morally *good*. An act in contradiction of conscience is evil. Man is obliged to act in conformity with his conscience, even when reason is mistaken and the moral judgment based thereon is therefore false.

This text also underlies the contention by natural law jurists that it is not simply *reason* that determines morality. It was readily admitted by Aquinas and others that *reason* could indeed be mistaken or erroneous. For

will be noted in our chapter on English Law,[152] conscience at some stage formed the bedrock of the whole of the English notion of equity. But it was not only the conscience of the judge himself, but rather that of a respondent before him that was called upon in the application of equity in that system.[153]

In the course of time, Roman law, being *'...considered by men of understanding to be full of **wisdom** and **equity,**"*[154] was at first accepted only as a model or example of *wisdom* and *equity*, but later as binding law. Canon law was admitted in Holland on the same basis, writes Grotius.[155]

Although it would seem from **Grotius** above, that local customs sometimes superseded Roman law, it has to be born in mind that for a custom to be valid and accepted, it always had to conform to *reason, fairness* and the *boni mores.* This was also the position in Roman Law.[156]

Grotius basically adhered to Aristotelian doctrine[157], in which equity fulfilled the role of a virtue, the *correctrix* or corrector of universally expressed strict law. [158]

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this reason they emphasized the use of *recta ratio* or *right reason*, or, as Grotius refers to it, *sana ratio*. Cf. **Coplestone *Aquinas*** (1979) 228; **Glenn A *Tour of the Summa*** (1978) 116-7.

152 Chapter V

153 ibid

154 **Lee's** transl.

155 On the significant role that canon law played in the integration of equitable legal principles into Roman Dutch law, see **Van Leeuwen *Censura Forensis*** (1662) 1 1 18; **Schreiner *Simon Van Leeuwen's Censura Forensis*** (1883) 16; **Wessels *History of Roman-Dutch Law*** (1908) 128-9

156 This was the legal position from time immemorial. In D 1 3 32 **Julianus** writes that *"**Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum" –** "Inveterate custom is not without merit regarded as law, for it is law since it has been constituted by good morals."* In C 8 52 (53) 2 (319) the emperor Constantine points out that ***"Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momemto, ut aut rationem vincat aut legem." –** "The authority of custom and long usage is not insignificant, but in reality it does not carry on its own such weight that it supersedes either reason or law."* **Gail *Practicarum observationum*** (1653) 11 XXI writes that ***"Quarto consuetudinis aequitas, quod nimirum ratione sit consentanea"*** *– "In the fourth place, the equity of the custom, in that it is in agreement with reason."* **Voet *Commentarius ad Pandectas*** (1757) 1 1 3 6 writes that ***"De caetero requisitum hoc rationabilitatis in lege non eo subvertitur, quod non omnium, quae a majoribus constituta sunt, ratio reddi possit..."*** *- "Furthermore the requirement of rationality of law should not be subverted (by the argument) that not everything determined by our forefathers can be reduced to reason."* **H C Cras**, who played a major role in the codification movement in Holland, writes in his ***Ontwerp Inleiding van het Recht*** *(1804)* Chapt. VI art.3 *"Niets kan als eene loffelijke herkomst of costume gelden, hetwelk of tegen de natuur-wetten aanloopt, of de goede zeden beledigt, of strijdt met de gezonde reden, waardoor dan de loffelijke herkomsten en deuchtige gebruiken van alle misbruiken en verkeerdheden worden onderscheiden."*

See also **Van den Bergh *Wet en Gewoonte*** (1982) 56-81

157 ***Nicomachean Ethics*** Bk VI

158 In his tract ***De Aequitate*** (On Equity), a supplement to various editions of his ***De Jure Belli ac Pacis***, **Grotius** stated: *"**Proprie vero et singulariter aequitas est virtus voluntatis, correctrix eius in quo lex propter universalitatem deficit" –** Properly speaking, equity is a virtue of the will, the corrector of the*

In his ***Censura forensis*** (1662), **Simon van Leeuwen** deals with the hierarchical position of Roman *law* and *equity* in the Dutch legal system of his time.[159] He commends the inherent qualities of Roman law as follows:

*"Notwithstanding that, the Roman positive law remains the basis and foundation of **equity** and **justice**...For while it is true that the Roman law was in the first instance written for the Romans and their subjects, yet by reason of its **excellence, equity** and **utility**, all other nations, by as it were a tacit consent of those using it, have adopted this law."*[160]

He observes that law is the science of the *good and the equitable*, separating the fair from the unfair.[161] From whatever perspective one may view the issue, there is no doubt that the Dutch jurists held Roman law, justice, reason and equity in the highest of regard.

Johannes Voet[162] refers to the Digest as

*"... a most hallowed temple of the whole of Roman jurisprudence, abounding in a most precious wealth of all those things which all the best priests[163] of law, distinguished for their worship and cultivation of **justice** and **wisdom**...drawn from the fountains of **equity** and **goodness".***[164]

According to **Voet,**[165] Roman law could be said to be the "default" law applicable in Holland. [166]However, omissions in statutory law could only be supplemented by reference to Roman law in subject-matters or areas of law where the latter had been specifically adopted.[167] Neighbouring customs could only be applied if these rested on *reason, sound judgement, justice* and *fairness.*[168] Similarly, where neighbouring customs were deficient, ***natural equity***[169] and ***right reason***

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deficits of the law that flows from its universality. **Grotius**, loc. cit. continues to state that ***"Aequum autem est id ipsum, quo lex corrigitur"*** *– 'Equity is therefore that by which the law is corrected.'* See **Hahlo and Kahn *The South African Legal System*** (1968) 130.

159 In this work, use has been made of **Schreiner *Simon van Leeuwen's Censura Forensis*** (1883)

160 **Schreiner** op. cit. 9.

161 **Censura Forensis** 1 1 1 (transl. **Schreiner**) (1883) 4

162 ***Commentarius ad Pandectas*** (1757) 1 1 1

163 Cf D 1 1 1 discussed in 2 1 supra

164 My emphasis. **Gane *The Selective Voet*** (1929) 4. This is the edition and translation of Voet that will be utilized in this work.

165 ***Commentarius*** (1757) 1 1 1

166 However, abovementioned prioritisation of sources of law is not applicable when, by universal consent or custom, certain areas of the Civil Law, like those of slavery, emancipation of slaves, or adoption have fallen into disuse.

167 **Voet *Com*** (1757) 1 1 1

168 ibid.

169 **Huber *Jurisprudence of my Time*** (1939) 1 1 15 observes that natural equity looks at cases in their universal simplicity.

remained as final *reserves.*[170] **Gane**[171], in his commentary on this title of **Voet**, points out that as the whole of Roman law "***glows with equity***", its study was indispensible, both for academic and forensic purposes.[172]

Van der Keessel wrote two works of monumental stature which we will briefly consider here.[173] First his ***Praelectiones***[174] and thereafter his ***Theses Selectae***.[175]

Van der Keessel confirms that the term *rechtsgeleertheid* in the Inleidinge[176] of Grotius means that jurisprudence is the *art of the good and the equitable.*[177] He then adds that **Grotius** had in mind that jurisprudence is that *discipline* or *art* which teaches us how we ought to arrange our actions according to the principles of justice. The term *rechtvaardigheid* as used in **Grotius**, bears the meaning of justice as the *virtue* according to which we are eager[178] (***voluntas***) to do the just.[179] Here the Roman value of "*virtue*" makes its appearance again.[180] Law (*recht*) in both its wide and narrow sense as used by **Grotius**, involves the actions of a *reasonable being* exercising *right reason.* In this respect **Van der Keessel** confirms the natural law position in terms of which law consists in the exercise of *reason*.[181] **Van de Keessel**[182] explains Grotius' understanding of law

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170 ibid

171 **Gane** ***The Selective Voet*** (1925) 5

172 **Voet** ***Com*** (1757) 1 1 3 is in agreement with Gane as far as the indispensability of the study of Roman law is concerned.

173 **Prof. J de Wal** formerly of Leiden University, pointed out in the biographical note prefacing the 1901 edition of the **Theses Selectae** translated by C A Lorenz, that nowhere could it be shown more forcibly how the principles of morality, honour, virtue and conscientiousness were applied and maintained in Roman law, than in an oration delivered by **Van der Keessel** in 1790, namely the '***Oratio de studio Iuris Civilis ad bonos mores formandos et virtutem colendam optissimo.***' This work is inaccessible to us.

174 The full title of the work is significant: ***Praelectiones Iuris hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam.***

175 ***Select Theses*** (1884) Amsterdam.

176 i.e in the Introduction to Dutch Jurisprudence, supra

177 ***Pr*** 1 1 1; cf. the corresponding reference in Grotius;

178 **voluntas**

179 **Van der Keessel** ***Pr*** 1 1 1 writes: ***"Sensus est: iustitiam esse eam virtutem, qua id agere studemus, quod iustum est."*** In other words, the term *rechtvaardigheid* in Grotius becomes ***justitia*** (justice) in Van der Keessel. **Van Warmelo** et al however translate this as *regverdigheid* in Afrikaans and not as law or justice. This translation confirms our view that Grotius is dealing here rather with ***equity*** or ***fairness*** than law in the strict sense of the word.

180 Cf.2.9 above. **Van Zyl** ***Justice and Equity in Greek and Roman Legal Thought*** (1991) 74-5; ibid: ***Justice and Equity in Cicero*** (1991) 1 et seq.

181 ***Praelectiones*** 1 1 5 Here Van der Keessel explains the meaning of *ruim* (wide sense) in Grotius' definition of law: ***"Latius sumptum ius hic dicitur convenientia actionis ab ente rationali perpetuae cum recta***

in the wide sense by observing that it refers to all the *virtues* written about by the ancient philosophers insofar as human actions affect fellow humans.[183] That Roman Dutch writers like **Grotius** and **Van der Keessel** valued the moral and virtuous aspects of law as indispensible, is clear from Van der Keessel's very definition of law: [184]

"Law is described by the Author (Grotius) as the dictate of right reason, prescribing that which is honourable for the common good, laid down and promulgated by him to whom belongs the power of doing so in a defined community."

To this definition, Van der Keessel observes, has to be added that law is a dictate of *right reason* since it has to based on a *rational cause of equity and utility.* It has to be *rationally and sensibly formulated for a specific purpose*.[185] The law has to prescribe *honest* actions, as turpid prescripts are generally regarded as *morally* impossible, which the citizens cannot be ordered to observe.[186]

As far as ***equity*** is concerned, **Van de Keessel** confirms the observation of Grotius, that from the earliest times, the judges of Holland were placed under oath to judge cases according to ***"optimam rationem quam sua religio et prudentia suggereret"*** – *"....their best reason and as suggested by their sense of duty*[187] *and prudence."*[188] With the lapse of time, equity, reason and wisdom, which in Holland first served as examples of legal rules only, were completely

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ratione, quatenus alterius interest." – *" Law in the wide sense as it is used here (by Grotius) means the perpetual agreement of the actions of a rational entity with right reason insofar as it affects the interests of another."* **Van Warmelo** et al have not translated the important adjective ***perpetuae*** which designates an important attribute of the rationality aspect of the law of nature.

Law in the strict sense is described as **"Strictius *acceptum ius est relatio inter ens rationale et illud, quod ipsi competit, sive aptitudine sive facultate."*** – *" Law in the strict sense is the relation between a rational entity and that to which it is entitled, either on the basis of dignity or powers."*

The text refers to D 1 3 1 where law is defined as a precept established by the *"common consent of the wise."* In other words, law has to have a rational element, as opposed to a rash or arbitrary nature.

182 ***Pr*** 1 1 7

183 ***Pr*** 1 1 7: ***"Grotius observat iustitiam, quae sese refert ad ius late sumptum, vocari a veteribus philosophis universalem, quia omnes virtutes complectitur, quatenus referentur ad alios..."***

184 ***Lex ab auctore dicitur dictamen rectae rationis, id quod honestum est dirigentis ad commune bonum, praescriptum et promulgatum ab eo, cui auctoritas in quandam competit societatem"***

185 ***Pr*** 1 2 1 (1)

186 Ibid.

187 *"religio"*

188 ***Pr*** 1 2 22

accepted as inherent to law.[189] Canon law was also received, specifically insofar as it introduced principles of ***equity***.[190]

Van der Keessel proceeds[191] to point out that ***equity*** and *reason* had been accepted for ages in Holland by means of so-called legal formulae that were utilised in legislation for its introduction. These included amongst others, legislative expressions and terms such as *"naar rechten en naar oordeel"*,[192] *"naar hulle vyf sinnen"*,[193] and *"na der reden"*.[194] He points out that these formulae are compatible with and co-existent with ancient Dutch custom as they imposed a duty on the judge to apply the law according to the dictates of ***goodness*** and ***fairness***.[195] However, the formulae also mean that where Dutch law is completely lacking, judges had to make decisions according to the principles of *natural law and equity*.[196]

Wessels[197]and **Van Lunteren**[198] confirm that in the practice of the Dutch courts, Roman law at some stage indeed played a default and subsidiary role, but that in academic jurisprudence that role was a primary one.

However, quite significant is the role that **Van der Keessel** ascribes to ***aequitas***, having set out all the above subsidiary rules regulating the application of law:

"In his ipsis tamen negotiis patriae originis genuinam juris antiqui rationem haud raro subegit aequitas iuris Romani" – *"However, even in these matters indigenous to the fatherland, the* ***equitable law of the Romans*** *has not seldom come to the support of the genuine sense of the ancient law"*[199]

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189 Ibid. In the preface to the 1800 edition of the ***Select Theses***, 2nd ed. translated by C **A Lorenz, van der Keessel** writes that the laws and customs of Holland had to a great extent been borrowed from the law of nature and the Civil Law (Roman Law) as tempered by the principles of equity.

190 Loc. cit.

191 Ibid.

192 "according to law and personal judgment"

193 "according to the five senses" of the judge.

194 "According to reason".

195 ***Pr*** 1 2 22 He had in mind here the **bonum et aequum** of Roman law.

196 Ibid.

197 ***History of Roman-Dutch Law*** (1908) 128-9 confirms the subsidiary role played by Roman law.

198 ***Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming*** (1935) 225

199 Author's translation and emphasis.

Recourse is to be had to ***aequitas naturalis***[200] in the absence or silence of local law, custom or the subsidiary (Roman) law. On this basis, Canon law has been admitted in Dutch courts, to the extent that its principles were in agreement with those of the Civil Law, or had an ***equitable*** influence on it.[201]

Ulrich Huber, a Frisian jurist of the 17th century provides us with some reasons as to why Roman law was adopted as subsidiary to Frisian law. He points out that the law of Rome had spread throughout the continent of Europe since it surpassed all other known systems of law in *sagacity* and *justice.*[202] All Christian peoples adopted Roman law for this reason, taking away superfluity and adding what is good.[203] Even amongst non-Christian nations where Roman law found no direct application, with the result that judges were not bound by it, it nevertheless served as a model of *wisdom* and *legality*.[204] In Friesland Roman law applies directly to all cases, provided the matter is not dealt with by domestic Frisian law.[205] Roman law is part and parcel of the domestic written laws of Friesland,[206] more so than in any other country.[207] Unwritten law, i.e. custom, had the force of law, only if it was *righteous, not repugnant to virtue, sound reason, or the common law of nations.*[208]

Cornelius van Bynkershoek[209] seems to be ambivalent in his recognition and application of *equity.*[210] **McGregor**[211] even mentions confusion in this regard. On the one hand **Van Bynkershoek** states that it is not the function of the judge to create law, but to apply it. With the expression ***leges, solae leges, Senatorum***

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200 Natural equity

201 **Van Bynkershoek, Grotius and van Leeuwen** are cited as authority, as well as two decisions of the **Curia** or High Court dating back to 1768 and 1771. Reference is also made to the Neerl. Jaarb. (Dutch Year Book) 1775 1127 et seq.
Wessels *History* (1908) 137-139.

202 ***Heedendaagse Rechtsgeleertheyt*** (1939) 1 2 24. In this work we make use of Gane's translation.

203 Ibid.

204 Ibid.

205 HR 1 2 28.

206 HR 1 2 32

207 HR 1 2 47

208 HR 1 2 52-3. Other requirements of custom were *generality* and *certainty* – HR 1 2 52.

209 Contrast with **Paulus** and **Johannes Voet**.

210 **Van Appeldoorn *Theorie en Practijk van de rechtsbronnen in Holland in den Tijd van Cornelius van Bynkershoek (1673-1743)*** 1937 THRHR 4-33.

211 op. cit. 9

animos regunt *(laws, and laws alone, govern the minds of the judges)*[212] **Van Bynkershoek** maintains a fairly positivistic view of law. **Van Appeldoorn**[213] correctly observes that such a view does not seem to leave any room for the application of equity.[214]

To **Van Bynkershoek** the notion of equity seems to have been too subjective in nature, admitting as many opinions as there are men. On the other hand is it a well known fact that **Van Bynkershoek** was an ardent proponent of Roman law, not least of all for its equitable character, so much so that according to **Wessels**[215] he enthusiastically remarked: ***"Ubi silent leges Patriae, cedo mihi, quid succedat nisi Romana."*** **–** *"When the laws of our Fatherland are silent, tell me, what takes its place but Roman law".*[216]

But it would seem on the other hand that his role as President of the Hooge Raad brought **Van Bynkershoek** face to face with the unavoidable need for equity in the realities of daily court practice. **Van Appeldoorn** convincingly shows that **Van Bynkershoek** utilised equity in practice, to the extent that the latter himself claims that the Hooge Raad sometimes set aside the subtleties of strict law, ***aequitate motus*** *– moved by equity.*[217] It would seem that the Hooge Raad, including **Van Bynkershoek** himself, even frequently had recourse to the ***bonum et aequum*** of Roman law, both in matters of procedure[218], and in the development of the substantive law.[219] **Van Appeldoorn**[220] observes that the same holds true in regard to the age old tradition of the law of nature.

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212 The judges of the Hooge Raad (Supreme Court), were referred to as senators, while the president, who was **Van Bynkershoek** himself, was the *praeses.*

213 loc. cit.

214 **Van Appeldoorn** ***Theorie en Practijk*** 1937 THRHR 4 - 33

215 ***History*** (1908)127. Wessels does not refer to a source.

216 He was of the view that the most intolerable legal uncertainty would set in should Roman law not be accepted as the subsidiary law of Holland. On the other hand, it would appear that **Van Bynkershoek** sometimes had difficulty with the "subtleties" of Roman law.

217 ***Observationes tumultuariae*** no. 600. **Van Appeldoorn** cites further examples of the application of equity by the Hooge Raad:

218 **Van Appeldoorn** ***Theorie*** (1937) 28, footnote 1, cites the example of a case reported in ***Observationes tumultuariae*** no. 1616, where a number of judges of the Hooge Raad remarked in 1720 that in procedural matters, the Court was less strict, and resolved related issues frequently on the basis of the **bonum et aequum**.

219 **Van Appeldoorn** ***Theorie*** (1937) 28: *"Maar ook in vragen van materieel recht werd in den Hoogen Raad meermalen een beroep gedaan, ook door Van Bynkershoek self, op de billijkheid."- "But even in matters*

To summarise the position of Roman law and *equity* in the Roman- Dutch legal system, it would be fair to state that Roman law was held in the highest esteem, not only for its systematic logical value, but especially for its inherent ***equitable*** and ***rational*** content. Equity as such, was expressly recognised as a subsidiary or default source of law. Roman law became the ***ius commune***, with the full force of law and left an indelible equitable influence on a legal system that would eventually be renamed Roman-Dutch Law, and as such find its way to South Africa.

3.2 EQUITY: ITS NATURE AND CHARACTERISTICS

Paul Voet[221] published his ***De statutis eorumque concursu, liber singularis*** [222] in 1661.[223] He divides the unwritten law into *custom* and equity. As a species of the unwritten law, equity is a form of law in the proper sense of the word, and has to be applied whenever appropriate. As *jurisprudence* embraces *equity*, the latter can also in that sense be said to be a form of law, or part of the province of law.[224] Compared to law in the strict sense of the word, Voet observes that "*It is more safe and useful to be engaged in the application of* ***equity*** *than in the various subtleties of the law...and* ***equity*** *occupies a position higher than the loftiest summits of the law.*"[225]

Equity is always applicable, even when the sense or meaning of the law is clear and manifest, and in that limited sense, *equity* could even be said to obtain contrary to law, as it *mitigates* the harsh effects of law, but does not appear to be *repugnant* to law.[226] If the intention of the legislature is clearly stated, the

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concerning substantive law, recourse is often had to equity in the Supreme Court, even by Van Bynkershoek himself." **Van Appeldoorn** refers to ***Observ. Tum.*** nos. 519, 1007, 1155 and 1728.

220 loc. cit.

221 Father of **Johannes Voet**

222 "***Concerning the Statutes and their Concourse, in a single book***"

223 For the life and works of **P. Voet**, see **Cloete** "***Equity in Roman-Dutch Law: Views of an old Roman-Dutch Jurisconsult***" 1987 **Transkei Law Journal** 284-251; **Journal for Juridical Science** 1985 183; **Speculum Iuris** 1985 43

224 ***De stat*** 3 4 3

225 ***De stat*** 3 4 1; **Van Leeuwen** ***Cens For*** 1 1 16 *ad finem;* **Voet** ***Com*** 1.1.5; **Gane** ***The Selective Voet*** (1925) 9

226 See also **Huber** ***Jurisprudence*** (1939) 1 1 21

judge has to give effect thereto, and cannot despise such intention by handing down judgements repugnant to it.[227] Theoretically a universal law, which is a law of general application, should not be disobeyed because of the harshness of its provisions. Disobedience may follow only when the *circumstances of a given case* necessitate the decline of strict observation of a law.[228] A generally enacted law becomes defective, not so much because the reason or rationale underlying the law ceases to exist, but rather because strict *observation* will lead to injustice and inequity in the particular circumstances of a given case. A law of general application which is couched in negative, i.e. in prohibitory terms, likewise becomes defective when the reason for the prohibition becomes inapplicable to a given case. In such case *equity*, rather than the law itself, should find application. *Equitable reason* is a matter that belongs solely to the field of *mental deliberation*[229] according to the infinite variety of circumstances that parties may find themselves in. From this perspective, or in this sense, *equity* and *written law* are mutually incompatible.[230] For this reason, the appellation of *equity* would have to change to that of law should its principles be reduced to writing.[231]

The *equitable law* always incorporates some *benign aspect* and *equitable reason.*[232] Thus we can describe *Voet's equity* as a species of law based on right reason and with the good as end or object. This is the classic Aristotelian, Roman and Roman-Dutch formulation of *equity.*

Johannes Voet[233] contends that law is a necessity to humankind[234] as even in the most primitive and barbaric times, man never found himself in a situation without laws which determine *right* and *honourable* conduct. However, the use of *untainted reason*, as well as the morality, righteousness and honour associated with it, perished with the Fall of our first parents. Yet *strength of mind and*

227 ***De stat*** 3 4 2

228 op.cit.3 4 9

229 This is Aristotelian in origin, as appears from Chapter II of this work.

230 **Voet *Com*** 3 4 4 actually uses the words *"mutually opposing"* to describe this relation between law and equity.

231 ibid. On the influence of Canon law on English law and equity, see **Vinogradoff *Reason and Conscience*** (1928) 27

232 **Voet *De stat*** 3 4 5

233 Son of **Paulus Voet**, above.

234 The section that deals with this topic bears the title of *Law, an inborn necessity of human nature.* See **Gane** 1 et seq.

virtue[235] were not utterly extinguished.[236] Certain inborn principles of justice, rightness and fairness remained divinely engraved on the hearts of man, dictating what is lawful and unlawful, fair or unfair, or what is to be avoided or to be done. These principles are undeniable.[237]

Virtue, as recognised and defined in our discourse on Roman law, plays a primary role in Voet's jurisprudence, for it is *virtue* that prompts persons towards doing *good* and acting fairly. However, experience has taught that vice has swayed humans to every form of impiety, injustice and inequity. A kind of *"counterfeit-equity"* has invaded mankind. Hence it became necessary for the inborn principles of equity, virtue and justice, as well as the dictates of right reason, to be firmly established by the adoption of laws which reward *virtue* and punish *vice*.[238]

Roman law is cited as a prime example of a law kept "*...free from all self-seeking favour, fear, partiality and bribery,"* and which ultimately culminated in *equity*. Roman law is to Voet a fountain of *equity* and *goodness*. A closer consideration of Voet's commentary on the Celsian definition of law as the ***ars boni et aequi*** and the Ulpian definition of justice as the constant and perpetual will to render everyone his due, is useful for the purpose of its understanding and interpretation by the Dutch jurists. The same applies to the Roman definition of jurisprudence as the knowledge of things divine and human, the science of the just and the unjust.

Voet[239] confirms the interpretation that we have attached to these definitions and concepts in the previous chapter.[240] The Aristotelian description of ***ars*** as the *virtue* of producing something *good* and *fair*, is confirmed by Voet,[241] as is the

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235 Etymologically the word *virtue* is derived from *vir* in Latin, which means *man*. In a more literal sense, *virtue* means manliness, while in a more abstract sense, it describes strength of mind.

236 As Voet elegantly puts it in **Gane's** translation: *"... no few sparks remained of the principles of justice and honour, like rubble from some fine mansion or planks taken from a shipwreck."*

237 As Voet puts it, no man debating these principles with himself and reflecting privately upon them in the quietness of his mind, can abandon them without inward conflict.

238 In this regard, Roman-Dutch law never deviated from the time honored principles and virtues of Roman law and Christianity. **Voet** cites **Cicero *De Orator*** 1 43 as authority.

239 ***Com*** 1 1 4

240 Chapter II

241 ibid.

Ulpian contention[242] that this definition emanates from a true and not a feigned philosophy.[243] This philosophy involves the art of "training"[244] (habituating) in all *virtue* or *goodness.*[245] *Happiness* is the end of all virtue, and the *summum bonum.*[246]

Justitia (justice), in its widest sense that is inclusive of equity, is the most perfect of virtues. It is the bond as it were, that binds other virtues together. Thus, as a virtue, it is justly defined as the *"constant and perpetual will to render everyone his due".*[247] In Aristotelian tradition, Voet explains that, "will" in the definition of justice properly refers to the *"habit of will",* for it is appropriate that *"...deeds of justice are called just or unjust not so much by results and the actual rendering to every man of what is due to him, as by will and purpose itself."*[248] If the *will* is separated from the actual external *rendering*, the *virtue of justice* will never be achieved.[249] To Voet, there is an unbridgeable difference between an action which is just in itself, and one which is done justly, or, on the other hand, one which is unjust in itself, and one which is unjustly done.[250] As ***equity*** is a species of justice, whatever has been explained above concerning *justice* is equally applicable in respect of ***equity*** or ***fairness.***

The expressions ***perpetua*** and ***constans*** in the Justinianic definition of justice are likewise intimately tied up with the characteristic of the ***voluntas*** or ***will*** as a virtuous disposition of man. Should a break occur at any given time in the *will* to

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242 D 1 1 1 pr

243 Aristotelianism, via Stoicism

244 Virtue was based on habituation, which is the habitual doing of good that becomes ingrained in the human character as virtue.

245 In ***Com*** 1 1 4, Voet puts it as follows: *"Who would deny the name of philosophy to that art, which is a training in all virtues, which shines out at the same time in duties both public and private, which causes a state, if nothing stands in the way, to be governed steadfastly, bravely and skillfully, and in virtue of which those states are denominated happy in which either kings are philosophers, or philosophers are kings."* **Gane's** Transl.

246 ibid.

247 The Ulpian definition.

248 **Gane's** Transl.

249 Examples from the ***Nicomachean Ethics*** of **Aristotle** are utilized to illustrate
that justice has a subjective element in addition to its objective effect. Such subjective element, as we pointed out in the previous chapter, is *virtue*. Thieves, robbers, possessors in bad faith may well appear to do justice when returning to the rightful owner what is his. But they may be driven by fear of the owner in pursuit, or of the judge's wrath. In contrast with this, one may have the case of the person who cannot pay his creditors or restore to others what belongs to them as a result of the calamity of a shipwreck in which he lost everything. But as long as such a person remains steadfast in his resolve and his intention to make good to such persons as soon as circumstances allow, he would be acting justly.

250 The thief who returns stolen property performs a just act, but he does not act justly.

render justice or fairness to a person, a failure of justice or fairness necessarily follows.[251] Positive laws may change, but justice and fairness are immutable. Statutory laws are likened by **Voet** to mere *"garments"* in which justice is clothed. Their frequent variation has no bearing or effect on justice itself.[252]
Voet, points out that the *good* and the *equitable* are basically synonymous concepts. Neither civil law, nor natural reason goes as far as to divorce the *good* from the *equitable.*[253]

There is a *presumption of equity* which underlies every written rule of law. All circumstances, new matters and every issue cannot be embraced by general law. Circumstances change on a daily basis. Recourse should be had to *equity* in stead of excessive strictness and subtle arguments.[254] This is especially so when adherence to the strict letter of the law would lead to absurdity and senseless conclusions.[255] Extreme law is rightly called extreme wrong.[256] ***Equity*** in the sense used above, should not be confused with *clemency, mercy* and *indulgence.* These can be granted by the Sovereign only.[257]
Huber[258] treats of the concepts of *justice* and *law* in different chapters of his work, an indication that he regards these concepts as distinct.[259] In truly

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251 **Voet *Com*** 1 1 8
252 ibid.
253 *"It is surely more than plain from many passages in our law, that law is the **art** of the **good** and the **fair**; that its ministers profess an acquaintance with the **good** and the **fair**; that on the basis of the **good** and the **fair** judges decide, pronounce judgment, assess and interpret; that exceptions are grounded on the **good** and the **fair**; that restitution is so made; and that thus everywhere the **good** is united with the **fair**, and the **fair** with the **good**. Needs must be that what is looked upon in itself as good is at the same time and for the same reason also **fair**..."* He comments that these two concepts are as indistinguishable as the notion of a **great** intellect is from that of a **good** one. In this regard he relies on the work of the Stoic philosopher **Seneca's** treatise **On Anger**, bk.1. **Voet** 1 1 5 points out that when, in given circumstances, something ceases to be fair, it also ceases to be good and vice versa. He uses the classic example of the rule that a deposit has to be returned to the depositor, which is good and equitable. However, if it later appears that the depositor is a thief, the thing should be returned not to him, but to the true owner. Thus, the circumstances of a case determine what is good and fair. See D 16 3 31 1
254 C III 1 8 is invoked as authority: *"In all cases special account should be taken of justice and equity rather than of strict law."*
255 The well-known example of the law which forbids the scaling of the city walls is referred to. The rationale of the law is to secure the safety of the city and its inhabitants. However, could a person who scaled the walls to repel an enemy from outside be said to have broken the law and on that account to deserve punishment?
256 This is contained in the expression popular amongst the jurists of the time: ***summum ius summa iniuria***.
257 C 1 14 1 is the authority. ***Summum ius summa iniuria***.
258 **Heedendaegse Rechtsgeleertheyt**
259 *Justice* is dealt with in Bk. 1 1, while law is considered in Bk 1 2

Romanistic tradition, *justice* is defined as *"the virtue displaying itself in a steadfast resolve to give to every man his own."*[260] Justice was regarded by antiquity as one of the four *cardinal virtues*. In adopting this view of justice, **Huber** is not exceptional. He simply follows in the footsteps of **Grotius, Voet** and other Roman Dutch writers. By considering justice a virtue, these writers emphasised the primacy of the *subjective element* of justice, in contrast to the positivistic approach in which the *objective rule* is elevated to the status of the essence of justice.[261] The steadfast resolve that **Huber** touches upon is simply a reference to the ***voluntas*** or will to do justice that we find in the Roman texts as well as those of contemporary Dutch jurists. We do not find the remainder of the usual elements of the definition of justice, such as ***honeste vivere*** and ***alterum no laedere*** in Huber's definition – only the ***ius cuique tribuere*** – *render everyone his due.*

Justice is not to be confused with *jurisprudence*. *Jurisprudence* is the *science* of the *just* and the *fair*. It is in a sense a generic science comprising both the formal or legal aspects of law and its *fairness (equity)* which is a species of the genus *justice.*[262]

But to **Huber**[263]justice is not only a *science.* It is also an *art.* The traditional Aristotelian and Romanistic view was that art is the *virtue of doing good*. It is for this reason that **Huber** points out that *"jurisprudence is not satisfied with science only, but demands that science should be put into operation."*[264]

Huber[265] defines *equity* as *the agreement of all laws with the principles of justice.* Whatever law is in conflict with *justice* is not equitable, in other words. In our view **Huber's** definition is somewhat overbroad since equity and justice are not identical in all material respects.

He divides ***equity*** into *natural* and *civil*. *Natural equity* pertains to the universal simplicity of cases, whereas *civil equity* is based on a consideration of what is

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260 ***HR*** 1 1 1 This definition is based on D 1 1 1

261 This has been discussed at length in the earlier part of this chapter.

262 This is the traditional Romanistic view of the relationship between law and justice discussed in the previous chapter, as well as in the earlier part of this chapter.

263 ***HR***. 1 1 1

264 ***HR*** 1 1 2

265 ***HR*** 1 1 12

useful and *profitable* to a nation.[266] Here **Huber** probably has in mind that natural equity is that equity recognised by the law of nature as universal, and which applies to cases purely in terms of natural reason. In this sense then, cases are considered in their *simplicity*.

Huber[267] describes natural law as *intuitive law.* It is therefore a simple, self-evident form of law detectable by human *intuition*. *Intuition* was also recognised by both **Grotius** and **Voet** as being a means of establishing the principles of natural law, and therefore also of equity.[268]

3.3 EQUITY AND EMPLOYMENT LAW

The subject of equity in employment law is not dealt with as such by any of the Roman Dutch jurists and one has to traverse the scanty literature on labour law to get some idea of this issue.

The ***Hollandsch Rechtgeleert Wooden Boek***[269] of 1768[270] defines the contract of hire as a form of *quasi*– ownership.[271] It is the right to the use for an agreed period of time, and at an agreed price, of the service of persons, of goods or things. We note from this definition that the Roman model of the contract of hire, was retained. The definition expressly treats the service of persons and the use of things alike as hired *objects*.[272]

The *Woorden-Boek* refers to the definition of hire given by both **Simon Van Leeuwen**[273] and **Grotius**[274] which seem to be largely consonant with that contained in the *Woorden-Boek* itself. **Grotius'** definition is dealt with hereunder.

The *Woorden-Boek*[275] expressly states that the contract of hire applies without distinction or exception to *everything*[276]required for the service or use of civil

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266 ***HR*** 1 1 13-15
267 ***HR*** 1 2 4
268 See also **Huber *Jurisprudence of my Time*** (1939) 1 1 4 on intuitive law.
269 Dutch Dictionary of Jurisprudence
270 **Steven Van Esveldt** (1768) 181, *„Huur"*
271 *Quasi Eygendom*
272 Loc. cit.; On the reception of the principles of hire into Roman Dutch law, see ***Smit v Workmen's Compensation Com*** 58-9.
273 ***Roomsch Hollandsche Recht*** (1678) 4 21 1
274 ***Inleiding*** 3 19 1

society.[277] The contract particularly applies to immovable property, like houses and land, as well as to "*.....Diensboden, of Loontrekkende Dienaren*" - *messengers or wage-earning servants*.[278] A contract of hire is concluded as soon as the "price" or rental[279] has been agreed upon. In this respect the contract of hire imitates that of sale.[280] A number of formal requirements for the conclusion of a contract of hire are mentioned by the *Woorden-Boek*[281] but important for our purpose is the customary principle which obtained in Gouda and other localities concerning the credibility of the parties: where the contract was not reduced to writing, or where there was no witness available "*....is't Costumier dat den Verhuurder boven den Huurder in alles rakende de Conditien van Huur geloof verdiend...*" "*....it is customary that the Lessor is given credibility over and above the lessee in all matters pertaining to the terms and conditions of hire....*"[282]

Where someone dismissed his servant[283] before expiry of the contractual term without *lawful reason*,[284] he was under obligation to pay the wage for the full period. However, some local customs and statutes introduced differences in this regard.[285]

The heirs of a lessor who had hired the services of a labourer[286] and who died before completion of the contractual term, were bound to pay an amount equivalent to 3 months[287] wage to the employee.[288]

This rule did not apply where the labourer had hired out his service soon[289] after the death of the employer to another person.[290]

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275 ibid
276 "*alles*"
277 "*.....en heeft in't algemeen plaats indistinctelyk en zonder uitzondering tot alles wat tot dienst en gebruik van de Burgelyke Societert*"
278 Loc.cit
279 "*huurpenninges*"
280 **Thomas *The Institutes*** (1975) 235.
281 182
282 *Woorden-Boek,* loc.cit.
283 "*Dienstbode*"
284 "*Wettige redenen*"
285 Ibid; **Van Leeuwen *Cens For*** 4 22 11; **Barber & Macfadyen *Simon Van Leeuwen's Censura Forensis*** (1902) 186.
286 "*Dienstbode*"
287 "*een vierendeel Jaar*"
288 ibid
289 "*aanstonds*"

These were principles directly received from Roman law.

A servant[291] or labourer[292] who had accepted any service[293] or had undertaken to do some work[294] was not allowed to abandon[295] work without legal reason,[296] on pain of forfeiture of the agreed wage.

Where a dispute concerning the legality or illegality of the reasons for abandonment of work came before a judge, he had to exercise a judicial discretion in this regard. However, if desertion was found to be unlawful,[297] nobody was allowed to take the deserter into service. This rule applied only to servants[298] and labourers.[299] Where this rule was contravened, the new employer had to pay damages[300] to the ex-employer.[301] **Van Wassenaar**[302] states that in the city of Utrecht, a deserting servant also forfeited such portion of his wage already earned at the time of desertion.[303]

Grotius,[304] treats of the employment contract under the title *"Van huir ende verhuiring" – "On Letting and Hiring".* Moreover, he does not mention equity or reasonableness directly in the course of his few cursory references to the employment contract. Like in Roman law, the contract for the hiring of services occupies a humble position compared with the contract for the hiring of things, with which it had originated and had been associated already in Roman times, and with which it so remained in Roman-Dutch law. In fact the Roman Dutch Jurists still adhered to the ancient but useful comparison of hire and sale, as

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290 ibid
291 *"Dienstbode"*
292 *"Arbeidsman"*
293 *"enig Dienst"*
294 "....of Werk te doen...."
295 *"verlaten"*
296 *"Zonder wettige oorzaken"*
297 *"onwettig"*
298 *"Dienstbode"*
299 *"Arbeidsman"*
300 *"Schade"*
301 *Woorden-Boek* 182; **Wassenaar *Practyck Judicieel*** (1729) 1 VII 64
302 ***Pract Judic*** 1 VII 64
303 He cites as authority art. 2 rub.30 of the ***Costumen van Utrecht.***
304 ***Inleidinge*** deals *passim* with the issue in 3 19

explained earlier.[305] The contract of letting and hiring is defined by Grotius as follows:

"Huir is een overkoming waer door iemand hem verbind sijn eighen dienst, ofte den dienst eens ander mensches ofte beestes, ofte 't ghebruick van eenighe andere zaeck, een ander te laten volghen, ende den andere hem wederom verbind tot loonbetalinge."[306]

Grotius does not differ significantly from **Paul Voet** who described hire as *"een concessie die gedaan word, wegens het gebruik van een persoon of een zaak, door tusschenkomst van een bepaald loon"*[307]

The contract of hire is complete when the thing or service which is given in hire and the wage (*loon)* is fixed.[308] Whereas a person who has taken a thing on hire may in turn sub-let it to a third person, this was impermissible in the case of the employment contract. The reason for this was that in the latter case we only have two parties involved. The employer had to accept the services personally, and the employee had to render such service personally. [309]

A very important requirement of the Dutch contract of hiring of services was that it could only be entered into for a definite and fixed period of duration.[310] Grotius explains that the reason for this rule was that the contract would otherwise be one for some "life-interest" or even some other unspecified kind of contract, commonly referred to as innominate contracts.[311]

Dismissal is dealt with by **Grotius** in a single text where he states that *"Die een dienst-bode binnens tijds oorloff geeft sonder wettelicke reden, moet den selve*

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305 Cf. **Lybreghts *Aanmerkingen* over het redeneerend vertoog over het Notaris – Ampt** (1778) 493 where it is stated: *"....want verhuur komt zeer naby koopt, en word in vele opzigten by koop vergereeken, maar zy verschilt ook in vele respecten...."- "....since hire is quit proximate to purchase with which it is compared in my respects, but they also differ in many respects...."*

306 *"Hire is an agreement by which someone binds himself to put at the disposal of another his own service, or that of another person or of an animal, or the use of some or other thing, and by which another person binds himself reciprocally to the payment of wages."*

307 **Paul Voet** is cited in **Lybreghts *Aanmerkingen*** (1778) 492. Whereas the Roman as well as Roman Dutch law texts treat hire primarily as a contract that pertains to *things*, and only thereafter to *services*, Grotius' definition commences with the hire of service (*dienst*), and only thereafter proceeds to deal with things (*beestes; zaeck*). At first glance, this methodology creates the impression that in Roman-Dutch law the hiring of services had finally emerged from the shadows of the hiring of things and had become the principal contract of hire. However, upon further perusal of Grotius, one finds that little change had been made to the Roman texts and that the hiring of service receives relatively insignificant attention.

308 ***Inleid.*** 3 19 8

309 op.cit. 3 19 8

310 op. cit. 3 18 8

311 ibid

de volle huir laten volgen." – *"He who dismisses a servant without lawful reason within the period of service, must pay the full wage to him."*[312] With this observation, Grotius concludes his treatment of the service contract. He does not stipulate what is understood by a *lawful reason* for dismissal. We submit that clarification in this regard has to be sought in the general principles governing the lawful or unlawful termination of contracts, such as breach of contract by non-performance or otherwise, on the part of the worker. Important however, is the fact that it is the *unlawful* and not the *unfair* termination of the contract which attracts payment of wages for the full term. On this basis it is arguable that the "penalty" or damages which the employer had to pay was the usual one in the case of breach of contract. He had to pay the "positive interest" to the employee, putting him in the position he would have been in, had the employer fully complied with the contract of service, which, as we have seen, always had to be for a specific period of time.

It is difficult to come to any conclusion about the applicability or not, of equitable principles on the basis of Grotius alone. One would have to examine some of the other Roman-Dutch writers for more clarity on this issue.

Simon Van Leeuwen[313] utilizes what is in essence the Roman law definition of hire. He contends that it relates to the use of a thing, or the provision of service[314] or the doing of something,[315] since hire can consist in either the doing of something or in the use of a thing.[316]

Significantly, **Van Leeuwen**[317] points out that where the service or labour of a person or animal is hired for profit, the contract is understood to include not only what is clearly implied, but moreover, "*everything that reasonably pertains to the deed or work*".[318] In other words, **Van Leeuwen** subjects the contract of

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312 **Grotius** loc. cit. cites the Digest as well as an urban law of Amsterdam dated 1624, and an urban law of Utrecht in support of this contention.

313 ***Het Roomsch-Hollands Recht*** (1678) 396 part XXII

314 *"dienst van enig werk"*

315 *"doen"*

316 *"om dat de huyr so wel in enig daad, als in het gebruik van enige saak bestaat". He relies on the Digest title: locati conducti*

317 Op. cit. 12 1 1

318 *"Also werd den dienst, of arbeid van een Mens, of Beest, voor seker gewin verhuyrd, en aangenomen, in welke overkomst niet alleen komt al het geen het geding duydlijk meebrengt, maar daar-boven al het geen tot*

employment to a reasonableness regime in that not only what is clearly implied should be read into the employment contract, but also everything that pertains to the labour in terms of reasonableness. But if **Van Leeuwen** is taken literally his text may seem to apply only to the performance of the labourer,[319] while there is silence about what reasonably pertains to the performance of the employer. However, **Van Leeuwen**[320] continues to state that *it is for this reason*[321] that an employer is not allowed to dismiss or send away his servant without legally valid reasons[322] in the absence of which he has to pay the full hire.[323] The converse of this is that the servant has to serve his master faithfully until expiry of the employment contract.[324] Our conclusion is that Van Leeuwen contends that, in addition to the contractual terms, there was a general requirement of reasonable (and fair) treatment of both parties to the employment relationship.

Van Leeuwen observes that a ***Placaat*** dated 8 May 1608, issued by the **Hove van Holland**, as well as a ***Placaat*** of the **Staten van Holland** dated 2 September 1597 regulated irregularities in and desertion from service. Last mentioned ***Placaat*** regulated the service of apprentices[325] in this regard. Art.137 of the ***Keuren*** of ***Leyden*** and cap.51 art 24 et seq of the ***Keuren*** and ***Kostuymen*** of **Amsterdam** prohibited a servant to desert or leave his service without *legally recognised reasons*.[326] Nobody with knowledge of the desertion was allowed to employ the servant.[327] Contravention of this rule rendered the transgressor liable in damages. Forfeiture of wages for desertion is not mentioned by **Van Leeuwen**.

[328]In Rotterdam a rule applied to the effect that a master could pay his or her servant only for services actually rendered, where the servant mutinied or

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sodanige daad, of werk, in ***redelijkheid****, behoort*" - my emphasis, **Van Leeuwen** cites the Institutes of Justinian an authority.

319 "*....al het geen tot sodanige daad, of werk, in redelijkheid behoort*"

320 ***RHR***. xxii 1 2

321 "*daarom*"

322 "*sonder wetlijke reden*"

323 He cites the Digest title *locati conducti* as authority.

324 RHR xxii 1 2

325 "*Ambagts-jongens*"

326 "*sonder wettige oorsaken*"

327 Cf. ***Woorden-Boek*** (1768) 182

328 ***RHR*** xxii 1 2

refused to work[329] for reasons relating to work or complaints about work.[330] This observation of **Van Leeuwen** is inconsistent with the doctrine of forfeiture of wages already earned by deserters, and which we examine in detail in Chapter VII.

Wassenaar[331] confirms **Van Leeuwen,**[332] observing that various ordinances and ***Keuren*** of **Holland** and **Hollandish** cities regulated good order, excess and irregularities between master and servant, including issues such as desertion.[333]

According to **Wassenaar** an employer was not entitled to dismiss a servant *"sonder billyke redenen" – without fair reasons*. A contravention of this principle could result in the employer having to pay the full remuneration for the contractual period.

This **Wassenaar** text is one of only a few that we encountered in the Roman Dutch law sources, that directly links the notion of *fairness* to labour law. In effect, **Wassenaar**[334] states that an employer could not *unfairly* dismiss his or her employee.

It was customary for a contract of employment to be concluded for the duration of one year.[335] However, the **Costumen** of **Utrecht** limited the compensation to a period of six months.[336] Where an employee refused to serve his employer to the satisfaction[337] of the latter, or where the employee became insubordinate,[338] he could be dismissed. In such event, the employer had to pay his wage on a pro rata basis, according to the period already served.[339] The principle applied here was that of *proportionalism.*

Again, it should be noted that proportional payment rather than forfeiture of the salary already earned applied to deserters.

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329 *"opstond"*
330 *"gebreken" – Cf.* **Wassenaar *Practyk Judicieel*** vii 1
331 ***Pract*** vii 1 68
332 ***RHR*** xx 1 2
333 Reference is to the **Placaat** of the **Hove van Holland** of 8 May 1608 discussed above.
334 Loc. cit.
335 **Wassenaar *Pract*** Vii 1 62
336 **Wassenaar** op. cit vii 1 65
337 ibid: *"niet na haar goetvinde wil dienen"*
338 ibid: *"ende hem daar Eegen onwillig aansteld"*
339 ibid

Van der Keessel, in his ***Dictata ad justiniani institutionum***[340] describes the contract of hire in a wide sense as "***contractus consensus initus de re fruenda vel facienda*** - *a consensual contract entered into for the purpose of the use of a thing or for something to be done*"[341] Throughout his discussion of hire, he draws a close comparison with the contract of sale and points out that the reason for this is that hire has the same qualities[342] as sale.[343] These are that both contracts are *nominate*, i.e belong to the class of nominate or named contracts[344], that they are ***consensualis,*** [345] ***bona fide***[346] and ***juris gentium.***[347] **Van der Keessel**[348] does not adhere to a tripartite division of the contract of hire. On the basis that the words ***fruendi et faciendi*** are used in the text of the Institutes, he adopts a dichotomous division of hire into the hire of things and of services.[349] No distinction is drawn between *locatio conductio operis – the hiring of the service of the independent contractor,* and *locatio conductio operarum,* the employment contract. This appears not only from the description of hire above but also from its subsequent discussion. **Van der Keessel**[350] provides the following definition and elucidation of hire:

"Locatio conductio operarum est cum quis certas operas, certa facta, pro mercede quadam praestanda promittit. Quod intelligendum de talibus factis quae aestimationem recipient."- *The letting and hiring of services happens where a person promises certain services, certain things to be done, for payment of a recompense. These things to be done*[351] *should be understood to be of such a nature as is estimable financially."*

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340 Leiden. We make use of **Beinart & Van Warmelo** (1967) Balkema

341 Tit. 25 **De locatione et conductione** par 1.

342 ***qualitates communes.*** In Tit. 25 2 he specifically states: ***Haec proxima est emptioni et venditioni iisdemque juris regulis continetur." –*** *"This contract (hire) is similar to that of sale, and is governed by the same rules of law."*

343 **Van der Keessel's** commentary or lectures were based on Roman legal principles as is evident from the title of his work. It consists of his lectures at the University of Leiden on the Institutes of Justinian Bk. 4. In his comparison of sale and hire, he follows the Roman law sources meticulously. See 2 1 above. Also Inst 3 24 pr.

344 These contracts are so called to distinguish them from the so-called *innominate contracts*, which were unnamed, usually because of their *sui generis* or peculiar nature, **Sanders *The Institutes*** (1917) 324; D 19 5 5

345 i.e. consensual, deriving from agreement or consensus between the parties thereto.

346 Based on good faith; Inst. 3 27 *De consensu obligatione;* **Sanders** *306-1.*

347 Derived from the ***ius gentium.***

348 ***Dict*** 25 2

349 ***Rerum vel operarum.*** In our discussion of Roman law on this issue in the previous chapter, we noticed that some modern commentators such as **Schultz** maintain that the trichotomous division of the contract of hire was in any case alien to classical Roman law as it was a medieval imposition.

350 ***Dict*** 25 2

351 ***talibus factis***

This becomes clearer if we consider the complete text:

"locatio conductio saepissime versatur circa facta, ut in definitione dictum est dari tam locationem conductionem operarum quam rerum. Veluti, si vestiarius vestimenta facienda susceperit pro certa pecunia, aut fullo vestimenta polienda acceperit, est locatio operae: Inst. h.t., in fine; Inst. 4.1.15(17)."[352]

Examples of work are ***tabulam pignere, vestimenta polire vel conficere, aedes construere*** *etc.*[353]

Important characteristics of hire pointed out by **Van der Keessel** are that the *merx* or recompense should be *certa, vera, iusta, et in numerate pecunia – certain, real, just, and sounding in a fixed amount of money.*[354] The reason for these requirements, is that without these the contract would be that of partnership[355] or an innominate contract.[356] The requirements were obtained from those relating to the contract of sale. *Certa* means determinable, in whichever way,[357] while *vera* refers to some measure of parity between the recompense and the usefulness of the labour.[358] One could even go as far as contending that *vera* implied a *fair* wage. *Iusta* means that neither of the parties to the contract suffers more than double the value of its performance.[359] This is

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352 Here we find the interesting situation that the contract does not only have *certas operas - certain work or employment,* but also *certa facta - certain things done*, or piece work as object. Examples given in a continuation of the text are cases where a tailor produces some clothing from material, or a fuller cleans some garment. In both cases we have a *locatio operae*, according to **Van der Keessel**. This wording of the text is peculiar, for the reference is not to *locatio operis* or *operarum*, as is the custom, but to *operae.* This makes it difficult to say whether any distinction is here drawn between the employment contract and the contract of the independent contractor. We submit that no such distinction was drawn.

353 ***Dict*** 25 2. The examples of the fuller and the cleaner clearly relate to the contract of the independent contractor. *Operae* in the text is a substitute for operis. It would seem that **Van der Keessel** treats of here the contract of the independent contractor (**operae**) as a sub-species of employment in general (**operarum**).

While no distinction is drawn between the contract of employment and that of the independent contractor, the so-called ***artes liberales*** are classified by **Van der Keessel** into a category of its own as services to which the contract does not apply on the basis of its inestimability. This distinction is based on D 11 6 (***si falsum modum dixerit***) 1 pr An example is the services of land surveyors (agrimensores). ***Dict*** 25 2. Examples of work are ***tabulam pignere, vestimenta polire vel conficere***

354 The examples of work done in terms of a contract of hire do not distinguish between hiring *operis* or *operarum.* ***Dict*** 25 2

355 ***societas***

356 ***contractus innominatus***

357 ***determinata quocumque modo***

358 ***"veram quoque, id est valori utilitatis quae ex re vel operis percipitur quodammodo parem."***

359 ***"et justam, id est in qua neque locatur neque conductor ultra duplum laedatur."***

obviously an instance where the so-called *duplum*-principle of sale was applied.[360] As the contract is one governed by the principle of *good faith*, the parties are liable for malicious acts (***dolus)***, as well as ***culpa levis.*** Of the party who has custody of the thing of another, the care of the ***diligens paterfamilias*** is required.[361] The principles of good faith, culpa levis, and impermissibility of dolus can be enforced by either party against the other, thus making possible a claim for interest against the late payment of the *merx*, or for necessary expenses [362] incurred in connection with the thing involved.[363]

Quite significant is the fact that **Van der Keessel**[364] describes the principle espoused by **Grotius**, to the effect that where a servant[365] was dismissed without lawful reason, the employer had to pay the full wage for the agreed period, as *....."illud quidem iustum et aequum et regularitum verum est – "generally just and equitable and true/correct".*[366]

This is only the second Roman Dutch labour law text in which we encounter the notion of equity.

Ulric Huber,[367] despite giving a relatively lengthy exposition of the contract of hire comprising three chapters, mostly deals with the hiring of things such as farms, farmsteads, quitrent and the ordinary articles in daily use in the Friesland of his time, but adds little in regard to the lease of services.[368] He basically only provides us with a short description of the hire of services, and does not

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360 **Van der Keessel**, loc.cit. points out that should this principle be found not to have been observed, the remedies allowed by C 4 44 2 would be available.

361 **Van der Keessel** Dictata (1961 – 1975) 25 5 points out that although the words ***"ab eo custodia talis desideratur qualem diligentissimus paterfamilias suis rebus exhibit"*** *("from him is required such custody as the most diligent paterfamilias would display towards his own thing"*), the yardstick is probably not the superlative **(diligentissimus)** as this form is often *used in the* ***Corpus Iuris*** while the ordinary form of the adjective is intended. Thus in D 4 2 (***quod metus causa gestum erit)*** 6, it is said that the **testamentum nuncupativum** is **perfectissimum**, whereas it is meant **perfectum**.

362 ***Impensae necessariae***

363 loc. cit. ibid.

364 ***Pr*** (1961-75) **Van Warmelo** (ed.) *Th.679.13* ; ***Voorlesinge oor die Hedendaagse Reg na aanleiding van De Groot*** *se "Inleiding tot die* ***Hollandse Rechtgeleerdheyd*** (1967-75) 39.

365 *Famulum domesticum*

366 **Van der Keessel *Pr*** 25 5

367 ***H R*** (1939)

368 **Huber** discusses the contract of lease of things in more detail than any of the other Dutch writers dealt with in this work. In chapter 8 he deals with letting and hiring in general; in chapter 9 the termination of lease is investigated, while chapter 10 treats of the actions arising from letting and hiring. However, the letting and hiring of services is dealt with only in two short paragraphs, namely 1 8 19 and 20.

distinguish between the service of a labourer and that of an independent contractor.[369] To him, apart from sale and the hiring of things, *hiring of deeds or acts*[370] is also allowed. He distinguishes between liberal services such as those of a tutor, and corporeal or physical services. The former are intellectual by nature and can hence not be regarded as hirable. It attracts an *honorarium* in stead of a *wage*. When the workman has received an award or wage, but is prevented by misfortune from accomplishing or completing his work, return of the payment could not be demanded.[371]

However, it is different where the misfortune affected the *person* of the workman only.[372] In that event, the adage *"No one goes lame for another man's hurt"* applied.

As far as termination of hire (or, for our purposes the employment contract) is concerned, no differentiation is made between various types of hire. With certain minor and irrelevant exceptions relating to farm land, the general rule was that any contract was valid and binding until expiry of the agreed period. This rule was specifically adopted from Roman law.[373] This necessarily implies that a contract of hire, including the employment contract, could not be terminated by unilateral notice. It is illogical to assume that parties could enter into a contract intended to be binding for a fixed period, but that one of them nevertheless had the power to terminate such contract unilaterally by giving notice. However, **Huber** states that when the period had in fact expired, a party could terminate by notice.[374]

It is because of this rule that we see individual cities towards the end of the Roman Dutch law period adopting specific legislation empowering employers to terminate the services of their employees even during the currency of the employment period. This is dealt with hereunder.[375]

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369 Ibid.
370 Gane's translation
371 **Huber** 1 8 20 relies on C 4 65 8 & 21
372 loc. cit.
373 D 19 2 13 11
374 ***H R*** 3 9 15
375 Towards the end of this chapter.

Van der Linden[376] seems to have an explanation for the lack of authority and clarity on Roman Dutch employment law. Some matters relating to the employment contract, especially those relating to *diens-boden* or messengers, were governed by urban statutes. [377] Insofar as these statutes were inapplicable, Roman law would govern a situation.

Although **Van der Linden**[378] states nothing more concerning the contract of employment, he does make the observation that contracts could be null and void[379] by virtue of lack of voluntary consensus,[380] as a result of total lack of a causa or cause,[381] or when it has a false cause[382] or a cause that violates fairness, good faith or morality.[383] These grounds of nullity certainly applied to the contract of employment as it did to any other contract.

Voet[384] provides somewhat more detail than others on the contract of service. As was done in Roman law, he treats of the subject under the general title of Letting and Hiring. He points out that, in addition to the use of things, the services of both free men and slaves could be let out. He draws a clear distinction between the hiring of service for *wages*, and other services such as the liberal services of professionals.[385]

The general rule in Holland was that a person could hire whomever he wanted to work for him according to his own free choice.[386] Rent, or *wages* in the case of a workman, had to be either a fixed sum of money, or a determinable one. As wages were the equivalent of the "price" of a thing, it was referred to as

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376 ***Koopmans Handboek*** 1806 1 15 111

377 ibid: *"In 't bijzonder is hier toe ook betrekkelijk de huur van* ***Dienstboden****, tegen wier ongeregeldheden, bij de Keuren van de meeste Steden, voorzieningen gedaan zijn."- "It is particularly the hire of servant messengers, against whose irregularities the statutes of most cities have made provisions that are relevant here."*

378 Op. cit.

379 *'onbestaanbaar'*

380 *'uit hoofde van het ontbreken eener vrijwillige toestemming'*

381 *'wanneer zij in't geheel geene oorzaak hebben'*

382 *'eene valsche oorzaak'*

383 *'eene oorzaak, die de rechtvaardigheid,de goede trouw,of de goeden zeden kwetst'*

384 ***Com*** 19 2, On Letting and Hiring

385 Such as those referred to in D 46 3 31

386 However, there were two important industries which were protected. One of these was the industry of so-called *sock-millers*, whose services had to be used by the inhabitants of his district. They could not remove wheat for milling to an outside miller. Secondly commanders of warships were not allowed to take merchandise on board for transport. The former instance was based on custom, the latter on the edicts of the States-General.

manupretium, literally meaning *handloon* in Dutch or Afrikaans, which translates into a *hand wage* in English. This stems from the fact that the contract of employment applied mostly, if not exclusively, to manual labour.[387] The wages had to be determined at the time of the conclusion of the contract, but if this was not done and the services were nevertheless rendered, the wage was determined according to usage or custom in the circumstances, as was the case with Roman custom. Where the service was broken or terminated by the fault of the employee (servant), the employee involved was not entirely deprived of the agreed wage. In terms of the principle of *proportionalism*, he had to be paid a wage proportional to the period for which he had worked.[388]

A claim for ***specific performance*** by the employer, aimed at compelling the employee to work for the full term agreed, was only allowed in *exceptional circumstances*.[389] There were two exceptions to this rule. The one was the case of the apprentice employee, the other that of household servants who left to work for another person before expiry of his or her contract of service. However, no specific performance could be claimed against a household servant who left in order to get married.[390]

We have seen that if the service was interrupted by fault of the employee, he still received a *proportional* wage. The position was different when it was due to the fault of the employer that the term of service was prematurely terminated.[391] In such cases the employee had to receive full remuneration in respect of the agreed period of service. A shipmaster for instance, could claim his whole wage if he could not make a voyage as a result of the fault of the owner of the merchandise.[392]

When service could not be rendered as a result of a supervening impossibility beyond the control of either party, different principles applied to the respective

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387 ***Com*** 19 2 7; **Gane *The Selective Voet*** (1925) 412

388 ***Com*** 19 2 27

389 ***Com*** 19 *2 27*

390 These particular exceptions concerning specific performance were not of Roman law origin. The case of the apprentice was governed by a decree of the States of Holland of 2 September 1597, whereas the position of household servants was based on custom, affirmed by statutes of various communities. **Voet *Com*** 19 2 27.

391 D 35 1 24 was the analogy.

392 ***Com*** 19 2 27.

parties: Where the employer died during the currency of the service contract, the entire wage for the whole agreed period of employment had to be paid, unless the workman had since the time of death hired out his service to a third person.[393] Although Voet does not make it clear what was due to the workman in the latter case, it would appear though that he received a proportional wage. On the other hand, where the employee had died or had become incapable as a result of unavoidable accident, the principle of *proportionalism* applied. However, there was a proviso: the service rendered had to be of some *benefit* to the employer.[394] A general rule of "*no value no pay*"[395] applied in Roman-Dutch law on the analogy of Roman law. Such would be the situation for instance due to the incomplete stage of the work, which had no value or benefit for the employer.[396]

Van der Keessel[397] confirms the contention of **Grotius**[398] that an employer (***dominus,*** i.e master) who dismissed his domestic worker (***famulus domesticus***) without *lawful reason prior to the expiry of his or her period of employment, was liable to pay the full wage* (the term actually used is *merces)*,[399] He contends that this rule is indeed ***just*** and ***equitable.*** However, he emphasises that it should not be lost sight of that numerous statutes had been adopted on this subject, both of general application, and in respect of specific localities or cities.

This is the third reference to equity in Roman Dutch labour law sources.

The adoption of local urban laws and statutes, generally known as k*euren* and *placaaten* (placaats) that the jurists refer to represent a dichotomous or

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393 D 19 2 19 9 & 10, and 38; D 14 2 10 pr

394 **Voet** points out that situations such as this often presented themselves in the case of male and female household servants and other hired workers. Where domestic service was interrupted due to short sickness for a moderate period of time, there was no deduction from the wage. The analogy for this principle was derived from the Roman jurist Paul who wrote that where a freed slave had served the master's heir for more than a year, but was prevented by ill health to work on certain days, those days had nevertheless to be counted as days worked. Paul added that those to whom we care for on account of sickness, and who are prevented by sickness from serving us, are regarded as actually serving.

395 Author's formulation

396 D 19 2 24 2

397 ***Pr*** 3 19 12

398 supra

399 The terminology that we use in this paragraph illustrates how close the position of an employee still was to that of a slave. In our chapter on modern Dutch law which follows later, we will see that there was an equalization process sparked by the introduction of the Dutch Civil Code or Burgerlijk Wetboek in 1838.

paradoxical development in Roman Dutch law that would play a significant role in the application of the Roman Dutch contract of *locatio conductio* as modified by these placaats, in early South African employment law. Three placaats became notorious in this regard. The first was adopted on 2 September 1597. Although an important instrument, its contents are not directly relevant to this study as it dealt with the position of apprentices. A Placaat of 1 May 1608 obtained in The Hague only and was eventually superseded by one of 29 November 1679.

These placaats received unprecedented attention by the highest courts in early South African employment law, especially during the first decades of the twentieth century when an Appellate Division of the Supreme Court had been established.[400] The 1679 placaat regulated the position of *"..dienstboden, hetzij, koetziers of knechts, dienstmaegden of jongwijven, minnemoers of bakemoers."* It prescribed the penalty of forfeiture of all stipulated wages, already earned as well as prospective, in respect of the remainder of the contract period, in the event of *desertion or* misconduct by abovementioned categories of workers.[401] This principle eventually established itself as the notorious *doctrine of forfeiture.* The Placaat furthermore introduced the *doctrine of employment at will* in that it empowered employers to dismiss for *no reason* or for *any reason whatsoever*, provided arrear wages due were paid. As already mentioned, forfeiture applied in the case of *desertion* or *misconduct.*[402] Misconduct consisted in the form of *insolence, disobedience*, and *insubordination* which generally are forms of misconduct challenging the authority of the employer, and resulting in withholding of performance.[403] It was pointed out by **Innes C J** in **Spencer** (supra) that as a result of these placaats, many local authorities began to legislate that a servant who is dismissed for misconduct or who deserts, forfeits his or her entire wage. In other words, the *doctrine of forfeiture* superseded proportionalism in what was regarded as serious forms of misconduct, such as desertion.[404]

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400 ***Spencer v Gostelow*** 1920 A D 617;
401 s 6
402 ***Spencer v Gostelow*** 627.
403 ibid.
404 Ibid.

Presumably in accordance with the placaat of 1679, the Court of Holland adopted the so-called *Ordre ende Reglement* of 29 November 1679,[405] which gave the right to masters or employers to dismiss employees when they were *dissatisfied* with the services which they rendered. In such cases the employer involved only had to pay a proportional fee to the dismissed employee. The employer was under no obligation whatsoever to provide reasons for his decision.[406] This was employment at will.

It would appear as though abovementioned local legislative developments represented a major retrogression in the Roman Dutch law regulating labour relations. The 1679 placaat in particular must have been introduced on the premiss that an employer needed, but lacked, the disciplinary and dismissive power conferred by that placaat before its introduction. The placaat seems to have satisfied this need. The placaats were the first statutory instruments that clearly provided these particular powers to employers. Hitherto these draconic powers had been unknown to both Roman and Roman Dutch law, both of which insisted that the employer had to keep the employee for the full period of service that had been agreed upon, or pay him or her the outstanding wage for the remainder of the period if the termination of the employment relationship was not due to the fault of the employee. It is not only the fact that the employer could now terminate the employment relationship prematurely and *at will* that is surprising. Equally so is the fact that he was under no obligation to provide reasons for the dismissal at all.[407] Add to these considerations the adoption of a *doctrine of forfeiture* and the magnitude of the retrogression brought about by the placaats becomes apparent. This could certainly be viewed is an *inequitable development* in the localised Dutch statutory law of the time. It provides the first hint that the equality and equitable relationship between employer and employee had become a rather *skew* or *oblique* one where relative disparity in power

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405 Reported in the ***Groot Placaet Boeck*** 527 et seq. (art.10)

406 **De Blecourt *Kort Begrip*** (1950) 307

407 **De Blecourt *Kort Begrip*** (1950) 307 explains as follows:*"In de latere, voor het dienstpersoneel ongunstiger ordonnanties wordt verklaard dat de meester ten allen tijde zonder redenen mag wegzenden, mits 6 weken extra loon uitbetalende. Deze latere ordonnantien bedreigden tegen het dienstbaar personeel zelfs tuchthuisstraffen wegens niet-nakoming van de contractuele bepalingen. Betwijfeld moet worden of dit ooit is toegepast. "*

relations showed strongly. One could speculate as to the cause of this seemingly irrational and unfair migration from the time honoured equitable principles of employment law developed by the Romans and cherished by the Roman Dutch jurist themselves.

There could of course be any number of causes, but what could not be discounted as significant, is the fact that as slavery was falling into desuetude, and serfdom receding into oblivion, the employment contract proper showed an inclination to step up a rung on the ladder of importance.

The Seventeenth Century represents the century of unprecedented Dutch economic and industrial growth. With it came the power struggle between master and servant, or rather employer and employee which had since intensified to the levels of today.

The influence of English law with its employment at will principle, also looms ominously in the background.[408]

We are approaching the era where a clear need for a third party to enter the employment relationship began manifesting itself. That third party is the State. In our chapters on English and American law we will see that this ordinance of 1679 virtually brings in line the law of the Province of Holland with that of the English common law, and more especially the English common law as applied in America, where the *employment at will principle* holds sway to this very day.[409]

Van der Keessel seems to echo the view that this law of Holland was some "*innovation*" since he is quick to point out that in terms of the *Keuren* (statutes) of the city of Amsterdam (the capital of the Province of Holland) the *earlier position* was that a full wage had to be paid to a domestic servant that was dismissed without reason. There were however later statutes entitling the employer to dismiss with the provision of reasons and which obliged him to pay the wage only up till the date of dismissal. He points out that some of these

408 See Chapter V
409 See Chapter VI

ordinances even fixed a penalty in the form of some corporeal punishment to be suffered by labourers for breaching the service contract.[410]

The[411] general principle of *proportionalism* mentioned by De Groot and others [412] was diluted still further by a later statute[413] dating to 31 January 1758, which confirmed the right of employers to dismiss without giving reasons. At Haarlem and Leiden the same law was introduced with the result that only Vlissingen [414]still applied the equitable principle of *proportionalism* advocated by **Grotius**.[415] Proportionalism was also one of only a few contexts in which we observed a Roman Dutch jurist explicitly labels a principle of Roman Dutch labour law as ***just and equitable.***[416]

De Blecourt, a modern commentator on the Roman Dutch law of this period, refer to these urban statutes as *"de latere, voor de dienstpersoneel ongunstiger ordonnanties"* thereby distinguishing them from the more equitable Roman common law that had obtained previously in the Netherlands.[417]

3.4 SUMMARY AND CONCLUSION

Despite the dearth of authority on the employment contract in Roman Dutch Law, the available textual material nevertheless allows us to draw certain conclusions regarding the status of equity and reason in this system. In this regard the texts dealing directly with employment issues should be understood in the wider context of the recognition and force that equity and reason enjoyed as general

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410 **Van der Keessel** ***Pr*** 3 19 12; **De Blecourt** ***Kort Begrip*** (1950) 307 expresses doubt as to whether this punishment was ever meted out.

411 S 10 of the statute of 1682, **Handvest** ***van Amsterdam*** 450. Other statutes pertaining to domestic servants are also to be found in this statute book.

412 supra

413 i.e. before **Van der Keessel** wrote his ***Praelectiones***

414 Reference is made here to ***De Keuren van Vlissingen*** cap. 7 art. 16 73. This *keur* was confirmed by a subsequent one of 18 October 1738.

415 At Haarlem the statute was introduced on 19 December 1693, s 5, ***Keuren van Haarlem*** 1 280 and at Leiden on 8 March 1703, s 12.This statute amended the earlier ones on the subject. It is to be found in ***De Keuren van Leiden*** art. 137 215, a statute that laid down diligently the rules overlooked in former ones.

416 See also **Voet** ***Com*** 19 2 27.

417 **De Blecourt** ***Kortbegrip*** (1950) 307.

principles of Roman Dutch Law, virtually straddling the whole of that legal system.

We have noted that, according to the *Hollandsch Rechtgeleert Woorden-Boek* an employer was under obligation to pay the full wage for the period of hire to an employee that he dismissed *"zonderwettige redenen"*- without lawful reasons. Since no particulars are given in the *Woorden-Boek* concerning these reasons, one would have to read the text in conjunction with those of such Roman Dutch writers that do provide further glimpses of information. One also has to bear in mind that local custom and statute introduced differences in this regard.

The *Woorden-Boek* furthermore states that an employee could also not abandon his work *"zonder wettige oorzaken"*. Thus, the common law of Holland strikes a balance between the interests of employer and employee.

Neither of the two is allowed to give up the employment relationship without reasons recognised by law. As already stated, the *Woorden-Boek* sheds no light on the nature of these reasons. What is significant however, is that it states that if a dispute concerning the lawfulness of the termination was brought before a judge, the latter had to exercise a judicial discretion. That is how far the *Woorden-Boek* goes. But a judicial discretion is generally speaking more compatible with equity than with strict law.

Thus we can assume that, even where there was a reason which was of such a nature that it was by law regarded as a recognised ground for termination, the discretionary power of the judge could still be brought to bear on the seriousness, and hence the equity of the matter. The judge seems to have had some general comprehensive, discretion in these matters.

We have noted that **Grotius** echoes abovementioned principle contained in the *Woorden-Boek*. He confirms that dismissal without *"wettelicke reden"* – lawful reason,[418] was not allowed.

Van Leeuwen held a view similar to that of the *Wooden-Boek* and **Grotius**, stating that *"wetlijke reden"* – lawful reason - is required for termination.

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418 See the translation of **Lee *The Jurisprudence of Holland*** (1926) 391.

But there are four texts which transcends the strictly lawful and that enter the realm of reason and equity respectively.

Van Leeuwen has been referred to above as stating that in a contract of employment is included, not only what is clearly implied, but also everything that *reasonably* pertains to such work.

Reasonableness then, becomes a crucial and comprehensive component or element of all employment contracts. The major significance of this **Van Leeuwen** text becomes much more apparent if one bears in mind that *ex lege*, an employment contract was easily and simply concluded. The parties only had to agree on the work to be done, the duration of the contract and the wage to be paid. These were the indispensible requirements. The rest of the employment relationship was left to the principle of reasonableness. Reasonableness would necessarily imply fairness, and it is exactly at this point where the wide judicial discretion that we alluded to above, comes into play.

Secondly, there is the **Van der Keessel** text that elucidates **Grotius**, stating that the principle that a servant dismissed without lawful reason should be paid his full wage, is *just, equitable* and *generally correct*.

Thirdly, there is the **Van Der Linden** text[419] that declares certain contracts null and void most notably those with false cause and those that violate *fairness, good faith* and *morality.*

The fourth text that is illuminating in this regard, comes from **Wassenaar**, above, who specifically points out that a servant could not be dismissed without *"fair reason"* The **Wassenaar** text takes the matter full circle: Roman Dutch employment law, and more specifically dismissal law, was subject to a comprehensive reasonableness and fairness regime.

It was only the local *placaats* and ordinances referred to above, that made a paradoxical and anomalous inroad into this hallowed system of law.

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419 ***Koopmans Handboek*** I XV III

CHAPTER IV

DUTCH LAW

4.1 INTRODUCTION

In contemporary Dutch employment law[420] various aspects of the employment relationship are governed by a number of specific statutes.[421] This is similar to the South African position. So for instance, amongst a host of others, do we find the *Arbeidstijdenwet,* [422] the *Arbeidsomstandighedenwet*[423] and the *Ziektewet,*[424] all of which contain provisions broadly corresponding to those that are to be found in the South African Basic Conditions of Employment Act[425] and other statutes. These acts are not of primary concern to us for the purposes of this work as they by and large contain specific provisions applicable to narrower issues such as labour hours, workplace circumstances or employment conditions, incapacity, sickness etc.

The bulk of statutory labour law relevant to our purposes is today contained in the (updated) *Burgerlijk Wetboek* (BW). This code is of particular importance insofar as it regulates the nature and content of the employment relationship between employer and employee, *ontslagrecht* (dismissal law), employment contracts etc. In fact large areas of Dutch statutory employment law concerning active and dynamic employment relations have been incorporated into this

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420 See **Jacobs *Labour Law in the Netherlands*** (2004) 21 et seq; **Koopmans *Compendium van het Staatsrecht*** (1983) 87 et seq; **De Blecourt *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht*** (1950) (ed. **Fischer H P W D**) 25 et seq; **Van der *J M M : Arbeidsrecht/Sociaal Recht*** in **van Apeldoorns Inleiding tot de studie van het Nederlandse Recht** (1985) 337 - 352; **Fortanier & Veraart *Arbeidsrecht*** (1880) 6 et seq.; **Van Poelje et al *Nederlands Bestuursrecht*** (1962) 439; **De Guasco et al *Het Sociaal Verzekeringsrecht in Nederland*** (1979) 277 et seq; **Schuit & Van der Beek *Dutch Business Law*** (1978) 448 et seq.

421 For a general survey of Dutch labour legislation, see **Fortanier and Veraart *Arbeidsrecht*** (1880) 6 et seq.

422 Labour Time Act

423 Labour Circumstances Act

424 Sickness Act

425 Act No. 75 of 1997

Code.[426] It furthermore contains important provisions relating to matters such as ***equity*** and ***reason*** as cardinal principles governing Dutch employment law.

An interesting difference between Dutch Labour law and that of South Africa is that labour rights do not enjoy explicit or direct constitutional protection in the Netherlands. Labour rights protection was introduced indirectly via the protection afforded to "social rights", of which labour rights were viewed as an integral part. Specifically is there no such constitutional right as is contained in section 23(1) of the South African Constitution, namely the right to fair labour practices. Sections 1 – 23 of the Dutch Constitution introduced in 1983, do however protect non labour related fundamental social rights.[427]

Another important source of Dutch labour law is international law. In the Netherlands the so-called "monistic approach" to international law has been adopted.[428] The Dutch Constitution makes provision for the direct application of international law once an international treaty has been ratified by the Dutch parliament.[429] Once so adopted, international law even ranks above the Dutch Constitution and Dutch legislation.[430] Examples of international law organizations of which the Netherlands are a member, are the ILO, the Council of Europe and the European Union. Both the Dutch Legislature and the courts keenly observe and apply its international obligations in terms of the treaties, recommendations and conventions of these bodies.[431]

Jacobs points out that loyalty to these international organizations has lead to the Dutch legislature having ratified the vast majority of the conventions of the ILO and the social treaties of the UN, the Council of Europe and the European

426 There are specific statutes dealing with specific limited issues such as those that we have already referred to. The general employer-employee relationship is however primarily regulated by the BW
427 **Jacobs *Labour Law in the Netherlands*** (2004) 32
428 ibid
429 Article 93 and 94 of the Dutch Constitution
430 **Jacobs *Labour Law*** (2004) 33
431 **Jacobs** loc.cit.

Union.[432] The principle of *bona fides* and the *"good employer - employee"* imperative that are characteristic of Dutch domestic labour law, are used as flexible instruments for the application of international law provisions in Dutch domestic labour law.[433]

4.2 EQUITY IN LABOUR LAW

Art. 7 611 of the BW, which came into operation in the Netherlands on 1 April 1997 contains one of the most progressive and enlightened provisions in the whole of Dutch law. It reads as follows: *"De werkgever en de werknemer zijn ver picht zich als een goed werkgever en een goed werknemer te gedragen."* – *"The employer and the employee are under obligation to behave as good employer and good employee."*[434] Art 6 248 has to be read in conjunction with 7 611 for it provides that a creditor and debtor ought to behave *vis-à-vis* each other in accordance with the dictates of *reasonableness* and *fairness*.

Articles 6 248 and 7 611 are prime examples of so-called open-ended, widely formulated provisions[435], or *"vage norme"* ("vague norms") that have become favoured by the modern Dutch legislator and commentators.[436]

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432 Ibid. Instances of international law principles that have been loyally enforced by the Dutch courts include the right to strike - art 6 (4) of the European Social Charter - and the prohibition on discrimination - art.26 of the U.N. treaty on civil and political rights **Jacobs**, loc. cit.

433 **Jacobs *Labour Law*** (2004) 33

434 In Dutch law there is a more rigid distinction than in South African law between labour law proper, which applies to the private sector, and the so-called *"ambtenarenrecht"* which is generally regarded as an aspect of administrative law. S 125 of the *Ambtenarenwet* was adopted in 2006, and contains a corresponding provision which reads as follows: *"Het bevoegd gezag en de ambtenaar zijn verplicht zich als een **goed werkgever en een goed ambtenaar** te gedragen."- The competent authority and the official are under obligation to conduct themselves as a good employer and good official."* It is clear from this text that an official in public service is not regarded as an employee in the general sense of the word.

Art. 7 611 of the Dutch Civil Code was a reformulation of two separate preceding provisions contained in the BW, namely 7A 1638 z, and 7A 1639 d, which respectively provided as follows: *"De werkgever is in het algemeen verplicht al datgene te doen en na te laten wat een goed werkgever in gelijke omstandigheden behoort te doen en na te laten."* - *"Generally the employer is under obligation to do and to refrain from doing what a good employer should do and refrain from doing under similar circumstances."* Art. 7A 1639 d is cast in identical terms, except that it refers to the employee in stead of the employer.

435 This kind of norm is commonly also referred to as *"kapstokbepalingen"* or *"peg provisions"* denoting the fact that its scope lends itself to a myriad of diverse specific norms or principles.

436 For more information on this norm of Dutch labour law, see **Jellinghaus *Commentaar op Burgerlijk Wetboek 7 art. 611*** in http://opmaatarbeidsrecht.sdu.nl 1 22; **Grundemann Goudswaard and Van Sloten**

The term *billijkheid* (equity/fairness) – which is a favoured vage norm - has been used no fewer than twenty four times in Book 6 of the Dutch Civil Code alone. This book deals with the general principles of the law of obligations. The terms *redelijk* (reasonable), *redelijkerwijs* (reasonably) and *redelijkheid* (reasonableness) are also encountered a number of times in art. 6 1 6 19. The terms *redelijkheid and billijkheid* seem to have been used synonymously.[437]

The reason for the adoption of such open-ended provisions is not hard to find. Centuries of jurisprudential evolution, first in the form of Roman law, and thereafter as Roman Dutch law, brought the realization that the Legislator is not in a position to pre-determine legislative rules to govern each and every concrete practical situation.[438] This fact has been specifically and expressly acknowledged by the Dutch legislator: Art 6 5 3 11 provides that the judge will have the power in the course of a law suit and at the request of one of the parties, to amend an agreement, or to annul it partially or totally on the basis of unforeseen circumstances which are of such a nature that a party cannot legitimately expect the continuation thereof according to the norms and dictates of ***reasonableness*** and ***equity***.[439] We have focused extensively on this aspect of jurisprudence in the preceding chapters,[440] where it was pointed out that the great Greek philosophers such as Aristotle,[441] followed by the Roman jurists, and thereafter the renowned Roman Dutch jurists themselves, were unanimous that the need for the application of equity arises from the rigidity, inflexibility, harshness and

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Goed *werkgeverschap* (2005) 65; **de Witt *Het goed werkgeverschap als intermediair van normen in het Arbeidsrecht*** (1999) 13 et seq; On the political expediency of vague norms in legislation, see **Mischke"Doing things with Rights: The Impact of a charter of Fundamental Rights on Labour Law and Industrial Relations"** Contemporary **Labour Law** 1993 3 no.2 13, 19.

437 **Veenhoven *Regterlijke matiging*** (1975) 294

438 **Knottenbelt and Torringa *Inleiding in het Nederlandse recht*** (1979) 95 explain the need for open-ended or vage provisions in statutory law, especially in a modern code: *"Een moderne codificatie heeft niet de pretentie alle denkbare rechtsvragen in algemene regels te beantwoorden. Veel wordt door de wetgever overgelaten aan de jurisprudentie, doordat de wet vage termen als '**goede trouw, billijkheid en redelijkheid**' hanteerd, die pas door rechtspraakt een concrete normatieve inhoud verkrijgen."*

439 See also **Van Eikema-Hommes *De rol van de billijkheid in de rechtspraktijk",* Uit het Recht : Rechts geleerde Opstellen aangeboden aan Mr P.J.Verdam** (1971) 39.

440 Chapters II and III

441 **Spruit *Betekenis en doel van het Recht*** (1985) 12-3; **Vinogradoff *"The Work of Rome"* The Collective Papers of Paul Vinogradoff** (1928) 229.

deficiency of strict law, which in a sense, also renders it incapable of dealing with unforeseen circumstances.

Modern Dutch commentators are fairly at ease with and have in fact espoused the idea that the classical Aristotelian concept of fairness[442] is the basis of open ended, flexible or "vage normen" and that the Aristotelian paradigm is still applicable in modern law.[443]

We have elaborated on the fact that not all concrete cases that present themselves in daily life are amenable to solutions by the mere application of predetermined legislative rules or provisions.[444]

By the same token, we have seen that the administration of equity and reason in the adjudication and solution of concrete cases fell squarely within the domain of the judge, whose duty it is to apply equitable principles and remedies in circumstances in which the law as such, strictly speaking "fails". Thus, equity represents a prime example of the open ended, widely formulated flexible principles that modern Dutch law has a tendency to embrace. As noted already, such tendency is not without its critics, but it has its fair share of ardent proponents, so much so that it represents the preferred method of dealing specifically with moral and value issues in today's legislation and legal codes.[445]

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442 **Aristotle *Nico. Ethics*** VI

443 **Spruit "*Betekenis en doel van het Recht*"** (1985) 12 - 13, points out that when the legislature prescribes the application of open-ended norms to the judge, the idea is that Aristotelian equity (*billijkheid)* has to be applied to the particular circumstances of the case; See also **Van Eikema Hommes "*De Rol van de billijkheid in de rechtspraktijk*",** (1971) *33 "Zij zijn practische eisen der gerechtigheid, die een individualiserend en concretiserend karakter vertonen, omdat ze slechts in concreto met inagneming van alle bijzonderheden van het geval kunnen Worden toegepast".*

444 See Chapters II & III

445 **Knottenbelt & Torringa *Inleiding in het Nederlandse Recht*** (1979) 107 point out that these open-ended or vague provisions are to be found in innumerable codes and pieces of legislation that are currently already in existence. According to them the criticism that this legislative technique is a modern invention is unjustified. It had at some stages of history a more significant role than in others. Today we live in such a legislative era. What is more, there is a growing jurisprudential tendency in this regard.
In some areas of law, particularly in the field of administrative law that involves careful balancing of administrative and judicial powers, the role of open-ended legislative provisions have become even more prominent, particularly against the backdrop of the doctrine of separation of powers, which is a powerful factor in Dutch jurisprudence. It is generally accepted that (completely) open-ended provisions or *vage bepalings* in a statute provide the judge with a so-called plenary or complete, as opposed to a mere marginal test for compliance with such provisions. In more familiar South African legal terminology, the judge does not have to defer to the administration, or anyone for that matter, when applying an open-ended legislative provision.

For instance, Dutch labour lawyers use the term *"flexicurity"* to denote the synthesis of security of employment – which is a fundamental value of labour law[446]- and flexibility, which is equally important as far as it relates to the need for flexibility and adaptiveness in the employment relationship.

Not unexpectedly, the gist of the most widely raised criticism consists in the generally recognized need for legal certainty. We have noted that throughout all ages, there have been those jurists who, rightly or wrongly, manifested an unshakable preference for legal certainty over and above legal flexibility and vice versa.[447] There are also those who furthermore invoke the doctrine of the separation of powers and who are emphatic that it is the duty of the judge to pronounce and apply law and not to make law – ***judicis est jus dicere sed non facere.*** **Jacobs**[448] observes that as is to be expected, the open-ended principles have in practice been fully explored[449] by labour lawyers, either in an attempt to justify claims, or to resist them. Recourse to art 7 611 is often had in cases relating to alleged unilateral changes to terms and conditions of employment,

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Van der Burg & Cartigny *Rechtsbescherming tegen de overheid* (1983) 166 par 4 5, provides the following commentary on the way that open-ended legislative provisions are sometimes dealt with by the legislature in order to obtain a proper balance between judicial and administrative power: *"De zaak is gecompliceerd omdat verschillende regelgevers – uit reactie op de uitspraak betreffende de gemeentesecretaris van Winkel – in door hen gestelde bepalingen soms **voor** vage termen de clausule 'naar het oordeel van' (B en W de minister etc.) in voegen om zo het hanteren van deze vage termen **'judgeproof'** te maken. De Centrale Raad heeft daarop gereageerd met marginale toetsing."*
See also in this regard the doctoral dissertation of **Barendrecht *Recht als model van rechtvaardigheid, Beschouwingen over vage en scherpe normen, over binding aan het recht en over Rechtsvorming*** (1992) 199 where the various pro's and con's of the debate are lucidly dealt with. He remarks in favour of the application of open-ended norms: *"In ons huidige rechtssysteem, en zeker in het civiele recht, is er bijna altijd wel een mogelijkheid om een vage norm in te roepen om een onredelijk resultaat te vermijden"* Referring with approval to **Kaplow *Rules versus standards: An economic analysis*** 1992 42 Duke Law Journal 557 561 n 5, Barendrecht cites the American adage *"a standard can trump a rule."*
446 **Nape v INTCS Corporate Solutions (Pty) Ltd** 2010 31 ILJ 2133; ***Sidumo v Rustenburg Platinum Mines*** 2007 28 ILJ 2405
447 On the virtually religious belief in legal certainty amongst Western jurists, see **Merryman *The Civil Law Tradition*** (1985) 48; **Jellinghaus *Commentaar op het Burgerlijk Wetboek 7 art. 711*** http://opmaatarbeidsrecht.sdu.nl ***1*** puts it as follows: *Het problem met dergelijke ruim geformuleerde normen is dat deze op gespannen voet staan met het rechtzekerheidsbeginsel: welke verplichtingen brengen goed werkgeverschap en goed werknemerschap nu precies mee?" – "The problem with widely formulated norms of this kind is that they stand in a relationship of tension with the principle of legal certainty: which obligations exactly are introduced by good employer and good employee conduct". **Mahlamu v Commission for Conciliation Mediation and Arbitration*** 2011 32 ILJ 1122.
448 ***Labour Law*** (2004) 61-62
449 He used the word "exploited"

overtime and remuneration, disciplinary sanctions other than dismissals, the effective provision of training etc. etc.[450]

Criticism of open-ended statutory provisions cannot simply be scoffed at and dismissed. Much is sacrificed in the adoption of open-ended ideas and principles in a legal code. However, ultimately this issue is determined by the subject matter that is involved. It is undeniable that in a modern and enlightened world, some aspects of the relationship between employer and employee are inherently incompatible with rigid legislative pre-determination. These aspects are more amenable and lend themselves to flexible and discreet judicial determination according to the circumstances of each individual case. Modern Dutch law has reached an advanced stage of development where the principles of *fairness, reason and morality* have found their proper places in the legal system, especially so in the field of labour law.[451]

One of the most respected Dutch jurists of modern times, **Prof. H J Van Eikema Hommes** puts it as follows, referring to the notions of *billijkheid (*fairness), *goede trouw* (good faith), and *goede zeden* (morality):

"Deze beginselen behoren tot de rechtsethische principes of de beginselen van de juridische moraal. Zij zijn regulatieve rechtsbeginselen, waarin de anticipaties van het rechtsaspect op het (eveneens ontsloten) morele aspect van een gedifferentieerde samenleving tot uitdrukking kom. Zij zijn de praktische eisen der gerechtigheid, die een individualiserend en concretiserend karakter vertonen, omdat ze slechts in concreto met inachtneming van alle bijzonderheden van het geval kunnen worden toegepast."[452]

The *regulative* principles identified above, are in continuous mutual interaction with the *constitutive* principles, which, as the appellation suggests, constitute the basis or building blocks of any legal system, such as *causality, legal certainty* and

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450 **Jacobs *Labour Law*** (2004) 33

451 **Van Eikema Hommes *"De rol van de billijkheid"*** (1971) 31 contends that in Dutch legal practice frequent recourse is had to the principles of reason and fairness.

452 **Van Eikema Hommes *"De rol van de billijkheid in de rechtspraktijk"*** (1971) 33.
Van Eikema Hommes divides legal principles into the *regulative* and the *constitutive.* The principles of equity, bona fides, moral goodness etc. are designated *regulative.* However, he points out that the *regulative* legal principles presuppose the *constitutive* as basis for their application. The *constitutitive* principles are those that express the necessary and commonly valid (i.e. the transcendental) basis of any legal order, undifferentiated or differentiated such as a highly developed legal order. An example of a *constitutive* legal principle is that of *juridical causality* which forms the basis of delictual liability. Other examples are the principles of *juridical accountability (juridische toerekening)* and that of legal certainty.

legal accountability.[453] This interaction is a cultural-historical process to which no legal rule or principle is immune in the long run. When this process runs its full course, the distinction between the *ius strictum* and the *ius aequum* disappears, as happened in Roman law.[454] However, at this stage of legal development, regulative principles such as that of good faith and equity should not be allowed to trump the constitutive principle of *legal certainty*, and especially such certainty founded on the principle of *pacta sunt servanda*.[455]

The learned author pays homage to the ancient but timeless adage handed down to us by Cicero,[456] ***summum ius summa iniuria,*** as a pre-eminent (*voortreffelijk*) expression of the relationship between the constitutive principles of law and the regulative principle of fairness. He hails it as an illustration of the individualizing and concreticizing effect of the regulative principle of *juridical morality* (fairness). A rigid (*starre)* formalistic application of the general principles or rules of law (*ius*), without reference to the refining and deepening principle of equity, amounts to *unfairness* (*onrechtvaardigheid; iniuria).* We are in respectful agreement with the sentiments of **Van Eikema Hommes.**

Spruit corroborates the view that even in modern law, ***summum ius*** could indeed lead to ***summa iniuria.*** As a result of the dichotomy between the principle of legal certainty which is created by rigid legal principles of general application, and equity which finds application in specific circumstances, law is an inherently imperfect phenomenon. In practice the judge has to overcome this

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453 Loc. cit.

454 Ibid. The learned author cites Canon Law as an example of a legal system in which this process has gone to full conclusion. This started with the introduction of the *imploratio officii iudices*, which developed a form of equity jurisprudence to make provision for cases involving exceeding hardship, for which no relief was available in terms of the ordinary rules of Canon law. This equity jurisprudence was however, through the medium of papal decretals spread into the whole of Canon law, with the result that the *Signatura Gratiae* eventually disappeared.

455 **Van Eikema Hommes *"De rol van de billijkheid"*** (1971): 36; Art. 1374 BW; **Van der Ven *„Arbeidsrecht/Sociaal Recht"***(1985) 337 et seq.; **Knottenbelt & Torringa *Inleiding*** (1979) 57 puts it as follows:*"Geldige overeenkomsten strekken de partijen die hen hebben aangegaan tot wet (art. 1374 lid 1 BW). Zij moeten te goeder trouw ten uitvoer gelegd worden. Ze verbinden niet alleen tot datgene dat uitdrukkelijk daarbij overeengekomen is maar ook tot al hetgeen naar de aard van de overeenkomst, door de billijkheid, het gebruik, of de wet gevorderd wordt (art. 1375 BW)."*

456 ***De officiis*** 1 33

inherent imperfection by means of the application of equity.[457] It is generally accepted that legislation of general application often contains *lacunae* or is lacking in clarity or suffer from over-broadness and ambiguity. The judge has to assume a moderating and supplementary role on the basis of equity, to give full effect to the law.

However, critics rely mostly on the principles of legal certainty and *pacta sunt servanda* which are constitutive principles of law and which should not be sacrificed on the altar of fairness.

Critics of general or open-ended norms have to bear in mind however, that a judge may not *refuse* to apply law, written or unwritten on the basis of perceived defectiveness, uncertainty, unfairness or some inherent quality of the law. Should a judge refuse to apply law he would make himself guilty of *rechtswijering*. This principle has specifically been adopted from the French Code Civil by the legislators of the Dutch Civil Code. The *Belgian Civil Code* has followed suit. Art. 4 of the French Code Civil states that:

"Le juge qui refusera de juger, sous pretext du silence, de obscurite ou de l ' insuffisance de la loi, pourra etre pour suivi commune coupable de deni de justice" - "The judge who refuse to judge under the protest of silence, obscurity or insufficiency of the law, may be prosecuted for denial of justice."

Similarly s 13 of the Dutch Wet *houdende algemene bepalingen der wetgeving van die koninkrijk* (WA) or Law relating to General Provisions of the Legislation of the Kingdom, states that *"De regter die weigert regt te spreken, onder voorwendsel van het stilzwijgen, de duisterheid of de onvolledigheid der Wet kan uit hoofd van regtsweigering vervolgd worden".*

In an attempt to strike a balance between the ardent adherents of the ***"Free Judicial Finding Movement"*** that flourished shortly after WWII in Germany and

457 **Spruit *"Betekenis en doel van het recht"*** (1985) 14-5 points out the inherent dichotomy between legal generality, created by the law of general application laid down for the general public interest on the one hand, and legal particularity which has to be judiciously applied to remedy the imperfection of the general law.
He cites **Grotius *Inl.*** 1 2 23, where the following commentary is made concerning this dual characteristic of law: *"...de burger-wetten doorgaens in't algemeen werden ingestelt, hoewel de reden niet altijd even-wel schijnt te passen, 't welck also toekomt omdat de verscheidendeiden der menschelijke zaken zeer onzeecker zijn, ende de wet iets zeeckers moet stellen."*

the Netherlands, and the stark adherents of "legal certainty", **Koschaker**[458] points out that art 4 of the French Code Civil was never intended to endorse the idea of the "*judge king*" who could freely and arbitrarily make and introduce law[459]

Fairness in modern Dutch law does not imply that the judge is free to simply override the law. On the contrary, it bears the classical meaning of the judge making an individual decision applicable to the case before him, taking into account and basing such decision on all the circumstances of the case. One could in a sense assume that whereas the legislature keeps itself busy with the creation of general law, dealing with the general legal order, the judge that apply fairness acts in accordance with the demands of the individual case before him.[460] The equitable judge does not create law, not even judicial precedent.[461]

In modern Dutch law, a judge is specifically prohibited to pronounce upon the inherent value or fairness of a law.[462] This is unlike the constitutional position in South Africa where the law itself may on various grounds be tested for compliance with constitutionality. But, in the field of labour law the principle of free judicial finding is of special significance. It has become axiomatic amongst

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458 ***Europa und das Romische Recht*** *(1947) XII E;* ***Veen*** (transl.)
Europa en het Romeinse Recht *(*2000) 90

459 **Koschaker**, loc.cit. refers with approval to the Swiss Civil Code 1907, art 2 2.
which enjoins the law-seeking judge to apply ancient doctrine and tradition, which **Koschaker** interprets as judicial precedent.
Art. 1 2 of the **Swiss Civil Code** – ZGB – reads as follows: "*Kan dam Gezetze keine vorschrift entnommen worden, so sall der Richter nach gewohnheitsrecht und, wo ein solches fehlt, nach der Regel entscheiden die er als Gezetzgeber aufullen wurde. Er folgt debei bewahrter* ***Lehre*** *und* ***Ubeilieferung*** *(*my emphasis) – *If no prescript can be derived from the statute, the judge has to decide according to customary law, and where this is lacking, in accordance with the rule that he would have determined as law giver in that he follows preserved doctrine and tradition*".
Koschaker points out that the idea that the judge will act under the circumstances that art. 1 2 of the BGB above has in mind as though he was the Legislator, is one derived from **Aristotle's *Ethics*** VI 14

460 Ibid.

461 However, see **Jacobs *Labour Law in the Netherlands*** (2004) 28, where the learned author points out the immense persuasive value of judicial precedent in the practice, if not in the theory of law; **Koschaker *Europa en het Romeinse recht*** (2000) 90

462 Art. 11 of the BW; **Veenhoven** "***Rechterlijke matiging van schadevergoeding***" (1975) 293-5: "*Voor de invoering van de Wet op het arbeidscontract werd het woord* ***billijkheid*** *in het Burgerlijk Wetboek...maar eenmaal gebruikt: in art. 1375. Daarnaast nog in art. 11 AB dat de rechter verbiedt de innerlijke waarde of* ***billijkheid*** *der wet te beoordelen. In deze laatse bepaling wordt gedoeld op de natuurlijke rechtvaardigheid, in de eerste op rechtvaardigheid in het concrete geval.*"

modern Dutch lawyers that the use of certain terminology in a statute, provides the power to a court of law to decide a matter before it in accordance with the dictates of *equity*. For instance, the particular statute involved may expressly require of the judge to decide a matter *in terms of equity* or make a decision that is *fair and equitable*. Examples are cases involving arbitration, where the arbitrator is enjoined to decide a case *"als goede mannen naar billijkheid"* – *"...as good men according to fairness.*[463] Another example is where parties obtain legally binding advice, which has to be rendered in *good* faith and *"...als goede mannen naar billijkheid."*[464]Where a statute requires that a court makes a decision that is *reasonable*, this is interpreted to mean a *fair* decision.[465] The same holds true where the legislature enjoins the judge to make a decision based on *all the circumstances of the case* etc.[466] **Veenhoven** adds to this that where a judge is empowered by statute to "*moderate*" damages or effects, this similarly amounts to statutory authority given to the judge to act in terms of the principle of *equity*.[467] This principle was applied for the first time in Dutch law in labour contract cases.[468] This mostly implies that the judge has to make a decision on a strong *moral basis*, using reasoning or sometimes even intuition as a yardstick.[469]

It would appear that the interaction between the legislative and the judiciary are complementary in regard to open-ended legislation. The legislature adopts an

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463 **Van Eikema Hommes *„De rol van de billijkheid"*** (1971) 39.

464 ibid. The learned author refers to an arrest (judgment) of the Hooge Raad 29 Jan. 1931 NJ 1931 1317, in which it was held that where such binding advice had been given in bad faith or in disregard of the principle of fairness, the disadvantaged party may have it judicially reviewed and set aside.
However, he warns that even when advisors have to act *als goeden mannen naar billijkheid*, they nevertheless have to observe the so-called *constitutive principles* of law, inter alia those of legal equality, legal certainty and the procedural principle of audi alteram partem. Should the legal advice violate any of these principles, it would in any case be unreasonable and unfair.

465 **Van Eikema Hommes** loc. cit.

466 ibid.

467 ***„Rechterlijke matiging"*** (s.a.) 293 : *"By de toepassing van het matigingsrecht is de billijkheid normgevend, al wordt dit alleen in art.1638q uitdrukkelijk gezegd en volstaan de art...met de vermelding dat de rechter bevoegd zal zijn de boete of som op een kleinere te bepalen indien deze hem bovenmatig voorkomt."*
The learned author then proceeds to deal with a plethora of legislative provisions outside the BW in which judicial moderation was allowed.

468 The so-called Wet op de Arbeidscontract provides moderating powers to the court in
regard to agreed penalties in ss 1636u, 1637x, 1638q. A host of articles empower the court to make a determination according to the requirements of fairness: 1637q, 1677x, 1638c, 1638j, 1639t, 1639w.

469 On the roles of and interaction between equity, reason and circumstances in modern Dutch law, see **Veenhoven *"Rechterlijke matiging"*** (1975) 294

open-ended provision to be fleshed out by judicial precedent which, when sufficiently developed, is used in turn by the legislature to enact updated statutory law based on the evolved judicial precedent. This mutual and reciprocal process has resulted inter alia in the Wet Flexibiliteit en Zekerheid, the Wet Arbeid en Zorg and the Wet Aanpassing Arbeidsduur,[470] all based directly on jurisprudence that evolved from the good employer - good employee relationship. **Jacobs**[471] contends that this process would eventually lead to legislation governing liability of the employer for the health and safety of employees outside of the workplace and the right not to have gratuities discontinued abruptly. This process is organic and repetitive. This would seem to be an appropriate way of incrementally developing the law in a jurisdiction with a codified system of law.

The idea of open ended judicially empowering or enabling provisions is not foreign to South African labour law. Labour law itself is a case in point. When the Labour Relations Act 28 of 1956 was amended in 1979, s 1 thereof defined an *"unfair labour practice"*[472] simply as *"any labour practice which in the opinion of the industrial court is an unfair labour practice."*[473]

The learned authors **Ian Currie & Johan de Waal**[474] contend that this open ended provision bore the fruit of the struggle for fairness in the jurisprudence of the Industrial Court, which gave substance and meaning to the definition. This

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470 **Jellinghaus *Commentaar*** (2011) 3 par. C 1 6

471 ***Labour Law in the Netherlands*** (2004) 6

472 By judicial interpretation this included unfair dismissal, of which there was no separate definition

473 See **De Kock *Industrial Laws of South Africa*** (1982) 620A; **Mureinik *"Unfair Labour Practices: Update"*** 1980 1 ILJ 113; **United African Motor and Allied Workers Union v Fodens (SA)** 1983 July ILJ 213, 224B; **Pillay *"Giving Meaning to Workplace Equity"*** 2003 24 ILJ 55; This open ended definition did not remain unamended for long. A number of amendments were introduced before the definition culminated in the separate definitions of unfair labour practice and unfair dismissal which we find in the 1996 LRA which is presently in force and to which we will return in Chapter VII. Before its present form, the amended 1956 definition described an unfair labour practice as "any act or omission other than a strike or lock-out, which has or may have the effect that (i) any employee or class of employees is or may be unfairly affected or that his/their employment opportunities or work security is or may be prejudiced or jeopardized thereby; (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby; (iii) labour unrest is or may be created or promoted thereby; (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby".

474 ***The Bill of Rights Handbook*** (2005) 502 par 23 2-23 3

underlines the usefulness and wisdom of having this kind of provision in labour legislation.[475] The authors point out that the current open-ended right to fair labour practices contained in the present South African Constitution[476] is unique to the South African Bill of Rights. The authors are probably right. But although the Dutch right to fair labour practices is not contained in a bill of rights, it is certainly found in their Burgerlijk Wetboek, which in itself is no ordinary statute but a code of civil law.

As already mentioned, the nature and contents of the "*good employer-employee norm*" contained in art 7 611 BW, amounts according to the *Hooge Raad*[477] to essentially the equivalent of the *equity* and *reasonableness* provisions contained in art 6 248 2 BW.[478] Last-mentioned article subjects all agreements between parties, including employment agreements, to the requirements and dictates of *equity* and *reasonableness*.[479]

The standard of ***fairness*** *and* ***reasonableness*** as used in article 6 248.2 BW, was introduced in 1992 as a replacement for the concept of *good* faith which had been in force up till that point. Faithful to the traditional requirements relating to reasonableness and fairness, the article specifically and expressly applies only to the particular circumstances of a given case.[480] **Jellinghaus**[481] points out that, particularly in the application of the norms of ***equity and reasonableness***, account should be taken of generally applicable legal or statutory rules, the living

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475 Ibid. The learned authors provide the following commentary on this definition of an unfair labour practice in the amended 1979 Labour Relations Act: *"To determine the ambit of this open ended right, regard must be had, first, to what is meant by a* ***labour practice****, and, thereafter, to what is meant by a* ***fair*** *labour practice...Once amended so as to allow for an open-ended definition of an unfair labour practice, the 1956 Labour Relations Act empowered presiding officers of the Industrial Court to declare their view on labour relations policy. This power to give meaning to the concept of fair and unfair labour practices resulted in the court being used over the following fifteen years by both employers and employees as an arena of struggle. The fruit of this struggle is a body of jurisprudence regulating both individual employment relations and collective labour relations."*

476 s 23

477 The Dutch Supreme Court of Appeal

478 See the so-called AGFA Arrest (decision), HR 8 April 1994 (JAR) 1994/94; See further the so-called Parellel Entry Arrest (decision) of the Hooge Raad, 30 Jan 2004 (JAR) 2004/68; cf. **Jellinghaus *Commentaar*** (2011) 17 n 4

479 Art. 6 248 BW. *"Doordat in beginsel het goed werkgever – en werknemerschap en de redelijkheids- en billijkheid dezelfde betekenis hebben, zal de werking van het goed werkgever- en/of werknemerschap zowel een uitbreidende als een beperkende (derogerende) werking hebben."*

480 **Jellinghaus *Commentaar*** (2011) 17

481 **Jellinghaus** (2011) 2

legal convictions of the Dutch citizens, as well as the social and personal circumstances that are involved in a particular case.

The collective labour agreement in particular, is the type of agreement that for purposes of labour law would have to be carefully scrutinized for compliance with the provisions relating to the good employer/employee relationship, as well as the dictates of reasonableness and fairness as far as its effect and consequences are concerned.[482]

As regards *employment contract law*, an important difference between Dutch and South African law lies in the fact that in South African law *equity* and *reason* as such, play a relatively minor role, if any, in the actual conclusion and terms of the *employment contract*.[483] In terms of the doctrine of freedom of contract parties are at liberty to contractually agree as they deem fit, provided of course that the employment contract complies with certain legally prescribed formalities and that it is not against the law or *contra bonos mores*.[484]

The most important statutory constraints to South African employment contracts are to be found in legislation such as the Basic Conditions of Employment Act,[485] and the Employment Equity Act.[486] Equity or fairness as such, and reasonableness have a limited role to play, if any, in the conclusion, contents or consequences of employment contracts. Equity is primarily dealt with in the Labour Relations Act, no.66 of 1995, as amended, based of course on the constitutional imperative of fairness referred to in s 23(1) of the Constitution. As

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482 ibid

483 For more clarity on the place of contract in the employment relationship, see **du Plessis & Fouche *A Practical Guide to Labour Law*** (2006) 4-5; For a discussion of the common law requirements relating to **boni mores**, public interest, obstruction of justice, undue restriction of commercial intercourse, statute etc., see **Van Jaarsveld *Suid Afrikaanse Handelsreg*** 88-92; **Hosten et al *Inleiding tot die Suid Afrikaanse Reg en Regsleer*** (1979) 416 et seq; **Hutchinson D et al *Wille's Principles of South African Law*** (1991) 428 et seq; **Wallis *Labour and Employment Law*** (1992) 2-17 et seq; **Joubert *General Principles of the Law of Contract*** (1987) 21 et seq; **Kerr *The Principles of the Law of Contract*** (1989) 3; **Christie *The Law of Contract*** (2001).

484 Cf. **Basson et al *Essential Labour Law*** (2002) 20-21. Basically this remains the position, subject to legislation that lay down minimum conditions of service. For a discussion of the role of the common law contract in South African labour law, see **du Plessis *A Practical Guide*** (2006) 9 et seq.; **Basson *Essential labour law*** (2002) 8 et seq.

485 ibid

486 No. 55 of 1998

also noted in Chapter 1 hereof, reasonableness as general yardstick of administrative action is dealt with in s 33(1) of the Constitution.[487]

The Employment Equity Act regulates fair and equal treatment by means of its anti-discriminatory provisions.[488] But, despite these admittedly impressive statutory machinery, it is still a feature of the South African *employment contract* law, that a comprehensive e*quity regime* is unknown to it. Equity or fairness as such, only finds specific and direct application in two areas of South African labour law as governed by the Labour Relations Act, namely the areas of unfair labour practices[489] and of unfair dismissal.[490] The rest of the remaining provisions of the LRA generally reflect strict law and have no direct and immediate bearing on equity or reasonableness as such. There is for instance no provision in the LRA or the Basic Conditions of Employment Act which requires that equity or fairness govern the conclusion, application or effect and consequences of the employment contract, collective agreements etc. In this respect, the South African employment contract does not differ significantly from other species of contract.[491]

In this and other areas, Dutch law is distinguished by this important feature, that in addition to the general legal requirements and restraints relating to the contents of contracts - which by and large are comparable to those in South African law - there is the additional prerequisite that, in order to have binding effect, contracts have to comply with the *"eisen van redelijkheid en billijkheid"* - *"the requirements of reasonableness and fairness* ***(equity)".***[492] As a general principle Dutch law does recognize the principle of ***pacta sunt servanda.***[493] The BW specifically states that valid agreements bind the parties thereto as law.[494]

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487 There are also the anti-discrimination laws which prohibit *unfair* discrimination, the most important of which is the Employment Equity Act, No. 55 of 1998. The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 does not have application in the employment relationship.
488 See Chapt. II of the EEA, 1998.
489 s 185, read with s 186(2) of the LRA
490 s 185, read with s 186(1) of the LRA.
491 **Basson *Essential Labour Law*** (2002) et al 8-9
492 Art. 6 248 of the BW
493 **Van der Ven *Arbeidsrecht*** (1985) 344.
494 Art 1374 1 of the BW; **Knottenbelt and Torringa *Inleiding in het Nederlandse Recht*** (1979) 57

However, the BW also provides that contracts do not only bind parties to what has been expressly agreed, but also to all the requirements of ***fairness***, ***custom***[495] and the ***law***, taking into account the nature of the contract.[496]

Parties to a legal relationship, such as debtor and creditor generally, are also under obligation to conduct themselves according to the dictates of ***fairness and reasonableness.*** This would include employers and employees, since they are parties engaged in a mutual debtor-creditor relationship. The *Burgerlijk Wetboek* (BW) makes this very important and far-reaching principle applicable to the whole of the law of obligations.[497]

The necessary implication of this is that Dutch employment contract law is subject to an *equitable regime* in the comprehensive sense, which means that it is not the freedom of contract or even the legal principles relating to contracts in general alone which determine and infuse the employment contract, but *reasonableness and fairness*, as well as the principles of *good employer-good employee* and *good creditor-good debtor relations.* The principles of *bona fides*, abuse of rights and moral reprehensibility are likewise applicable to the employment contract and relationship. [498]

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495 Custom had to be reasonable: **Van der Linden *Institutes of Holland*** (1887) 1 VII (tr **Juta**)

496 Art 1375 BW; **Knottenbelt & Torringa *Inleiding*** (1979) 57; Cf art 6 248 1 of the BW:*" Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van **redelijkheid** en **billijkheid** voortvloeien." -"A contract does not only have the legal effects agreed upon by the parties but also those which according to the nature of the contract result from statute, custom or **reasonableness** and **equity**."*

Art 6 248 2 of the BW states the following:*" Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaarbaar zou zijn." – "A rule binding upon parties as a result of an agreement, does not have application, insofar as it would in the given circumstances of the case be unacceptable according to the dictates **of reasonableness** and **fairness**."*

497 Art 6 2 1: *"Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van **redelijkheid** en **billijkheid** -"The parties to an obligation are bound towards one another to conduct themselves as debtor and creditor in accordance with the dictates of **reasonableness** and **equity**."* See **The Netherlands Ministry of Justice *The Netherlands Civil Code*** (Draft text and Commentary) 1977 18. The text of art. 6 2 1 was officially translated by **J. Drion and G. de Grooth**.

Art. 6 2; 2 BW: *"Een tussen hen krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van **redelijkheid** en **billijkheid** onaanvaarbaar zou zijn."*

498 **Knottenbelt *Inleiding*** (1979) 57

Employment contracts which would otherwise be perfectly legal and enforceable, would cease to be so, insofar as it is found to be *unreasonable or unfair* or repugnant to the *good employer-employee* or *good creditor-good debtor* imperatives. It is a necessary corollary of this principle that if parties are not allowed to incorporate unreasonable or unfair stipulations in the labour contract itself, much less so will the employer be in a position to issue work instructions to the employee or to adopt a generally unfair or unreasonable attitude towards an employee. The requirement of *fairness and reasonableness* and the other imperatives mentioned above apply in respect of the general *conduct* of both parties during the entire course of the employment relationship. As the parties are by law required to behave *as good employer and employee in respect of each other respectively,*[499] this necessarily means that employment arrangements, agreements and reciprocal duties may be judicially extended or moderated according to the dictates of *fairness and reasonableness* or as a good employment relationship demands.[500]

The general principles of *fairness and reasonableness* even manifest themselves in the so-called *sollicitatiefase* or recruitment phase of the relationship between a job applicant and a prospective employer. The prospective employer has to act fairly and reasonably *vis-à-vis* the prospective employee and may for instance not discriminate against him. The Employment Equity Act, 1998 of South Africa contains similar but more specific anti-discriminatory provisions.[501] Where an applicant for employment had failed to disclose a sickness or ailment to the prospective employer, *reason and fairness* may justify the withholding of the salary during the period of sickness or in some other way deprive the employee of benefits relating to such sickness. *Reason and fairness* may even justify dismissal.[502] The good employer–employee imperative is a double edged sword

499 Art. 6 248; 7 611 BW
500 ibid.
501 Chapt. II of the EEA 1998.
502 Art. 7 653 s 2 BW. Another area of the employment contract law that is specifically subjected to a regime of *equity* is that of the so-called *concurrentiebeding*, or as it is referred to in South African law, the restraint of trade clause. The judge may annul a restraint of trade clause in toto or partially, insofar as its provisions are

that imposes reciprocal obligations on both parties. The Hooge Raad has indeed applied this principle effectively, as we will see in more detail later in this chapter.

When one looks at the practical applications to which articles 7 611 (*good employer/employee conduct*) and its corollary, art 6 248 (*reasonableness and fairness*) have been put in Dutch jurisprudence, one notices that it straddles the whole field of labour law, that it is not confined to the realm of employment contracts. Important areas that can efficiently be regulated by these articles are matters such as labour recruitment, the post termination phase of the employment relationship, the reciprocal provision of information, the medical fitness of an employee to perform a particular function; legitimate expectations; extensions of contracts; safety issues in the workplace; labour hours, especially for youthful and female persons; flexibility of work hours; the maintenance of equality in the workplace, such as equal pay for equal work; protection of employees' constitutional rights such as the right to privacy , dignity, freedom of expression, whistle blowing etc. The circumstances are virtually unlimited.[503]

In conclusion we wish to refer to a few concrete examples of how the Hooge Raad has interpreted and applied articles 7 611 and 6 248 in practice. The question whether the principle of equal pay for equal work existed in Dutch law was at some stage fiercely debated. Incrementally, the Hooge Raad first decided that this principle simply had to be recognized on the basis of equal treatment in equal circumstances.[504] Eventually the Hooge Raad determined that the principle of equal pay for equal work emanated from the *good employer-good employee*

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repugnant to the dictates of *fairness* in its *effects* on the employee. A restraint of trade agreement entered into by a minor is null and void.

503 **Jellinghaus *Commentaar*** (2011) 3 par C 1 5 points out that strictly speaking the norm of the good employer-employee is applicable only in the individual employment relationship and that it is actually the equity and reasonableness provisions of the BW that extends its ambit to collective labour relations. See also **Jacobs *Labour Law*** (2004) 61-2.

504 This was laid down in the well known AGFA-arrest (judgment), HR 8 April 1994 (JAR) 1994/94

obligation laid down by art.7:611, as further moulded by the principles of *equity* and *reasonableness.*[505]

Another example where the good employer-employee as well as the equity provisions were constructively applied by the Hooge Raad relates to the so-called *"zorgplicht"* (duty of care) of an employer. On 18 March 2005 the *Hooge Raad* dealt with the question whether there was any sufficient connection between the employment time of an employee and the period between his to and fro flights for purposes of his employment. The Hooge Raad decided in favour of the employee and pronounced that an employer may be under an obligation to take out collective insurance for its employees in respect of this period.[506]

In yet another case, the *Hooge Raad* delivered a well known judgment concerning the issue of what in South African law would be called a unilateral variation of or change to conditions of employment by an employer.[507] In South African labour law this is clearly a wrongful act, against which the employees involved have a number of remedies, such as a declaratory order, interdict, the eventual right to strike, and a claim for damages for breach of contract and lost wages etc.[508]

However, when comparing the position relating to unilateral changes to conditions of service as regulated in Dutch law with that in South African law, one has to bear in mind that South African Labour law, as reflected in the LRA (despite having been intended to give embodiment to s 23(1) of the

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505 Parallel-Entry Arrest (judgment), HR 30 Jan. 2004, (JAR) 2004/68

506 HR 18 March 2005 (JAR) 2005/100

507 **Jacobs *Labour Law*** (2004) 62.

508 **Grogan *Dismissal*** (2010) 420 observes that s 64(4) of the LRA suggests that a unilateral change to terms and conditions of service constitute a matter of mutual interests that may eventually lead to strike action, apart from other remedies available to the employees involved.
This view is supported by the wording of the section which makes provision for employees to refer a dispute involving an alleged unilateral change to terms and conditions of employment for conciliation by a Bargaining Council or the CCMA. In such referral, the employee may include a notice that requires the employer not to implement unilaterally the changed terms or conditions, or, if the employer has already done so, to restore the terms and conditions that applied before the change.
In fact the CCMA Form 7.11 which is used for such referrals, already contains such a section (s 10), to be signed by the employee involved to activate the requirement.
For an example of such a CCMA form, see **Du Plessis & Fouche *A Practical Guide*** (2006) 340.

Constitution), does not recognise a general right to fairness for either employees or employers. Dutch law does recognize such a right and gives Dutch citizens direct access to it. In South African Law direct access to s 23(1) of the Constitution is as a general rule not recognized. Litigants have to resort to labour statutes purportedly embodying the constitutional right to fair labour practices, such as the LRA, EEA etc.[509] Moreover, the imperative and paramount Dutch labour law principle of the *good employer-employee relationship* remains unknown to South African labour law, as reflected in the LRA,[510] although it may coincide with the constitutional right embodied in s 23(1).

In the landmark ***Van der Lely/Taxi Hofman*** judgment of the Hooge Raad, the question to be decided was whether someone who had once been employed by the same employer as a centralist but was currently employed as taxi-chauffer could be required to perform the work of centralist again. This would without a doubt amount to a unilateral change to terms and conditions of employment. However, the Hooge Raad decided in favour of the employer, on the basis of the *good employer-employee imperative* governing Dutch labour law that an employee generally has to approach the reasonable suggestions and proposals of the employer with a positive attitude, particularly in situations where such proposals relate to changed working conditions. An employee may only reject such proposals if it cannot *reasonably* be expected of him to accept it. The question whether the proposals fall within the job description or risk sphere of the employee is irrelevant.[511]

Art 7 611 has also been applied by the Hooge Raad for the purpose of enforcing constitutionally protected fundamental rights such as the right to privacy, the

509 To this issue we return in Chapter VII

510 In Chapter VII, South African Law, we will deal with the casuistic way that the LRA attempts to give effect to s 23(1) of the Constitution. Little mere than a few narrowly defined unfair labour practices and forms of unfair dismissal are to be found in the text of the LRA. These fall short in important respects, of the comprehensive fairness regime which the Constitution itself purport to introduce.

511 **Van der Lely/Taxi Hofman Arrest** HR 26 June 1998 JAR 2000/120.

provisions of international treaties and international labour law relating to the contract of employment, sexual harassment and health rights in the workplace.[512]

Lately there has been a move away from the overprotection of employees' rights in an attempt to effect a healthy balance with those of the employer.[513]

Jacobs[514] provides other examples of the constructive interpretation and application to which the Hooge Raad has recently put articles 7 611 and 6 248[515]

A brief outline of the various types of dismissal in Dutch law is necessary, before we deal with the question to what extent, if any, fairness and reasonableness may apply to the matter. Dismissal is governed by the so-called *ontslagrecht*, which is generally used in a wider sense in Holland than in South Africa.[516] *Ontslagrecht* refers to the law governing the termination of service in general, and is not confined in its meaning to dismissal as commonly understood, or as defined in section 186 of the South African LRA, which is generally speaking some initiative of the employer terminating the employment relationship.[517]

Four types of termination of service are recognized by the BW: 1. Termination by agreement. This is self-explanatory. Reasonableness or fairness normally plays only a minimal role here.[518] Consensual termination is not allowed if it is a mere

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512 **Jacobs *Labour Law*** (2004) 62

513 ibid

514 ***Labour Law*** (2004) 62

515 Recent innovations by the Hooge Raad include the right of (partially) disabled workers to adapted working conditions; the right of employees to have full time contracts converted into part time contracts etc.

516 On Dutch employment law generally, see **Van Haren *Ontslagrecht voor de praktijk*** (1969); **Fokkema et al *Introduction to Dutch Law for Foreign Lawyers*** (1978) 535 et seq. (**Van Esveld & van Aerde**); **Molenaar *Arbeidsrecht*** (1957) Part II.

517 It has to be noted that *ontslaan* in Afrikaans means dismissal in the strict sense, namely a unilateral termination of service by an employer, usually for, but not limited to misconduct. The meaning of the term dismissal is in South Africa regulated by s 186 of the LRA.

Bakels *Burgerlijk Wetboek* (1983) 84 observes that the term "ontslagrecht" ("ontslagreg" in Afrikaans; "dismissal law" in English) can sometimes lead to confusion. It is not a term that appears in any civil law legislation, but is often used as synonym for "opzegging" or termination of employment relationship. Moreover, the term "ontslagrecht" is often and conveniently used in labour law literature to refer to all forms of termination of the employment agreement. Ultimately, the precise meaning of the terms has to be determined according to the context of its use.

518 As in any other labour law system, termination with mutual consent can take place for various reasons. A common factor would be that both parties agree that the employment relationship should cease to exist. In contrast with unilateral termination, this kind of termination most likely takes place under amicable conditions, such as where the employee has obtained alternative and better employment and the employer does not wish

fictional construction or simulation effected for an illegal reason or with an illegal motive, dressed up as a dismissal by the employer so as to make the employee qualify for social or unemployment benefits for instance.[519] 2. Termination *ex lege* or by operation of law. This kind of termination is also familiar to South African law. Examples are to be found in the so-called s 17(5) (a) (i) terminations in terms of the Public Service Act, 1994, and certain types of termination in terms of the Employment of Educators Act, 1998. These acts, or at least aspects of them, have been specifically found to be draconian by South African courts in some instances, depriving the employee of at least *procedural fairness.*[520] Technically however, such terminations fall outside the purview of the LRA, and therefore do not qualify as 'dismissals' in the sense that this notion is described in the LRA.[521] The possibility remains that statutes and codes which allow *ex lege* termination may be declared unconstitutional in the sense that its provisions may be found repugnant to the right to fair labour practices as enshrined in s 23(1) of the Constitution. It is not inconceivable that some of these statutory provisions may also be in conflict with the ILO conventions on dismissal of employees.[522] 3.

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to stand in his way, or where the employee accepts that he has become redundant, and is happy to receive a 'golden handshake'.

519 **Schuit *Dutch Business Law*** (1978) 451 XXV 7 5 point out that in Dutch law this is illegal as employees who consent to dismissal, are practically never entitled to unemployment benefits.

520 These acts contain so-called "deeming provisions" in terms of which employees in the public sector are deemed to have been *discharged* by operation of law and not through any termination decision by the employer.

One of the leading cases in this regard is that of ***Hospersa v MEC for Health*** 2003 24 ILJ2320 (LC) where the court decided in favour of *fairness*, that the draconian provisions of s 17 could only be invoked where the Disciplinary Code (Resolution 2 of 1999) was inapplicable. The court pointed out that the provisions of s 17 had to be invoked sparingly, and that the Disciplinary Code should be applied where possible as it affords more protection to employees in terms of their constitutional rights to *fairness* and *reasonableness* than the mere text of the Act.

Cases where the employment relationship terminates as a result of the expiry of work permits, have also been held by CCMA commissioners to fall into this category: ***Vundla and Millies Fashions*** 2003 24 ILJ (CCMA); ***Maila v Pieterse*** 2003 12 BLLR 1405 (CCMA); See further in this regard **Grogan *Dismissal*** (2010) 166-7.

A great deal of jurisprudence has evolved in South Africa on this issue. Of the more well known cases are: ***Minister van Onderwys en Kultuur v Louw*** 1995 4 SA 383 (A) where the principle of *ex lege* termination was endorsed by the Supreme Court of Appeal (the then Appellate Division of the Supreme Court). The Labour Court gave recognition to the principle in ***Nkopo v Public Health and Welfare Bargaining Council*** 2002 23 ILJ 1552 (LC); See also ***Ntabeni v Member of the Executive Council for Education, Eastern Cape*** 2002 3 SA 103 (Tk);**MEC, *Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration*** 2003 23 ILJ 2155 (LC).

521 ibid

522 On the role of ILO Conventions in domestic labour law, see **Mischke *The Significance and Practical Effects of ILO Standards – A View from the Outside*** 1993 14 ILJ 65; ***National Union of Metalworkers of***

Dismissal in the strict sense, i.e. termination by the employer; 4. Dissolution of the employment relationship by the judge.

Interestingly, the Dutch courts have been reluctant to apply the *good employer-good employee* principle contained in art 7 611 in the realm of dismissal law. The general sentiment amongst Dutch jurists seems to be that Dutch dismissal law provides enough protection to employees and that there is no additional need for the introduction of the art 7 611 principle or of the notion of *bona fides* into this area of the law.[523]

Any of the parties to the employment contract has the right to approach the court, should the question arise whether the counter-party has complied with his or her good employer-employee obligations. Quite significant is the fact that in such an event, the court does not adopt a deferential approach to the conduct of the parties. It does not apply a "marginal test" in the adjudication of a dispute of this nature, but a full and substantive test. In this respect the approach of the court can be compared with that endorsed in the South African Constitutional Court case of **Sidumo**, where it was laid down that a CCMA commissioner is vested with the full power to arbitrate the fairness of a dismissal, and should not defer to the employer or employee in that regard.[524]

South Africa v Bader Bop (Pty) Ltd 2003 24 ILJ (CC) 322-3; **Basson et al *Essential Labour Law*** (2002) 17-8; ***Chemical Workers Union v BHT Water Treatments*** 1994 15 ILJ 141 (IC) 149E; **Saley S & Benjamin P *"The Context of the ILO Fact Finding and Conciliation Report on South Africa"*** 1992 13 ILJ 731-8; **Landman A *"The ILO Commission"*** 1992 **Contemporary Labour Law** 1992 1 No 11 117-123; **Erasmus & Jordaan: *"South Africa and the ILO: Towards a New Relationship"*** 1993/4 19 **South African Journal of International Law** 65.

523 **Jacobs *Labour law in the Netherlands (***2004) 62. The position of persons on probation are somewhat different. In terms of art. 7:676 of the Code, the principle of dismissal at will applies during the probationary period. The Hooge Raad has therefore intervened in exceptional cases on the basis of the principle of *bona fides* and of art 7 611, and granted relief.

524 See our discussion of ***Sidumo*** in the first chapter, as well as that on SA law. In ***Cowley v Anglo Platinum*** **(**unreported case no. JR 2219/2007, dated 18/11/2008) **Musi AJ** summarised the grounds on which the Labour Court would interfere with the exercise of a discretion by a CCMA commissioner, specifically identifying the following: misdirection, gross irregularity, capriciousness, adherence to a wrong principle, bad faith and *unfairness*, as well as unreasonableness.

4.3 CONCLUSION

Dutch labour law has reached a remarkably advanced level of development. As is the case with any other legal system, not all aspects are above reproach or criticism.

Most significant about Dutch labour law is that, at least formally, if not substantially, it has reached an apotheosis as far as its recognition of the principles of ***equity, reasonableness, good employment relations, and good creditor-debtor relations*** are concerned. The Dutch system has truly embraced *"the good and the fair"* that the Roman jurists have written endlessly about. The dreams of one of their own ancestors **Johannes Voet,** of the good being seen as the fair and the fair as the good, have basically indeed materialized.

Dishonesty, untruths, deceitfulness and mere formalism at the expense of the good and the fair will find it hard to get some foothold in this legal system. Virtually every loophole seems to be somehow covered by principles deeply rooted in the good and the fair. Much is to be learned from such a system of law.

CHAPTER V

ENGLISH LAW

5.1 HISTORY AND NATURE OF EQUITY

In the previous chapters the history and role of the concepts of equity and reasonableness in some civil law systems of the world have been explored.[525] These systems refer in particular to Roman, Roman Dutch and Modern Dutch Law.[526] Although the South African legal system has been predominantly influenced by the civil law systems mentioned, it ultimately is a hybrid system containing significant elements of Common Law as well, more specifically English law.[527] For this reason, a comparative consideration of the role of ***equity***, in English employment law will not be out of place here.[528] As will also be noted in our chapter on South African employment law,[529] our labour courts often consult contemporary English labour jurisprudence because of its usefulness and persuasive value.[530] It is further to be remembered that the right to fair labour practices is a basic human right protected by s 23(1) of the South African Constitution, and that all South African courts have a constitutional obligation to

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525 The term civil law systems of the world is utilized to refer to those legal systems that have their history and roots in, or that have been heavily influenced by Roman law – the ***ius civile*** – from which the term is derived. Thus the term civil law encompasses virtually all continental European legal systems which have today been codified, as well as the systems of such countries which have either adopted the European civil codes or were heavily influenced thereby in the drafting of their own codes. Cf. **Van Der Bergh *Geleerd recht*** (1980) 48.

526 See Chapters II, III and V.

527 For a useful comparison of Roman Law and Common Law, see **Stein *Roman Law and English Jurisprudence Yesterday and Today*** **Smith and Weisstub *The Western Idea of Law*** (1983) 414-418

528 On equity in English law, see: **Smith & Keenan *English Law*** 10th ed 10-11; **James *Introduction to English Law*** (1989) 354; **Keenan *Principles of Employment Law*** (1979) 81 et seq; **Jones & Goodhart *Specific Performance*** (1986) 135 et seq; **Burrow *Words and Phrases*** (1943) vol. II. (Equity); **Hanbury *Modern Equity*** (1962) 3 et seq; **McGlyne *Unfair Dismissal Cases*** (1979) 183 et seq; **Milsom *Historical Foundations of the Common Law*** (1981) 82 et seq; **Kahn-Freund *Selected Writings*** (1978) 1 et seq; **Montrose *Precedent in English Law and other Essays*** (1968); **Pollock *"The Transformation of Equity"* Essays in Legal History** (1993) 286.

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530 Cf. ***Sidumo v Rustenburg Platinum Mine Ltd*** 2007 28 ILJ 2405, 2429-30; ***SA Maritime Safety Authority v Mc Kenzie*** 2010 31 ILJ 529 (SCA). This matter will be further dealt with in our chapter on South African law.

consider not only international law, such as the law of the ILO,[531] but also to consult foreign law when interpreting the Bill of Rights.[532] No foreign law system has been consulted and applied more than English law in South African labour jurisprudence.

It has to be pointed out however that even a cursory perusal of English common law literature will probably sound a note of caution to any jurist schooled in the civil law tradition.[533] In English law and other common law jurisdictions such as the American, the term *equity* has to be treated with caution and circumspection. It has a variety of fairly technical and compartmentalized special meanings and nuances, in contrast with the civil law tradition.[534] In this work we will resist the temptation of exploring any or all of these meanings in detail. We will treat of the concept of equity here in the general sense in accordance with the meaning that it more or less bears in the civil law tradition. This refers to the meaning more or less corresponding to that of general *fairness* in law or in the application of law.

English Common Law scholars often refer to these narrow and technical meanings of equity as equity in the narrow sense, as opposed to equity in the wide sense.[535] This work is about equity in the recognized wide sense, which is more or less the English equivalent of –but not necessarily co-extensive with - *natural justice*[536] or *morality.*[537] We approach English equity from the perspective

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531 ***South African National Defence Union v Minister of Defense*** 1999 4 SA 483 (CC).

532 See s 39 (1) of the Constitution, Act 108 of 1996. International law *must* be, while foreign law *may* be considered.

533 For a history of equity in English law, see **James *Introduction*** (1976) 23 et seq; **Plucknett *Concise History of the Common Law*** 5th ed 695; **Holdsworth *History of English Law*** 512 et seq; **Fifoot *History and Sources of the Common Law*** 66 et seq.

534 English literature on the subject very often utilize the term *"an equity"* in stead of *"equity"*. First-mentioned may have four different meanings, all depending on the particular context in which it is used. Most commonly it refers to an equitable interest in property in the sense of some right – perhaps interest – in property not recognized or protected by common law. It may also mean a so-called" *mere equity"*, which would be some procedural right – usually also relating to property –for instance, to have a conveyance rectified. References to the so-called *"floating equity"* in the literature are also often encountered. This equity involves the interests of a beneficiary under a will or intestacy in some inheritance. In the fourth and last instance, the term equity may simply be applied to the right to obtain some injunction or other equitable remedy. For a more detailed discussion of these concepts, see **Megarry & Baker *Snell's Principles of Equity*** (1966) 24 et seq.

535 On the various shades of meaning of the term equity in English law, see **Cribbet *Judicial Remedies: Cases and Materials*** (1954) 302

536 This term refers to natural law, rather than the so-called principles of natural justice as applied in procedural or administrative law. The latter is of course a derivate of natural law.

that despite what would appear to be some aberrations in the notion of equity that sometimes infiltrated the jurisprudence, English equity maintained a close connection to principles and notions underlying ethical and conscionable conduct.[538] For our purposes it is important to bear in mind that when the term *"equity"* is used in the texts of modern English statutes, it normally bears the wide and general meaning of *"fair".*[539] This corresponds to the civil law meaning of the term, and it is primarily in this sense that it will be utilized in this work.

Equity by no means represents a novel or even recent phenomenon in English law, although this submission does not imply that English equity has the same antiquity and extensive evolutionary heritage as that of the civil law systems. Etymologically the Court of Chancery or *court of equity* in England derived from the Roman office of the *cancellarius,* who was an usher that served at the bar of a Roman court.[540] Via further developments spearheaded by *Charlemagne* during the Middle Ages, and later by Edward the Confessor, the equity court system eventually established itself firmly in the English legal system.[541] Like in ancient civil law systems, equity proved to be an elusive and arcane, but at the same time versatile and flexible concept.[542]

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537 **Megarry & Baker *Snell's Principles*** (1966) 5. The learned authors sound a note of warning however to the effect that it would be a mistake to suppose that the principles of equity, as applied in the courts are coextensive with the principles of natural justice. Many matters of natural justice are not subject to legal sanction but are left to the dictates of public opinion or to the conscience of each individual. This would include some matters of "honour."
Nevertheless, by far the majority of the principles of natural justice are enforced by the courts and only a small fraction of the enforced rules of equity are equity in the technical sense.
Cf. the dictum of Lord Romilly M. R in ***Cooper v Jarman*** (1886) L.R 3 Eq. 98 at 102 cited by the learned authors: *"The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty."*
Megarry & Baker *Snell's Principles* (1966) 5 define equity as follows: *"Equity is thus a body of rules or principles which form an appendage or gloss to the general rules of law...This new body of rules (or "equity") is therefore distinguishable from the general body of law, not because it seeks to achieve a different end, for both aim at justice, nor because it relates necessarily to a different subject matter, but merely because it appears at a later stage of legal development."*
538 **Spry *The Principles of Equitable Remedies*** (1990) 1
539 Cf. **Megarry & Baker *Snell's Principles*** (1966) 6 where the following authority is referred to: ***Westminister Bank Ltd. V. Edwards*** [1942] AC 529 at 535; ***Re Fitzhardige's Lease*** [1944] 2 All ER 145 at 148 and also *ibid.* [1944] 2 All ER 535 at 539***; R. v. Minister of Housing and Local Government, ex p. Finchley Borough Council*** [1955] 1 WLR 29 at 31; cf 35
540 Cf. **James *Introduction*** (1976) 23-6 (Glover)**; Hanbury *The Principles of Equity*** (1962) 3 et seq.
541 Ibid.
542 **Milsom *Historical Foundations*** (1981) 82

In fourteenth century England there was no legal system in the proper sense of the word. In other words, there was not as yet a system of law in the strict sense in existence defining and delimiting the substantive rights of parties in any considerable sense.[543] Still less was there the equivalent of a Roman doctrine of natural law or natural reason as the *fons et origen* of law. Law was largely a procedural matter, and unlike their civil law counterparts, English lawyers of this age were not dealing with substantive legal or moral principles that had to be applied to the facts of the cases they were handling. The Common Law, or so much of it as could be said to have been in existence, was simply unacquainted with the principles of equity and even with a general and comprehensive system of substantive law. Law in the England of this epoch was by and large a mechanical or procedural phenomenon.[544]

It was not the facts of the case or the law in the form of predetermined legal principles that provided the basis to a solution or judgment, but rather the coincidence of the facts falling within a recognized and remediable category of actionable wrong. A plaintiff who had selected a particular writ for the purpose of bringing an action, might find that once he had made his selection, he might be unsuccessful, not only because of his erroneous selection, but also because the particular kind of wrong done to him had hitherto known no remedy. Needless to say, the denial of justice in such situations was complete.[545] It is unquestionable, that a system of equity, or even equitable considerations in general, had no place in such an underdeveloped legal environment.

See also the remarks of Kearney J in ***Burns Philp Trustee Co Ltd v Viney*** 223-4 as discussed in **Hay *Words and Phrases Legally Defined*** (2005) 252-3.

543 **Milsom *Historical Foundations of the Common Law*** (1981) 84; **Berman *"The origins of Western Legal Science"* Smith and Weisstub** (1983) 399 **Stein *Roman Law*** 414-8 points out that **Bracton's *The Laws and Customs of England*** hailing from the 13th century was the earliest scientific exposition of the English common law, and even so, leaned heavily on the Roman law of the Glossators.

544 **Milsom *Historical Foundations*** (1981) 84. In this respect, there was some similarity between English Law and early Roman Law. However, English Law was not ritualistic by nature. See Chapter II on early Roman Law.

545 Cf. **Heynes *Oliver Freeman: Outlines of Equity*** (1880) 9-11; **James *Introduction to English Law*** (1989) 24; **Hanbury *Modern Equity: The Principles of equity*** (1962) 4

The King's Chancellor eventually introduced a system whereby remedies had in principle to be available and applied in all cases of *moral* or *unconscionable wrong*.[546] This led to the humble beginnings of today's equity jurisprudence.[547]

Heynes[548] points out that at this early stage of the development of a law of equity, the aim was the *temperance* of the *harshness* of the law and the *supplementation* of *defects* therein. This is not dissimilar to the approach of classical Roman law[549] as we noted in a previous chapter.[550]

But there were important differences between English equity and civil law equity. To understand a most significant difference in this regard, one only has to consider the subtle distinctions drawn between the various categories or nuances of (English) equity. Equity in its wide sense is[551] often equated with *natural justice,* which as a whole is not per se directly enforceable at law. English equity, in the sense of *natural justice,* was regarded as a supplementation of an omission of justice in a given case by the Court of Chancery.[552] The result of all this was that English law developed and is still marked by a rigidly distinct dual form of jurisdiction, namely *legal jurisdiction* and *equitable jurisdiction*. But this was a relatively truncated and trimmed form of equity, in comparison to that of the civilian systems.[553]

Milsom[554] provides an explanation of the need for and application of equitable principles which sounds familiar to the student of the civil law tradition: It was generally realized by the late sixteenth century, that any general rule must work

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546 Ibid. Classical Roman law was acquainted with the principle of ***ubi ius ibi remedium***.
547 Ibid.
548 ***Outlines of Equity*** (1980) 14
549 Cf. Ulpian's definition of the Praetorian law in D 1 1 7 1 as the law which the praetor introduced for the purpose of *assisting*, *supplementing* and *correcting* the civil law for the greater public good.
550 Chapter II. **Heynes *Outlines*** (1980) 9-11 quotes from the ***De Augmentis Scientiarum*** 8 35 of Lord Bacon, the great champion of equity in this era: ***"Habeant similiter curiae praetoriae potestatem tam subveniendi contra rigorem legis quam supplendi defectum legis."*** – *"In order that they should have in a manner similar to the praetorian courts, the power of both lending assistance against the harshness of the law, and of supplementing the defects in the law."*
551 Somewhat controversially we would submit.
552 Cf. D 1 1 7 1 above
553 **Heynes** Outlines (1980) 8
554 ***Historical Foundations*** (1981) 8

injustice in particular cases,[555] and therefore that the application of positive law must be subject to some dispensing power[556] in the interests of a higher justice.[557]

But one's understanding of English equity may still remain nebulous if one does not examine the relation between equity and so-called *divine justice* of which it was by some regarded as a mere manifestation in sixteenth century jurisprudence.[558] This was largely due to the influence of Canon law.[559] Divine justice was deemed as revealing and manifesting itself in the human *conscience.*[560] An appeal to the Chancellor was in effect an appeal to this higher justice, especially so in cases where human laws and institutions had failed the petitioner. In medieval times the Chancellor, in granting relief to the poor, the oppressed and the downtrodden, did not (deliberately) act against or simply according to *law*, but according to the dictates of his *conscience*.

Although the Roman jurists had related law to a divine being, such being was initially simply Nature or Providence. Justinian who reigned in post-classical times, was a Christian emperor who dedicated his *Corpus Iuris* to Divine

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555 This was the distinctly Aristotelian equitable paradigm.

556 In our chapter on Roman Dutch law, we noted that **Paul Voet** warned that equity should not be confused with dispensation. Equitable powers belong to the judge, whereas dispensation falls within the domain of the Sovereign or Executive.

557 Cf. the reference to "*greater public good*" in D 1 1 7 1 referred to above.

558 **Vinogradoff *"Reason and Conscience"*** (1928) 190 et seq.

559 Cf. **James *Introduction*** (1989) 28 who points out that before the chancellorship of **Sir Thomas Moore**, the chancellors were usually not only administrative officials, but also ecclesiastics who, in the exercise of their discretion, lay the foundations of equity onto which they built many rules and principles borrowed from Roman and Canon Law.

560 **Milsom *Historical Foundations*** (1981) 89 refers to the famous work of **St. Germain**, ***Doctor and Student*** of the sixteenth century, in which an elaborate explanation is given of this concept of higher justice. He points out that it was the taking of the oath during equity proceedings that bound the conscience of the parties and that constituted a divine test. **Aquinas *Summa Theologica*** (1979) Ia IIa 19 5 had defined *conscience* in the 13th century as the judgment of reason on the morality of a human act. An act was morally good if the will acts in conformity with a person's conscience-judgment. Thus the equity procedure was aimed at intrinsic moral goodness, the very bedrock of equity.

Violating one's conscience constituted the sin of violating faith and reparation of a wrong could be made a condition precedent for mitigation of punishment for sin. Unlike the corporeal body, the conscience was stirred and prompted by spiritual sanction. The Chancellor could in the *forum conscientiae* move a person to change his position without violating or infringing the common law. In this way the common law and equity could exist for centuries side by side.

Providence and even to *Jesus Christ*.[561] However, during the Dark Ages the Corpus Iuris fell into oblivion and its study only revived in the 12th century. **Thomas Aquinas** (1225 - 1274), in his famous ***Summa Theologica***, not only attempted a reconciliation between and synthesis of **Aristotelian** reason (philosophy) and Biblical revelation, but also between Divine law (**Lex Aeterna**) and human or natural reason (***Ius naturale***).[562] **Aquinas** contended that all things are subject to the ***Lex Aeterna***, which he identified with God himself.[563] But man, as a natural creature, in a special way participates in this divine law, which manifests itself through natural reason as the ***Ius Naturale***,[564] **Aquinas** taught.

Aquinas pointed out that *equity* – *epikeia* in Greek - interprets the mind of the lawgiver as to the law's application in a particular case. Laws have to be general in content and ambit. They cannot cover the details of each and every particular case. Lawgivers focus their minds on what ordinarily happens. Therefore, in an extraordinary case, rigid application of the law, which regularly brings about good effects, may result in evil. In such situations it is the duty of the *virtues* of *prudence*, *justice* and *fairness* to apply the true spirit of the law. Such interpretation and application of the law is done by *epikeia* or equity, a *virtue* which forms an integral part of the virtue of justice.[565]

This exposition of the nature of equity by Aquinas was thoroughly Aristotelian in origin. But its real value lies in the fact that it was **Aquinas** who "*Christianized*" it, thus rendering it attractive to the Christian judicial conscience of subsequent ages.

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561 Justinian's Digest text proper is preceded by a preface ***"In Nomini Domini Nostri Jhesu Christi"*** – "*In the name of Jesus Christ our Lord*". He follows this up by drawing attention to the fact that the arduous work had been completed ***".....summa providentia adnuente deo"*** – "*by divine providence and the approval of God*".

562 **Aquinas** devoted ***Questiones*** 90-108 of Iae IIae of the ***Summa*** to this topic.

563 **Summa** Ia IIae q 91 1; **Salmond J *"The Law of Nature"* Law Quarterly Review** (1805) April 121. **James *Introduction*** (1989) 6; **Vinogradoff *"Sources of Law"*** (1928) 467.

564 ***Summa*** Ia IIae q 91 1 and 91 2

565 ***Summa*** Ia IIae q 120

Aquinas taught that human *conscience* is a judgment on moral actions according to the *process of reasoning*.[566] Human *reason* – the thinking mind – is man's only natural guide in moral matters.[567] When the will – per se - acts in accordance with a conscience-judgment, an act is morally good. When the will – per se - acts contrary to conscience, the act is morally evil.[568]

Aquinas[569] distinguished between ***synderesis***[570] and ***conscientia***. To him[571] ***synderesis*** is the intellectual habit, the moral equipment acquired by a person in the process of emerging from infancy to responsible conduct. In other words, ***synderesis*** is the capacity or faculty of distinguishing between right and wrong.[572] It should not be confused with conscience.[573] ***Synderesis*** is a *habit*, conscience is a judgmental *act*; Reason draws upon ***synderesis*** in forming a conscience judgment.[574]

Without exception, the English Chancellor was a *Doctor utriusque Iuris*[575] and thus applied the equitable principles of Roman and (Thomistic) Canon law.[576] This involved the application of *moral, ethical,* and *conscience-values* of *good* and *evil– abstract virtues* - in administering equity to those denied substantive justice by the common law. These values ranked above judicial precedent in the conscience of the Chancellor.[577] Eventually there was a gradual move away from

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566 The idea that reason manifests itself primarily as a process, is thoroughly Aristotelian. See Chapter II.

567 In the ***Summa Theologiae*** 2 2 q 120 1, where **Aquinas** treats of ***Epieikeia***, the equivalent of the Roman ***Aequitas,*** he writes that in certain cases it is *malum* or evil to follow the positive law. in such cases the strict wording of the law have to be ignored and the rationality of justice and common utility have to be adhered to.

568 ***Summa*** Ia IIae q 91 5

569 ibid

570 **Vinogradoff** ***"Reason and Conscience"*** (1928) 196 calls it a curious product of Christian thought and ancient philosophy.

571***Summa*** Ia q 79 12-14

572**Vinogradoff** ***"Reason"*** (1928) 196-7 contends that in substance, **synderesis** comes down to the admission of a power of discerning between good and evil and of inclining towards good.

573 **Aquinas** himself contended that **synderesis** is sometimes confused with conscience, and sometimes even called by the name of conscience – ***Summa*** Ia q 79 13

574 ibid

575 A Doctor of both Laws, i.e. Roman Law and Canon Law.

576 **Stanlis** ***"Edmund Burke and the Natural law"*** **Precedent in English Law and other Essays (Montrose)** (1968) 34 et seq.

577 **Hanbury** ***"Modern Equity"*** (1962) explains as follows:*"From these abstract virtues springs equity: conscience and equity in the medieval period present the appearance of Siamese twins who are well content not to be separated. And, indeed, the moment of separation had not yet come.*

the terminology of *conscience* as the fundamental basis of equity[578] to that of *discretion*.[579] This remains the case to this day,[580] although *conscience* still infuses such discretion.

A discretion is a determinative power conferred by law on a judicial officer.[581] When the legislature itself determines what the outcome of such judicial determination should be, there can be no room for the exercise of a free discretion. Thus, a discretion is no more than a faculty or power to determine an issue within certain parameters. Such discretion has to be exercised *"judiciously,"* in modern parlance.[582] But a judiciously exercised power will invariably be a fairly and conscionably exercised power.[583]

In English jurisprudence, the shift from conscience to discretion was probably brought about by a power struggle between the Chancellor and the common law judges and lawyers concerning the overriding powers of the chancellors to grant *equitable,* or rather *"conscionable"* relief.[584]

It was **St Germain** who first brought about some secularization of the idea of divine justice to English law. Equity is no longer simply the manifestation of the ***Lex Aeterna*** through the human conscience. It begins finding application as a

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578 But it was the need for legal certainty which made a major contribution towards the bringing about of this result. There was first a move from the *personal conscience* of a party to the so-called *civil conscience* of the court. It was the latter that gradually acquired pre-dominance. **Milsom *Historical Foundations*** (1981) 95 contends that *"what mattered now was the civil conscience of the court, which was nothing other than a new system of law; and the conscience of the party slowly passed out of consideration. The dialogue between certainty and justice, law and morals, had been acted out in real life; and the end of it was two systems of certainty, two systems of law."*

579 **James *Introduction*** (1989) 25.

580 Ibid.

581 **Wiechers *Administrative Law*** (1985) 123, where it is stated that *"A discretion that is exercised by an organ is a power to act in a certain way, taking into account the existence and nature of surrounding circumstances"* - It is also referred to (**loc.cit**) as an *option.* On 220 **Wiechers** describes a discretion as a *"legal power" a "choice"* permitted by law, and to be exercised in accordance with law. **De Ville *Judicial Review of Administrative Action*** (2003) 103 also accepts that a discretion involves a choice between two or more alternatives; **Henning *"Diskresie-uitoefening"*** THRHR (1968) 158.

582 **Wiechers *Administrative Law*** (19850 123

583 This issue will be dealt with in more detail in Chapter VII.

584 **Vinogradoff *"Reason and Conscience*** (1928) 195 alludes to a *"crisis", "struggle"* and *"strife"* in the relationship between the Common Law judges and barristers who realized the danger of their position in view of the encroachments of the Chancery.

substantive and self manifesting secular principle of justice.[585] Ironically, during the age when divine equity and the common law were still strictly separated and were anathema to each other as it were, there was little conflict, if any, between the two systems of jurisprudence. However, the secularization of equity brought in its wake the distinct potentiality for conflict between the common law judge, who often had to endure severe criticism based on the limited nature of the strict law that he applied, and the Chancellor. Another source of conflict was the fact that the equitable relief that a party could obtain from the Chancellor was increasingly perceived to be some kind of illegitimate relief available on disguised appeal. It was hard for common law judges who applied what they considered to be substantive rules of (common) law, to find that their judgments were considered "*wrong*," "*inequitable*" or "*unconscionable*" in the courts of equity.[586] Nevertheless, the issue of the nature and role of equity settled more or less in accordance with the following description or definition of the concept by **Lord Cowper**, which has stood the test of time:

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and denude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifty and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."[587]

The issue of the relationship between equity and judicial precedent is an interesting one. In our discussion of Dutch Law[588] we noted that many respected jurists have warned against the hardening of the notion of equity into rigid and inflexible principles enforced by means of a system of judicial precedent or *stare decisis*.

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585 **Milsom *Historical Foundations*** (1981) 89, 91

586 Cf. **Milsom** (1981) 93.

587 ***Dudley (Lord) v Dudley (Lady)*** (1705) Prec. Ch. 241, per Lord Cowper 244; **Burrows *Words & Phrases*** (1943) 216. Cf. the following description of the nature and role of equity handed down in **McLaughlin v O'Brian** [1982] 2 W.L.R. 982, at 997: *'The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no casus omissus. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case.'* See also **Farrar & Dugdale *Introduction*** (1990) 266

588 Chapter IV

A system of judicial precedent in the familiar sense of the word does not normally develop in the courts of equity. However during the course of time some well known and regularly applied maxims do sometimes seem to gain acceptance.[589] These are not independent, isolated or autonomous adages or principles, but are all grounded in the *moral values* deeply embedded in the *conscience* of the equitable institutions, most important of which are *honesty*, *bona fides* and *fairness* in dealings with fellow human beings.[590] We proceed to consider some of these maxims, by way of example.

Some of the most powerful of these equitable maxims were *"he who comes to equity must come with clean hands"* (the well known clean hands doctrine that is often still applied in South African civil courts); *"equity acts in personam"* – equity applies to the person, i.e. *ad hominem*[591] and *"equity assumes the law"*. The meaning of last-mentioned is that equity does not come to defeat the law but, to assist it. Equity should not be viewed as a rival to law but as a gloss or growth appended to it.[592] In this sense equity in Roman law and English law bear great resemblance. Another well known English maxim is *"equity follows the law."*[593] This maxim is often applied to give preference to the person with a *legal* title to property above one who only has an *equitable* title, expressing the notion that, in a sense, equity could be viewed as subordinate to the law.[594] Even in Roman Dutch law equity was often viewed as subsidiary to the strict law.[595]

The traditional expression of equitable principles through the medium of maxims has at times been heavily criticized in England. **Spry**[596] expresses the opinion that the use of maxims could actually be misleading. Maxims do not and cannot decide whether equitable relief should or should not be granted in particular

589 **James *Introduction*** (1989) 25
590 **Milsom *Historical Foundations*** (1981) 93
591 See **Hanbury *Modern Equity*** (1962) 5 for a full appreciation of the real significance of these maxims in English law.
592 **James *Introduction*** (1989) 25 draws attention to the fact that in lectures on equity in English law it is a well known statement that *"equity is a glossy appendix on the common law."*
593 ***Aequitas sequitur legem***
594 **James** (1989) 25; **Smith & Keenan *English Law*** 10th ed 11; **Salmond *Jurisprudence*** (1947) 81
595 See Chapter III.
596 ***The Principles of Equitable Remedies*** (1990) 6

circumstances. It is *equitable discretion* that takes this decision, taking into account all the relevant circumstances of the case. When the role of maxims under these circumstances is closely scrutinized, it would be found that maxims simply explain a decision already taken on the basis of equitable discretion.[597]

On the other hand, it has to be realized that the role of maxims is not entirely insignificant. Maxims generally reflect the ethical and moral quality of a body of principles whose main value lay not so much in the formation of fixed and immutable rules, but rather in the determination of the conscienability or moral quality of the behaviour of the parties.[598] Maxims should not be viewed as imperative traffic signs, but rather as pointers in the right direction.

THE JUDICATURE ACT, 1925

S 44 of the **Supreme Court of Judicature (Consolidation) Act**, 1925[599]

states:

"Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

This is without a doubt a drastic and far-reaching inroad into the traditional domain of the strict law. In fact, it brought about what became known as the fusion of law and equity.[600] The English scholar **Marshall** observes that two schools developed concerning the interpretation of s 44 of the Act.[601] There is the *traditional* view, in terms of which due recognition is given to both law and equity, allowing the two to co-exist in some kind of partnership.[602] In contrast with this, there is the *radical* view, in terms of which *'it is neither serviceable nor*

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597 The learned author for instance explains that the only value of the maxim *"he who seeks equity must do equity"* lies in the fact that it explains that the conditions that an equitable court imposes in granting equitable relief have to be complied with by a plaintiff, and that compliance with those conditions is a necessary requirement for equitable relief.

598 **Spry** *loc. cit.*

599 Which replaces s 25(11) of the **Judicature Act** 1873; **Salmond** ***Jurisprudence*** (1947) 82

600 See the speech of **Lord Denning** in ***Central London Property Trust Limited v High Trees House Limited*** (1946-K.B) [1947] K.B. 130, text reported in **Marshall** ***Nathan's Equity through the Cases*** 4th ed. 8; See also **Salmond** ***Jurisprudence*** (1947) 81

601 **Marshall** ***Nathan's Equity*** 17 4th ed. et seq.

602 **Marshall** 4th ed. 18

rational to ascribe each component to its historical antecedent, and to label it as a matter of law or of equity.'[603] He observes that the radical approach leads to fallacious arguments and inferences, and submits that the traditional view is to be preferred, and that in every case the solution to which law and equity have a contribution to make, the precise scope of the legal and equitable rules must first be determined, before the *'conflict and variance'* provision[604] is applied. The learned author seems to enjoy the support of judicial precedent as well as some reputable scholars.[605]

But, it would seem that although the more conservative courts were not reticent to give effect to s 44 in regard to certain classes of contract where equity had traditionally been applied in addition to strict law, labour contracts and the labour relationship were exceptions – at least in important respects. This is well illustrated by the **Britain**-judgment.[606] The Court of Appeal pointed out that it was well known that where a contract for the sale of land that was void or defective had nevertheless been partly performed (such as *in casu*), courts of equity nevertheless in certain circumstances recognised and enforced it. This was known as *'the doctrine of part performance.'* However, the court pointed out that such contracts involved only the sale of land, and that contracts of service never fell into this category. As the doctrine had *before* adoption of the Judicature Act not been extended to any other form of contract, there was no need to do so now.[607] The court emphasised that the Judicature Act conferred no new rights, but only confirmed rights which previously were to be found in either the courts of equity or of law.[608] Needless to say, this dictum virtually excluded the

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603 The reference here is to counsel's argument in ***Britain v Rossiter*** (1883) 11 Q.B.D 123.

604 Contained in s 44 of the Act.

605 He cites a lecture that **Maitland** had held in 1906, **Holdsworth**, writing in 1935, and **Lord Evershed**, writing in 1948. Judicial precedent cited by these authors are for instance ***Lowe v Dixon*** (1885) 16 Q.B.D.455; ***Walsh v Lonsdale*** (1882) 21 Ch.D 9, at 5-6; ***Berry v Berry*** [1929] 2 K.B.316.

606 Supra. Here the Plaintiff agreed to enter the service of the Defendant as a clerk and accountant for a period of one year. He remained in Defendant's service for some months and was then dismissed without notice. He brought an action for wrongful dismissal and defendant contended that the contract was one not to be performed within a period of one year, according to s 4 of the Statute of Frauds. That section required a contract of this nature to be in some form of writing.

607 **Marshall *Nathan's Equity*** 3-4

608 Ibid; On the modern interaction between law and equity, see **Salmond *Jurisprudence*** (1947) 82-3. See also the judgment of **Lord Greene** in ***Re Diplock, Diplock v Wintle*** [1948] Ch 465 at 481; [1948] ALL ER

employment contract and the employment relationship entirely from the realm of equity.

Before the introduction of equity into employment law by the English Industrial Relations Act of 1971, equity was traditionally confined to a few limited areas of English law, noteworthy of which were trust law and property law.[609] No significant role was played by the equitable principles alluded to above within the realm of employment law, or, as it was previously known, the law of master and servant.

A very interesting aspect of equity jurisprudence is the fact that powerful voices have recently gone up in English literature emphasizing the significant difference between common law judges and equity judges as far as equity experience and expertise are concerned. **Spry**[610] points out that many judges with extensive experience in equity have acquired not merely an exact knowledge of particular rules and doctrines, like their common law counterparts, but have also developed what may be called a general *intuition* as to the nature and application of equitable principles. A great deal of disfavour has been done to the cause of equity, according to **Spry,**[611] by the introduction of the Judicature Acts,[612] which merged the courts of common law with those of equity.[613] Many principles of equity have been passed over in silence or have been hopelessly confused with common law principles by some of the inexperienced common law judges.

318, at 326 CA: *"Nevertheless, if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that, because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time."* See also ***Halsbury's Laws of England*** (2003) vol 16(2) 154.

609 **James *Introduction*** (1989) 25; **Milsom *Historical Foundations*** (1981) 86 et seq. See also the following English cases reported *passim* in **Marshall *Nathan's Equity through the Cases***: ***Walsh v Lonsdale*** (1882 CA) 21 Ch.D. 9 (lease of land); ***Central London Property Trust Limited v High Trees House Limited*** (1946 K.B.) [1947] K.B 130 (lease of property); ***Winter Garden Theatre (London) Limited v Millennium Productions Limited*** (1947 – H.L.) [1948] AC 173 (revocation of license to land).

610 ***The Principles of Equitable Remedies*** (1990) 2

611 Loc.cit

612 1873-1875

613 The learned author regards one consequence of the merging of the courts by the Judicature Act as regrettable, and that is that judges are now called upon to decide issues of equity - judges who are not as conversant with the material principles as those judges who formerly dealt exclusively with Chancery practice. Frequently questions of equity arise incidentally before these judges without *equity* experience during the course of proceedings. It does not surprise that many equitable principles have been misapplied or passed over.

Furthermore, an unhealthy *scepticism* – something that we referred to already in our chapter on Roman Law - has also taken root amongst some members of the common law judiciary in respect of equity, as opposed to law.[614]

Of great concern is the fact that, while equity lawyers express themselves in terms of general discretionary considerations, common lawyers stubbornly adhere to terms with specific and inflexible content and limitation.[615]

Concern has been expressed about the fact that English equity has today lost its versatility, elasticity and adaptability as it has hardened into a fully developed but extremely limited system of judicial precedent.[616]

5.2. ENGLISH EMPLOYMENT LAW

Apart form the common law, English employment law is contained in a number of statutes which could be viewed as more or less the equivalent of the major South African employment statutes, namely the Constitution, 1996, the Labour Relations Act (LRA), 1995, the Basic Conditions of Employment Act (BCEA), 1997 and the Employment Equity Act (EEA), 1998. These statutes are the Employment Protection (Consolidation) Act, 1978 (EPCA), replaced by the current Employment Rights Act, 1996 (ERA), The Sex Discrimination Act 1986 (SDA), the Race Relations Act, 1976 (RRA), the Health and Safety at Work Act, 1974 (HASAWA), and the Employment Act, 1990 (EA).[617] A discussion of the details of these statutes fall outside the ambit of this work, for the purposes of which it will be accepted that these statutes provide comprehensive employment security, and perhaps employment fairness. Suffice to state here that none of these statutes contain any equivalent to s 23(1) of the South African Constitution, which guarantees the right to fair labour practices. In fact no general right to fair

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614 Cf. Chapt. II. The age old struggle between adherents and opponents of equity ever since the time of the Romans, and even in modern South Africa, has been touched upon in Chapter II. **Spry *The Principles*** (1990) 23.

615 The learned author provides numerous examples of how judges trained in the common law rather than the equitable tradition may misunderstand the nature of equitable discretions and harden these into inflexible rules-op.cit. 15 et seq.

616 **Smith & Keenan *English Law*** 10th ed. 11

617 **Keenan *Smith and Keenan's English Law*** 10th ed. 342. **McGlyne *Unfair Dismissal Cases*** 1979

labour practices such as we find in the South African Constitution or the LRA is to be found in any of these statutes either. Only the concept of *fair* or *unfair dismissal* is found, virtually exclusively in the ERA.[618]

There is no area of employment law where the issue of fairness is as controversial as in English dismissal law.[619] For this reason we will consider here primarily that area of the law. We specifically focus on the role of fairness in the common law of dismissal, and the changes and developments brought about by legislation. Thereafter we consider such legislation.

5.3. EMPLOYMENT AT WILL VERSUS FAIR DISMISSAL:

THE ADDIS-PRINCIPLE

The *locus classicus* on the English common law relating to dismissal – as yet unaffected by statutory innovation – used to be the controversial judgment[620] of the House of Lords in ***Addis v Gramophone Co Ltd***, decided in 1909.[621] Addis was wrongfully, abruptly and ignominiously dismissed by Gramophone as manager of its business in Calcutta, and sued his employer for wrongful dismissal. In the trial court he was awarded an amount of damages exceeding his salary for the notice period. The House of Lords eventually overruled the trial court and held that an employee cannot recover damages for the *manner* in which a wrongful dismissal takes place, for injured feelings, or for any loss he may sustain from the fact that his dismissal itself makes it more difficult to obtain fresh employment.[622] In other words, ***Addis*** cemented a restrictive principle into

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618 Employment Rights Act 1996

619 **Anderman** ***The Law of Unfair Dismissal*** (1985) 1 writes that unfair dismissal disputes comprise more than 75% of the workload of **Industrial Tribunals**.

620 See for instance the remarks of **Lord Steyn** in ***Johnson v Unisys*** (804, where the criticism of the "Addis-principle" by **Sir Frederic Pollock,** (1910) 26LQR, 1 is endorsed. In ***Eastwood*** 1008, **Lord Steyn** opined that it would be wrong to assume that ***Addis*** reflected settled law which precluded the development of the common law contended for in the later case of ***Johnson***. In ***Malik*** 9, **Lord Nicholls** noted that the reporting of the facts in ***Addis*** was sketchy, and that it was not even clear what kind of loss Addis had attempted to prove. See also **Malik** 19, where **Lord Steyn** refers to the long debate of ***Malik***, as well as the assumed authority and proposition that it stood for.

621 [1909] AC 488; 1908-10 ALL ER Rep 1; See **Schofield and Burke** ***Cases and Statutes on Labour Law*** (1978) 77.

622 ***Addis*** All ER 1; ***Malik v Bank of Credit and Commerce International SA (in liquidation) – Mahmud v Bank of Credit and Commerce International SA (in liquidation)*** [1997] 3 ALL ER, p.1, at 8; ***Johnson v***

the common law relating to employment, limiting the remedy for breach of the employment contract to loss of income due in respect of the notice period.[623]

In ***Johnson v Unisys***,[624] **Lord Steyn** cites the following exposition from the ***Donovan Report***[625] as reflecting the true state of English employment law at the time that ***Addis*** was decided. This state of the law also dominated English employment law for nearly a century, until its abolition by the Industrial Relations Act, 1971, which was adopted upon the recommendations of the ***Donovan Report***: At common law an employee does have protection against *wrongful* dismissal, but such protection is strictly limited.[626] If the employee is dismissed without due notice he can claim the payment of wages he would have earned during the period of notice.[627] Beyond this, the employee has no claim in common law (or in equity), whatever the hardships he may have suffered due to the act or manner of wrongful dismissal.[628] The term *"wrongful dismissal"* did not relate to the reasons for or the fairness or manner of dismissal, but only to the question whether there was compliance with the contractual notice period.[629] This of course means that the concepts of substantive and procedural unfair dismissal remained entirely foreign to English common law.

Way back in ***Addis***, there were already some reservations expressed about this unhealthy state of the law. **Lord Shaw of Dunfermline** for instance, noted *"with*

Unisys Ltd [2001] 2 ALL ER, at 803; ***Eastwood & Another v Magnox Electric plc – McCabe v Cornwall County Council & Others*** [2004] 3 ALL ER 991, 994; **Keenan** ***Principles of Employment Law*** (1979) 109

623 Cf. ***Johnson*** 810.

624 [2001] 2 ALL ER 803

625 ***Report of the Royal Commission on Trade Unions and Employers Associations*** (1965 – 1968) (Cmnd 3623) (1968)

626 Hence, the "restrictive principle" enunciated in ***Addis***.

627 From this payment would be deducted any amount the employee earned or could have earned, but for his own fault, during the notice period.

628 Cf ***Addis*** 486. **Anderman** ***Unfair Dismissal*** (1985) 3; **Hepple** and **O'Higgins** ***Employment Law*** (1980). The question whether an employee has suffered *'injustice'* as a result of a dismissal is irrelevant to the issue of the lawfulness of such dismissal: ***W Devis & Sons Ltd v Atkins*** [1977] 3 ALL ER (House of Lords) 40, 41C-D; ***Dobie v Burns International Security Services (UK) Ltd*** [1984] 3 ALL ER 333

629 In ***Johnson v Unisys*** 823f-h, **Lord Millett** summarises the common law as follows: *In Ridge v Baldwin...Lord Reid observed that an employer can terminate the contract of employment at any time and for any reason or for none. It follows that the question whether damages are recoverable does not depend on whether the employer had a good reason for dismissing the employee, or had heard him in his defense, or had acted fairly towards him: it depends on whether dismissal was in breach of contract."* It has to be added that such *"breach"* related to the period of notice only.

regret" the absence of a cause of action in English common law based on the manner and circumstances of dismissal.[630]

In ***Johnson v Unisys,*** **Lord Hoffmann**[631] described the following summary of the common law by **McLachlan J** in the Canadian Supreme Court case of ***Wallace v United Grain Growers Ltd***[632] as one of *"great clarity"*: The action for wrongful dismissal is based on an implied obligation in the employment contract to give *reasonable notice* of an intention to terminate the relationship (or pay in lieu thereof), in the absence of just cause for dismissal. *A "wrongful" dismissal is not concerned with the wrongness or rightness of the dismissal itself.* Dismissal is not a wrong at law. On the contrary, the law entitles both employer and employee to terminate the relationship without cause and without the provision of reasons. The *"wrong"* in *"wrongful"* dismissal only means a breach of contract by the employer for failure to give reasonable notice of termination to the employee. The only remedy recognised by common law was an award of damages based on the salary that the employee would have earned during a proper notice period.[633]

At common law there rested no duty on the employer to hear the employee before dismissal. The reason for this principle was not hard to find: if the employer could dismiss without cause, a hearing would hardly serve any purpose. The employer could even act unreasonably or capriciously but the dismissal was nevertheless not wrongful or invalid. Only if the dismissal was in breach of the employment contract in regard to notice, would the employee have the only

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630 ***Addis*** [1908-10] ALL ER 11; **Malik** 10a-b.
631 ***Johnson*** 816
632 (1997) 152 DLR (4th) 1 at 39
633 ***Johnson*** 817. See also ***O'Laoire v Jackel International Ltd (no 2)*** [1991] ICR 718, 730-1; The Canadian Supreme Court case of ***Vorvis v Insurance Corp of British Columbia*** (1989) 58 DLR (4th) 193, 205, and the New Zealand case of ***Vivian v Coca-Cola Export Corp*** [1984] 2 NZLR 289, 292 cited in ***Malik***, 9a-b, as authority where the Addis – principle was adopted. In New Zealand however, there were decisions to the contrary: ***Whelan v Waitaki Meats Ltd*** [1991] 2 NZLR 74; ***Brandt v Nixdorf Computer Ltd*** [1991] 3 NZLR 750.

available remedy, namely a contractual claim for damages relating to his salary for the period of notice.[634]

In ***Johnson***[635] **Lord Millett** pointed out that it was hard to defend the decision of ***Addis*** in modern times. ***Addis*** had however been confirmed even after about half a century by the House of Lords in ***Ridge v Baldwin***[636] and was therefore still valid law in 2001 when ***Johnson*** was decided. However, the rationale for ***Addis*** was a commercial one: In ordinary commercial contracts aimed at profit, such as the contract of employment, non-commercial losses such as mental suffering, anxiety, frustration and disappointment caused by a breach of contract in the form of wrongful dismissal, are not within the contemplation of the contracting parties, and are therefore too remote to be actionable.[637] However, certain contracts were always excluded from this general rule. These were contracts that were not purely commercial but which were aimed at the provision of enjoyment, comfort, peace of mind or other non-pecuniary personal or family benefits. In such cases the injury is within the contemplation of the parties, and is a direct result of the breach itself, and not just of the *manner* of the breach.[638]

The relevance of the so-called Addis-principle, better known as the principle of employment (or dismissal) at will, to our investigation, is quite clear. Dismissal at will is incompatible with and indeed intolerant of equitable considerations. Fairness features nowhere in the dismissal of the employee – not even in the required period of notice, for such notice is not based on the requirements of fairness but on legal principle.

The principle of dismissal at will also has a checkered history in South African labour law, on which it exerted considerable influence. For this reason we give extensive attention to it in Chapter VII of this work.[639]

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634 See ***Johnson*** 817, where this exposition of the law by **Lord Reid** in the case of ***Malloch v Aberdeen Corp*** [1971] 2 ALL ER 1278 at 1282; [1971] 1 WLR 1578, 1581.
635 Supra, 823a-g
636 [1963] 2 ALL ER 66, 71
637 ***Johnson*** 823a-e.
638 ***Jarvis v Swan Tours Ltd*** [1973] 1 ALL ER 71; [1973] QB233; ***Johnson*** 823a-e
639 Chapter VII: SA Law

5.4 THE DONOVAN COMMISSION AND UNFAIR DISMISSAL

The **Addis** decision, despite its controversial role in modern times, settled English common law for nearly a century.[640] However, under pressure of intense criticism from various quarters, the Legislature eventually intervened. The Royal Commission on Trade Unions and Employers Associations (1965–1968), investigated the common law position in regard to fairness and dismissal, and submitted its report with recommendations to Parliament in 1968.[641] As the Commission identified a need for fairness in dismissal law, it recommended that the common law position in regard to dismissal should expeditiously be amended by legislative means.[642] It specifically recommended the adoption of a statute safeguarding against *unfair dismissal*,[643] a hitherto wholly unknown, but presumably much experienced phenomenon in English labour law.[644] **Anderman**[645] points out that since the introduction of the first pieces of unfair dismissal legislation in 1971, the right of employees to file unfair dismissal complaints accounted for about 75% of the workload of employment tribunals. The concept of an *unfair labour practice* as is known in South Africa under the LRA, remains unknown, however[646].

The English parliament gave effect to the recommendations of Donovan in a number of subsequent pieces of legislation, beginning with the Industrial Relations Act of 1971, followed by the Trade Union Labour Relations Act,1974, the Employment Protection Act, 1975, the Employment Protection (Consolidation) Act (EPCA), 1978,[647] and the current Employment Rights Act (ERA), 1996.[648]

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640 ***Eastwood v Magnox*** 995
641 Ibid. ***Johnson v Unisys*** 810
642 Ibid.
643 ***Donovan Report*** par. 1057; ***Eastwood v Magnox*** 995.
644 The primary recommendation of the commission was that the employee's vulnerable position at common law be improved so as to provide job security against employment at will – **Anderman** ***Unfair Dismissal*** (1985) 3
645 **Anderman** (1985) 1.
646 There is no statute in existence in English labour law providing for the determination of unfair labour practices.
647 For a detailed discussion of the provisions of this Act, see **Keenan** ***Smith and Keenan's English Law*** 10th ed. 342 et seq.
648 ***Johnson v Unisys*** 810; ***Halsbury's Laws of England*** par 472 n 6

Unfair dismissal is currently regulated by s 94(1) of the Employment Rights Act, 1996, (ERA) which contains, like s 23(1) of the South African Constitution, the wide and open-ended provision that *an employee has the right not to be unfairly dismissed by his employer.*[649] Like its South African counterpart (the LRA), ERA contains an elaborate statutory scheme providing *inter alia* for an Employment Tribunal[650] and an Employment Appeal Tribunal with exclusive jurisdiction to determine unfair dismissal disputes. An appeal is available to the Court of Appeal, and eventually to the House of Lords.[651]

ERA contains provisions defining both the concept of dismissal[652] as such, as well as the concept of *unfair dismissal.*[653] But before we embark on an investigation of these provisions, we first consider certain judicial developments relating to the common law of *unlawful dismissal*, as opposed to *unfair dismissal* under the provisions of the statutory scheme as explained above. This is essential for a proper understanding of the scope and ambit of the statutory fairness regime.

5.5 JUDICIAL MODERNIZATION OF THE COMMON LAW

A perusal of recent case law on the dual concepts of *"wrongful"* dismissal, and *"unfair"* dismissal, leaves one in no doubt that, since the controversial decision of **Addis** in 1909, judicial creativeness has made giant strides in the development of the common law relating to *"wrongful"* dismissal. So profound and extensive was this development, that in ***Johnson v Unisys***[654] **Lord Hoffmann** alluded to an *"employment revolution"* in this regard. This development was not limited to dismissal law only, but impacted positively on the whole of the employment contract and relationship. In this regard, **Lord Hoffmann** remarked that *"the contribution of the common law to the employment revolution has been by the*

649 ***Eastwood*** 995; ***Johnson*** 819; ***Halsbury's Laws of England*** (2003) par 471
650 Under the repealed Industrial Relations Act, 1971, this institution was named the National Industrial Relations Court.
651 The Employment Tribunals are regarded by the House of Lords as specialist tribunals, as is done by the Constitutional Court in South Africa in regard to the CCMA, the LC and the LAC: ***Johnson*** 803; ***Eastwood*** 997.
652 Employment Rights Act, 1996, s 95(1) (a); ***Halsbury's Laws of England*** (2003) par 477
653 Employment Rights Act 1996, Pt. X (ss. 94-134A); ***Halsbury's Laws*** (2003) par 480 fn 1
654 [2001] 2 ALL ER 816

evolution of implied terms in the contract of employment."[655] The force behind this process was a profound change in social, but especially judicial perception of "*labour*", the employment contract, and most significantly, of the labourer or employee as provider of labour. Perceptions of labour in the labour and economic markets themselves also underwent fundamental change. In ***Johnson,*** [656] **Lord Steyn** points out that ***Addis*** was decided *"in the heyday of a judicial philosophy of market individualism*[657] *in respect of what was then called the law of master and servant."* At the time of ***Addis,*** continues **Lord Steyn** – and correctly so in our submission – the idea that in the eyes of the law the position of a servant was a subordinate one, seemed natural and inevitable.[658] Since then, there has been a fundamental change in legal (including judicial) culture.[659] **Lord Hoffmann,**[660] in general agreement with these sentiments, points to the fact that at common law the contract of employment was regarded by the courts as a mere commercial contract – the same as any other. The parties were free to negotiate their own terms, and freedom of contract meant that the stronger party – usually the employer – was free to impose his terms upon the weaker. However, over the last 30 years or so before ***Johnson*** was decided, the nature of the contract of employment was radically transformed. Judicial perception of it changed irrevocably. As **Lord Hoffmann**[661] states, it has been recognised that a person's employment is usually one of the most important things in his or her life. It provides a livelihood, an occupation, an identity, and self-esteem. To this we would like to add human dignity and self-worth.[662]

To the above, **Lord Millett**[663] adds that the common law at the time of ***Addis*** was premised on *party autonomy*, in terms of which employer and employee were treated as free equals. Each had the right in terms of the nature of the

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655 Ibid.
656 Supra 808
657 laissez-fair
658 ***Johnson*** 808
659 Ibid.
660 ***Johnson*** 815
661 ibid
662 We deal with the relationship between fairness and these concepts in detail in Chapter VII.
663 ***Johnson*** 823

contract itself, to terminate it freely. By 1971 when the Industrial Relations Act was adopted, there was widespread realization in the industry and the judiciary, that the common law was indefensible. The comparison of consequences of dismissal for employer vis-a-vis employee was based on a myth of party equality. Dismissal for an employee is a disaster, as many people – if not most – build their lives around their jobs and plan their future on the expectation of continued *job security*. In ***Wallace v United Grain Growers Ltd***[664] the court expressed the view that contracts of employment are no longer to be regarded as pure commercial contracts between equals, that it is generally recognised today that 'work' is one of the defining features of people's lives, that loss of a job is a traumatic event, and that it can be especially devastating when accompanied by bad faith.[665] In Chapter VII of this work we will note how modern South African employment law departs from the same premiss.

The English judiciary by and large put their money where their mouths are as far as judicial reform in this corner of the law by means of judicial creativity is concerned. The case law reveals that as far as was reasonably possible within the confines and restrictions of statutory law and the traditional boundaries of the law of contract in general, the English judiciary made an invaluable contribution to the development of a relatively modern and enlightened employment law, especially dismissal law. The most obvious route to follow was the introduction of implied terms into the fabric of the employment contract. [666] We now proceed to examine these implied terms more closely.

5.6 THE IMPLIED TERM OF TRUST AND CONFIDENCE

The development of the *implied term of trust and confidence* as a comprehensive and overriding principle of the English common law relating to employment

664 (1997) 152 DLR (4th) 33, per **Iacobucci J**

665 These views were endorsed by **Lord Millett** in ***Johnson*** 825.

666 Referring to the rise of stress-related illnesses in the modern workplace, **Lord Steyn** points out in ***Johnson*** 809E & G, that there is *"a need for implied terms in contracts of employment protecting employees from harsh and unacceptable employment practices...The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past."*

contracts was a relatively recent development.[667] It had its origin in the general and reciprocal duty of cooperation between employer and employee, which has as its primary aim rendering the employment contract workable and viable.[668] Its evolution formed part and parcel of the wider historical development of an English common law directly in need of reform, and of a modernized and enlightened English legal culture, especially so in the area of employment law.[669] The earliest impact was on employees: they had to be loyal to employers and had to refrain from acting against their interests.[670] However, in practice it would seem as though it is employers who were eventually more seriously affected. The notion of a *'master and servant'* relationship became obsolete for instance, so much so that by 1994 the Appeal Court recognised a general duty of care resting on the employer, including a duty *"to care for the physical, financial and even psychological welfare of the employee."*[671] By 1997, when ***Malik*** was decided, [672] the implied principle of trust and confidence in employment relations had been embraced by all courts, including the House of Lords. **Lord Steyn**, in ***Malik***[673]enthusiastically endorsed it, pointing out that it had proved workable in practice, had not been subjected to serious adverse criticism, and had been welcomed in academic writings.

Seemingly under influence of English jurisprudence, the implied contractual term of trust and confidence eventually also thrived in South African labour law. This matter will be considered in more detail in Chapter VII.[674]

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667 See ***Woods v WM Car Services (Peterborough) Ltd*** [1981] ICR 670, where a ground-breaking judgment was delivered by **Brown-Wilkinson J**, later cited with approval in ***Lewis v Motorworld Garages Ltd*** [1986] ICR 157, and ***Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*** [1991] 2 ALL ER, 597 [1991] 1 WLR 589; ***Malik v BCCI*** 15 a-g.

668 **Hepple** ***Employment Law*** (1981) 134-5; ***Malik*** 15d-f.

669 ***Malik*** 15e-j

670 ibid

671 ***Spring v Guardian Assurance plc*** [1994] 3 ALL ER 129, at 161, [1995] 2 AC 296, at 335, cited with approval in ***Malik*** 15e-g. In ***Scally***, supra, it was for instance held that the implied term of trust and confidence meant that employees in a certain category had to be notified by their employers of their entitlement to certain benefits.

672 1997, see ALL ER [1997} 3, 16a-d

673 ibid

674 SA Law. See for instance, amongst a plethora of cases, ***Old Mutual Assurance Co Sa Ltd v Gumbi***, 2007 28 ILJ, 1499 (SCA); ***Boxer Superstores Mthatha & Another v Mbenya*** 2007 28 ILJ 2209 (SCA); ***Murray v***

5.7 CONSTRUCTIVE DISMISSAL

The Industrial Relations Act of 1971, and its successors,[675] suffered from a serious shortcoming as far as protection of employment security is concerned: it failed to make provision for the concept of constructive dismissal. Dismissal was dealt with only as an active termination of employment by the employer. The very idea of a constructive dismissal remained thoroughly alien to English common and statutory law.[676] In cases involving constructive dismissal, employees remained without remedy. The common law rule remained however, that an employee could claim damages from his or her employer for breach of the employment contract.[677] However, an action was available to the employee only if he could prove that the breach was of such a nature that the employer could be regarded as having *repudiated* a material term of the employment contract. This was an onerous burden of proof. Not even proof of unreasonable conduct was sufficient to discharge this onus.[678]

It was the English Employment Tribunal[679] that pioneered a remedy for employees in regard to constructive dismissal, using the *"implied term of trust and confidence"*[680] , also known as the duty of loyalty and faithfulness which an employer owes to his employee.[681] One of the first steps in this direction was taken by declaring *"work to rule"* by an employee as a breach of contract since such action was regarded as frustrating the commercial objective of the

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Minister of Defence 2008 29 ILJ 1369 (SCA); ***SA Maritime Safety Authority v McKenzie*** 2010 31 ILJ 529 (SCA)

675 The EPCA and ERA mentioned above.

676 ***Eastwood v Magnox Electric*** [2004] 3 ALL ER, 995-6

677 Ibid.

678 ***Western Excavating (ECC) Ltd v Sharp*** [1978] 1 ALL ER 713; ***Eastwood*** 995

679 Formerly the Industrial Tribunal

680 In ***Malik*** 14-5, **Lord Steyn** explains that in English law a distinction is drawn between an implied term of fact and one of law. A person relies on an implied term of fact when he or she relies on an individualized term to be implied from the particular provisions of their employment contract considered against its specific contextual setting. In the case of an implied term of law the party relies on a standardized term implied by law, and which is said to be an incident of all contracts of employment. An implied term of contract operates as a default term of such contract and may be excluded by the parties by express agreement: ***Malik***, loc. cit.; See also ***Scally v Southern Health and Social Services Board (British Medical Association, third party)*** [1991] 4 ALL ER 563, 572, [1992] 1 AC 294, 307

681 ***Eastwood*** 995; ***Johnson v Unisys Ltd*** 809-10; **Hepple and O'Higgins *Employment Law*** (1981) 134-5 par 291-2.

employment contract.[682] The next step was the logical one of holding both parties to a duty to conduct themselves in such a way as to allow the employment contract to be performed. The employer was placed under a duty not to conduct himself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Thus a comprehensive, wide-ranging open-ended implied principle of good faith, trust and confidence was embedded in the contract of employment. This was to some extent akin to the *"goede werkgever – goede werknemer"* principle of Dutch employment law.[683]

Breach of the implied term of trust and confidence could manifest itself in a variety of impermissible and unreasonable forms of conduct by the employer, entitling the employee to "resign" in response to such repudiatory behaviour. In this way the concept of *"constructive dismissal"* became fully recognised and entrenched in the English common law of employment.

5.8 DEVELOPMENT OF THE COMMON LAW

As mentioned earlier, the concept of constructive dismissal was for the first time developed by the Employment Tribunal, allowing the employee to file a complaint of *"unfair dismissal."*[684] But the route that the Tribunal followed to arrive at this unfair dismissal remedy, was the development of the common law by means of the evolution of an implied term of trust and confidence. It would not take long for the common law courts to follow suit and to hold that employer conduct amounting to constructive dismissal may, apart from constituting unfair dismissal, also amount to a breach of the contract of employment on the basis that it infringes the trust and confidence relationship, and is thus actionable with a common law claim for damages.

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682 ***Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen*** (No 2) [1972] 2 ALL ER 949; [1972] 2 QB 455; ***Eastwood*** 955.
683 See for instance ***Woods v WM Car Services (Peterborough) Ltd*** [1981] ICR 666; ***Eastwood*** 996. For Dutch law, Chapter IV.
684 **Eastwood** 996

In ***Malik***[685] the employee had worked for a bank (BCCI) for 16 years, when the bank collapsed financially, leading to the loss of his employment through statutory redundancy,[686] as the bank was liquidated.[687] He found out subsequently to his dismissal that he could not find employment due to the fact that BCCI had been conducting dishonest and corrupt business during the period of his employment there, with which he was associated by prospective employers, even though he was unaware of such business at the time. He brought a common law claim for *"stigma damages"* against the liquidators of BCCI, basing such claim on the implied term in his contract of employment that the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.[688] Such a claim would have been inconceivable under ***Addis***, discussed earlier and for this reason the Court of Appeal dismissed ***Malik's*** claim.[689] On further appeal, the House of Lords[690] held that the bank was under an implied obligation not to conduct dishonest and corrupt business and that this obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required for the continuation of the employment relationship.[691] The test whether such conduct impinge on this aspect of the relationship is an objective one, and the fact that the employee was unaware of the dishonest conduct does not preclude a claim for damages.[692] Actual, subjective undermining of the trust and confidence of the employee is not

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685 ***Malik v Bank of Credit and Commerce International SA (in liq.); Mahmud v Bank of Credit and Commerce International SA (in liq.)***[1997] 3 ALL ER 1

686 Retrenchment.

687 Malik's colleague Mahmud was in a similar situation, hence the citation of this case.

688 ***Malik*** 4.

689 The Court of Appeal relied on ***Addis v Gramophone Co Ltd*** (supra), ***Withers v General Theatre Corp Ltd*** [1933] 2 KB 536, [1933] ALL ER, 385, and ***O'Laoire v Jackel International Ltd*** (No. 2) [1991] ICR 718. These authorities were examined by Lord Steyn who found that the ratio decidendi in Addis did not exclude the implied term of trust and confidence, and that Addis was decided when this term had not yet been developed.

690 Per **Lord Nicholls**, at 5

691 Ibid.

692 In ***Malik***, **Lord Steyn** at 16g cited with approval an article by **Brodie** ***"The heart of the matter: mutual trust and confidence"*** (1996) 25 ILJ, 121-2, where the learned author states that in assessing whether there has been a breach, what is significant is the impact of the employer's behaviour on the employee, rather than what the employer intended. Such impact will be assessed objectively.

required, in the sense that the employee must have had knowledge of the subversive conduct.[693] Furthermore, the mere fact that employer conduct impacts not on a particular individual, but on the workforce generally, also does not mean that the implied term of trust and confidence could not have been broken.[694] The fact that the employee(s) affected may not have been aware of the conduct at the time of its commission, is also in itself no bar to a claim for damages.[695]

As far as remedies are concerned, ***Malik*** laid down that an employee still employed at the time of the misconduct, may treat the employer's conduct as a repudiatory breach, cancel the contract, and leave.[696] Such an employee would be entitled to claim the normal damages available in cases of breach of contract. But the fact that an employee only learned of the misconduct after he had left employment does not deny him an ordinary contractual claim for damages. As **Lord Nicholls** puts it,[697] of the many forms which trust-destroying conduct may take, some may have continuing adverse financial effects on an employee even after termination of employment.

The usual damages that an employee may claim where he or she terminates the contract prematurely, i.e before the agreed or legal term, are *"premature termination losses."* These include remuneration and other benefits such as pension rights, commission and even promised benefits that the employee would have received had the contract run its full course.[698]

Occasionally, or exceptionally however, an employee may suffer further or additional damages or *"continuing financial losses."* These losses are all those flowing from the fact that an employee may find him or herself worse off financially than when he or she concluded the contract. An obvious example is

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693 Ibid. Proof of a subjective loss of confidence in the employer is not an essential element of the breach, although the time when the employee learns of the misconduct and his response thereto, may affect his remedy, **Lord Nicholls** held.
694 ***Malik*** 17a-c, where **Lord Steyn** expresses his approval of this finding in the Court of Appeal.
695 ibid
696 ***Malik*** 6b-e
697 ibid
698 ***Malik*** 7a-b. It has to be born in mind that we have it here about damages flowing from the actual misconduct and not from an unrelated source such as redundancy.

where, as a result of the breach of the relationship of trust and confidence, an employee's future employment prospects are prejudicially affected, as was the case in ***Malik***.[699] Damages in respect of this kind of loss may be recovered, provided it was reasonably foreseeable that as a result of the breach, loss of this kind could follow.[700] In ***Malik***, a claim for damages as a result of *injured feelings and anxiety* were specifically mentioned, but not considered or dealt with, because the facts of the case did not require it.[701]

We have already noted that the implied term relating to trust and confidence would be breached in every case where a serious or significant breach of the contractual terms occurs. However, in considering the question whether a breach of this nature has in fact taken place, one always has to bear in mind the significant changes which the nature of the employment relationship has undergone since ***Addis***. ***Malik*** is authority for stating that a breach of this nature will take place whenever the employer conducts himself in a *harsh* and *oppressive* manner, or any other conduct which is *unacceptable* in today's labour market, and which falls short of the demands of the relationship of trust and confidence. The vulnerable position of the employee vis-à-vis the employer is a factor that is always relevant to this question.[702]

Where an employee terminates the relationship as a result of the breach by the employer of the implied term of trust and confidence, the employee involved is regarded as having been constructively dismissed. But this constructive dismissal applies both to common law as an ordinary breach of contract, and to the statutory regime created by ERA, and which relates to *unfair dismissal*. It could be said that the implied contractual term of trust and confidence is some kind of intersection or common ground between unlawful and unfair conduct. It relates to behaviour that constitutes both a breach of contract and constructive or *unfair* dismissal. A breach of trust and confidence would virtually invariably be unfair.

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699 See the speech of **Lord Nicholls** in ***Malik*** 7d-g.
700 Ibid.
701 See 7d
702 ***Malik*** 8b-d. See also the speech of **Lord Steyn** in ***Malik*** 19g-h.

In 2001 the House of Lords was presented with the opportunity of considering the issue of the implied contractual term of trust and confidence and the implications of the ***Addis*** and ***Malik*** decisions again. This happened in ***Johnson v Unisys.***[703] Johnson brought unfair dismissal procedures under the statutory scheme (ERA), and was awarded compensation. He subsequently instituted a common law claim for damages on the basis that the employer had not afforded him a fair opportunity of defending himself at the disciplinary stage, and that the employer had also not complied with its own disciplinary code of procedure. He alleged that this amounted to breach of contract (in common law, as opposed to ERA),[704] and that the fact and manner of his dismissal had caused him to suffer a nervous breakdown and had therefore made it impossible for him to find work. He based his claim on the implied term of trust and confidence which the employer was alleged to have breached by the failure to give him a fair hearing and by breaching its disciplinary procedure. He brought an alternative claim in tort, alleging that the employer had knowledge of his psychological vulnerability, and thus owed him a duty of care in tort because it ought reasonably to have foreseen that the manner of his dismissal was likely to cause the injury that he suffered.[705] Thus the crucial issue was whether the House of Lords would be prepared to extend the operation or reach of the trust and confidence principle in such a way that it made provision for a common law claim for damages for the *unfair manner* of a dismissal, such as a failure to follow an applicable disciplinary code, or not providing a fair hearing to the employee. In short, it was an unprecedented common law claim based on alleged procedural *unfairness.*

Lord Hoffmann, delivering the majority judgment,[706] traced the history of the development of the common law in the decades before ***Johnson***, concluding that an employment revolution had occurred, for which the development of the

703 [2001] 2 ALL ER 801.
704 Employment Rights Act, 1996.
705 ***Johnson v Unisys*** 801d-h.
706 **Lords Cornhill, Birkenhead** and **Millett** concurred with the judgment of **Lord Hoffmann**. **Lord Steyn** delivered a dissenting judgment, but reached the same conclusion.

common law, mainly by means of the introduction of the implied term of trust and confidence, had been responsible.[707]

However, **Lord Hoffmann** found himself faced by two insuperable obstacles to the extension of the common law as requested by the Appellant: In the first place is there the inherent difficulty that in employment contracts, no less than in ordinary contracts, implied terms are always subordinate to, and hence have to yield to express terms of the contract. Only Parliament could change this position. Secondly, judges, in developing the common law, do not have *carte blanche*. Parliamentary policies as reflected by legislation, require a balancing of the interests of employers with the individual dignity and worth of the employee as well as general economic interests. Subject to the issue of human rights, which fall within the enforcement parameters of the courts of law, the point at which the balance has to be struck is a matter of *democratic*, i.e parliamentary decision.[708] Expressing a personal willingness and enthusiasm to perform the task of reforming the ***Addis*** restriction, **Lord Hoffman** comments that the fact remains that at common law wrongful dismissal does not consist in the *reasons* for a dismissal or the *manner* thereof, but simply in a failure to give the proper contractual notice. Referring to ***Wallace v United Grain Growers Ltd***[709] **Lord Hoffmann** stressed that it could not be said that judicial creativity could provide a remedy in a case like ***Johnson***. In ***Wallace***, for instance, **McLachlan J**, who delivered a minority judgment, stated that the courts could imply an obligation to exercise the power of dismissal in *good faith*. That did not mean that the employer could *not* dismiss *without cause*. The contract entitled him to do so. But in so doing, he should be honest with the employee and refrain from *untruthful, unfair or insensitive conduct.* He should bear in mind the exceptional vulnerability

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707 ***Johnson*** 815-6. The trust and confidence principle was not the only catalyst for the development of the common law. Statutory and common law often developed hand in hand. So for instance, in ***Goold (WA) (Pearmak) Ltd v McConnell*** [1995] IRLR 516, the Employment Appeal Tribunal used s 3 of ERA as an analogy for holding that it was an implied term of the employment contract that an employer would promptly offer an opportunity to employees to redress grievances.

708 ***Johnson*** 816c-e.

709 (supra), (1997) 152 DLR (4th) 1, at 44-48

of an employee who looses his job, and act accordingly.[710] In cases of wrongful dismissal, the only loss flows from the failure to give proper notice. If wrongful dismissal is therefore the only cause of action underlying a claim, nothing can be recovered for mental stress or damage to reputation.[711] Pointing out that the implied term of trust and confidence could not be pressed as far as the term relied upon by **McLachlan** J in ***Wallace,*** which was really an implied term that the power of dismissal would be exercised *fairly and in good faith,* the learned judge declines to follow this route: Such a step is not merely an incremental step from the implied duty of trust and confidence as approved in ***Malik***, but is rather of such an overly intrusive nature, inconsistent with the established principles of employment law, that it calls for legislative intervention.[712]

Parliament had already adopted a statutory scheme under ERA, which provides remedies for both substantively and procedurally unfair dismissal.[713] The remedy opted for by Parliament was not to build on the common law by creating a statutory implied term that the power of dismissal should be exercised *fairly and in good faith*. Parliament established an entirely new system outside the jurisdiction of the ordinary courts, and administered by statutory employment tribunals. These statutory innovations were not intended to qualify the employer's power to dismiss *without cause* by giving notice, or to create contractual duties which were independently actionable.[714]

Thus the majority in ***Johnson*** were not prepared to develop the common law of employment to the extent that a duty to act *fairly* and a *duty of care* could be regarded as an implied term of every employment contract.[715] However, **Lord Steyn** disagreed with this approach.[716] Citing respected academic authority[717], inter alia, he pointed out that the statutory scheme with its low and artificial

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710 ***Johnson*** 817e-g.
711 Ibid.
712 Ibid.
713 s 94(1) of the Employment Rights Act, 1996.
714 ***Johnson*** 822f-g.
715 See also the judgment of **Lord Millett** on 826e.
716 See ***Johnson*** 811 *passim*.
717 **Collins *Justice in Dismissal: The Law of Termination of Employment*** (1992) 218-223.

limits of compensation had failed to meet corrective justice in response to the changed circumstances following ***Addis***. Contractually, **Lord Steyn** concluded, ***Johnson*** had a reasonable and enforceable cause of action,[718] based on a breach of the implied term of trust and confidence by the employer in regard to the procedural fairness and manner of dismissal.[719]

In ***Eastwood***[720] the question whether the implied term of trust and confidence, which was by now regarded as a settled principle of the developed common law, could be seen as compatible with the statutory scheme introduced by ERA, came up for decision again by the House of Lords. The employees involved brought a common law claim for damages against the employer, alleging that they had suffered personal injuries in the form of psychiatric illnesses caused by a deliberate course of conduct by management, using the machinery of the disciplinary process. ***Johnson***[721] was distinguished on the basis that ***Johnson*** had sought to rely on a breach of the implied term of trust and confidence, not as a foundation for a statutory claim for unfair dismissal or as a foundation for a claim for damages unrelated to dismissal,[722] but as foundation for a contractual claim at common law for unfair dismissal.[723] The House of Lords held that this development of the common law, however inherently desirable it might be, faces one overwhelming difficulty: Further development of the common law along the lines of a requirement of (substantive and procedural) fairness of dismissal cannot exist in harmony with and is incompatible with the statutory code[724] regulating unfair dismissal. A common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be much more than a major development of the common law.[725] In the legislative scheme[726]

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718 However, he agreed that on the facts of the case, particularly in regard to proof of causation, the employee's appeal had to be dismissed.
719 ***Johnson*** 814a-g.
720 ***Eastwood and Another v Magnox Electric plc; McCabe v Cornwall County Council and Others*** [2004] 3 ALL ER , 991
721 ***Johnson v Unisys*** (supra)
722 i.e. as a separate cause of action.
723 ***Eastwood*** 996f.
724 ERA
725 **Lord Nicholls**, in ***Eastwood*** 997d-g.
726 ERA

Parliament fixed a fine balance between fairness to the employee and the requirements of the economy. This balance should not be overturned by introducing an additional common law remedy of unfair dismissal.[727] Exceptionally, an employee may have a common law claim for unfair treatment prior to his dismissal, for instance where such treatment forms part of a suspension. In such cases however, the claim is based on a separate cause of action antecedent to dismissal. Such claim may be enforced by the Employment Tribunal in terms of the statutory scheme.[728] As had happened in ***Johnson***,[729] **Lord Steyn** delivered a dissenting judgment, holding that the majority had proceeded in Johnson on a fundamentally wrong assumption. He stated that the statutory dismissal scheme is less comprehensive than it was thought to be. He pointed out that the symmetry between the statutory regime and the proposed common law development visualized by the majority probably did not exist, and that the core reasoning of the majority in Johnson was therefore flawed.[730] Employment legislation normally only acts as a *"floor of rights,"* so that courts of law should in appropriate cases use the enactment of protective legislation as a basis for extending, rather than limiting recognition of the legitimate common law interests of the employee.[731] In the absence of proof that the statutory regime rendered the proposed development of the common law *"unworkable"*, **Lord Steyn** was prepared to extend the implied term of trust and confidence to the point where it included the requirement of fair dismissal.[732]

5.9 FAIRNESS AND THE IMPLIED TERM OF TRUST AND CONFIDENCE

The question arises as to what exactly the relationship between the implied term of trust and confidence on the one hand, and *fairness* is on the other. We have already noted that the House of Lords, in ***Johnson*** and ***Eastwood,*** declined to extend the implied term to the common law of dismissal, in that it regarded the

727 At 997h.
728 Ibid.
729 supra
730 See ***Eastwood*** 1006a-b.
731 **Lord Steyn** at 1006e-g cites ***Deakin and Morris: Labour Law*** 419 par.5.3 as authority.
732 Ibid.

statutory regime as a separate and self-sufficient scheme of fairness. However, we submit that the implied term should apply comprehensively to all areas of the employment relationship, and that its reach be limited only by statute or express contrary provisions in the contract employment.

It would seem as though the House of Lords virtually equates the concept of fairness with the trust and confidence principle in employment relations, sometimes explicitly so, sometimes impliedly and indirectly. Having the implied term in mind, **Lord Nicholls** referred in ***Malik***[733] to *"harsh and oppressive behaviour or ...any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."*[734] In the same case **Lord Steyn** finds the implied term to be incompatible with *"dishonest and corrupt business"* and *"harsh and unacceptable employment practices."*[735] The implied term has also been seen as imposing an obligation of *"good faith and fair dealing."*[736] However, in ***Unisys*** **Lord Hoffmann** was not prepared to equate the implied term of trust and confidence with an implied term of *fairness* as such. Thus he remarked that the term seemed not altogether appropriate for use in connection with the way that the employment relationship is terminated. In his view, a separate implied term, that the power of dismissal will be exercised *"fairly and in good faith"*, was a more elegant solution.[737] He confirmed however, that such implied term did not exist in common law.

The conclusion on this aspect of fairness in English common law is that the implied term of trust and confidence is a comprehensive term aimed at the maintenance of a continuing employment relationship between the parties to the employment relationship, based on mutual respect, trust confidence, good faith and *fair dealing* during the course of such relationship. However, *unfair dismissal*, from both a substantive and procedural point of view, is excluded from the ambit

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733 8c-d

734 In ***Johnson*** 808b, **Lord Steyn** also mentions the *"harsh and humiliating"* manner of dismissal.

735 809e

736 **Lord Steyn** stated in ***Johnson*** 813: *"The implied obligation aims to ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship."*

737 ***Johnson*** 818c-d.

of the implied term. All aspects relating to the *fairness* of dismissal fall within the exclusive domain of the statutory fairness regime established by Parliament.[738] The courts regard the development of the common law so as to include the requirement of *fair dismissal* as a matter best left for legislative (representative) reform.[739]

Recent developments in English law relating to the implied term of trust and confidence are of significance to similar or at least comparable developments in contemporary South African employment law. The English case law dealt with above[740] had great persuasive influence in the development of the recognition of an implied term of trust and confidence in South Africa. South African developments in regard to an implied term of fairness culminated in the SCA case of ***S A Maritime Safety Authority v McKenzie***[741] where the majority approach in ***Eastwood*** eventually triumphed. To this aspect we will return at a later stage[742] in more detail. We first consider the English statutory scheme relating to unfair dismissal.

5.10 UNFAIR DISMISSAL

The issue of the fairness of dismissal is currently regulated by the Employment Rights Act, 1996.[743] The Employment Tribunal is the primary institution that decides whether a dismissal is fair or unfair.[744] In determining such issue, the employer has to show; 1 the reason for dismissal. In the event of there being more than one reason, then the principal reason for dismissal.[745] 2 The employer has to show that such reason relates to the *capability* or *qualifications* of the employee,[746] or to his *conduct*[747] or redundancy,[748] or to a contravention of a

738 ERA
739 **Lord Steyn** dissenting in ***Eastwood***, supra
740 Especially ***Malik, Johnson*** and ***Eastwood***
741 (2010) 31 ILJ 529
742 In Chapter VII: S A Law.
743 Part X, ss. 134A-194 (as amended).
744 ***Halsbury's Laws of England*** (2005) vol. 16(1B) 81 par. 630.
745 ERA, s 98(1) (a).
746 ERA, s 98(2) (a); ***Halsbury*** 97 par 640
747 ERA, s 98(2)(b)
748 ERA, s 98(2)©

statutory restriction on his or her employment, by either the employer or the employee.[749] Apart from the aforesaid reasons, the employer may also show *some other substantial reason* of such a kind as to justify the dismissal of an employee holding the position which the employee held.[750]

Where the employer has satisfied the above requirements, the determination of the question whether the dismissal is fair or unfair, having regard to the reasons given by the employer, depends on whether, in the circumstances,[751] *the employer acted reasonably* in treating it as a sufficient reason for dismissing the employee. This issue has to be determined in accordance with *equity* and the *substantial merits of the case.*[752]

These provisions of ERA apply to both substantive and procedural fairness, and the test is that of a *"range"* or *"band of reasonable responses."*[753] It has to be noted, that the ultimate test is not that of *fairness* as such – including fairness to both employer and employee – but rather the *reasonableness* or *unreasonableness* of the act of the employer in treating a reason as a *sufficient* reason for dismissal of the employee. A sufficient reason for dismissing an employee would be one of the reasons enumerated above, or some other substantial reason.[754] *Fairness* and the *substantial merits* of the case serve to determine the *reasonableness* of the employer's conduct, and not vice versa. If the dismissal falls within the range of reasonable responses, the dismissal is *fair*; if outside, the dismissal is *unfair.*[755] There is therefore no criterion of fairness applied directly to the dismissal.

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749 ERA, s 98(2) (d).
750 ERA, s 98 (1) (b).
751 Including the size and administrative resources of the employer's undertaking.
752 ERA s 98 (4), (6).
753 ***Whitbread plc (t/a Whitbread Medway Inns)*** [2001] EWCA Civ. 268, [2001] ICR 699; ***Halsbury,*** 98, par.640, n. 18. In ***Rolls Royce Ltd v Walpole*** {1980} IRLR 343 EAT, the EAT stated: *"In a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee. Frequently there is a range of responses....on the part of the employer, from and including summary dismissal downwards to a mere informal warning, which can be said to be reasonable"*
754 In other words, a reason falling within the parameters of ERA.
755 See the following dictum of **Lord Denning** in ***British Leyland (UK) Ltd v Swift*** [1981] IRLR 91: *"There is a band of reasonableness, within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him*

In ***Post Office v Foley***[756] the Court of Appeal reaffirmed this test, emphasizing that the test is not marred by *"perversity"* or unhelpfulness by virtue of the fact that extremes may be involved in *"the range of reasonableness"*, and that dismissal is the ultimate sanction. It also reaffirmed the correctness of the approach that freedom on the part of the Employment Tribunal to substitute its own judgment for that of the employer would be an impermissible departure from the established test.[757]

The net result of ERA and the test for fairness sanctioned by it, is that unfair dismissal primarily means dismissal for an *inadmissible reason.*[758] It is not the *end result* and its effect or impact on the employee that determines the fairness of a dismissal, but simply whether the employer acted reasonably in the circumstances.[759]

Only facts known to the employer, or facts that the employer could have reasonably expected to have known at the time of dismissal are relevant.[760]

Where more than one employee were thought to have been involved in dishonesty, a reasonable suspicion was held to be sufficient a ground for dismissal.[761]

In South African employment law, literature and jurisprudence, this approach of English statutory law has become known as the *reasonable employer test*. It

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on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him." **Anderman *Unfair Dismissal*** (1985) 3.

756 ***Post Office v Foley, HSBC Bank plc(formerly Midland Bank plc) v Madden*** [2001] 1 ALL ER 550, [2000] ICR 1283, CA

757 ***Halsbury*** 101 par 642, n.8. Prior to ***Post Office***, there was a fair amount of dissent as to the appropriateness of the range of reasonableness test, which was first embraced in ***Iceland Frozen Foods Ltd v Jones***[1983] ICR 17, 24-5, [1982] IRLR439, at 442.

758 **James *Introduction*** (1989) 354

759 **Mc Glyne *Unfair Dismissal Cases*** (1979) 183; ***W Devis & Sons Ltd v Atkins*** [1977] AC 931; [1977] ILR 662, HL; **Anderman *Unfair Dismissal*** (1985) 110.

760 **Mc Glyne *Unfair Dismissal Cases*** (1979) 183. It is to be noted however, that at common law, subsequently discovered facts may justify a dismissal: ***Cyril Leonard & Co. v Simo Securities Trust, Ltd*** [1971] 3 ALL ER 1313; **Mc Glyne *Unfair Dismissal Cases*** (1979) 184. ***W Devis & Sons Ltd v Atkins*** *{1977} AC 931; [1977] ILR 662, HL*; **Anderman Unfair Dismissal** (1985) 111.

761 This approach has led to the so-called *"reasonable suspicion test"* It was confirmed as correct by the **Court of Appeal** in ***Monie v Coral Racing Ltd*** [1981] ILR 109; [1980] IRLR 464, CA; **Anderman *Unfair Dismissal*** (1985) 99.

would seem as though the attitude of South African jurists to this test was for some time somewhat ambiguous.[762] While it was popular among some jurists and often applied in unfair dismissal disputes,[763] it gradually fell into disrepute, and was finally abolished by the Constitutional Court in ***Sidumo***. The reason for this abolition is quite obvious: the *"reasonable employer test"* approached the resolution of an unfair dismissal dispute from the perspective of the employer. The English Employment Tribunal has to defer to the perspective of the employer. ***Sidumo*** sounded the death-knell to this approach,[764] holding that *fairness* demands that the CCMA and the Labour courts do not defer to either employer or employee, but bring their independent judgment to bear on the fairness as such, of a dismissal.

This does not mean however, that since ***Sidumo*** South African labour courts have turned their backs to sound and persuasive principles of English law. This is evidenced by the fact that the *"range of reasonableness"* test was retained by ***Sidumo***.[765] There is this difference however, that in South African employment law such range applies to the decisions and awards of the CCMA and labour courts, and not to decisions of the employer as such. Employers have to dismiss

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762 For a detailed discussion of the reasonable employer test and the various approaches that had been adopted to it, see **Van Niekerk A *"Determining the existence of misconduct: The reasonable employer and other tests revisited"* Contemporary Labour Law** 1994 3 no.7 63 et seq.

763 See **Myburgh and Van Niekerk *"Dismissal as a Penalty for Misconduct: The Reasonable Employer and other Approaches"*** 2000 21 ILJ 2145 for a review of the literature and jurisprudence. The last reported case before the CC decided ***Sidumo*** where the reasonable employer test was still applied, was the SCA case of ***Rustenburg***, which was overruled by the CC. The SCA held in ***Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*** 2006 27 ILJ 2076, 2093, par. 40 that it is not the CCMA commissioner that is vested with the discretion to dismiss, but the employer, to whom the commissioner has to defer. The SCA cited inter alia the LAC in ***Nampak Corrugated Wadeville*** 1999 20 ILJ 578 par 33, and ***County Fair Foods (Pty) Ltd v CCMA*** 1999 20 ILJ 1701 (LAC), par. 28 as authority; On the various forms of the reasonable employer test, see **Van Niekerk *Determining the Existence of Misconduct*** 1994 3 no 7 63 et seq.

764 In ***Sidumo v Rustenburg Platinum Mines Ltd*** 2007 28 ILJ 2405 2429 par. 68, the CC expressed regret that the LAC had adopted the reasonable employer test in the cases of ***Nampak*** and ***County Fair*** on which the SCA had relied. The CC pointed out that this test was based on the (peculiar) wording of the Employment Protection Consolidation Act, 1978 that had been repealed and replaced with the ERA, 1996. The provisions of EPCA were very different from those of the S A LRA in this regard, the CC remarked. The text of ERA as discussed above does not materially differ from that of EPCA, and the criticism of the CC would still hold water, even in relation to ERA. The House of Lords case of ***British Leyland (UK) Ltd v Swift*** [1981] IRLR, 91 did not allow for a proper balancing of the interests of employer and employee, the CC opined.

765 **Myburgh *"Sidumo v Rustplats: How have the Courts dealt with it?"*** 2009 30 ILJ 1

fairly. In assessing the fairness of the dismissal, the CCMA or Labour Court is afforded a range of reasonableness. To this matter we return in Chapter VII.[766]

5.11 CONCLUSION

Since ***Addis***, the development of the English common law of employment has made giant strides through judicial creativity. Most important of these is the introduction of an implied term of trust and confidence into the contract of employment. English jurisprudence interpret this development as establishing a general requirement of *fair dealing* between employer and employee during the entire course of the employment relationship, with the exception of the common law relating to dismissal. In this area, fairness has not materialized as the ultimate regulative principle. The main reason for this is not judicial conservatism as such, but rather the existence of the statutory scheme of unfair dismissal that was introduced by the Legislature,[767] and which is seen by the majority of English judges as an insurmountable obstacle to the development of the common law to the extent that it embraces the concept of unfair dismissal.

It would seem as though the statutory unfair dismissal scheme has brought some relief to those suffering from the harsh effects of the common law of dismissal, which were not tempered by the evolution of the implied contractual term of trust and confidence. However, such scheme still contains unsavory remnants of the very common law mischief that it sought to remedy, namely the asymmetric power balance between employer and employee in the form the *"reasonable employer test"* relating to the fairness of a dismissal. This test has rightly been found unsuitable for South Africa in ***Sidumo***, and has been criticized in England itself. It would come as no surprise if this test is eventually abolished and supplanted by a more comprehensive fairness regime in which *fairness to both parties* triumphs over reasonableness from the perspective of the employer only.[768]

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766 South African Law
767 ERA
768 This was done by the South African LRA, as interpreted in ***Sidumo***. We revert to this issue in Chapter VII.

CHAPTER VI

AMERICAN LAW

6.1 INTRODUCTION

While the principal heirs of the civil law systems of the world are the continental European countries, the main beneficiary of the English common law heritage is the United States of America.[769] Along with the reception of the common law in that country, came a substantial volume of equity jurisprudence.[770]

Some American authors draw a distinction between substantive equity and remedial equity, the latter comprising equitable remedies or relief. Equity has also been viewed from a *moral*, a *positivistic* or an *historical* point of view.[771]

From a *moral* point of view, *equity* may refer to *"the basic principles which measure the virtue of justice."*[772] On the other hand, the positivists have stamped equity as no more than a body of arbitrary rules, based on nothing external to man, but simply on his own moral, legal and political man-made orders.[773] Others, like **Maitland** and **Walsh** preferred the historical approached based on the *grace of the King*[774] *and the rules applied by the courts of equity.*[775]

The more conventional view of equity is that it forms part of the body of norms accepted as law, yet at the same time constituting a distinct section thereof, having as function the tempering of the harsh effects of law in particular

769 **Kahn-Freund *Selected Writings*** (1978) 320, where the differences between "Anglo-American" and "Continental Law" are highlighted.
770 **Parker *Modern Judicial Remedies: Cases and Materials*** (s.a.) 14
771 **Parker *Modern Judicial Remedies*** 12-15.
772 **Brown *"Equity in the Law of the United States"* Equity in the World's Legal Systems** (1973) 174; **Parker** 13
773 **Parker** 13.
774 The King of England
775 **Parker** 13

circumstances.[776] This view is the orthodox one, more or less, consonant with equity as known in the civil law systems of the world, and in English law.[777]

The dual system of separate and dedicated courts with equity and common law jurisdiction respectively still exists in some States. However in the vast majority of States, these systems have to some extent become integrated and synthesized. American courts of law and of equity form an integrated judicial system, applying both law and equity, depending on the nature of the dispute before them.[778] We have a system similar to this in South Africa.[779]

Because of the distinction between *substantive equity* and *remedial equity* or *equitable remedies*, the institutional integration of common law and equity, i.e. the integration of the dual court system, should not be confused with the integration and synthesis of the substantive notions and principles of law and equity.[780] The formal distinction between law and equity remains, and the principles of equity are clearly identified and characterized as such, and are governed by its own unique jurisprudence and not by that of the common law.[781]

In contrast with the civil law position, American equity, derived as it is from the English common law system, shows a heavy inclination to and preference for the sphere of property law and property rights. Ownership, property rights, real rights in property and estates, the rights of landowners and trust law, remain the

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776 Ibid.

777 For an apt description of the role and functions of equity, see **Parker** 14, where he relates the remedial and auxiliary role of equity in the early stages of development of a legal system, later followed by a coalescence and synthesis of strict law and equity.

778 **Kimbrough *Summary of American Law*** (1974) 264 par 10 1

779 See Chapter VII

780 **Parker *Modern Judicial Remedies*** 13 1 cites the following observation by **Newman**, who explains the different courses of development and evolution that common law and civil equity have experienced:
"The gradual coalescence of equity and strict law has been the normal course of evolution throughout most of the world. The evolution of English law has taken a different course. The general or common law has taken on an ambivalent attitude toward equity, to which it is attracted by reason of the inescapable identity of equity with justice, but which it rejects for reasons which are of purely historical origin but which have been reinforced by an elaborate façade of legal rationalization. Of the opposing forces, the resistance to equity has been the stronger, and ***the principles of equity have not been fully received into the main body of Anglo-American law.***" My emphasis.

781 **Parker** 13 1

areas where equity jurisprudence has been most active and creative.[782] This would seem to stem from the general recognition of the fact that legal title and real rights do not necessarily bring about complete and peaceful enjoyment of property rights, and that the latter can best be secured through equitable intervention and remedies, where appropriate.[783] So close is the association between equity and property in the American legal system, that some courts maintained that equity jurisdiction applies only to matters involving property, and that it finds no application in matters merely relating to personal rights.[784] Labour law and relations are of course founded entirely on a theory of personal rights.

However, this jurisprudential view of the role of equity has changed considerably and courts are now more generously inclined to grant equitable relief in matters of all kind, including those involving personal rights only. Personal rights, and even personal interests, such as privacy, health, physical comfort, reputation, civil liberties etc, which often escape the full grasp or reach of the common law, can often be more fully and effectively protected by equitable relief and remedies.[785]

Equitable principles have assumed the role of *"auxiliary law"*, to use a popular American legal expression.[786] This role was brought about by the very same factors that necessitated its introduction in all systems of law earlier discussed in this work, namely *rigidity* of the strict law, the need for *flexibility*, the need for *supplementation* (hence the expression *"auxiliary law")* and above all, the need for real and *substantive remedies and relief where the common law fails in individual cases*. In this sense, American equity[787] generally has the same nature and characteristics as Roman and civil law equity.

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782 ***Kimbrough Summary of American*** Law (1974) 264 par 10 2
783 Ibid.
784 **Kimbrough *Summary*** (1974) 264 ibid. points out that the connection between equity and property is so strong in these courts, that they have found ways of connecting any equitable relief granted by them to some property right.
785 Ibid.
786 **Kimbrough *Summary*** (1974) 268 par 10 5
787 The term American equity is used only for the sake of clarity and for emphatic purposes. In reality equity is a universal phenomenon.

The principles of equity are successfully applied in American law as part of its auxiliary role of underpinning and upholding of *moral values* and *ethical conduct* in legal intercourse and dealings. Equity serves as a potent weapon against dishonesty, fraud, misrepresentation, misapprehension, concealment, conceit, the adverse effects of genuine mistake and suppression of the truth, unjustified enrichment and the prevention of irreparable harm etc.[788]

American law does not recognize and is not compatible with a system of *"equitable judicial precedent."* In fact, strictly speaking, none of the legal systems earlier considered in this work applies any system of *equitable precedent*, at least not in the sense that the principle of *stare decisis* is applied in regard to strict law. Binding precedent is in a sense inherently incompatible with the notion of a flexible, supple, adaptive and pervasive notion of equity.[789]

However, as in the English common law, there is indeed a tendency in American legal practice to apply equity along the line of *established principles*, which should by no means be confused with judicial precedent. They are mostly expressed in the form of recognized maxims and adages which serve as convenient expressions of the particular principle of equity that would best afford relief to a party or that would most readily lead to an accepted form of relief to one of the parties tied up in an otherwise inextricably complicated legal situation where established legal rules fail or are found to be deficient.[790] It has to be kept in mind that the primary purpose of equity is not the creation or protection of substantive legal rights but rather the provision of *equitable relief*. In our consideration of the English common law above, we identified some of these maxims. The following are examples of maxims most often used in American courts when applying equity: 1 *Equity acts in personam and not in rem;*[791] *2*

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788 **Cf. Kimbrough** (1974) 269 par 10 4

789 However, see the criticism of **Spry *The Principles of Equitable Remedies*** (1990) discussed in 5.2 above.

790 **Kimbrough *Summary*** (1974) 269 par 10 5

791 The meaning of this maxim is that equitable relief is intended to affect or apply personally, i.e in respect of the actions of a particular individual or individuals, and not as against the general public. In this way, the conduct or actions of a particular party or parties are regulated.

Equity follows the law;[792] *3 Equity is equality and equality is equity;* [793] *4 Equity regards as done that which ought to be done;*[794] *5 Equity has regard to substance and intent rather than form;*[795] *6 Equity aids the vigilant and diligent;*[796] *7 He who seeks equity must do equity;*[797] *8 He who comes to equity must come with clean hands;*[798] *8 He who is prior in equity is prior in right,*[799] *and 9 Where equities are equal, the law must prevail.*

Maxims may indeed be useful indicators of the way to equity. However, a word of warning has been sounded concerning its overuse and rigidity of application.[800] **Spry**, an American authority on the use of maxims and equitable law, has warned that over-emphasis of the usefulness of maxims may eventually tend to elevate maxims to the level of judicial precedent.[801] The main function of equity remains the provision of justice and fairness necessitated by the unavailability of an *adequate remedy* at law.[802] A legal system in which equity has fully integrated

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792 The meaning of this maxim has been touched on in the footnote above. It implies that equitable principles and relief may apply in all cases susceptible to legal principle, but furthermore apply in a way analogous to legal principle. It supplements, corrects and fulfills the law, but does not abrogate or nullify the law, as explained above.

793 There is a centuries old association between equity and equality, as is observed in the etymological derivation of the word *aequitas*. The association with *evenness, balance, equal before the law* etc. is remarkable. For this reason there is always some element of equity in equality, and of equality in equity.
In legal practice this maxim is often applied in situations where the only equitable solution appears to be that people should for purposes of decision of the case be treated equally, such as cases involving joint liability, joint ownership, division of estate etc.

794 This maxim finds application in cases where agreement demands that a particular act should be performed by an individual, and where unfairness would result from a failure to perform such agreed act.

795 In contrast to the strict law which requires certain forms, procedures and formalities for the validity of some legal acts, and which regard acts lacking such form, procedure or formalities as void or voidable, equity considers the substance of an act rather than its form. Equity will look for and give effect to the real intention and spirit of parties to a transaction, rather than to the form of the transaction.

796 This maxim has its derivation or perhaps counterpart in Roman law which knew the maxim ***vigilantibus non dormientibus lex subvenit***.

797 Logic demands that a person seeking equitable relief from a court must be prepared to act equitably himself.

798 This well known maxim is called the doctrine of clean hands. Where it appears to a court of equity that the person seeking equity from it is himself tainted or marred by some inequity, turpidity, deceitfulness, dishonesty or other moral blemish incompatible with the grant of equitable relief, such relief may be denied.

799 This maxim was well known to Roman law and South African law and is expressed in the Digest as ***qui prior est tempore potior est iure***– *He who is earlier in time is stronger in law.*

800 See e.g. the observations in this regard made by **Schreiner J A** in ***Union Govt. v Ocean Accident & Guarantee Corp. Ltd*** 1956 (1) SA 584 (AD).

801 **Spry *The*** Principles (1990) 6

802 **Kimbrough** *Summary* (1974) 269 par 10 5

with law such as we had in Roman law and the civilian legal systems, does not as yet exist in America.[803]

6.2 EMPLOYMENT AT WILL AND EQUITY

The American legal system is a complex network of law, a comprehensive consideration of which falls beyond the ambit of this work. Even American labour law cannot be considered here in any great detail.[804] We will briefly examine the most important general principles of labour law and thereafter proceed to what is of more interest to us: the question whether equitable principles have any role to play in American employment law, more specifically in unfair labour practice and dismissal law, and if so, the nature and extent of such role.

American common law relating to dismissal does not differ significantly from English common law. A fundamental principle of English common law was that an employer could dismiss an employee *at will* for any reason or even for no reason at all,[805] provided that he complied with any contractual or other legal requirements relating to the giving of notice.[806] **Goldman** puts it succinctly: "*...if a contract of employment has no specified duration, then the traditional American approach is to treat it as a contract that is terminable at the will of either side for good cause, bad cause, or no cause at all.*"[807] We have seen

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803 This has led, **Kimbrough** 269 par 10 5 a leading scholar to the following critical observation:
"Although today, when all law emanates from popular sovereignty, it is nonsense to think of law as having to correct itself, we have reached a not entirely dissimilar result by continuing to treat equity as a separate system of law to which is left the major responsibility of providing relief from hardship. This is an unsatisfactory solution of the function of equity because the only cases which come within the equitable jurisdiction are suits for specific relief, and equitable solutions of the problem of relief from hardship are not applied in actions for damages, which constitute the vast majority of cases in which such relief is necessary."

804 Cf. **Wolkinson & Block** ***Employment Law*** (1996) 247-267; **Forkosch** ***A Treatise on Labour Law*** (1965) 362-420 and 517-563; **Goldman** ***Labour and Employment Law in the United States*** (1996) 55-98 and 167-222

805 **American Bar Association** ***Guide to Workplace Law*** (2007) 78

806 For English law see ***Addis v Gramophone Co. Ltd*** (1909) AC 488; 1908 - 10 ALL ER, Rep. ***Malik v Bank Credit and Commerce International SA*** *(in liquidation)* [1997] 3 ALL ER, p.1, at 8; ***Johnson v Unisys Ltd*** [2001] 2 ALL ER, at 803; ***Eastwood & Another v Magnox Electric plc*** [2004] 3 ALL ER, p.991, These cases are discussed in Chapters V and VII

807 **Goldman** ***Labor Law and Industrial Relations in the United States of America*** (1984) 75; **Goldman** ***Labor and Employment Law in the United States*** (1996) 63

earlier[808] that in the event of such a dismissal, the employer was also not obliged to provide reasons for the dismissal.[809]

Wolkinson and **Block** point out that the principle of employment at *will* and dismissal *at will* was introduced in the early nineteenth century when American society began to view mercantilist control and regulation as an anachronistic impediment to the economy.[810] As has already been pointed out earlier,[811] the mercantile atmosphere in Holland and other continental countries in the wake of the French Revolution was much the same. Freedom of the individual and the *laissez-fair* commercial ethos became the dominant forces in contractual law, including the law relating to labour contracts.[812] The principle of the paramountcy of what has been agreed between the parties, in other words of the terms of the contractual relationship between them, is the ambient environment in which an American employment relationship has to operate and function: American courts are generally unwilling to impose obligations – even implied obligations - unless these have been incurred by voluntary agreement.[813]

The American common law relating to dismissal remains uncodified up till this very day, at least as far as individual employment law is concerned.[814] As we will see later herein, considerable inroads have been made into this common law position, especially at individual State level, but the general scheme remains the same.[815] The majority of State courts seem to have been in favour of legislative

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808 Chapter V, supra.

809 See Chapter V; ***Addis*** 486; ***Johnson*** 816; **Anderman *Unfair Dismissal*** (1985) 3; **Hepple** and **O'Higgins *Employment Law*** (1981) 248

810 ibid

811 Chapter V, supra.

812 *"Prosperity and personal liberty were thought to depend on removing all barriers to commercial activity, including wage-fixing and commercial constraints. Thus, after 1800, the notion that employment implied some imposition of moral obligations was viewed as inconsistent with the principle of contract – parties should be free to design their own relationship."* – **Wolkinson & Block *Employment Law*** (1996) 248

813 Ibid.

814 **Clark & Ansay *Introduction to the Law of the United States*** (1992) 132 points out that no State has enacted comprehensive legislation concerning wrongful discharge, although a California State Bar Report issued in 1984 recommended that such legislation be enacted.

815 **Goldman *Labour and Employment Law in the United States*** (1996) 63 et seq.

intervention, if the need therefore existed, but remained conservative in regard to judicial creativity.[816]

The National Labour Relations Act, 1935 focuses primarily on collective bargaining and collective unfair labour practices, and not individual employment law.[817] The concept of unfair dismissal is not addressed at all.[818] The kinds and contents of unfair labour practice that we find regulated in this national piece of legislation seems to be more protective of unionization and freedom of association rather than the individual employee.[819] In this respect it differs materially from the South African LRA.[820] At a collective level, though there is some similarity in the description of American and South African unfair labour practices.[821]

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816 **Goldman *Labor and Industrial Relations* (1984)** 75; See also **Olsen *"Protecting At Will Employees Against Wrongful Discharge"* Harvard Law Review** 1816 (1980) 93

817 **Feldacker *Labor Guide to Labor Law*** (1983) 133 et seq.

818 **Clark & Ansay *Introduction to the Law of the United States*** (1992) 111; **Forkosch *A Treatise on Labor Law*** (1965) 560 et seq.; **Feldacker *Labor Guide to Labor Law*** (1983) 7 et seq.

819 **Clark & Ansay *Introduction*** (1992) 113; 117.

820 **Clark & Ansay (**1992) 112-113.

821 Since 1935 when the NLRA was enacted, certain formulations of unfair labour practices have remained unchanged. A marked difference exists between the LRA definition of an unfair labour practice and that contained in American legislation, particularly the National Labor Relations Act and the so-called Wagner Act. The LRA defines an unfair labour practice mainly as an unfair act between an employer and an individual employee, whereas the American legislation contains a more collective definition of the concept. s 186(2) of the LRA specifically defines an unfair labour practice as *"...any unfair act or omission that arises between an employer and an employee..."* On the other hand, the American NLRA and the Wagner Acts create unfair labour practices of a more diverse and collective nature, dividing it into three main categories: unfair labour practices committed by an employer, mostly as against the union but also against its members; unfair labour practices by a union vis-à-vis an employer or the members of the union, and lastly unfair practices committed jointly by the employer and the union. The following employer conduct qualifies as unfair labour practices under the NLRA: interference with and coercing of employees in connection with trade union activities, their working conditions, their right to join trade unions for the purpose of collective bargaining; surveillance of union activities, interrogation of employees regarding such activities or threatening them in that regard; promising benefits for not belonging to or participating in union activities etc. (s 8(a)(1);s 7; domination or interference with the formation or administration of a labour organization or the contribution of financial or other support to it – (s 8(a)(2)); encouragement or discouragement of membership of a union – (s 8(a)(3)); discouragement of or discrimination against a trade union member for giving testimony under the Act – (s 8(a)(4)); refusal to bargain collectively with union – (s 8(a)(5)). Trade unions commit unfair labour practices in restraining or coercing employees in connection with organizational rights- (s 8(b)(1)(A); restraining or coercing employees in the selection of their representatives –(s 8(b)(1)(B); causing or attempting an employer to discriminate against an employee- (s 8(b)(2); refusal to bargain collectively with the employer- (s 8(b)(3); requiring excessive or discriminatory membership fees – (s 8(b)(5); causing or attempting to cause an employer to or agree to pay money or another thing of value for services not performed or not to be performed – (s 8(b)(6); encouraging any person to boycott another's business or product or to refrain from doing business with such person; forcing an employer to join any labour or employers' organization where prohibited by law; requiring or forcing an

This does not imply that the interests of individual employees are ignored or neglected. A host of legislation exists, both at National and at State level that provide adequate employment protection and benefits to employees.[822] Legislation such as the Fair Labor Standards Act, 1938,[823] the Employee Retirement Income Security Act, the Occupational Safety and Health Act, 1970, the Employment Discrimination Law, and the Civil Rights Act, 1991 are some examples of legislation which certainly protect and promote the interests of individual employees.[824]

But, as we have already mentioned, there is no comprehensive statutory regulation of fairness in dismissal law –collective or individual- either at Federal or at State level. The position is therefore that the common law still holds sway, although in a more sophisticated and incrementally developed form.[825]

The fundamental point of departure of American dismissal law is still that dismissal can take place *at will*.[826] This means that an employment contract, and

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employer to bargain with an uncertified trade union; requiring or coercing an employer to bargain with a particular trade union where another union has been certified as the employees' representative; requiring or coercing an employer to assign particular work to work in a particular union, or in a particular trade, craft or class; picketing or threatening to picket in an attempt to coerce the employer to bargain with a particular union on behalf of employees if such union has not been certified as the representative union of such employees – (s 8(b)(4) and (7).
Any employer and any trade union commit an unfair labour practice if they enter into any contract or agreement aimed at such employer doing business with any other employer or refrains from or handle or deal in his product – (s 8 (e)).

822 For individual employment legislation, see **Clark & Ansay *Introduction*** (1992) 129-131.
823 The FLSA, despite its name, provides for minimum wages and does not introduce an equitable labour regime generally.
824 **Clark & Ansay** (1992) 129-131
825 **Clark & Ansay** (1992) 131
826 **American Bar Association *Guide to Workplace Law*** (1999) *78;* **Goldman *Labour and Employment Law*** (1996) 75-76.
Wolkinson & Block *Employment Law* (1996) 248, relying on **Jacoby S *" The duration of indefinite employment contracts in the United States and England: an historical analysis."* Comparative Labour Law** 1982 1 85-128 and **Kossek & Block *"The Employer as Social Arbiter: Considerations in limiting Employer Involvement in off-the-job Behavior."* Employee Rights and Responsibilities Journal** 1993 6 no 2 139-55, point out that the employment at will principle had not always applied: *"Yet, throughout the history of the USA, it has not always been that way. Jacoby points out that, from the mid-sixteenth to the mid-eighteenth centuries, master-servant law in England and the colonies which did not specify duration were for one year.";* **Muhl *"The Employment –at-will Doctrine : Three Major Exceptions"* Monthly Labor Review**, 2001 3 (Jan.)
The idea that an employment contract of unspecified duration terminated after the lapse of a year never really attained a firm foothold in the American legal system, largely because the American Revolution coincided with

hence an employment relationship, can only exist by *mutual consent* and that the employer's common law right to terminate the employment relationship by dismissal, is virtually absolute and unconditional.[827] Although the contents and terms of the employment agreement are of some relevance in the modern developed form of American common law, as a general rule the employer still has virtually unimpeded power of dismissal, even if such dismissal amounts to a breach of contract.[828] From an evidential point of view, there is also a presumption that all employment contracts are terminable by either party *at will.*[829]

However, various limitations, distinctions and exceptions to the employment-at-will doctrine have been introduced gradually and incrementally. These differ according to the kind of employment contract involved.

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the *laissez-fair* philosophy. Labour litigation was virtually unknown as employers enforced labour contracts by means of blacklisting and wage-withholding.

Wolkinson & Block Employment *Law* (1996) 248 point out that **Horace Wood's** influential treatise on employment law of 1877 was instrumental in establishing the employment at will doctrine in the United States. Wood argued that, unlike in England, there was no evidence that a presumption in favour of employment for a year had ever been accepted in America, and that in the absence of evidence that an employment contract in America had been concluded for a period of fixed duration, the presumption was that it was terminable *at will.*

Rothstein Knapp & Liebman *Cases and Materials on Employment Law* (1987) 738 emphasise that in terms of the principle of employment-at-will *"...any hiring is presumed to be 'at will', that is, the employer is free to discharge individuals 'for good cause or bad cause or no cause at all', and the employee is equally free to quit, strike or otherwise cease to work."*

Cf. **Clark & Ansay *Introduction to the Law of the United States*** (1992) 131; **Goldman *Labor and Employment Law in the United States*** (1996) 58 states that *"Absent an express agreement for the engagement to be for a specified period of time, an employment contract is presumed to be 'at will'. This means that either party is free to terminate the contract with or without prior notice or justification."*

827 **American Bar Association *Workplace Law*** (1999) 78: *"In the United States most of us are considered employees **at will**. This means that we have no written contract governing the length of our employment or the reasons for which we might loose our jobs. The employer is free to fire us with no notice and with no reason. And we are free to leave the job at will."*

Culligan & Amodio *Corpus Iuris Secundum* (Vol 30) 67 par 35. In stead of repeatedly referring to the authors of this work, followed by the full title, we deem it convenient rather to use the abbreviation CJS. The learned authors rely on ***US-BLRB v Waterman SS Corp.*** 60 S.Ct.493

828 Ibid.

829 **Goldman *Labour and Employment Law*** (1996) 63

Wolkinson & Block *Employment Law* (1996) 248 point out that *"...the principles developed in the one hundred years prior to the reconsideration of the employment-at-will doctrine in the 1980s are still operative in modern jurisprudence."*

Cf. ***Murphy v American Home Products Corp.***, 488 N.E. 2d 86 [N.Y.1983]; ***Wal-Mart Stores Inc. v Coward***, 829 S.W. 2d 340 (Tex. App. 1992)

Contracts may be categorized according to the *duration* of employment into: 1. fixed or definite term contracts; 2. indefinite term contracts, also known as permanent contracts or contracts for the permanent provision of labour.[830]

Another categorization of employment contracts distinguishes between four different *types of employee* that is covered by such contract. This would include the following 1. Government employees, who are protected by civil service laws; 2 union members protected by collective agreements regulating inter alia dismissal and labour practices;[831] 3 highly skilled professionals who work in terms of employment contracts enforceable at law, and 4 the ordinary, regular or traditional type of employee.

The *exceptions* to the employment-at-will doctrine fall mainly into three categories: 1 contractual exceptions, 2 good faith and fair dealing exceptions, and 3 public policy exceptions.[832] Although more recent statistics are not available, it is significant that by March 1994 36 states had developed contractual exceptions, 43 had adopted public policy exceptions, whereas only 13 had good faith and fair dealing exceptions.[833] The relatively low levels of good faith and fair dealing exceptions suggest a reluctance to tamper with the employment-at-will doctrine. This view is corroborated by the fact that in most states no litigation concerning good faith and fair deal exceptions had actually taken place.[834] However it is significant that all abovementioned exceptions were introduced through judicial initiative or creativity.[835]

The categories, distinctions and exceptions enumerated above do not form watertight compartments. They do not only overlap, but are also inextricably interwoven. Practicality often dictates which category is given preference in literary expositions of the employment-at-will doctrine.

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830 CJS 69-73
831 **American Bar Assoc *Workplace Law*** (1999) 78-79.
832 **Wolkinson & Block *Employment Law*** (1996) 249 et seq.
833 This was the result of research done by the **Bureau of National Affairs** as reflected in their ***Individual Employment Rights Reference Manual*** 505 [March 1994] 51-2; **Wolkinson & Block** (1996)249 ; 266 n 2.
834 **Bureau of National Affairs Manual** (1994) 51-2; **Wolkinson & Block** (1996) 249.
835 Ibid.

The first three employment relationships based on *employee categorization* as explained above, generally do not involve employed *at will*. Employment at will is either excluded by civil service statutory law, collective agreement,[836] or specific professional rules or agreements respectively.[837] The fourth category, which relates to so-called ordinary or common employment is as a general rule subject to the doctrine of employment-at-will, unless one of the *exceptions* to the doctrine is applicable to the specific employment contract under consideration.[838]

The legal position of employees categorized according to the *duration* of their employment contract can be summarized as follows. A fixed term contract may not be unilaterally terminated by the employer, except a) *for cause*, b) or by *mutual agreement*, or c) in terms of *contractual reservation of right*.[839] We will only consider a) in further detail.

Under normal circumstances, a fixed term contract will terminate only upon the expiry of the term fixed in such contract.[840]

The right to terminate an employment agreement *for cause* is *implied* in every fixed term agreement, even when this is not expressly dealt with in the specific contract.[841]

From the employer's perspective, one may think in terms of a *right* to terminate for cause. However, from the employee's point of view the employer is under

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836 There is a general tendency in American jurisprudence and arbitration awards to regard employment *at will* as having been excluded by collective agreement, whenever it appears from the terms of such agreement that it was entered into by the labour union with the intent to protect labour security. This protection could be expressly or implicitly incorporated into the agreement. Job security is by its very nature, aims and purposes incompatible with employment *at will*. In such cases *just cause* would be a requirement for dismissal.
The arbitration award ***In the Matter of Coca-Cola Bottling Co. of Boston***, 1949 is an example in point.
The award is fully reported in **Cox & Bok *Cases and Materials on Labour Law*** (1965) 527-534.

837 The **American Bar Assoc.**, loc. cit. points out that there are two further general exceptions to the dismissal *at will* principle: The State of Montana has enacted the **Wrongful Discharge from Employment Act**, which expressly prohibits the discharge of non-probationary employees, except for *good cause*, which is defined as 'reasonable job-related grounds for dismissal' for legitimate business reasons. *The second form of restriction on dismissal at will are those cases stipulated in Federal law in which dismissal at will is not allowed.*

838 **Bureau of National Affairs Manual** (1994) 51-2; **Wolkinson & Block** (1996) 249

839 **Goldman *Labour and Employment*** Law (1996) 65-77.

840 However, where there is a continuation of the agreement for an indefinite period after the expiry of the original fixed term, such continued contract no longer qualifies as a fixed term contract, with the result that the continued contract becomes indefinite, and may be terminated by the employer *at will.*

841**CJS** 69 par.38

obligation not to terminate the contract, unless *for cause*, which is generally interpreted to mean for *good reason* and in *good faith*.[842] The requirement of good faith means that the cause for dismissal attributed by the employer to the employee is the real cause established after reasonable and genuine effort concerning possible conflicting assertions in this regard.[843]

Reasonable or good cause relates mostly to non-performance or underperformance such as failure to perform the assigned work faithfully, diligently, honestly, competently and in compliance with reasonable and lawful directions. Misconduct in the form of habitual drug or alcohol abuse, intoxication at the workplace, assault, theft and even immoral conduct away from the workplace may likewise constitute good cause. In short, good or reasonable cause would be any or all those reasons having a serious impact on the work relationship of the parties.[844]

It should be pointed out again however, that some State courts have been consistently conservative even in regard to what constitute good cause, and have adopted a deferential approach in regard to the actions of the employer: As long as the employer acts in good faith, they would not interfere.[845] These courts have often imposed the burden of proving the absence of good cause on the employee.[846] The correct approach seems to be that the burden of proving good cause rests on the employer, and some courts have maintained this approach.[847] This conservative approach in regard to the burden of proof is evidence of the persistent and pervasive influence of the doctrine of employment *at will*, even in the case of so-called fixed term contracts where the doctrine is strictly speaking inapplicable.

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842 **Goldman** (1996) 76-77
843 Ibid.
844 Ibid.
845 See ***Baldwin v Sisters of Providence*** 769 P. 2d 298 [Wash. 1989]; **Goldman *Labour and Employment Law*** (1996) 67. Cf. ***American Oil & Supply Co.***, 36 Lab. Arb. Rep. 331 (1960). In ***Rheem Automotive Co***, Arbitration Award, 1956.27 Lab. Arb. Rep. 863. The genuine suspicion of the employer was regarded as insufficient for the purposes of constituting *just cause*; ***Cox & Bok: Cases and Materials*** 534.
846 ***Kass v Brown Boveri Corp.***, 488 A. 2d 242 [N.J. App. Div. 1985] is an example.
847 ***Turner v Allstate Ins. Co.***, 902F. 2d 1208 [6th Cir. 1990]

An employment contract for an indefinite period, also known as an employment for life or *permanent* employment contract, may truly be terminated by the employer [848] *at will.* In such cases the employer is under no obligation to provide reasons for the termination.[849] Subject to the exceptions that have been developed by judicial precedent and which we will consider in more detail hereunder, the employer does not even need to act in good faith.[850] It is important to note that a covenant or implied term of good faith and fair dealing is not presumed to have been included in an employment contract for an indefinite period, and its existence would have to be clearly demonstrated by the employee.[851] The courts do however enforce contractual stipulations to the effect that dismissal will only be for *cause*.[852]

As a general rule, no disciplinary or investigative procedures of any kind need to be followed before dismissal, in the absence of a contractual stipulation to the contrary. The court is also not empowered to order the employer to provide reasons for the dismissal.[853] An employer that is entitled to dismiss *at will*, is under no obligation to issue any warning to an employee prior to dismissal.[854] There is also no prescribed form of termination, except that the termination has

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848 Either party may terminate such contract.

849 **CJS** 78. It has to be noted however, that although the employer himself, i.e. personally, may without incurring liability dismiss the employee *at will*, a fellow-employee such as a manager, may commit a wrongful discharge of the dismissed employee, if he dismisses him without consultation of the employer. The reason is that a fellow employee, unlike the employer himself, does not have the absolute right of dismissal, but only a derivative and conditional right.

850 Ibid.

851 **CJS** 84 par 44; **Culligan & Amodio *CJS*** 84-5 explain this as follows: *"The discharge of an employee employed for an indefinite term, where not otherwise prohibited by contract, has been held generally not to violate any implied covenant of good faith and fair dealing, at least where there is no violation of public policy. It has been held that such a covenant will generally not be implied, that the employee can be discharged even for a bad reason or even if the employer acts in bad faith or with an improper motive or malice and that there is no prima facie tort claim for wrongful discharge."*

852 ***Sanders v May Broadcasting Co.*** , 336 N.W. 2d 92 [Neb. 1983]

853 **Culligan & Adomio *CJS*** 98 par 54.

854 CJS 99

to be clear and unequivocal.[855] Termination at will generally operates with immediate effect.[856]

There seems to be a feeble but growing tendency however, to afford protection in the form of damages to indefinite period employees, although the fundamental principle of employment at will basically remains firmly established.[857]

The so-called permanent employment or employment for life contract,[858] is ironically terminable *by either party at will.* This seems logical in terms of the argument that as the employment relationship is brought about by mutual agreement or consensus, once that consensus ceases to exist, either party should be free to terminate the relationship at will.[859]

6.3 WRONGFUL DISMISSAL

An employee's remedy for wrongful dismissal is an action for breach of contract, i.e. an action for monetary loss or damages. This means that even this remedy would not be available to the employee where no actual monetary loss resulted from the wrongful dismissal, or where loss cannot be proved. Where an employee on a fixed term contract is wrongfully discharged, his only remedy is the

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855 **Goldman *Labour and Employment* Law** (1996) 79 provides some examples of common forms of termination or giving of notice, such as 'You are fired', or 'You are discharged', 'You are sacked.'
The popular reference to 'You are being handed a pink slip' refers to the traditional pink form used by employers to notify employees of dismissal.

856 Ibid.

857 **Goldman** (1996) 76 points out that there is a modern trend to require *good cause* for the termination of indefinite period contracts under certain circumstances: The most obvious case would be where the contract itself stipulates good cause or mutual consent as a requirement for termination. Where a permanent employee has provided a *separate* consideration, in addition to the mere rendering of personal services to the employer, the courts tend to require good cause for termination. Such is the position for instance where the employee has provided the employer with a waiver of certain claims (e.g. a claim for compensation for work related injury), or where the employee has sold his business to the employer subject to the condition that he remains on as employee for the remainder of his life. The purchase of some consideration or shares in the employer's business may also entitle the employee to good cause as a requirement for termination.
It is quite clear however that no unanimity has as yet developed amongst the courts in abovementioned regard, and although these cases definitely constitute some erosion of the employment at will principle, it would be erroneous to regard that principle as having been abolished or abrogated in any significant sense.

858 To determine whether a contract is a so-called permanent one, much depends on the interpretation of the contract itself. Stipulations such as *permanent employment, employment for life, permanent position, permanent vacancy, as long as the master desires, as long as the employee desires* etc. may well be treated as constituting permanent contracts and therefore terminable by either party *at will.*

859 ***Paine v Western & Atl. R.R., 81 Tenn.*** 518-519 (1884).

monetary loss representing the remainder of the period that he has not been remunerated for.[860] Employees generally have an action for breach of contract as well as an action based on tort, where the employer was actuated by a *specific intent to cause harm* to the employee through the dismissal, or where the dismissal is illegal, such as when it violates public policy.[861]In such cases normal compensatory damages may be claimed in respect of the breach of contract, but in addition to that, punitive damages arising from the tortuous conduct of the employer may be recovered.[862]

In ***Tameny v Atlantic Richfield Co.***[863] the Appeal Court of California explained as follows:

"Whereas contract actions are created to protect the interest in having promises performed...[864] *tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct that give rise to them are imposed by law, and are based primarily upon social policy and not necessarily upon the intention or will of the parties."*[865]

6.4 EXCEPTIONS TO DISMISSAL AT WILL

Whereas the doctrine of dismissal at will as explained above primarily retains its force at National or Federal level, various exceptions to the doctrine has been developed mainly at State level through judicial precedent.[866]

A relatively tiny number of States including **Montana** and **Puerto Rico** have gone further though and have for all practical purposes either abolished the employment at will principle or imposed significant limitations on it by statute.[867] But we are more concerned with judicial exceptions to dismissal at will, as these mainly reflect the attitudes of the courts in regard to fairness of dismissal.

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860 **Goldman *Labour and Employment Law*** (1996) 80-81
861 **CJS** 134-5.
862 ibid
863 1 IER Cases 102; **Wolkinson & Block *Employment Law*** (1996) 261
864 *Pacta sunt servanda*
865 1 IER Cases 105-6; **Wolkinson & Block** (1996) 262.
866 **American Bar Assoc Workplace *Law*** (1999) 82 et seq.; **Wolkinson & Block** (1996) 248-267.
867 In **Montana** an employee who is dismissed without good cause is provided a statutory action for up to 4 years' loss of salary and benefits. Punitive damages may also be claimed in the event that the dismissal was malicious or fraudulent. In **Puerto Rico** an employee dismissed without good cause is entitled to claim severance pay which is proportionate to his length of service. In the Virgin Islands the dismissal of a resident worker without good cause is subject to reinstatement with back-pay- See **Goldman *Labour and Employment Law*** (1996) 65; **American Bar Association *Workplace Law*** (1999) 79

As already explained, these exceptions can generally be divided into three categories: 1 *public policy* exceptions, 2 *implied contractual terms* exceptions, and 3 *good faith and fair dealing* exceptions.[868]

6.4.1 PUBLIC POLICY EXCEPTIONS

Public policy considerations have led to the judicial evolution of exceptions to the employment at will doctrine in about 43 States.[869] This makes the public policy exceptions by far the most widely recognized in American law.[870] Recognition did not occur overnight but rather incrementally, mainly as a result of the vagueness of the concept of public policy. Despite the tendency by some State courts to embrace this exception, seven such courts have nevertheless categorically refused its adoption. These were the courts of Alabama, Florida, Georgia, Louisiana, Nebraska, New York and Rhode Island.[871] The underlying consideration of public policy is that no subject or person, natural or legal, may act against the *public good* or require another to do so.[872]

The following four exceptions are based on this principle: Firstly, the dismissal of any employee for refusing to perform an illegal act, such as refusing to commit perjury; Secondly, the dismissal of an employee for reporting a violation of law.[873] Thirdly, an employee may not be dismissed for engaging in any act or activity which is *encouraged* by public policy or which actively *promotes* the common good. An employee who assists statutory agents in the investigation of income tax, anti-trust and other similar violations would qualify for this kind of

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868 Ibid. **Goldman** deals with these exceptions under two headings only, namely those of public policy and of implied contractual exceptions. However, we submit that the threefold division of **Wolkinson & Block**, supra, is more practical and convenient.

869 This is a matter of statistics which may change in the course of time. **Goldman *Employment Law*** (1986) 65 fixed the figure at 30. However his work was published in 1986. **Wolkinson & Block** wrote in 1996, by which time the figure had escalated to 36. **Muhl *"The Employment-at-will Doctrine: Three major Exceptions"*** Monthly **Labor Review** 2001 3-11 puts the figure at 43. Although Muhl's work was first published in 2001, he keeps a website in which he continuously updates the article above.

870 **Goldman** (1986) 65; **Wolkinson & Block** (1996) 248 - 267

871 Ibid.

872 Ibid.

873 **American Bar Assoc. *Workplace Law*** (1999) 82 cites the example of an employee who files a complaint about health and safety issues at work. He would be protected by the anti-retaliation laws. An employee who reports that his employer is bribing an inspector would enjoy the protection of the whistle-blower laws.

protection.[874] The fourth public policy based exception applies to the dismissal of employees for exercising their statutory rights, such as for instance the filling in of a workman's compensation claim.[875]

The following prominent case law illustrate some of the exceptions to the doctrine of dismissal *at will* based on public policy. The California Court of Appeal set the ball on the roll as early as 1959 with the decision of ***Peterman v International Brotherhood of Teamsters.***[876] Peterman was told by the treasurer of the Teamster Union that he would be employed for as long as his work was satisfactory. Subsequently thereto, he was sub-poenaed by the California legislature to testify before the Interim Committee on Government Efficiency and Economy, which was investigating corruption within the Union. He refused the instruction of the Union to give false testimony before the Committee and answered truthfully. This led to his dismissal a day after his testimony.

In a wrongful dismissal claim, the California Appeal Court held that although the concept of public policy does not have a precise meaning, it covered acts which have the tendency to be injurious to the public or against the public good, such as acts of perjury. Although persons who make themselves guilty of such conduct are liable to prosecution, a public policy exception to the doctrine of employment-at-will would even be more efficient in this regard, to effectuate the State of California's declared policy against perjury. This would also discourage criminal conduct perpetrated by both employer and employee.

The Illinois Supreme Court followed suit in 1981 in the matter of ***Palmateer v International Harvester Company.***[877] Here Palmateer was dismissed for having provided information to law enforcement agencies concerning potential criminal acts by a co-employee. He also indicated his willingness to assist with an investigation and to testify if necessary. In a wrongful dismissal claim the court

874 Loc. cit.
875 Loc. cit.
876 174 Cal. App. 2d 184 [1959].
877 85 Ill. 2d124, 421 N.E. 2d 876 [1981].

found in his favour, basing its decision on a *"...proper balance between the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing public policies carried out."*[878]

Although the Wisconsin Supreme Court adopted the public policy exception enunciated in Palmateer only two years later, it did so on a much narrower basis, and in fact declined to take the wide view of public policy espoused in Palmateer. In ***Brockmeyer v Dun & Bradstreet***[879] Brockmeyer allegedly had a romantic relationship with a fellow employee, and spent company time with her under false pretentions. After certain negotiations aimed at Brockmeyer getting another position for his colleague had failed, she resigned and filed a sex discrimination suit against Dun & Bradstreet. Brockmeyer amongst others, threatened that he would testify the truth concerning the sex discrimination suit. However, the suit was settled and Brockmeyer was dismissed three days later. He brought a claim for wrongful discharge and alleged that the company had violated public policy in discharging him. This , he contended, the company had done by violating Wisconsin statutes that prohibited perjury, willful and malicious injuring of another in his or her reputation, trade business , or occupation, and the use of threats, force and coercion to keep a person from working. Rejecting Brockmeyer's claim, the court held that the public policy exception to the principle of employment-at-will does not apply to situations in which the claimant's actions are merely consistent with public policy, or to judicially conceived notions of public policy.[880] The court preferred that the exception should be limited to *"...fundamental and well-defined public policy as evidenced by existing law."*[881]

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878 Idem 878.

879 113 Wis. 2d 561, 335 N.W. 2d 834 [1983].

880 Idem 839-840.

881 In subsequent judgments the court provided more clarification concerning situations in which public policy would demand that the exception be allowed. In ***Wandry v Eye Credit Union***, 129 Wis. 2d 37, 384 N.W. 2d 325 [1986] the court held that the public policy requirement would be satisfied, if it appears from the spirit as well as the letter of constitutional and legislative provisions. In ***Winkelman v Beloit Memorial Hosp.***, 168

Watson v Cleveland Chair Company[882] was decided in 1985 by the Tennessee Court of Appeal. It should be noted that although the case represents a landmark decision in terms of the incremental eroding of dismissal *at will*, such development took place against the background of strong judicial emphasis that the doctrine of employment-at-will would not be easily departed from.[883]

The facts of the case were that Watson and Barnett, a fellow employee, had been employed as truck drivers. They were dismissed for insubordination and a display of bad attitude. However they claimed that the real reason for their dismissal was their refusal to violate state speed limitation laws and rest regulations as determined by the Interstate Commerce Commission. While acknowledging the primacy of the employment-at-will principle in American commerce and labour relations, the court stressed the need for the combat of lawlessness as a matter of public policy, and found in favour of the Appellants by introducing an exception to the principle.[884] The court continued to find that a cause of action for *retaliatory discharge* arises when an at-will employee is dismissed for the sole reason of refusing to participate, continue to participate, or remain silent about illegal activities.[885]

The hallmark of this decision lies in the fact that it recognizes factors extraneous to the contract between the parties, as having a potentially crucial significance for the limitation of the right of dismissal-at-will. This was a deviation from the traditional approach in terms of which an express contractual term was the only potential source of limitation to dismissal-at-will.

The Watson-judgment should be viewed in the light of a case that had been decided five years earlier, i.e. in 1980, and which represented a significant move away from a purely contractual view of dismissal, and where it was held that dismissal could under certain circumstances amount to a tort, in which case

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Wis. 2d 12, 483 N.W. 2d 211 [1992] administrative rules and regulations were accepted as sources of public policy.

882 See 122 LRRM 2076 (Tenn. CA. 1985); Cf. **Wolkinson & Block *Employment Law*** (1996) 260.

883 ibid.

884 **Wolkinson & Block** (1996) 260

885 Ibid.

tortuous or penal damages could be claimed from the employer in addition to the normal compensatory damages available for breach of contract.

That case was ***Tameny v Atlantic Richfield Co.***[886] Tameny had been discharged for incompetence and unsatisfactory work performance. His claim, which was not disputed by Atlantic, was that the real reason for his dismissal was his refusal to participate in an illegal price-fixing scheme on behalf of his employer. He argued that in dismissing him for this reason, Atlantic had committed a *tort* or *public harm* in addition to a breach of contract. Atlantic, relying on the principle of dismissal-at-will argued that as there was no (written) contract in existence which excluded the at-will, principle, it had the right to dismiss Tameny in its sole discretion or at-will.

The California Supreme Court, invoking the public policy exception to the doctrine of dismissal-at-will, found in favour of Tameny[887]

The court explained the difference between contractual causes of action and those based on tort. Contracts are entered into for the purpose of protecting the interests of parties by the fulfillment of promises,[888] whereas tort actions are aimed at the protection of freedom against various kinds of harm. Whereas the duties imposed by contract emanate from and are based on the will of the parties, duties that give rise to tort actions have their origin in *social policy* and are *imposed by law*.[889] An employer who discharges an employee for refusing to comply with unlawful orders violates imperative social norms and therefore commits a tort. Public policy involve legal duties statutorily imposed by public authority, and not duties imposed by private employers for the purpose of furthering their private interests.[890]

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886 1 IER Cases 104

887 The court overruled the decision of the court *a quo* where the employer had successfully invoked the dismissal-at-will principle.

888 *Pacta sunt servanda*

889 1 IER Cases 105-6; **Wolkinson & Block** (1996) 262.

890 Cf. ***Foley v Interactive Data Corporation (IDC),*** 3 IER Cases 1729 where the court held that a disclosure of information to an employer concerning past possible criminal conduct of a manager with the sole

Earlier we mentioned that seven State courts have so far refused to accept the public policy exception to the employment-at-will principle. One of the States mentioned was that of New York. The attitude of this State's highest court, namely the Court of Appeals of New York, is well illustrated by the decision of ***Murphy v American Home Products Corporation***.[891] Here the court held that as the exception would involve a fundamental move away from the employment-at-will policy, requiring a new scheme in this area of labour law, the matter fell within the province of the legislature. The legislature is in the position to elicit public views and act accordingly, which the court is not in a position to do.[892] The legislature was also felt by the court to be in the more advantageous position where it could amend the law prospectively, whereas the court could only do so retrospectively.

This decision did not go unnoticed, for one year later the legislature bolstered employment security by legislative protection to whistle-blowers.[893]

6.4.2 CONTRACTUAL EXCEPTION: IMPLIED TERMS

Apart from considerations of *public policy*, State courts have also evolved an exception to the doctrine of employment at will involving *implied terms* of the

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purpose of furthering the interests of the employer could not be regarded as enjoying protection under the public policy exception to the dismissal-at-will principle.
See also ***Adams v George W Cochram & Co.*, 597** A. 2d 28 [D.C. app. 1991], where the District of Columbia Court of Appeals limited the public policy exception to cases where *"...the sole reason for the discharge is the employee's refusal to violate the law as expressed in a statute or municipal regulation."* This is obviously a rather narrow view of the exception. The same court, in ***Carl v Children's Hospital***, 702 A.2d 159[D.C. App. 1997] adopted a wider approach and extended the sources of public policy to include not only statute or municipal regulation, but also constitutional provisions 'concretely applicable' to the employer's conduct.
Cf. **Wolkinson & Block (1996)** 262.
In ***Sucholdolski v Michigan Consolidated Gas Company***, 115 LRRM 4449[1982] an employee was dismissed for disclosing that his employer had violated accounting procedures provided for in the Code of Ethics of the Institute of Internal Auditors. The court held that the dismissal did not amount to a violation of public policy as the internal code of ethics of a private professional association did not establish public policy.
On the other hand, in ***Holmes v General Dynamics***, 8 IER Cases 1249 (Cal CA 1993) an employee was dismissed for claiming that his employer had violated the Federal False Statement s Act by making incorrect statements concerning certain government contracts. The dismissal was held to have violated public policy, as a statute had been contravened.
891 58 N.Y. 2d 293, 448 N.E. 2d 86 [1983]
892 ibid 302
893 ***Gould's New York Consolidated Laws Annotated*** (1988) 740; **Muhl *"The Employment at Will Doctrine"*** 2001 3 ***Monthly Law Review*** 11 n 20.

employment contract. We have noticed above that, traditionally, the common law of employment *at will* was rigidly applied, and that, in order to qualify as an agreement or stipulation to the contrary, such agreement or stipulation had to be in *writing* and had to be *expressly* stated.[894]

However, State jurisprudence has opened the door for the acceptance of *implied* contractual terms that employment is not *at will*. In such cases dismissal would have to comply with the *implied* terms of the contract.[895] The implied term exception to the employment-at-will doctrine has been adopted to various extent by at least 38 out of the 50 states, making it the most popular exception after that relating to public policy.[896]

Implied terms may be contained not only in the employment contract per se, but also in employment handbooks and manuals, written policies and even in oral declarations of the employer.[897] A common requirement for any implied term however, is that it should not be vague, but clear.[898]

The following case law, aptly illustrates the *implied terms exceptions* to the dismissal at-will principle. In ***Foley v Interactive Data Corporation***[899] (IDC), the employee had been with his employer for years, consistently receiving positive feedback for good performance. This took the form of employment bonuses, good performance evaluations, awards, promotions etc. When he informed his immediate superior about possible fraud that one RK who was about to be appointed in his superior's place had committed at his previous work, RK somehow came to hear of it. When RK was subsequently appointed in the place of his immediate supervisor, things started happening to Foley. He was transferred, given bad performance appraisals, put on a performance plan, given the opportunity to resign or be dismissed, and eventually dismissed.

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894 **Muhl "*The Employment at Will Doctrine*"** (2001) MLR 11
895 **American Bar Assoc *Workplace Law*** (1999) 84-85
896 **Muhl "*The Employment at Will doctrine*"** (2001) MLR 7. See also the table on p. 4.
897 Ibid.
898 ibid
899 3 IER Cases, p. 1729 et seq; Cf. **Wolkinson & Block *employment*** Law (1996) 249-252.

The matter came before the California Supreme Court in 1988, and as is to be expected IDC argued that the dismissal was lawful, based on the long standing presumption that any employment contract was terminable at-will by either party. IDC furthermore argued that if any of the parties claimed that the employment at-will principle was not applicable to the employment relationship such party had to rely on a written contract expressly excluding the at-will principle and requiring *just cause* for dismissal. Moreover, such party had to show that the employee had rendered an *extra consideration* justifying the exclusion of the employment or dismissal at-will principle. The argument concluded that since Foley had not complied with these requirements, the dismissal was unassailable.

Foley on the other hand argued that over the course of years, and in the light of the history of the employment relationship between the parties, an implied contractual term had arisen to the effect that he would not be dismissed, but for *just cause*. This argument was upheld.

Contractual freedom and *pacta sunt servanda* were adopted as the test stones for adjudicating the wrongfulness of the dismissal. This meant that the court opted for a solution based as far as possible on the agreement between the parties in regard to the particular issue, namely the existence of *just cause* as a requirement for dismissal. But whereas the courts had as a general rule previously accepted that the at-will principle was excluded only when it was done so by an express written clause to that effect, the court in Foley was prepared to accept that this could also be achieved by means of an implied clause.

The implied term does not have to exist at the moment that the contract or agreement is entered into, but could arise at any time during the course of the employment relationship. The conduct of the parties for the entire duration of the

employment may be scrutinized for evidence of an *implied-in-fact* rebuttal of the presumption of employment at-will.[900]

Another important aspect of the case is that the court rejected the so-called requirement of additional consideration. The employer's contention was that a contract not to terminable at-will by the employer would be one-sided as the employee would be free to terminate at-will. This argument was based on the traditional requirement for just cause for termination that the employee should have rendered a *consideration additional* to the mere agreement not to terminate at will. This consideration, it seems, is to be found in the extra loyalty and productivity which the employer would reap by employing someone who is aware that he does not work on an at-will basis, but on a more stable and protected one.[901]

We have mentioned earlier that employer policy, as found in policy manuals etc. have given rise to an exception to the dismissal-at-will doctrine. This exception is, as was the case in Foley, likewise based on implied contractual terms. A case that is representative of the recognition and application of this exception is that of ***Toussaint v Blue Cross and Blue Shield of Michigan***[902] decided by the Michigan Supreme Court in 1980.[903] At his appointment interview Toussaint had enquired about job security. He was given oral assurances that his job would be secure, 'as long as he did his job.' In addition, he was handed an employment manual containing employment policies and disciplinary procedures. The manual stated that it was company policy that upon completion of the probationary period, employees would be released *'for just cause only.'* Toussaint had been appointed for an indefinite period.

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900 **Wolkinson & Block *Employment Law*** (1996) 251 point out that if the behavior and words of the employer were such as to create an understanding on the part of the employee that his or her employment would be terminated only for just cause, and the employee accepted that, then a contract existed.
The court does provide some guidance on the issue of factual circumstances which may disprove the presumption of dismissal at-will: the totality of circumstances determines the issue. Length of service, repeated assurances of job security, consistent promotions, salary increases and bonuses and even legitimate expectations on the part of the employee are relevant.
901 Ibid.
902408 Mich. 579; **Wolkinson & Block** (1996) 252 et seq.
903 See **Muhl *"The Employment-at-will Doctrine"*** 2001 MLR 7 - 10.

After he had been accused of having tampered with the odometers of several company cars, Toussaint was dismissed. He instituted action for wrongful dismissal in violation of a contract of service, arguing on the basis of the policy manual that Blue Cross had contractually undertaken not to discharge him, but for just cause. The court found in his favour, holding that while an employer is not obliged to adopt such policy manuals, where it does so, the employment agreement may be subject to the limitation of the dismissal at-will doctrine.

The court specifically held that such an employee was entitled to the peace of mind associated with job security and the conviction that he/she would be treated *fairly* throughout the period of employment.[904]

Here again, we notice that the court does not refer to an implied provision or term in the original contract of employment at all. In fact, it is doubtful as to whether the court is dealing here with contractual terms in the sense of consensual provisions, express or implied, at all. The fact that the court states that knowledge by the employee is not a requirement for lending binding force to the policy manuals of the employer, and that there needs to be no meeting of the minds, definitely points away from a contractual basis for the employer's liability in this regard. It would seem that the real basis for the exception to dismissal at-will doctrine, is the fact that the employer creates an expectation of *fair and consistent treatment*, based on the existence of policy documents in this regard.[905] This expectation of fair treatment is in a sense similar to the so-called legitimate expectation which is recognized in South African administrative law, particularly so where employment is concerned. In the Foley case discussed earlier, the court also referred to a "*reasonable expectation that he would not be discharged, except for good cause.*" Toussaint is an incremental advance on Foley in the sense that it does not limit the expectation of the employee to dismissal

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904 408 **Mich.** 613

905 This view is supported by that of **Culligan & Amodio *Corpus Iuris Secundum*** 86. where the learned authors emphasise that it is the *reasonable expectation* - in contrast with contractual consensus - that determines whether the implied covenant of good faith and fair dealing is violated. It is submitted though, that there is a fair amount of muddled and confusing terminology employed by the courts and the authors in this respect.
Ultimately, it would seem, the exception may be connected to public policy: ***Corpus Iuris Secundum*** 86

for good cause only, but actually extends it to an expectation of *fair*, *consistent* and *uniform* treatment at the hands of the employer. The court makes clear in so many words that, unlike a contract which has mutual consensus as basis, this exception is based on the unilateral actions of the employer only: the employer creates a situation "*instinct with obligation.*"

Since the Foley and Toussaint cases, the exceptions to the dismissal at-will principle formulated there, have been accepted in principle in a number of cases.[906] However, many State courts have remained conservative, requiring the clearest of proof that employment at-will had been contractually excluded.[907]

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906 ***Coelho v Posi-Seal International*** 3 IER Cases 821, 1988; ***Tony v Security Experts*** 9 IER Cases 522, 1994; ***Barber v SMH (US) Inc.*** 9 IER Cases 244, Mich. CA, 1993; ***Anderson v Post/Newsweek Stations*** 7 IER Cases 472 [DC Conn. 1992].
Coelho had been told in many statements by the company president at the time that he was hired that he had a bright future with the company and that he would be supported by top management in the case of conflict with the manager of manufacturing. After such conflict, he was dismissed. The court held that such dismissal amounted to a violation of the implied terms of his contract.
In Tony, the employer had a practice to dismiss only for just cause. Moreover, Tony had been in the company's employ for eight years, had received a significant early promotion, as well as a series of bonuses and increases, and had made an important relocation for the sake of the company. His performance had also been above reproach. The court held that his dismissal amounted to a breach of an implied contractual term that he would be dismissed only for just cause, and held in his favour.
From the two cases mentioned should be distinguished the latter two where the court refused to find for the employees as their claim that an implied contract excluding dismissal at-will existed was based on single incidents. In Barber there was a pre-employment statement that he would not be dismissed "as long was he was profitable and doing the job". In Anderson the single statement by an official to the effect that Anderson would have the "full support" of his superiors was too vague and hence insufficient to rebut the presumption of dismissal at-will.
907 ***In Muller v Stromberg Carlson Corporation*** -427 So. 2d 266[1983] the Florida Court of Appeal rejected a claim based on the implied contract exception, on the basis of the vagueness thereof, which could lead to legal uncertainty. Here the employer had a so-called 'merit pay plan' involving an annual evaluation of performance and a pay recommendation based thereon. The court, in rejecting Muller's claim ,referred to long established principles of definiteness and certainty of the terms of a contract for it to be binding, and dismissed the claim that an implied term excluding employment-at-will could be said to exist in the case. Furthermore the court dismissed the idea that court discretion could replace employer discretion in the formulation of the terms of a contract.
The Texas Court of Appeal made a finding more or less consonant with that of Muller in ***Webber v M W Kellogg Company*** [1986] 720 S.W. 2d 124, although the factual situation was different. Here the court held that there had been no agreement of employment for a specific period as contended by the employee. This meant that the doctrine of employment-at-will was not excluded. The court was not convinced that a letter of appointment classifying the employment as 'permanent' and identifying in the company documents a retirement date 22 years after appointment, was sufficient to create an implied term that the contract was of specific, limited duration.
The Supreme Court of Pennsylvania adopted a somewhat more radical approach in ***Richardson v Charles Cole Memorial Hospital*** [1983] 320 Pa. Sup.106, 466 A. 2d 1084, holding that as policies published in an employer handbook did not bring about a meeting of the minds, i.e. consensus, a contract cannot on that basis be said to have been entered into. The court preferred to adhere to the traditional requirements for the establishment of a

6.4.3 GOOD FAITH AND FAIR DEALING EXCEPTIONS

The third generally recognized exception to the employment at-will principle is that relating to the requirements of *good faith and fair dealing.*[908] This exception has rightly been described as *"representing the most significant departure from the traditional employment-at-will doctrine".*[909] Yet, this exception is also the one that the vast majority of courts in the U S refused to adopt. In fact, the courts of only 11 States accepted it in some limited form or other.[910] We will briefly examine some illustrative case law in this regard. Before we do so, we wish to refer to our earlier discussion of one of the corollaries of the dismissal at-will principle, namely that at common law, English as well as American, an employer could dismiss an employee without a valid reason , for no reason at all, or even in bad faith[911] or for a morally indefensible reason.[912] A dismissal was only wrongful in common law if the required notice period was not observed. In other words, good faith or fair dealing played no part in the common law of employment or dismissal at-will. It was simply irrelevant matters into which a court of law had no power or reason to inquire.

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contract, which were lacking in the particular case. The court mentioned that the benefits mentioned in the manual were mere gratuities in stead of contractual rights which are brought about by consensus, normally following a bargaining process.

In other cases the courts have been similarly reluctant to deem the employment at will principle to have been ousted by an alleged implied contractual term. In ***Matagorda County Hospital District, Petitioner v Christine Burwell,*** 49 Tex. Sup. J 370, 2006 Tex. LEXIS 137 the court held that a provision in an employment manual that dismissal 'may be for cause' and requiring the employee records to specify the reason for dismissal, was not sufficient to exclude the applicability of the employment –at-will principle.

908 **Muhl** ***"The Employment at Will Doctrine"*** (2001) Jan. 10-11

909 Ibid.

910 Ibid.

911 ***Corpus Iuris Secundum*** 84-5.

Cf. ***Peterson v Glory House of Sioux Falls***, 443 N.W. 2d 653 on which reliance is placed. See also: ***Phung v Waste management, Inc.*** 491 N.E. 2d 1114, 23 Ohio St. 3d 100, 23 O.B.R. 260, in which it was held that an employment contract can be terminated at will at any time for any cause, even if done in gross and reckless disregard of any employee's rights. Cf. ***Corpus Iuris Secundum*** 85

912 See the Wisconsin case of ***Brockmeyer v Dun & Bradstreet***, 335 N.W. 2d 834, 113 Wis. 2d 561; ***Corpus Iuris Secundum*** 85

In more recent years there has been a limited move away from this legal position in the direction of enforcing an *implied* (and *a fortiori an express*) *covenant of good faith and fair dealing* between the parties.[913]

It was the California Court of Appeal, in the matter of ***Lawrence M Cleary v American Airlines, Inc***[914] which initiated this exception, just as it had done with the public policy exception in the Peterman case.[915] Cleary was dismissed without the provision of reasons after a service period of 18 years. The court held as follows;

"Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of ***good faith and fair dealing****...a duty arose on the part of American Airlines...to do nothing which would...deprive the employee of the* ***benefits of employment having accrued*** *during 18 years of employment."* [916]

In ***Kmart Corporation v Ponsock***[917] the Nevada Supreme Court held that a tort action, and therefore punitive damages, were available to every employee in every employment relationship that was subject to the principle of *good faith and fair dealing*. Ponsock had been hired *'until retirement or as long as it is possible'*. However, the court found that he was dismissed by the company in an effort to avoid paying his retirement benefits.[918] This was held to be in breach of the implied term of good faith and fair dealing.

In ***Khanna v Microdata Corp.***[919] the employee (Khanna) had instituted legal action against his employer for payment of outstanding commission on certain sales. The employer, although admitting that the commission was due, nevertheless dismissed Khanna for disloyalty in the form of making "unfounded allegations" against Microdata personnel. Dismissal took place while the commission case was pending. Khanna brought legal action for wrongful

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913 However, it has to be borne in mind that the principles laid down in the following cases that we are about to discuss are always subject to the general rule that where good faith on the part of the employer *actually exists*, the exceptions to the dismissal at-will doctrine enunciated would not find application. - This was decided by the California Supreme Court in ***Fowler v Varian Associates, Inc.***, 6 Dist. 214 Cal. Report. 539, 196 C.A 3d, 34.
914 111 Cal. App. 3d 443 [1980]
915 Supra.
916 My emphasis.
917 103 Nev. 39, 732 P. 2d 1364 [1987].
918 **Muhl** ***"The Employment at Will Doctrine"*** (2001)10.
919 1 IER Cases 1854, Cal CA, 1985

dismissal, claiming compensatory damages for breach of the employment contract, as well as punitive damages based on tort. Khanna based his claim on an alleged violation of an *implied good faith and fair dealing covenant* in the contract of service.

The court upheld the claim on the basis that this breach occurs *"whenever the employer engages in 'bad faith' action, extraneous to the contract, combined with the employer's intent to frustrate the employee's enjoyment of contractual rights."* In the case under consideration, the employee's contractual rights that he had been deprived enjoyment of, was the commission earned. An *additional consideration* was found in the fact that it was the employee's legal action that had been brought for the payment of his commission that had moved the employer to dismiss him. This in itself also amounts to a deprivation of the enjoyment of (existing) contractual rights and is in that respect a further violation of the *covenant of good faith and fair dealing*.[920]

The principle pronounced in Khanna and as explained by **Wolkinson & Block** above, has been confirmed in a number of cases in which it was held that the implied covenant applied only to benefits already earned, and not to future or undue benefits.[921] Certain forms of opportunism on the part of the employer have also been held to be violations of the good faith and fair dealing covenant.[922]

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920 **Wolkinson & Block *Employment Law*** (1996) 252 et seq. explain the difference between breach of contract and violation of an implied covenant of good faith and fair dealing as follows: *"The Khanna case presents an excellent example of a discharge in violation of the **covenant of good faith and fair dealing**. A classic violation of the covenant differs from a violation of an agreement in that in the former, the employer, by its discharge action, attempts to deprive an employee of a previously earned benefit to which he or she would be entitled if he or she remained employed. In the latter, the employer has agreed not to terminate the employee except under certain conditions."*

921 See ***Wakefield v Northern Telekom,*** 1 IER Cases 1762 et seq. (CA 2, 1985); ***Edwards v Massachusetts Mutual Life Insurance Co.*** 1 IER Cases 1046 (CA 7, 1991); ***Franklin v National Bank of Boston*** 7 IER Cases 1440, 1447 (DC Mas.1992).

Also see ***Corpus Iuris Secundum*** 86 where the following authority is cited in support of the proposition that the good faith and fair dealing criterion only applies to *past benefits*: There is the federal case of ***Chambers v Valley Nat. Bank of Arizona.*** D. Ariz. 721 F. Supp. 1128; At state level see ***Wagenseller v Scottsdale Memorial Hosp.*** 710 P. 2d 1025, 147 Ariz. 370;Then there is the well-known Californian case of ***Heijmadi v AMFAC Inc.*** App. 1 Dist. 249; Cal. Rprt. 5, 202 CA 3d 525; ***Metcalf v Intermountain Gas Co.*** 778 P.2d 744, 116 Idaho 622.

However see the Alaskan case of ***Mitford v de Lasala,*** 666 P. 2d 1000; ***Corpus Iuris Secundum*** 86. Here the employee was discharged for the purpose of preventing him from a share of the unrealized gains in value of the

Quite significant for our purposes however, is ***Luedtke v Nabors Alaska Drilling Co***,[923] where the Supreme Court of Alaska held that the covenant of good faith and fair dealing also requires the parties to an employment contract to act in a manner which a *reasonable person would regard as fair*. This is the widest sense in which the American courts have applied the good faith and fair dealing principle.[924] In this case an employee was dismissed for failing a drug test the administering of which he was not warned about. He was also the only employee tested. This decision does not justify the conclusion that the court has subjected the relation between employer and employee to a general and comprehensive *equity* or *fairness* regime. It would seem that the decision was made within the rather narrow confines of procedural fairness requirements.

As already mentioned, the vast majority of State courts rejected the exception of good faith and fair dealing. It would seem as though the idea of legal certainty and the reluctance of courts of law to assume the duties of the legislature played a major role in this rejection. The matter of ***Catania v Eastern Airlines***[925] provides a good example of and significant insight into this approach. Four dismissed employees of Eastern Airlines brought a wrongful dismissal action against the employer, claiming that the employer had committed a breach of the good faith and fair dealing covenant contained in their contracts of employment. Although expressing criticism of the employment-at-will doctrine which subjects the interests of the employee totally to the employer's will, the Florida Appellate Court declared itself unwilling to act as lawgiver, and declined to follow the precedent set by the Nevada Supreme Court in Kmart.

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employer's property. The employment contract entitled the employee to share profits with the employer. The discharge was found to have violated the good faith and fair dealing covenant.
Where an employee was dismissed to prevent him from benefitting from retirement benefits, the dismissal was regarded as wrongful – **Wagenseller** above. Dismissal for the purpose of depriving an employee of a bonus has similarly been held to amount to a violation of the good faith and fair dealing covenant – ***Manuel v International Harvester Co.*** D.C. III, 502 F. Supp. 45; ***Cook v Alexander and Alexander of Connecticut, Inc.*** 448 A. 2d 1295, 40 Conn. Sp. 246; ***Corpus Iuris Secundum*** 86

922 Thus, a dismissal in order to allow call of stock which was about to rise in value, was regarded as opportunism violating the good faith and fair dealing covenant – ***Jordan v Duff and Phelps, Inc.*** C.A. 7(III), 815 F. 2d 429; ***Khanna*** (supra); ***Corpus Iuris Secundum*** 86

923 7 IER Cases 834 (Alaska SC, 1992)

924 **Wolkinson & Block** (1996) 259-260.

925 381 So.2d 265 [1980].

6.5 THE CONCEPT OF JUST CAUSE FOR DISMISSAL

In order to form a more comprehensive idea of the equitable content of American employment law,- or the lack thereof - one also has to consider the meaning that is attached to the phrase *just cause* as a requirement for certain kinds of dismissal. Without such consideration, it would be difficult, if not impossible to say whether *equity*, *fairness* or *reason* has any role to play in American dismissal law relating to just cause. We have seen that as a general rule just cause has to be shown by the employer, where the dismissal involved a fixed term contract that has been terminated. The same applied where a permanent or indefinite term contract contained a *just cause* clause. The logic or rationale behind this requirement is that where the parties have agreed upon a fixed term, the agreement is *ipso facto* that termination will not take place prior to the expiry of such term. However, it is also an implicit term of such agreement that if one of the parties thereto commits a material breach of the agreement, the counterparty would have the right to terminate the contract. In other words, we are dealing here with the trite principle of breach of contract by one party, followed by termination by the aggrieved one. In this sense, the term *just cause* therefore denotes the right of the innocent party to terminate the contract on the basis that he has a good and lawful reason (*just cause*) in law to do so.

However, although breach of contract would certainly constitute good cause for dismissal, it should not be seen as the only ground for termination or as being synonymous with *good cause*. American jurisprudence and juristic writing suggest that *good cause* is a wider, more comprehensive notion than breach of contract. **Culligan & Amodio**[926] suggest that as a general proposition, *good cause* comprise any act of the employee[927] which injures or has the tendency to injure the employer's[928] business, interests, or reputation. Such acts would justify dismissal.[929] Actual loss is not required. Potential loss or damage is sufficient.[930]

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926 ***Corpus Iuris Secundum*** 105
927 They use the word 'servant.'
928 They use the word 'his master's'
929 The learned authors rely on certain State jurisprudence in making this submission: ***Brock v Mutual Reports, Inc.*** App., 397 A. 2d 149 (District of Columbia); ***Bright v Ganas***, 189 A. 427, 171 Md. 493 (Md.);

Good cause has also been held to exist in cases where there is some inherent shortcoming in the qualifications of the employee, or some failure to perform some essential part of the job, or other shortcomings detrimental to the employer's interest recognized by the community as good reason for termination of the employee's services. [931]

Although this description of the concept of good cause is somewhat extravagant and wide, the essence of it points in the direction of an objectively determinable reasonable or recognized ground for dismissal. Unlike cases where dismissal at-will applies, dismissal in these cases may not be *arbitrary*, *capricious* or motivated by *bad faith*.[932] The employer is not the sole judge of what constitutes *good cause*. Mere dissatisfaction with the employee's work, or the absence of bad faith, ulterior motive, evil intent or fraud on the part of the employer does not per se constitute good cause.[933] In fact it has been held that *good cause* depends on *objective reasonableness*. If a *reasonable person* would find the cause sufficient to justify dismissal, *just cause* would exist.[934]

The employer is entitled to establish the facts and act upon them if probable cause is found to exist. There is furthermore a subjective element in this process in that the employer must subjectively believe the evidence on which he bases his finding of *good cause*. Should the employer himself not believe the evidence, he may be found by the court or an employment tribunal to have violated the implied covenant of good faith and fair dealing.[935] The reason for a dismissal may also only be regarded as *good cause*, if it existed at the time of or prior to

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Robinson v Western Union Telegraph Co., 135 N.W. 292, 169, Mich. 503 (Mich.); ***Osburne v de Force***, 257 P. 685, 122 Or. 360 (Or.); ***Bernstein v Lipper Mfg. Co.***, 160 A. 770, 307 Pa. 36 (Pa.); ***Curtis v Reeves***, App., 736 S.W. 2d 108 (Tenn.); ***Associated Milk Producers v Nelson***, Civ. App. 624 S.W. 2d 920.

930 ***Corpus Iuris Secundum*** 105.

931 Ibid.

932 Ibid.

933 Ibid.

934 Ibid.

935 Ibid.

dismissal, and if the employer was aware of it at the time of dismissal, it was the actual reason for dismissal.[936]

6.6 CONCLUSION

It is quite clear that fairness as such does not form the basis of American employment law, more specifically dismissal law. It seems unlikely that the courts will use the instruments of the implied contractual term of fair treatment and the concept of just cause for dismissal as vehicles for the importation of fairness into American dismissal law as these have been applied on a very restricted and narrow basis even by such courts as had the boldness to do so. As far as the courts may have applied some measure of fairness in such cases, this was not done as part of a process of imposing an immanent criterion of fairness on the employment relationship but rather because it was contractually (impliedly) agreed upon by the parties involved.

In all probability, legislative reforms resembling those adopted in England upon recommendation of the ***Donovan Commission*** will eventually materialize in America.

936 Ibid.

CHAPTER VII

SOUTH AFRICAN LAW

7.1 EQUITY AND THE COURTS IN GENERAL

Traditionally, South African courts of law adopted the Aristotelian, the Roman and the Roman Dutch approach to equity and its role within the province of law.[937] This means that, from as early as one could establish from the published South African law reports, South African courts declined to follow the English model[938] that observed a strict institutional division between law and equity, where differentiated courts traditionally applied law to the exclusion of equity, and vice versa.[939]

South African jurisprudence always embraced the idea that the courts of law were *ipso facto* also courts of equity.[940] The *locus classicus,* often quoted in subsequent jurisprudence, is the well known statement of **De Villiers** CJ, which dates back to **Mills and Sons** in 1876:[941]

"Now it is quite true that this Court is a Court of Equity as well as common law, but it can administer equity only so far as it is consistent with the principles of Roman-Dutch law."[942]

It may at this stage be noted that the original 1995 version of the LRA only contained a provision stating that the Labour Court is a court of law. In 1998 an

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937 **Hahlo and Kahn *The South African Legal System and its Background*** (1968) 136

938 Originally based on statute - see Chapt. V

939 ***Estate Thomas v Kerr*** 1903 20 S.C 366; ***Bothwell v Union Government*** 1917 C.P.D., reported in 1917 A D 262, per **Kotze J.** at 269.The dual judicative system of English Law had a lengthy and rich history that was dealt with in Chapter V.1 (English law). The system was finally abolished with the adoption of the Judicature Acts of 1873-75. See ***Smith & Keenan English Law*** 10th ed 11

940 **Nathan *The Common Law of South Africa (***1906) 28 points out that equity is comprehended in the law generally, and in the very definition of law. Equity should be observed in the application of all law, written or unwritten. He who clings to the wording of the law, in stead of the meaning thereof, can be said to be acting *in fraudem legis.*

941 ***Mills and Sons v Benjamin Bros.*** (1876) 6 Buch. 121. **McGregor "Aequitas"** 2 THRHR (1938) 1

942 This dictum makes it clear once more that traditionally equity is seen as supplementary and complementary to the strict law, a 'handmaiden' to such law, and not a competitor or adversary.

amendment was made to the effect that the Labour Court and the Labour Appeal Court are courts of law as well as courts of *equity*.[943] We revert to this issue at a later stage.

In ***Hassan Khan v Immigration Officer,***[944] the CPD, relying inter alia on ***Mills & Sons,***[945] re-emphasised the dictum of **De Villiers CJ** cited above.[946] Ultimately, the authority for this approach goes back to the Digest of Roman law, the court stated.[947]

The equitable jurisdiction of the erstwhile Supreme Court, regarded by it as inherent to its jurisdictional powers, was put beyond doubt by the AD in 1925 in ***Weinerlein***,[948] a case that concerned the rectification of a contract.[949] It was

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943 The amendments were introduced by s 11 of Act 127 of 1998. See ss 151(1) and 167(1), which deal with the LC and LAC respectively.

944 1915 C P D 661

945 1876 Buch 121

946 In ***Hassan*** 661 the court stated, with reference to ***Mills***: " *There is no doubt and this must be considered to be all that the learned Judge meant when he pronounced the Court to be one of equity as well as of law. The court, in the application of the law, will indeed take equitable principles into consideration."*

947 **Hassan** 661: *"It (the Court) will act ex aequo et bono where it is free to do so, and hence one of the outstanding features of our Roman Dutch Law is its equitable spirit, for the maxim of Paulus (Digest 50 17 50),* ***in omnibus quidem, maxime tamen in jure aequitas spectanda est****, is likewise the rule of our law."*
The court duly applies equitable considerations as part of its ordinary functions under the common law, but it does not possess a general equitable jurisdiction separate and distinct from that which it enjoys under the strict law.

948 ***Weinerlein v Goch Buildings*** Ltd 1925 AD 282. See the lucent exposition of **Wessels JA**, who stated at 292-3: *"It is therefore clear that under the civil law the courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, dates back to remote antiquity and is embodied in the maxim* ***'summum ius ab aequitate dissidens jus non est...'****. The Court will not allow it [the contract] to be used as an engine of fraud...I think this right is an inherent right of our courts and is well within their traditional equitable jurisdiction."*
The terminology employed here by the learned judge is testimony to his acute awareness of the nature of equity: it is applied not as a general rule or principle of law, but rather only *inter partes* or between the particular parties before the judge. It is similarly sourced in the particular circumstances of the case, and is thus not aimed at constituting judicial precedent. A clear distinction is also drawn between the *ius strictum* and *aequitas*.
The judgment has however been criticized in one respect: it has been argued that, as would appear from the concurring judgment of **Kotze JA**, the so-called *'inherent equitable jurisdiction is nothing more than principles of substantive common law.'* See **Taitz** ***The Inherent Jurisdiction of the Supreme Court*** (1987) 38, where it is argued that the court therefore erroneously used the term *'inherent jurisdiction.'* While it may be correct that the principles relied upon by **Wessels JA** form part and partial of the substantive law, there can be little doubt that they had their origin and roots in ancient equitable principles which were over the course of time assimilated into the civil law.

especially the *equitable spirit*[950] of Roman, Roman Dutch and Canon law[951] that triumphed in South African jurisprudence.[952] **Hahlo and Kahn**[953] cite a number of areas of law where the courts traditionally applied equitable considerations in addition to or in the absence of legal principles: The law of unjustified enrichment;[954] especially in employment related matters; the law relating to estoppel; fictional fulfillment,[955] and various other branches of law. In many of these cases it was especially the requirements of *bona fides, honesty,*

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949 The matter involved an application for the rectification of a written deed of sale of immovable property. The deed did not contain the original terms agreed upon by the parties and that were intended to be incorporated into the contract.

950 The ***bonum et aequum***. See for instance C 3 1 8 where Justinian states that in all matters, the pre-eminent sense of justice and equity is to be preferred to the strict law; Cf. **D 50 7 90 ; D 6 1 38; D 45 1 91 3; D 12 1 32; D 23 3 12; D 27 8 27; D 37 6 6** etc. All these texts reflect the equitable spirit of Roman law referred to here. The equitable spirit of **Roman Dutch Law** is clearly reflected in the fairness passage of **Voet, *Com* 1 1 8,** where the famous author states that the good is the equitable and the equitable the good – See also ***Com* 1 1 1**

951 On the adoption of Canon Law in Holland, see **Nathan *The Common Law of South Africa*** (1904) 2-3.

952 In ***Bothwell v Union Govt. (Minister of Lands)*** 269, the court stated: *"As I had occasion to remark in Thomas' Estate v Kerr (20 S.C. 374 and 13 C.T. 540), one of the most noteworthy characteristics of our common law is its broad equitable spirit. This could not very well be otherwise, for our jurisprudence is founded on a system which in the opening lines of the Digest elegantly defines law as* ***ars boni et aequi****; and Paulus also lays down for our guidance the definite precept* ***'in omnibus quidem, maxime tamen in jure, aequitas spectanda est*** *(Digest 50.17.90)* " ; See also ***Umhlebi v Umhlebi's Estate*** 1905 19 E D C. 237, 249; ***Estate Thomas v Kerr*** 374.

953 **The SA Legal System** (1968) 137

954 The following early cases dealing with the role of equity in unfair enrichment of one party, mostly the employer, at the expense of another (the employee) are dealt with later in this Chapter : ***Spencer v Gostelow*** 1920 AD 617; ***Hauman v Nortje*** 1914 AD 293; ***Breslin v Hichens*** 1914 AD 312; **Bassamaradoo v Morris** 6 Juta 28; **Nixon v Blaine Co.**1879 **Buch; Robertson v Heathorn** 21 SC 428; ***Smith v Federal Cold Storage Co.*** 1905 TS 734; ***Van Rensburg v Straughan*** 1914 AD 317; ***Hutchinson v Ramdas*** 1904 26 NLR 165; ***Rene v Alexander*** 1916 CPD 603; ***Boyd v Stuttaford*** 1910 AD 101, at 104-5. The equitable principles relating to *double sale* by a seller were based on *bona fides* in contractual dealings: ***Van Zyl v Engelbrecht*** (1889) 16 S C 209; ***De Jager v Sisana*** 1930 A D 71, 84; ***Esterhuizen v Brenner Bros.*** 1908 18 C T R 575; **Hahlo & Kahn** (1968) 137.

The maxim of Roman Law, that no-one was allowed to improve his position, or to derive any benefit from his own bad faith was also adopted at a very early stage of the development of South African law: ***Robinson v Randfontein Estates G.M. Co. Ltd.*** 1924 A D 159; ***R. v Close Settlement Corporation Ltd*** 1922 A D 300; ***Hansen & Schrader v Deare*** 1883 3 E D C 45; ***Holder v Epstein*** 1905 T H 158; ***Darlington v Union & Rhodesia Wholesale Ltd.*** 1926 O P D 172; ***Associated Manganese Mines of S.A. v Claassens*** 1954 3 S.A. 758 A.D 774. On the Roman law foundations of the principle of unjustified enrichment, see **Stein *The Character and Influence of the Roman Civil Law*** (1973) 31 et seq.

955 This refers to the principle in terms of which a condition is deemed to be fulfilled against a person who would, on its fulfillment, be bound by an obligation, and who intentionally prevented fulfillment in circumstances where he was under a legal duty not to do so. See ***MacDuff & Co. Ltd v Johannesburg Consolidated Investment Co. Ltd.*** 1924 A D 573; ***Koenig v Johnson & Co. Ltd.*** 1935 A D 262

reasonableness, fairness and the application of *simple fundamental justice* within the context of contractual relations that were emphasised.[956]

Damsell v The Southern Life Association Ltd[957] is a case in point. Here the employee applied for a declaratory order to the effect that he was entitled to certain disability benefits in terms of a scheme administered by Southern Life, his employer. In terms of the contract of employment, payment depended on whether, *"in the opinion"* of the employer, the employee had been disabled by injury or decease.[958] The court held that such opinion had to be formed in a *bona fide*, honest and reasonable way, based on principles of fundamental *fairness* and *natural justice*.[959] The court emphasised that we are here not within the realm of administrative law, but squarely within the framework of contractual law.[960] The vehicle used for the importation of these principles is the *implied term of fairness* in contractual agreements.[961]

In ***Umhlebi***[962] Roman Dutch and Canon law were commended for their *equitable spirit*, *flexibility* and *liberality* which serve to combat undue rigidity and

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956 Cf ***Damsell v The Southern Life Association Ltd*** 1992 13 ILJ 533 C P D, where the court stated that where the contract between parties empowers one of them to make certain factual findings in the capacity of some kind of tribunal or adjudicator, such findings or opinion concerning the issue should be *reasonable, honest,* based on fundamental fairness, and should have observed the principles of natural justice. This dictum is not related in any sense to administrative law, but is based in an implied contractual term of fairness between the parties.

957 Loc. cit.

958 ***Damsell v Southern Life*** 534.

959 ***Damsell*** 537.

960 On p. 537C-D, the learned judge stated: *It was common cause in argument that the principles of administrative law had no application in this matter, that the relationship between the parties in casu was governed solely by the terms of the contract between them and the applicable principles of the common law, and that the principles of natural justice or fundamental fairness...could only come into play in the field of contract where an adjudicating body or tribunal was contractually created."*

The court cited **Broom JP** in ***Thandroyen v Sister Annucia & Another*** 1959 4 SA 632 (N) 639F - 640B.

961 The court applied the principles governing the importation of implied terms into contracts as classically set out in ***Mullin (Pty) Ltd v Benade Ltd*** 1952 1 SA 211 (A). The court stated at 539H, that in the circumstances, an implied term will follow, unless there are clear indications in the contract that the parties intended to vest the *'arbiter'* with an absolute and unfettered discretion. The court also remarked that the construct of a legitimate expectation could be used to the same effect.

962 In ***Umhlebi v Estate of Umhlebi and Fina Umhlebi*** 1905 E D C 249, the Court remarked that *"The equitable spirit of our own Roman Dutch Law, to a large extent due to the influence of Canon Law, is indeed one of its leading features."*

In this same judgment, the court applied the **Praetor's Edict** on *iustus error* and *restitutio in integrum* (D 4 6 11), and the extensive interpretation that was given to that remedy in Roman Dutch Law (**Voet** 4 1 26). Voet had been cited with approval in ***Stewart's Assignee v Wall's Trustee*** 3 S C 26.

stagnation.[963] It is flexibility and suppleness of legal principle, rather than rigidity that lends itself to development of the common law so as to keep trend with modern circumstances.[964]

In the true tradition of Roman Dutch law, South African courts applied equity as a supplementary system of principles, subsidiary to well-established and well-defined principles of Roman Dutch law and statutory provisions.[965] The aim was never the defeat of established principle, but rather the prevention of injustice through harshness and rigidity.[966] Relief was for instance not easily granted against the express terms of a contract,[967] contrary to conditions registered against title deeds,[968] or against hardship caused by clear and intended statutory provision.[969] It should furthermore be noted that there is a presumption that the legislature does not intend its enactments to have *unfair, unjust* or *unreasonable* results.[970]

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963 In ***Umhlebi*** 249, the court cited the following passage from ***Stewart's Assignee*** 426: *"In deciding this question, our courts would not be bound by the strict rules of the civil law, but would take for their guidance the more liberal principles which guided the Dutch courts."*

964 This view was also expressed by South African courts from the earliest times that case law was reported. In ***Blower v van Noorden*** 1909 T S 905, **Innes C J** held that where new needs require that new remedies should be devised, or that the scope of the old ones should be extended, there is sufficient elasticity in our law to provide therefore within its basic principles. This approach was endorsed in subsequent case law ,such as **Feldman v Mall**, 1945 A D 733, 789; ***Die Spoorbond & Another v South African Railways*** 1946 A D 1013; ***Essa v Divaris***, 1947 1 SA 765; ***Union Govt. v Ocean Accident & Guarantee Corp. Ltd.*** 1956 1 SA, 577, 586C-H. The underlying ratio of this case law is of course the need for flexible and elastic equitable considerations in the administration of law. On the need for flexibility and fairness, see also ***National Entitled Workers Union v Commission for Conciliation, Mediation and Arbitration*** 2003 24 ILJ 2335, 2340.

965 ***Lazarus and Jackson v Wessels*** 1903 T S 509

966 In ***Estate Thomas v Kerr***, **De Villiers C J**: formulated the principles governing the application of equity as follows: *"But the power of the court to exercise an equitable jurisdiction in so far as it is not inconsistent with fixed principles of the Roman-Dutch law has been repeatedly recognised. Where the court has to elect between the rigid application of a rule of the old law to a case not clearly contemplated by that law and the application of an equitable principle which does not defeat the old law but prevents any injustice from its rigid application, the court would be quite justified in choosing the latter alternative."*

967 ***Human v Rieseberg*** 1922 T P D 157; See also the criticism leveled by Labour Court judge **Pillay** against an award of a CCMA commissioner in an article entitled ***"Giving Meaning to Workplace Equity : The Role of the Courts"*** 2003 24 ILJ 61. The commissioner had assumed jurisdiction over the termination of a fixed-term contract on the basis of *'the primacy of equity over contract.'* This approach is labeled *unreasoned, thoughtless* and *brazenly ignoring of complex legal principles* by **Pillay.**

968 ***Ex Parte Frost*** 1956 2 SA 110, later reversed on grounds irrelevant to this issue in 1956 2 SA 300 (A D.)

969 ***Moser v Milton*** 1945 A D 527-8

970 **Steyn *Uitleg van Wette*** 4th ed. 108; ***Principal Immigration Officer v Bhula*** 1931 AD 336-7; ***Van Heerden v Queen's Hotel (Pty) Ltd*** 1973 2 SA 14 (RAD); **Cockram *Interpretation of Statutes*** (1987) 77-8; ***United African Motors*** 232-3.

However, the courts always maintained that they had a discretion to avoid undue *hardship* and injustice and in that process to apply equitable principles when it comes to the granting of relief for breach of contract, particularly where a claim for specific performance was involved.[971] Even *hardship* that would be caused to a third party could move the court not to order specific performance of an agreement.[972] The courts also pointed out that it had a discretion to refuse relief to a claimant, where the agreement that gave rise to a claim was clearly *unreasonable*[973] The court specifically held that this approach emanated ***ex aequo et bono***.[974]

Although the courts were generally satisfied with the application of established legal principle of Roman Dutch law, they were on occasion readily prepared – where appropriate - to apply ideas and principles derived from *morality* that were binding *in foro conscientiae.*[975] It should be borne in mind however, that sheer morality *in foro conscientiae* per se would seldom be the sole basis of a court's decision.[976]

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971 See ***Haynes v King Williams Town Municipality*** 1951 2 SA 377, where **De Villiers A J A** cited with approval the following dictum of **Gardner J.P.** in the court a quo: *"After consideration of all the authorities cited it appears to us that the equitable principle underlying the above cases is in harmony with the principles of our law; See* ***Wessels on Contract****, vol. 2 par. 3119...In considering the matter of hardship, we think that the parties at the time of the making of the contract, never contemplated a shortage of water..."*

972 ***Haynes v King Williams Town Municipality*** 371. In this case the court declined to order specific performance in the form of the provision of water in a time of drought, as it would result in undue hardship to the inhabitants of a town.

973 See the judgment of **De Villiers A J A** in ***Haynes v King Williams Town Municipality*** 378H-379A, where it was stated: *"To these may be added examples given by Wessels on Contract (vol. 2, sec.319) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."*

974 ***Haynes v King Williams Town Municipality*** 381A. This expression derives from Roman Law. See Chapter II.

975 For the role of the *forum* conscientiae in Roman Dutch equity, see **Wessels *History of the Roman Dutch Law*** (1908) 137. On SA law see ***Hahlo & Kahn The South African Legal System*** (1968) 137; See also ***Bothwell v Union Government***, per Kotze J., 269; ***Liquidators Union Bank v Beit*** 1892 9 S C 137; ***Executors of McCorkingdale v Bok N.O.*** 1884 1 S.A.R. 216, 218; ***Weinerlein v Goch Buildings, Ltd.*** 1925 A D 295; ***Ford v Allen*** 1925 T P D 5 11. ***Hahlo & Kahn*** 138 furthermore refers to *"the much criticized judgment"* of ***Preston & Dixon v Biden's Trustee*** 1883 1 Buch. A.C. 322, 350-1; 353-4.

976 In ***Bothwell*** 269, the court remarks that the fact that it had cited equitable principles from the Digest in support of its judgment, does not mean that the court would necessarily enforce everything that is binding *in foro conscientiae,* for the Digest also warns that ***'non omne quod licitum (sic) honestum est.***

It is also to be noted that notwithstanding the fact that the courts have stated that in applying equitable considerations they do not enter the forum *conscientiae* as such, they have also emphatically declared their aversion to enforce contracts that are *unconscionable* and therefore unfair. In adopting this approach, the courts have not only relied on Roman Dutch, but also on English equity jurisprudence and academic writers.[977]

Our conclusion is that equity or fairness in the wide sense, has been recognised by the civil courts from the earliest times, or at least for as long as we have had reported judgments in South Africa. Such equity was identical in nature and scope to that of Roman and Roman Dutch Law. The courts acted ***ex bono et aequo*** as Roman and Roman Dutch law required, and also refused to act ***contra conscientiam***, as Roman Dutch[978] Canon Law and English Law required.[979] Equity has always found its application as a system of jurisprudential principles subsidiary to the strict law.[980] Particularly in the field of the law of contract however, of which employment law is an important branch, the courts retained a discretion, and indeed declined to enforce *unreasonable, unfair* and *unconscionable* contractual provisions and remedies.[981]

7.2 TOWARDS A DOMESTIC SYSTEM OF LABOUR LAW: FATE OF THE DUTCH PLACAATS AT THE CAPE

For a proper appreciation of the extent of the adoption and application of Roman Dutch labour law proper in South Africa early in the twentieth century[982], one has to briefly revert to the developments that occurred in the Netherlands towards

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977 In ***Haynes v King Williams Town Municipality*** 379A-C, the court cites with approval from ***Rex v Milne and Erleigh*** (7) 1951 1 SA 873, where **Schreiner J A** stated: *"More generally, specific performance will be refused where it would be 'inequitable in all the circumstances', 'or where from a change of circumstances or otherwise it would be **unconscientious**' to enforce the contract specifically."*
The court also placed reliance on **Story *Equity Jurisprudence*** 13th ed. 65, sec. 750(a), where it is stated: *"Upon grounds still stronger Courts of Equity will not proceed to decree specific performance where the contract is founded in fraud, imposition...or where from a change of circumstances or otherwise it would be **unconscientious** to enforce it..."*
See also **Christie *The Law of Contract in South Africa*** 92001) 526.
978 **Grotius *Inl*** 1 2 1
979 See Chapter V, English Law
980 See ***Estate Thomas v Kerr*** 374
981 Ibid; ***Bothwell*** 269
982 There had been sporadic developments even earlier to which we will return in more detail hereunder.

the end of the 17th and the beginning of the 18th centuries.[983] This has to some extent already been dealt with in our chapter on Roman Dutch law.[984] In this respect, the placaats of 2 September 1597, 1 May 1608 and especially of 29 November 1679 are of particular relevance.[985]

The 1679 placaat became notorious for having introduced a number of foreign doctrines and anomalies into the rational and equitable Roman Dutch law of employment that had largely been adopted from Roman law and had been developed further over centuries.[986] It is for this very same reason that the adoption of these placaats is noteworthy for the purposes of our investigation. These incongruities and anomalies can briefly be summarised as follows:[987]

Firstly, through the 1679 placaat, the so-called *doctrine of forfeiture* was introduced. Secondly the *doctrine of employment at will* found its way into Dutch employment law and thirdly, a special category of employees receiving differentiated legal consideration and treatment, namely the so-called *dienstboden* or domestic servants as distinguished from other workers, made its appearance. Fourthly, a *penal element* was introduced into the civil law of employment.[988] Lastly, the equitable *doctrine of divisibility of labour*, traditionally recognised by Roman and Roman Dutch law, was reversed. This was done through the introduction of the principle of forfeiture of unpaid wages for work partly done by the 1679 placaat. It abolished the existing principle of *pro rata* payment for work done, which **Grotius** and **Voet** had called *proportionalism*,[989] and which allows for *fair* and honest treatment of employees.

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983 Cf. Chapter III.
984 Chapter III.
985 Ibid. The placaat of 2 September 1597 dealt mainly with the employment of apprentices and is not directly relevant here, while that of 1 May 1608 was applicable mainly to the **Hague**.
986 See Chapter III.
987 ibid
988 Cf. ***Spencer v Gostelow*** 1920 AD 617.
989 Cf. Chapter III.

That these novel notions introduced by the 1679 placaat represented a radical and unfair departure from Roman Dutch law, was pointed out in a number of early South African judgments.[990]

Although ***Spencer v Gostelow*** was not the first case in which these issues had been considered, it does reflect the most comprehensive consideration of these aspects of early South African labour law, and consolidates as it were earlier relevant judgments.[991] Moreover, ***Spencer*** was one of the earliest cases in which the Appellate Division of the Supreme Court of a unified South Africa had the opportunity to pronounce upon the old placaats of Roman Dutch law mentioned above, as well as the established equitable principles that they infringed, or the foreign doctrines that they introduced.

In ***Spencer***[992] the court embarked upon a comprehensive investigation of the question of the extent to which Roman Dutch labour law applied in South Africa.[993] The court correctly remarked that the local urban *keuren* and similar statutes do not pose a problem as these were by nature meant to be applicable in the particular circumstances of Dutch cites only.[994] As regards the three Placaats considered here,[995] the court expressed itself in unambiguous terms, stating that it was not aware of any authority from which it could be inferred that

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990 In ***Spencer v Gostelow*** 1920 AD 617, 643 Innes C J stated: *"But the legal relationship of master and servant was in Holland materially modified by legislation. Besides a large number of local Ordinances on the subject, there were three general placaats. Their provisions,* ***reflecting as they did the spirit of the time*** *when they were passed, were* ***drastic*** *as regards the servant's position."* (our emphasis). **Mason** A J A not only concurred with the ratio of **Innes's** judgment, but also expressly confirmed the placaats as *drastic.*

991 The **Spencer** matter was an appeal from a judgment handed down by **Wessels** and **Gregorowski** JJ in the Transvaal Provincial Division. Other earlier judgments cited in **Spencer** and to which we will return, include ***Hauman v Nortje*** 1914 A D 293; ***Breslin v Hichens*** 1914 A D 312; ***Bassamaradoo v Morris*** 6 Juta 28; ***Nixon v Blaine & Co.*** 1879 Buch. 217;***Robertson & Co. v Heathorn*** 21 SC 428; ***Smith v Federal Cold Storage Co.*** 1905 TS 734; ***Field v Grace*** 1911 CPD 149; ***Rene v Alexander*** 1916 CPD 603; ***Van Rensburg v Straughan*** 1914 AD 317; ***Hutchinson v Ramdas*** 1904 26 NLR 165; ***Discount Bank v Dawes*** 1829 1 Menz. 388.

992 1920 AD 617. (supra)

993 620-1.

994 **De Blecourt** ***Kort Begrip*** (1950) 16 explains that the landlord (landsheer) would confer on a city the so-called *recht van keur* or privilege of enacting urban statutes or ordinances for the citizens within its territory. This was a form of limited autonomy. **Grotius** ***Inleid*** 1 2 18

995 The **Placaats** of 1597, 1608 and especially of 1679

these placaats were ever recognised or enforced in South Africa.[996] For that, the circumstances in South Africa and Holland differed much too widely.[997]

According to ***Spencer*** there are at least two major reasons why the placaats never obtained the force of law at the Cape: In the first place, the institution of *slavery* was still so dominant here at the time of the adoption of the placaats that virtually all labour was slave labour.[998] There was therefore a complete abrogation by disuse of the placaats here locally. Secondly, the individual Provinces that made out the Union of South Africa at the time, had each adopted its own exhaustive labour legislation in the form of labour Ordinances which were intended and virtually served as *'codes'* of labour law.[999]

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996 ***Spencer*** 629; **Brassey *Employment Law*** (1998) A1: 4; See also ***Smit v Workmen's Compensation*** 59.

997 Ibid. In ***Muller v Grobbelaar*** 1946 OPD 276, **Van den Heever AJP.** pointed out that the Dutch placaats could not be applicable in South Africa, as even general statutes of Holland did not find application here, unless so enacted by the Estates General of the United Netherlands.

998 The Cape Colony was colonized in 1652, only 27 years before the adoption of the 1679 **Placaat**. Slavery persisted in the Cape Colony until it was officially abolished in 1834, and perhaps thereafter in some form or another.

999 ***Spencer*** 641. In the Cape Colony a Proclamation dated 26 June 1818 dealt with the position of apprentices as the Dutch Placaat of 2 Sept. 1597 had clearly been abrogated by disuse. Ordinance 50 of 1828 applied only to coloured servants and repealed various minor enactments that had been adopted between 1787 and 1823. On 1 March 1841 an Ordinance was adopted that consolidated and amended the existing so-called Master and Servant law. This Ordinance was finally repealed by an Act of 4 June 1856 which sought to amend the existing laws regulating the rights of Masters, Servants and Apprentices. This Act inter alia contained definitions of a Master, a Servant, a Contract of Service etc (s 1); s 3 empowered a Magistrate to annul any contract of service in the event of any party having been induced to enter into the contract by fraud, misrepresentation or concealment. The Act furthermore regulated employment periods, notice of termination, as well as the provision of *"sufficient food of good and wholesome quality"* to employees residing on the master's premises – s 9. s 5 contained a specimen contract of service, which provided that services would be rendered *"at all fair and reasonable times"*. The Act of 4 June 1856 was still in force when ***Spencer v Gostelow*** was decided in 1920. The colonies of Natal and Transvaal used the 1841 Cape Ordinance and the 1856 Act as models when they promulgated employment ordinances of their own in 1850 and 1880 respectively. For a concise history of abovementioned statutory labour law of early South Africa, See ***Spencer v Gostelow*** 627; ***Brassey Employment Law*** (1998) A1 : 4; ***Cape of Good Hope Statutes*****:** (1652) – (1895) 570

7.3 PROPORTIONALISM VERSUS FORFEITURE

Proportionalism comprises the principle that an employee has to be remunerated a pro rata share of his remuneration for the proportion of the agreed employment period that he actually worked.[1000]

The principle of the *divisibility* of labour, which is closely related to proportionalism, means that the value of labour, and thus the remuneration therefore, is divisible and proportionable according to the actual period worked, as opposed to the agreed or normal period for which the employee is supposed to work, thus allowing for the employee who has failed to work for the full period to receive a pro rata share of his remuneration.[1001] Without divisibility of labour, there can be no proportionalism, and ultimately no *fair* remuneration.

Forfeiture means that an employee, for some reason such as desertion or misconduct, forfeits his remuneration in respect of a period for which he had

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1000 See the judgment of **Wessels J** in the T P D version of ***Spencer v Gostelow***, cited with approval by the AD in ***Gostelow*** 619; ***BK Tooling v Scope Precision Engineering*** 1979 1 SA 391 A, discussed in more detail infra.

1001 The meaning of the concepts of proportionalism and divisibility af labour was thoroughly considered and explained by **Wessels J** (as he then was) in the T P D judgment of the ***Spencer*** case, cited on 618-621 of ***Spencer.*** Citing **Averanius** the court explained that *'It was a principle of Roman Law that labour, like money was divisible, and that a person was entitled to proportionate payment for work he had done."* The reference is to **Averanius** Bk 3 Vol 2 102, and **Brunneman ad Dig** 33 1 19, both of which ultimately rely on the famous Roman text incorporated in D 12 6 14: ***Nam hoc naturae aequum est neminem cum alterius detrimento fieri locupletiorem*** – *"For it is by nature fair that no one should be enriched at the expense of another."* **Averanius** (loc. cit.) wrote: ***"Si conductor tertia parte temporis conventi fruatur tertiam partem mercedis persolvat ex laudatis legibus atque ita semper juxta proportionem."*** – *"If the hirer (employer) had made use of the service (of the employee) for one third of the agreed period, the praiseworthy laws determine that he shall pay a third of the remuneration, and so on, always according to proportion."* In his ***Inleidinge*** 3 19 11 (**Lee *The Jurisprudence of Holland*** (1926) 388-9, **Grotius** explained the divisibility of labour.

See also ***Valasek v Consolidated Cotton Corp*** 1983 1 SA 697B & G, discussed in detail hereunder, where the court held that a 3year fixed term contract was indivisible, as it could not be said to contain 36 distinct and consecutive contracts. However, the work, i.e the performance was held to be divisible in the sense that a monthly salary was provided for in the contract, commensurate with monthly performance. However see **De Vos *Verrykingsaanspreeklikheid*** (1987) 295, n. 81, where it is maintained that where an employee is hired for an indefinite period of time, and remunerated on a monthly basis, the contract is divisible into segments of one month each. Salary in respect of a month during which work was fully done, is payable *ex contractu.* Enrichment only plays a role in regard to a month not fully worked for.

Indivisibility of *labour* applied to *locatio conductio operis* – ***B K Tooling*** 419G-H.

already worked according to agreement.[1002] *Forfeiture* is therefore the antithesis of *proportionalism*.

In earlier judgments there had been a gradual *encroachment* of the provisions of the Placaat of 1679 onto the terrain of South African dismissal law. This needs to be considered briefly.

In ***Bassaramadoo v Morris***[1003] the forfeiture principle was incrementally extended from domestic workers as mentioned in the 1679 Placaat, to an *hotel - waiter*. This extension is not justifiable as a waiter, unlike a domestic servant, is active in general commerce extraneous to the household of the employer. For that reason the original *ratio* for the application of the Placaat in the first place falls away. It may however be argued that forfeiture applies where one is dealing with a live-in waiter.[1004] It has to be borne in mind however that, strictly speaking, the placaat never applied in South Africa.[1005]

Hutchinson v Ramdas[1006] involved a *tea-room servant* earning a monthly salary who was dismissed for refusal to comply with a lawful instruction. The appeal Court dismissed his claim for arrear wages on the basis that his *misconduct* was so gross as to amount to *desertion*, which was visited with the sanction of forfeiture.

In ***Robertson & Co. v Heathorn***[1007] a further incremental extension of the ambit of the 1679 placaat was made to include an *ironmonger's assistant*[1008] while forfeiture equivalent to four months' salary was applied to a *gardener* in ***Field v Grace.***[1009] In ***Smith v Federal Cold Storage Co.***[1010] an extension to a

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1002 See the judgment of **Wessels J** quoted in ***Spencer*** 619.
1003 21 SC. 427
1004 ***Spencer*** 620 (TPD judgment).
1005 ***Spencer v Gostelow***
1006 1904 NLR 165
1007 supra
1008 He had attempted to misappropriate the proceeds of an article sold by him to a customer. **De Villiers C J** relying on ***Bassaramadoo*** (supra) held: *"The misconduct took place during the current month and, in my opinion, as the misconduct was of such a nature as to justify the immediate dismissal and amounts to an act of leaving the service, the plaintiffs are not liable.....for any portion of the current months' salary".*
1009 Supra, 1911 CPD 949. This case involved theft
1010 1905 TS 735; **Amler *Precedents of Pleadings*** (1956) 101.

worker in a *butcher's shop* took place. The last extension before the TPD judgment reported in ***Spencer,***[1011] occurred in ***Rene v Alexander***[1012] where a *chef de cuisine* had been absent from service.

The application of the doctrine of forfeiture in South African employment law was tested for the first time by the then Appellate Division of the Supreme Court in ***Gostelow***.[1013]

Gostelow,[1014] who was employed as a foreman in Spencer's engineering works, was dismissed for gross misconduct. The date of dismissal was 11 August[1015] but Gostelow brought a contractual claim for damages for the full amount of his salary for August. His claim was dismissed in the Magistrates Court *in toto*, including that portion of the claim relating to the period in August ending on the 11th, i.e. the date of dismissal. The *ratio decidendi* of the Magistrates Court was that as Gostelow had been dismissed for misconduct, he was not entitled to any portion of his salary for August, including the period during which he had rendered his services.[1016] In other words, the Magistrates Court declined to apply *proportionalism* based on the *divisibility of labour*, and in stead resorted to the *doctrine of forfeiture* introduced by the 1679 placaat.[1017]

Apart from the issue of the general applicability of the Dutch placaats that has been dealt with earlier another decision that the AD had to take was whether the placaat of 1679 applied only to *domestic workers* as such, or whether all categories of workers were affected by its provisions. In other words, the court had to decide whether all workers (including Gostelow) who had been dismissed for misconduct were subject to the *doctrine of forfeiture*. The answer to this

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1011 supra
1012 1916 CPD 608
1013 (supra)
1014 Respondent on appeal in the Spencer case.
1015 The year does not appear from the law report but since Spencer was decided in 1920, it could have been in the immediately preceding years, or even in the same year for that matter,
1016 It would appear from 633 of ***Spencer*** that the Magistrates Court had relied on ***Bassaramdoo v Morris*** and ***Smith v Federal Cold Storage*** (supra).
1017 Gostelow was successful on appeal to the TPD, hence the appeal by Spencer to the AD.

question depended to a large extent on the interpretation of the language used in the placaat, and the common law context in which it had been adopted.

In the TPD.[1018] **Wessels J**[1019] had carefully analyzed the position of the domestic servant in Dutch law before and after introduction of the placaat and had come to a conclusion that Dutch Law indeed drew a distinction between domestic workers [1020] attached to the household itself and other workers.[1021] Domestic workers were viewed as belonging to a more modest category of workers. They were generally living in the master's household and by virtue of that had a somewhat more personal and intimate relationship with him or the mistress of the household. A coachman or stable boy would fall into this same category.[1022] Because of the attachment of domestic workers to the household, they were more strictly controlled. Numerous *keuren* and *ordonnantien* were therefore adopted, imposing penalties for *misconduct* or *desertion*. These were like Master and Servant Acts.[1023] Statutes of general application also placed domestic servants in a less favourable position than other workers. One of these is the Placaat of 1679, [1024] which, as we have seen, introduced the principle of *forfeiture* of wages earned as penalty for *desertion* or misconduct in the case of dismissals. The TPD painstakingly pointed out that this placaat did not reflect the general common law of the Netherlands as it was a statutory measure applicable to domestic servants only.[1025] Forfeitures and penalties were therefore not intended in the placaat to regulate the service of non-domestic workers.[1026]

1018 The TPD was the court a quo

1019 With the concurrence of **Gregorowski** J.

1020 *Dienstboden* or ***famuli*** or ***servi*** in Latin.

1021 *Bedienden, dienaars, werklieden.* The court in the TPD had made use of the dictionary meanings of the terms as given in **Muller & Kluyver** and **De Vries & Kluyver.**

1022 The TPD held that a similar division existed in French law.

1023 **Wessels J** on 618 of ***Gostelow***, pointed out that it was the policy of the law of Holland to control domestic servants as much as possible because they were inmates or attached to the household of the master or the mistress. Numerous local statutes or Keuren could therefore be found all over the Netherlands that were of the same nature as Master and Servant Acts.

1024 ***Groot Placaet Boeck*** 3 527; ***Spencer*** 618.

1025 ***Spencer*** 618 per **Wessels J**: *"It was from the general customs and Statutes of general application that the Common Law of Holland laid down the rule that the Diensboden or domestic servants forfeited whatever current pay was due to them if they were so insolent, disobedient or immoral as to justify their dismissal."*

1026 See ***Spencer*** 618, where the judgment of **Wessels J** is quoted.

Notwithstanding the Placaat of 1679, **Wessels J** could find nothing in the Roman Dutch authorities to the effect that *clerks*, *managers*, overseers and *employees* in the position of Gostelow were ever put on the same footing as *domestic workers* in this respect.[1027] Non-domestic workers had to carry out work in terms of their contracts, and in the event of *desertion* or non-performance, had to pay *damages* to the employer.[1028] The doctrine of forfeiture was therefore declared foreign to Roman Dutch and South African law, and Gostelow succeeded with his claim for payment of his remuneration for work already done but unpaid for at the date of dismissal.[1029]

This was the first triumph of the doctrine of *proportionalism,* and signaled the death knell for the doctrine of *forfeiture,* which, at the time that **Wessels J** wrote, had already obtained a foothold in the backdoor through some earlier case law.[1030]

The AD, per **Innes** CJ and **Mason** AJA upheld the TPD judgment. **Innes** CJ confirmed that although the doctrine of forfeiture is to be found in the works of many Roman Dutch authorities, the reason for the adherence thereto does not relate to any principle of common law, but rather to particular statutory

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1027 The TPD cites as direct authority for the common law position on the issue, **Arntzenius *De Jure Belgica*** 1 10 n 12 and **Van Leeuwen *Censura Forensis*** 4 22 11 and **Schorer ad Grotium** 3 19 13 n 54 (no. 395). **Arntzenius** (supra) refers to *famulos* who may be evicted prior to the expiry of their contracts (***ante tempus conventum domini ejicere***) for good cause (***aut ex alia justa ratione***) without payment of any wage (***nulla etiam merceda solute***). See also ***Smit v Workmen's Compensation*** 60.
Schorer (supra) goes a little further: *"De dienstbode die zonder geldig reden den dienst verliet verbeurde het verdiende loon en zomtijds nog eene som bovendien."* According to Schorer a deserting servant forfeits (*verbeurde*) not only his wage already earned, but could be imposed a penalty consisting in an additional sum of money.
1028 **Spencer** 619. See also the judgment of the TPD, per **Wessels J**, reported in **Spencer** 619.
1029 In **Spencer** 619, **Wessels J** states: *"That the master could claim damages for the breach and retain the wages due until the question of damages was settled is no doubt true, but I can find no authority in the Roman Dutch law for the proposition that arrear wages or money already earned during the current period could be declared forfeited."*
The AD, per **Innes CJ**, in ***Spencer*** 628, upheld the decision of **Wessels J**, finally disposing of the notorious doctrine.
1030 In our discussion of the Dutch placaats above, we examined the incremental encroachment of placaats in cases such as ***Bassamaradoo v Morris***, ***Nixon v Blaine & Co***, ***Robertson & Co v Heathorn***, ***Smith v Federal Cold Storage Co*** and especially ***Rene v Alexander*** 1916 CPD 603. These cases were carefully considered by **Innes CJ** in ***Spencer***, and overruled.

provisions such as the placaat of 1679.[1031] He confirmed the interpretation of the Placaat by **Wessels** J in the TPD to the effect that the terms *dienstboden* or *famuli* utilized therein refer to domestic workers and to no other category of workers, such as Gostelow.[1032]

With this dictum of the court in ***Spencer***, equity in the workplace achieved a major victory while the *doctrine of forfeiture* was virtually eradicated – except in one important respect, namely its applicability to *deserters*. That issue was specifically left open in ***Spencer***.[1033] Desertion involves not only physical absence or abstention from work, but also a mental element, namely the intent not to resume work. The question whether an employee with this metal attitude would be entitled to equitable relief was also deliberately left unanswered in ***Spencer***.[1034]

The question of desertion by an employee specifically came up for consideration and decision in ***Muller v Grobbelaar***.[1035] This decision is important as the law laid down there still seems to be applicable today.

The employee[1036] rendered services in terms of a written contract as a farm foreman.[1037] He deserted work by unauthorized absence over certain weekends and by leaving the farm prematurely before expiry of the contractual term. He brought a claim for remuneration and crop-sharing in terms of the contract. The court of appeal confirmed a finding by the Magistrate's Court that as the employee had absconded, he was not entitled to any remuneration, past or future, and that he had *forfeited* past remuneration. The OPD judgment is, with the greatest of respect, not a model of clarity and the judges constituting the

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1031 **Innes CJ** 628, then refers to more or less the same authorities as the TPD had done in support of this contention, namely ***Cens. For***. Pt 1 4 22 of **Van Leeuwen,** par.11; **Van Leeuwen *R H Law*** 4 22 2; Van **der Keessel *Theses Selectae*** Th 679; **Schorer *Notes*** 395; **Carpzovius *Jur. For.*** Pt 2 c 51 13 etc.
1032 Ibid.
1033 The Dutch placaat of 1679 made provision for forfeiture not only in the event of *desertion* by the employee, but also in the event of various forms of misconduct and even immorality. In ***Gostelow***, p.632, **Innes C.J**. re-established proportionalism and abandoned forfeiture.
1034 In ***Gostelow*** 632, **Innes C J**. stated that he found it unnecessary and undesirable to decide the issue under the circumstances, as he had also done in ***Hauman v Nortje.***
1035 1946 OPD 272
1036 ***Muller***
1037 ***Grobbelaar***

court[1038] were not *ad idem*, rendering it difficult to find the real *ratio* of the judgment.

The judges did however consider the following issues individually, each stating his finding or view thereon:

1. A claim for future income by a deserter.

The judgment was unanimous – and correctly so, we submit – in dismissing such a claim in a case where there was desertion or serious breach of contract;

2. The applicability of the Dutch Placaats and common law principles.

Van den Heever AJP held that the Placaats could never have had the force of law in South Africa as the Estates of Holland never had legislative authority over Dutch overseas possessions.[1039] We subscribe to this view.

In a dissenting judgment **De Beer J**[1040] argued, apparently without conceding that the placaats were not applicable in South African law, that the common law authorities nevertheless recognized a general principle that a deserter forfeited past remuneration earned.[1041]

Van Den Heever A.J.P. rejected the idea that forfeiture was ever part of the common law.[1042]

3. The scope of the placaat

Van den Heever AJP[1043] held the view that the placaat of 1679 only dealt with a limited class of servants such as coachmen and lackeys, maidservants and household – servants, during and after their accouchement. This brought the

1038 **Van De Heever A J P** and **De Beer J.**
1039 Matrimonial matters were an exception to the rule.
1040 ***Muller*** 290
1041 ibid
1042 ***Muller*** 277.**Van Den Heever A J P** argued that "*If the tendency of our law is against the enforcement of expressly stipulated conventional penalties, I cannot see how it can countenance a form of forfeiture which has no contractual basis and an extremely shaky foundation in law*".
1043 **Muller** 277

learned judge to the conclusion that such provisions could have no bearing on a farm foreman in South Africa "*at the present time*", i.e in 1946.

We are in respectful agreement with **Van Den Heever A.J.P** in this respect.

De Beer J, on the other hand argued that the placaat drew no distinction between domestic servants and other employees and that forfeiture as laid down therein was therefore applicable to all employees.[1044] **De Vos**[1045] agrees with the finding of **De Beer J**.

We respectfully disagree with the conclusion drawn by **De Beer J**, and thus with the learned author **De Vos**, on the position of the deserter at common law, for the following reasons:

Firstly, we do not agree that the common law texts cited by **De Beer J** in support of his conclusion[1046] really sustains such conclusion. Let us commence our evaluation with **Grotius** and **Voet**, the two most authoritative R D jurists cited by **De Beer J**.

In the text cited by **De Beer J**, **Grotius**[1047] simply repeats the well known general principle of both Roman and Roman Dutch law, that he who has undertaken to do some work, is not entitled to claim his wage before completion of his work. This passage does nothing more than repeat the synallagmatic or reciprocal obligations flowing from a consensual contract: the parties have to perform more or less at the same time. The next Grotius-text relied upon by **De Beer J**[1048] states that he who dismissed a servant without lawful reason within the agreed employment period, had to pay the full wage to such an employee.

1044 On 288, the learned **De Beer J**, expressed his disagreement with **Wessels J** who had held in the **TPD** judgment cited in ***Gostelow*** that the placaats applied only to domestic servants and servants *eiusdem generis* as follows: "*The learned judge stated the Dutch lawyers drew a distinction between diensboden who were domestic servants and other workmen who hired out their services and who were referred to as either bedienden, dienaars or werklieden. In spite of careful search of the authorities, I doubt whether this distinction did or does exist. I have consulted the following dictionaries……, with the result that the doubt was by no means dispelled*".

1045 ***Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg*** (1987) 294.

1046 See **Muller v Grobbelaar** 282-3 for the exposition of the common law source material by **De Beer J**.

1047 ***Holl Recht*** 3 19 11 (*sic*)

1048 **Grotius *Holl Recht*** 3 19 13 (*sic*)

None of the abovementioned texts can be interpreted to mean that **Grotius** or the common law recognised a doctrine of forfeiture. On the contrary, the texts seem to strike a sensible balance between the interests of employer and employee, as fairness demands.

A third text of **Grotius**[1049] considered by **De Beer J** deals with sailors.[1050] It indeed indicates that sailors who do not fully complete their contract, forfeited their wages. But it has to be remembered that the employment of sailors fell into a separate and specialized area of Dutch employment law, namely maritime law.[1051] Sailors could be charged with mutiny if they deserted captain, fellow sailors and ship in times of danger away from home. The fact that **Grotius** specifically mentions forfeiture in regard to sailors, while not in the earlier texts dealt with above,[1052] rather demonstrates that forfeiture did not apply to employees other than sailors in stead of showing the opposite.

De Beer J[1053] furthermore refers to **Schorer**, who wrote a commentary in the form of "*notes*" on the **Grotius** text. But as the learned judge rightly pointed out, **Schorer** was making reference to and relying upon **Carpzovius** who was primarily dealing with an ordinance of **Saxony**. **Carpzovius**[1054] was a German professor mainly active in **Saxony**.[1055] Saxon law in the form of local ordinances dealing with the hiring of labour in all probability did not form part of Roman Dutch law.[1056]

A second authoritative Roman Dutch jurist that **De Beer J** relied on was **Voet**. But in the **Voet**-text cited,[1057] **Voet** clearly advocates the doctrine of

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1049 Bk 3 20 20 in fin *(sic)*
1050 ibid
1051 For Roman Dutch law, see **Grotius** ***Inleiding*** 3 20 1; **Lee** ***The Jurisprudence of Holland*** (1926) 391; for modern law: **Jacobs** ***Labour law in the Netherlands*** (2004) 48.
1052 ***Holl Recht*** 3 19 11 and 3 19 13; **Nathan** ***The Common Law of South Africa*** (1904) 795.
1053 ***Muller v Grobbelaar*** 282
1054 1595-1666
1055 The full title of his work referred to in ***Muller v Grobbelaar*** is ***Jurisprudentia Forensica Romana-Saxonica*** 1638.
1056 On the term "**Roman Dutch law**" its history and scope, see **Van Zyl** ***Geskiedenis van die RH Reg*** (1983) 303; **Wessels** ***History of the Roman Dutch law*** (1908) 95 et seq; **Nathan** ***The Common Law of South Africa*** (1904) 7.
1057 **Voet** ***Com*** 19 2 27; ***Muller v Grobbelaar*** 283

proportionalism in so many words, not mentioning or even implying forfeiture at all.[1058]

The second Voet-text text that the learned judge relied upon, with the greatest of respect, does not take the matter further.[1059] It merely re-affirms the legal position stated in the ***Commentarius*** 19 2 27 text dealt with above. In fact it applies the doctrine of proportional payment specifically to "*men and women servants quitting untimely, or hiring their labour prematurely to another*". This category of employee would most certainly include deserters. Nevertheless, proportionalism was applied to them. They had to be paid for work already done.

Still on **Voet**, we humbly submit that nothing could be made of the fact that **Voet** cites **Van Leeuwen**,[1060] for, as the learned judge himself remarks, **Voet** attributes the legal position stated by **Van Leeuwen** either to local statutes or local custom, neither of which constitute Roman Dutch common law.[1061]

Concerning the rest of the authorities cited by **De Beer J** in support of the doctrine of forfeiture[1062] we are in respectful agreement with **Van Den Heever A J P**[1063] that these ultimately rely on purely local statutes which never formed part of the common law.

1058 **Voet** states that if it has depended on a person who has hired out his services, that these have not been rendered, the hire is to be ratably (pro rata; proportionably) diminished for the period during which they were not given, unless the person to whom they were due resolved to compel an unwilling debtor for his services to make them good for the time agreed upon. Clearly **Voet** would have mentioned forfeiture if that was an alternative at all. The wording of the text is so comprehensive that the conclusion that a deserter falls within the category of a *person on whom it has depended that the services have not been rendered,'* is unavoidable.

1059 There is no textual reference, but reference is made to **Berwick's** translation of **Voet** 228-229

1060 ***Censura Forensis*** 1 4 22 11

1061 By contrast, the learned **De Beer J** expressed the opinion in ***Muller v Grobbelaar*** 282, that **Van Leeuwen *Cens. For***. 1 4 22 11 reflects the common law. This view is of course at odds with that of **Voet**, as explained above. It further has to be noted that **Van Leeuwen** makes reference to **Hieronymus Treutler**, ***Selec. Disput***. 1 29 2, and **Menochius *de Arbitr. Jud***. (Case 364), published in 1996 and 1583 respectively, or even earlier. But none of these jurists were authorities on Roman Dutch law. **Menochius**, the more well-known of the two was an Italian Humanist - See **Van Zyl *Geskiedenis van die Romeins-Hollands Reg*** (1983) 313. **Treutler** was unknown to the extent that his name does not even appear in **Van Zyl's** authoritative work. Certainly these jurists could not be ranked above or on a par with **Grotius** and **Voet** in matters concerning Roman Dutch law.

1062 The Frisian **Huber** and **Arntzenius**

1063 ***Muller v Grobbelaar*** 276

Our conclusion therefore, is that forfeiture of wages for work done was unknown to the common law, even where the employee had deserted or otherwise misbehaved. The mental attitude of the deserter or the misconducting employee seems to have been irrelevant. The employer had a number of options open in the case of desertion. He could claim damages from the deserter and even from the new employer of such deserter,[1064] or he could claim specific performance, but not forfeiture of remuneration for services rendered.[1065]

Although **De Vos**[1066] expresses some doubt as to whether the rule relating to desertion as applied by **De Beer J**[1067] was still valid today[1068] he agrees with the learned judges' view that such rule reflects the true position of Roman Dutch Law on the issue.[1069] As has already been pointed out, the doctrine of forfeiture of remuneration already earned, was not supported by Roman Dutch jurists.

From a comparative point of view it is interesting to examine the way that the courts looked at English law in regard to issues such as forfeiture, the divisibility of labour and the like. In ***Spencer***, the implications of the *indivisibility of labour*, as applied in English law were considered by the AD. The court first explained the meaning of the concept as follows: In Roman law, it was a recognised principle that labour, like money, was *divisible*. This principle entitled a person to receive a proportionate (*pro rata*) payment for work already done by him. This, in the final analysis, is only one specific instance where the equitable principles of unjustified

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1064 See Chapter II of this work.

1065 In ***Muller v Grobbelaar*** 277, the learned **Van den Heever A J P** stated: "*I cannot remember that it was ever in accordance with our law that a servant, who contracted his services for a year and who gets drunk at the prospect of release during the last fortnight of the last month of his contract and is lawfully discharged in consequence, forfeits to his employer his accumulated wages earned during eleven and a half months, of faithful service, irrespective of the value to his employer of a fortnight's service*".

1066 ***Verrykingsaanspreeklikheid*** (1987) 294 et seq.

1067 Supra

1068 **De Vos** (1987) 298 n 93; 284 n 6

1069 In ***Verrykingsaanspreeklikheid*** (1987) 297, **De Vos** stated that the judgment of **De Beers J**, provides clear proof that the deserter forfeited all remuneration in respect of that period of his contractual term for which he had actually worked. **De Vos'** motivation for this view is that since the old common law knew no general enrichment action and since the deserter could not bring his claim within the ambit of one of the classic actions, it follows that the deserter was left without any legal remedy.

enrichment manifested itself. It is derived from D 12 6 14,[1070] and is infused by purely equitable considerations. We return hereunder in more detail to this issue.

Apart from Roman law, **Averanius** and **Brunneman** are cited as authority for the application of proportionalism in Roman Dutch law.[1071] **Grotius** would have been as good an authority on the issue.[1072] The court points to the universality of the principle and the fact that it had found application in the very same court in ***Hauman v Nortje.***[1073]

The doctrine of divisibility of labour is unknown to English Labour law. The notion of proportionalism is therefore also foreign to that system.[1074] Although this seems at first glance to be grossly unfair since this position may be incompatible with the enrichment doctrine of Roman Dutch law, it is not wholly without logic. The English common law approach is based on the principle that parties to a bilateral contract are not allowed to claim performance from one another unless the claimant party himself has fully performed or performs at the time of the claim, i.e. on *strict bilateralism.*[1075]Generally speaking, there can be no problem with this approach. However, strict application of bilateralism becomes problematic where labour is regarded as *indivisible*, which is the case in English common law.[1076] The logical conclusion of English common law is therefore that where a worker is dismissed for desertion under that system, such worker *forfeits* arrear wages:[1077] *No completed work (period of service), no (proportionate) wages.* 'There can be no doubt that English law leans heavily in favour of the

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1070 Here, **Pomponius** states:***"Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem."*** – *"This is after all natural equity: that no one can become enriched to the detriment of another*

1071 **Averanius** Bk 3 vol 2 102. **Brunneman ad D 33 1 19** states that ***"quia tam labor quam pecunia pro labore debita divisionem recipiunt."***- *"For just as labour itself, so the money due for the labour is capable of division."*

1072 **Grotius *Inleidinge*** 3 18 8: *"Die een dienst-bode binnens tijd oorloff geeft sonder wettelicke reden moet de selve de volle- huir laten volgen" – „He who dismisses a servant without lawful reason within the period of service, must pay the full wage to him".*

1073 At 619 the court *per errorem* referred to Nortje v Hauman.

1074 ***Spencer*** 634.

1075 ibid.

1076 ibid. The court cited as authority ***Cutler v Powell*** 1795 6 T.R. 320.

1077 **Spencer**, loc. cit. The court cited the following authorities: **Smith *Master and Servant*** 182; **MacDonnell's *Master and Servant*** 2nd ed. 119-122; 185.

employer in this regard. The main difference between English law on the one hand, and Roman Dutch and South African law on the other, is that in the former, the position of the parties is strictly governed by contractual terms only. No room is left for the doctrine of unjustified enrichment, and hence *equity*, to find application. As a matter of fact, Roman Dutch and South African law also enforce contractual bilateralism, but limit the harsh or unconscionable effects thereof with the application of equitable enrichment principles.[1078] It is interesting to note that American law does admit the equitable enrichment principle to some extent.[1079]

The principle of proportionalism has recently been recognised and applied by the Labour Court in the matter of ***Hospersa v MEC for Health***[1080] where it was held that if through default of the employee his services are not fully rendered, the employer still has to pay him *proportionately* for work already done.[1081] Where it was due to the employer that the work was not done or completed, the full wage had to be paid. The court based its decision on the same equitable considerations embraced in some of the early cases referred to above.[1082]

7.4 EMPLOYMENT AND DISMISSAL AT WILL

Having considered the demise of the doctrine of forfeiture as introduced by the Placaat of 1679, the next issue which presents itself is the *doctrine of employment at will* introduced into Roman Dutch Law by the same placaat.

One of the anomalous novelties of the 1679 Placaat was the introduction of this notion, whereby a most fundamental principle of contract, namely ***pacta sunt***

1078 Referring to D 50 17 206 (enrichment), **de Villiers AJA** stated in ***Hauman v Nortje*** 307:*"This maxim does not seem to obtain in English law, and accordingly the English decisions hold parties strictly to their legal rights."*

1079 ***Hauman v Nortje*** 307.

1080 ***HOSPERSA & another v MEC for Health, Gauteng Provincial Government*** 2008 29 ILJ, 2769, 2776.

1081 Ibid.

1082 The court relied on ***Myers v SA Railways & Harbours*** 1924 AD 85, and also applied ***Boyd v Stuttaford*** 1910 AD 101; 104-5.

servanda was seriously undermined.[1083] It also constituted a major setback to the role of equity in Roman Dutch law, to which it was a totally foreign concept.

Employment at will – sometimes ironically also referred to as dismissal at will – comprises the principle espoused by the English common law of contract[1084] and by American law,[1085] that an employer may lawfully terminate a contract of employment at any time, for any or for no reason or even for bad reason.[1086]

In our consideration of American law[1087] we noted that there *employment at will* is still the dominant principle that governs individual dismissal law.[1088]

Where employment at will holds sway, the concept 'unlawful dismissal' bears the limited meaning of termination of the employment contract without proper notice as required by law or agreement.[1089] Failure on the part of an employer to comply

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1083 One could argue that **pacta sunt servanda** is indeed the most inviolable principle of the law of contract, as the very purpose of the formation of contracts is that they should be honoured. The natural law scholars often stated that the honouring of agreements is a basic tenet of natural law.

1084 Chapter V

1085 Chapter VI

1086 For a classic formulation see ***Johnson v Unisys*** 823 f-h, where the earlier formulation of ***Ridge v Baldwin*** is used. The formulations in regard to American law are even more apt: an employer can terminate the employment contract for any reason – good or bad – or for no reason, in bad faith or with an ulterior or improper motive – See **Culligan & Amodio *CJS*** 84 par.44; **American Bar Association *Guide to Workplace Law*** 78; **Goldman *Labor Law and Industrial Relations in the United States of America*** 2nd ed. 75; **Goldman Labor and Employment Law in the United States**, Kluwer, p.996, p.63.

1087 Chapter VI

1088 In the US, collective dismissal is largely governed by collective agreements between trade unions and employers. **Wolkinson & Block *Employment law*** (1996) 247-267; **Forkosh *Treatise on Labour Law*** (1965) 362-420; 517-563; **Goldman *Labor and Employment Law in the United States*** (1996) 55-98;167-222; **American Bar Association *Guide to Workplace Law*** (1999) 78; **Goldman *Labor Law and Industrial Relations in the United States of America*** (1984) 75; **Clark & Ansay *Introduction to the Law of the United States*** (1992) 132; **Olsen *Protecting At Will Employees Against Wrongful Dismissal*** **Harvard Law Review,** 1816 (1980) 83; **Feldacker *Labor Guide to Labor Law*** (1983) 7 et seq; **Jacobs *"The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis"*** 1982 **Comparative Labor Law** 85-128; **Kossek & Block *"The Employer as Social Arbiter: Considerations in Limiting Employer Involvement in off-the-job Behaviour"*, Employee Rights and Possibilities Journal** 1993 2 139-155; **Rothstein Knapp & Liebman *Cases and Materials On Employment Law*** (1987) 738-; **Culligan** & **Amodio *Corpus Iuris Secundum*** Vol (30) 67 par.35; **Bureau of National Affairs *Individual Employment Rights Reference Manual*** 1994 505 51-2; **Muhl *"The Employment–at-will Doctrine: Three Major Exceptions"*** 2001 **Monthly Labor Review** 3-11; **Epstein *"In Defence of the Contract at Will"* The Yale Law Journal** 1983 92 No 8, July; **Epstein *"A Common Law for Labor Relations : A Critique of the New Deal Labor Legislation"* The Yale Law Journal** 1983 92 No.8 3-54 (reprint); **Antoine St.** ***"A Seed Germinates : Unjust Discharge Reform heads towards Full Flower"*** **The Yale Law Journal** 1983 92 No.8 161-186; **Verkuil *"Whose Common Law for Labor Relations"* Yale Law Journal** 1409 (1983) 92; **Zweigert & Kotz *An Introduction to Comparative Law : The Institutions of Private Law*** (1977) 8-9.

1089 **Johnson v Unisys** 823 f-h; **American Bar Association *Guide to Workplace Law*** (1999) 78

with such notice requirement entitles the employee to a claim for damages, and nothing more.[1090] The measure of such damage is limited to the equivalent of earnings that would have accrued to the employee during the period of notice only and does not cover the full outstanding period of employment.[1091]

Thus the salient features of employment-at-will in English Common Law and American law were that:

(i) Substantively, a dismissal could not be unlawful, even less so unfair. Every dismissal, whether for good reason, bad reason or no reason al all, terminated the employment relationship. The requirement of proper notice was strictly speaking some kind of contractual procedural requirement only. All it involved was that where proper notice had not been given, the employee had to be paid what he/she would have earned during the period of notice. This constituted the so-called claim for damages that the employee was allowed to bring. An enquiry by the court into the substantive *reason* for dismissal was not competent;

(ii) An order of specific performance or reinstatement order was a *priori* not competent.

There are cases dating back to the early part of the 20th century and further, which suggest that employment at will was adopted from English law here locally.[1092]

In ***Gracie v Hull***[1093] the court stated:"*.....When a Master says to its servant: 'Take your wages and go', he terminates the relationship. It may be that he acts illegally in terminating it, but he does put an end to it."*

In ***Beeton v Peninsula Transport Co. (Pty) Ltd,***[1094] the court held that dismissal of the employee means *ipso facto* that the employment contract was

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1090 ibid
1091 ibid
1092 ***Gracie v Hull, Blythe & Co. (SA) Ltd***, 1931 C P D 539; ***Beeton v Peninsula Transport Co. Pty Ltd***, 1931 CPD 53; ***Rodgers V Durban Corporation***. For a discussion of these, see ***Myers v Abramson*** 1952 3 SA 121, 122 et seq.
1093 supra

terminated and the employee would as a result thereof owe no further duty of service.[1095]

In ***Rodgers*** the court confirmed that even a wrongful dismissal terminated a contract of employment and that the only remedy was a claim of damages for wrongful dismissal.[1096]

The Labour Appeal Court also recently held in ***Modise v Steve's Spar***[1097] that employment at will was part of South African common law.[1098]

The issue of termination of service was comprehensively considered in ***Spencer***. We have already alluded to **Arntzenius**[1099] who was cited by **Wessels J** in the TPD[1100]as presenting an accurate picture of the true Roman Dutch law of dismissal. **Arntzenius**[1101] wrote that *domestic servants* may be dismissed for *disobedience*,[1102] *causing harm or injury*,[1103] *insubordination* or *insolence*,[1104] *dishonesty*[1105] or for *other* ***just reason***.[1106] This means that in Roman Dutch law, the common law of South Africa, *iusta ratio* or good cause or reason was required before a dismissal could take place. This was a requirement of the law of *contract* itself. It had no relevance at all to equitable or fair dismissal. It amounts to this: as a matter of law an employer may terminate the employment contract for a *good reason* only, such as misconduct.

1094 Supra 59.
1095 The court held that the remedy for breach of contract arises as soon as the employee is wrongfully dismissed -122E-F
1096 In **Rodgers** 69, **Broom J** stated: "*.....whether the defendant (employer) has acted rightly or wrongly is relevant on the damage claim (sic), but has no bearing on the claim for reinstatement which is incompetent.....A servant wrongfully dismissed has no remedy other than damages*".
1097 ***Modise & Others v Steve's Spar Blackheath*** 2000 21 ILJ 519; 525.
1098 In ***Modise*** 529 par 16, the learned **Zondo AJP** compared the unfair labour practice regime introduced by the LRA as follows with the common law of dismissal: "*Whereas under the common law the employer had a right virtually to hire and fire as he pleased, a serious inroad was made into the right under the unfair labour practice dispensation. Whereas under the common law an employer could fire for a bad reason or for no reason at all provided the dismissal was on notice...*"
1099 ***De Jure Belgica*** 1 10 n 12
1100 As referred to in ***Spencer*** 618-9.
1101 loc.cit.
1102 ***Famulus parum obedientes***
1103 ***injurioses***
1104 ***Ministerium negantes***
1105 ***Vitae parum honestae***
1106 ***Aut ex alia justa ratione***

Grotius[1107]a more authoritative jurist than **Arntzenius** went even further, stating that where an employer dismissed an employee without lawful reason, he had to pay the full wage for the contractual period to such employee. Needless to say, such full wage constitutes full compensation for the breach and does not relate to limited damages based on failure to give the appropriate notice. The **Grotius** text[1108] thus puts the issue beyond any doubt: employment at will was not tolerated by the dictates of Roman Dutch Common law.

It was one of the *essentialia* of all employment contracts under Roman Dutch law, that duration of the period of employment had to be agreed upon prior to or during conclusion of the contract.[1109] The notion of employment for an indefinite period of time was unknown.[1110] Moreover, none of the Roman Dutch jurists consulted by us,[1111] mentions that an agreed term of service could simply be terminated by unilateral notice. The reason for this is obvious. Notice of termination would amount to breach of contract, unless of course, the parties had *agreed* on such a mode of termination. **Innes CJ** provided an illuminating summary of the law in ***Spencer***:[1112]

"Either the misbehavior of the servant is such as to warrant his dismissal, or it is not. If it is not, the master cannot get rid of him save on due notice; if it is, then he may discharge him at once, paying no wages for the future, but making proper compensation for the services rendered during the prior period."

In ***Venter v Livini***[1113]it was decided that an employer cannot by a unilateral act of dismissal terminate a contract of employment, unless he has good grounds for

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1107 ***Inleidinge*** 3 18 8 - See Chapter III, supra
1108 ibid
1109 **Grotius *Inleid*** 3 18 8 - See Chapter III above.
1110 Ibid. **Grotius** explained that a contract of employment for an indefinite period would be viewed as some "life interest" conferring contract, or some or other innominate contract.
1111 See Chapter III above
1112 631-2 - Although a sign of fair and progressive thinking, some aspects of this passage are not sufficiently clear. A crucial phrase is "*the master cannot get rid of him.*" This could be interpreted in two ways; Either the employer has to keep the employee physically in active service, or if that is not the case, the intention of **Innes C J** could have been that the employee had to leave, but the employment relationship would continue, with the employee technically remaining on the payroll of the employer. We suggest that the latter alternative was the case.
1113 1950 1 SA 524 [T]

doing so.[1114] If the employer seeks to terminate the employment relationship without good cause, the employee may accept the termination and thereby bring an end to the contract, or he may refuse to accept the termination and keep the contract alive until the end of its term.[1115] In the latter case the employee's right is to claim wages for wrongful dismissal at the end of the term.[1116] The onus of proving misconduct on the part of the employee that justified the dismissal rested on the employer.[1117]

In ***Myers***[1118] the court assumed that where an employer wrongfully repudiated the contract i.e. without good cause, the employee could keep it alive and sue on it as had been decided in ***Venter***.[1119]

The legal principles governing repudiation or fundamental breach of the employment contract by the employer[1120] were comprehensively re-stated in

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1114 Should he have good grounds for dismissing the employee, he would in any case simply be accepting a prior repudiation by the employee, the court held in ***Venter*** 528. ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*** 1985 6 ILJ 369, at 374; ***Sigwebela v Huletts Refineries Ltd*** 1980 1 ILJ 51 (N)

1115 ***Venter*** was followed in ***Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd*** 1983 4 ILJ 84 (IC) 93; See also ***National Union of Textile Workers v Stag Packings*** 1982 4 SA 151;

1116 ***Venter v Livini*** 528-9. The court pointed out that the employee does not have the right to keep the employer's property or to remain in occupation of his premises.

1117 ***Mine Workers Union v Brodrick*** 1948 AD 959; 975. Where the dismissal is based on facts which give rise to a suspicion of dishonest conduct, the onus rests on the employer to prove, not only a suspicion of an act of misconduct, but the commission of such an act. Where however it is based on facts amounting to conduct which, because of its dishonesty or for some other reasons, justifies dismissal, the employee, in order to avoid the consequences of the proof of such facts, must allege by confession and avoidance further facts excusing his misconduct, and the onus of proving these facts rests on him.

See also ***Sigwebela v Huletts Refineries Ltd*** 1980 1 ILJ 51 (N) 51 where it was held that the principle concerning the onus also applies in cases of summary dismissal; ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*** 1985 6 ILJ 369; 372E; ***Metal & Allied Workers Union v Stobar Reinforcing (Pty) Ltd & Another*** 1983 4 ILJ 84 (IC)

1118 Loc.cit.

1119 The court expressed the view that all that was intended by what was said in **Gracie, Beeton and Rodgers** (supra), was that, since the court is not prepared to grant specific performance, repudiation of the contract by the employer puts an end to it *de facto* and not *de jure*. Following English law, the court went further than **Schierhout** where it was held that as a matter of *practice* the courts decline to order specific performance (reinstatement), and specifically elevated this to a rule of law. The reason for adopting this approach is the same as in England. Firstly the inadvisability of compelling a person to employ another in a close relationship, where such a person is not trusted, and secondly the so-called lack of mutuality, which refers to the inability of the court to monitor and enforce its reinstatement order, i.e. to supervise compliance therewith by the employee. ***Schierhout*** 99; See also the earlier cases of ***Wolhuter v N*** 20 CTR 116, and ***Hunt v Eastern Province Boating Co*** 11 EDC 23

1120 Or by the employee, for that matter.

***Stewart Wrightson (Pty)Ltd v Thorpe*:**[1121] Where an employer commits a fundamental breach of contract, the employee obtains the right to make an unequivocal election, either to stand by, i.e enforce the contract, or to terminate it and claim damages.[1122]

The court confirmed and applied ***Meyers v Abramson.***[1123] Such election follows as of right and does not have any consensual basis. It therefore does not depend on any form of acceptance of the election by the guilty party.[1124]

The Labour Court have adopted and applied these classic principles that govern the employment contract.[1125]

But even under the pre-1979 common law dispensation, there was an approach that where misconduct, even if gross, on the part of the employee had been proved, the matter did not end there, and that the employer also had to prove that he acted *reasonably* in dismissing such employee.[1126]

In the context of the English doctrine of employment at will, we conclude therefore with the following:

1121 1977 2 SA 943 [AD]

1122 ***Stewart Wrightson*** 952; In ***National Union of Textile Workers & Others v Stag Packings*** 1982 4 SA 151 (T) 156 the court, per **Van Dijkhorst J** stated:*"As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. There is in my view no reason why this general rule should not also be applicable to contracts of employment."* This exposition of the law by the learned judge is of course correct, except for the terminology perhaps. A party to a contract cannot unilaterally or wrongfully *rescind* such contract. Such purported rescission would in reality be a breach of contract.

See also ***Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd*** 84; 93B; ***Ngewu v Union Co-operative Bark and Sugar*** 1982 4 SA 390 (N) 405E-F; ***Media Workers Association of SA v Argus Printing and Publishing*** 1984 5 ILJ 27; ***R v Smit*** 1955 1 SA 239C; 241-2; **De Kock *Industrial Laws of South Africa*** (1982) 649

1123 supra

1124 ***Stewart Wrightson*** 953. The court expressed approval of the view held in ***Moyce v Estate Taylor*** 1948 3 SA 822 [AD] 829, that election is a form of waiver.

1125 ***Van Wyk v Albany Bakeries Ltd*** & others 2003 12 BLLR 1274 (LC); ***Monyela & others v Bruce Jacobs t/a LV Construction*** 1998 19 ILJ 75 (LC); ***Jooste v Transnet Ltd t/a SA Airways*** 1995 16 ILJ 629 (LC); **Bonthuys and Central District Municipality** 2007 28 ILJ 951 CCMA 961; ***Spies v MI-3C Holdings SA (Pty)Ltd*** 2010 11 BLLR 1208 (LC); See also **Loubscher *"Employment Law Update"*** 2010 **De Rebus** no. 508 2011 57.

1126 ***SA Association of Municipal Employees v Minister of Labour*** 1948 1 SA 528 (T) 532; ***George Divisional Council v Minister of Labour & Another*** 1954 3 SA 300 (C) 305; ***Swanepoel v AECI Ltd*** 1984 5 ILJ 41 (IC) 212E; ***National Automobile & Allied Workers Union*** 376.

(i) Such doctrine was unknown to Roman Dutch Common law, which observed a remarkably balanced and *fair* relationship between employer and employee in regard to matters pertaining to termination of employment;

(ii) As the Roman Dutch sources are generally silent on the issue of reinstatement or specific performance of employment contracts, it would seem that such remedy was unavailable and that unlawfully dismissed employees had a relatively fair claim for full contractual damages, i.e. remuneration equivalent to that for the whole contractual period.

In ***Myers***[1127] the court, quoted from ***Schierhout*** where it had been noted[1128] that in England the equity courts had at some stage issued decrees of specific performance, but that they had long since abandoned the practice for the very same two reasons for which the court was not prepared or competent even, to order reinstatement.[1129] However, subsequent case law vested the courts with the discretion to order specific performance of employment contracts in the form of re-instatement.[1130]

It is in this context that ***Harper v Morgan***[1131] should be interpreted.[1132] ***Harper*** had been dismissed, following a disciplinary hearing at which she was found guilty of gross misconduct in the form of leaking sensitive information to the Reserve Bank. She brought a claim for damages, alleging that the dismissal was for an ulterior purpose, not bona fide, and therefore constituted an unlawful repudiation of the contract, which she accepted. She claimed that the real reason for the dismissal was unrelated to the leak, namely to prevent enquiries from a

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1127 1244-5

1128 **Macdonnell *Master and Servant*** 2 nd ed. 162 was relied on.

1129 In ***SA Diamond Workers Union v SA Diamond Cutters' Assoc*** 1982 3 ILJ 87 (IC), the Industrial Court remarked that the English practice in regard to specific performance had been taken over in SA, and applied for the same reason as in England.

1130 ***National Union of Textile Workers v Stag Packings (Pty) Ltd*** 1982 4 SA 151 (T); ***Rossouw v SA Mediese Navorsingsraad*** 1990 3 SA 297 (C).

1131 **Harper v Morgan Gaurantee Trust Co of New York, Johannesburg & another** (2004) 25 ILJ 1024 (W)

1132 The judgment is, with respect, by no means a model of clarity.

powerful client, namely Tiger, and that the employer had effected the dismissal with full knowledge of her innocence. She sought damages for loss of earnings and loss of a bonus payment, in effect seeking relief similar to a claim for enforcement of the contract in the form of alternative performance. Defendant raised an exception to the claim on the basis that it did not disclose a cause of action as ulterior motive and bona fides were irrelevant factors when a contract of employment is terminated by proper notice. In this case the employment contract as such made provision for such notice, and the employee had been served with such notice.

The court applied the principles relating to employment at will laid down in the English case of ***Johnson v Unisys***[1133] and the Canadian case of ***Wallace v United Grain Growers***[1134] which we have already considered in our discussion of English law.[1135] In these cases it was held that a wrongful dismissal is not concerned with the wrongness or the rightness of the dismissal itself, as the law entitles an employer to dismiss for any reason, for no reason, without cause, even unreasonably or capriciously. A wrong arises only if the employer breaches his contract by failing to give the dismissed employee the required notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.[1136]

As we have shown above, these principles are foreign to Roman Dutch common law, and to the earlier law laid down by the then Appellate Division of the Supreme Court in cases such as ***Spencer.***[1137]

Apart from the foreign law referred to above, the court in ***Harper*** also relied on the following South African authority in holding that the principle of employment at will with its concomitant remedies are part of our law: ***Mustapha v Receiver***

1133 ***Johnson v Unisys Ltd.*** [2001] 2 ALL ER 801 (HL) par 40.
1134 ***Wallace v United Grain Growers Ltd*** (1997) 152 DLR 4th 1 par 39.
1135 Supra, Chapt. V.
1136 **Grogan *Labour Litigation and Dispute Resolution*** (2010) 12
1137 Supra.

of Revenue,[1138] ***Grundling v Beyers,***[1139] and ***Langeni v Minister of Health and Welfare***[1140]

But in our submission, reliance on these authorities, especially the foreign cases of ***Johnson*** and ***Wallace*** was unfortunate and erroneous, at least as far as the wholesale importation of the foreign doctrine of employment at will into South African law is concerned. ***Mustapha*** was not an employment case and concerned the question whether a trustee in terms of Act 18 of 1936 could issue notice of termination of a permit to permit-holders occupying a trading site. Such notice was allegedly issued in bad faith on the basis of racial considerations, but did comply with the contractual notice period. The court held[1141] that "*...in the case of a private individual who is a party to a contract, his reasons or motives for exercising an admitted right of cancellation of that contract are normally irrelevant.*"

In ***Grundling***[1142] the court held that a trade union Secretary did not hold a public office, but rather a contractual position placing it within the ambit of the so-called Master and Servant laws. Citing English case law on dismissal at will as authority,[1143] the court concluded that in pure contractual terms, a master's act of wrongfully dismissing his servant, without first giving him the hearing that the contract requires, does not render the dismissal a nullity which both parties could subsequently ignore as if it had never happened. It is merely a breach of contract which, so far from being a nullity, gives the servant certain remedies and imposes on the employer certain liabilities.

Langeni involved certain temporary workers who had rendered service in terms of an employment contract with a government department. Such contract provided for a notice of termination of contract of 24hours. The court, applying

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1138 ***Mustapha and Another v Receiver of Revenue, Lichtenburg*** 1958 3 SA 343 (A).
1139 ***Grundling v Beyers*** 1967 2 SA 131 (W) 142.
1140 1988 4 SA 93 (W) 101C.
1141 ***Mustapha*** 358F
1142 ***Grundling v Beyers*** (supra).
1143 ***Ridge v Baldwin*** 1964 AC 40

Ridge v Baldwin and **Grundling v Beyers**[1144] held that the relationship between the parties was a contractual one governed by the Master and Servant laws, and that a hearing was not necessary before notice of termination could be given.

Thus we note that in each of these South African cases, the employer acted or purported to act in terms of a contract in which the parties had agreed a priori on the course of action which the employer had subsequently taken, and which was for that reason not unlawful, namely termination by notice. We are in respectful agreement with the findings of the courts in these cases on this particular issue.

But we disagree that employment at will as a general principle governing termination of employment by the employer, formed part of South African law. Where the parties had a fixed term contract for instance, it is inconceivable that one could unilaterally but lawfully terminate such contract by the simple act of giving notice to the other party – unless, of course such notice coincides with the agreed termination date of the contract itself.[1145] Such contract could also be terminated by the employer in the event of gross misconduct by the employee, as such conduct in itself amounted to a breach of contract. Indefinite term employment could only be terminated by dismissal following gross misconduct or incapacity on the part of the employee.

Our conclusion is that ***Harper*** and the South African precedents that it relied on, erroneously imported employment at will into our employment law, contrary to the legal and equitable principles embraced in earlier case law.

In our view ***Spies*** presents a true reflection of the common law principles governing dismissal. In ***Spies v MI-C3 Holdings***[1146] the employer had repudiated the contract of employment by failure to pay to the employee his agreed salary. The Labour Court applied the traditional test for repudiation, namely whether the conduct of one of the parties, fairly interpreted, exhibits a

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1144 supra
1145 ***Spies v MI-C3 Holdings SA (Pty) Ltd*** 2011 32 ILJ 149
1146 ***Spies v MI-C3 Holdings SA (Pty) Ltd*** 149

deliberate and unequivocal intention no longer to be bound by the contract.[1147] However, we subscribe to the view expressed in ***Datacolor International***[1148] that repudiation is not simply a matter of intention, but rather of perception by a reasonable person in the position of the aggrieved party. Like in ***Harper***[1149] the court in ***Spies*** was dealing with a fixed term contract, but unlike Harper, notice of termination had not been given. It does not appear from the report that the contract provided for termination by notice. This inevitably led to a finding of repudiation. However, it is important to note that the claim for damages was not limited to either an agreed or reasonable or customary notice period. Full and substantive damages for the remainder of the contractual period, was granted. The court furthermore held that there was no duty at all resting on the employee to mitigate his damages.

But in ***Jafta v Ezemvelo KZN Wildlife,***[1150] the Labour Court[1151] stated again:

"Thus, whereas an employer's liability for breach of an indefinite duration contract is limited to paying the employee up to the end of the notice period, that is, when the contract may be terminated lawfully under the common law, that option is no longer available under the LRA."[1152]

We have pointed out earlier that the principle that one of the parties to a common law contract, including a contract of employment, could unilaterally terminate such contract in the absence of an empowering term to that effect in the contract itself, was foreign to common law. A valid reason such as desertion or serious misconduct was required at common law for termination of the contract. It was through erroneous interpretation of the common law, and under influence of the English concept of dismissal at will, that the SA courts went astray, holding that contracts of employment could be terminated by notice only,

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1147 ***Inrybelange (Edms) Bpk v Pretorius*** 1966 2 SA 416A; ***Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou*** 1978 2 SA 834 (A); ***Member of the Executive Council, Dept. of Health, Eastern Cape v Odendaal*** 2009 30 ILJ 2093 (LC); ***Nash v Golden Dumps (Pty) Ltd*** 1985 3 SA 1 (A).
1148 ***Datacolor International (Pty) v Intamarket (Pty) Ltd*** 2001 2 SA 284 (SCA) 294.
1149 supra
1150 2009 30 ILJ 131 (LC)
1151 Per **Pillay J**
1152 See also the summary of the perceived common law position by the LAC (per **Zondo** AJP) in ***Modise & others v Steve's Spar Blackheath*** 2000 21 ILJ 519 (LAC) 525: *Whereas under the common law an employer could fire for a bad reason or for no reason at all provided the dismissal was on notice, under the unfair labour practice dispensation, he became obliged not to dismiss even on notice – unless he could prove the existence of a good reason to dismiss."*

and that where a contract was unlawfully repudiated by the employer, it had to pay *'notice damages'*(i.e limited damages) only.[1153]

The erroneous dismissal law as interpreted by ***Harper*** and the precedents that it relied on was rigidly applied in subsequent jurisprudence.[1154] The first significant deviation only surfaced after the introduction of a comprehensive fairness regime by the 1979 amendments to the 1956 Labour Relations Act.[1155] The Industrial Court began to apply the provisions of the ILO Convention on the Termination of Employment.[1156]

S 37(6) of the BCEA was also adopted to remedy the situation: It provides that even where notice has been given in terms of a contract of employment or legislation, this does not prevent the employee to challenge the *fairness* of a dismissal.[1157] S 186 of the LRA, which contains the definitions of various forms of *unfair dismissal*, also contain provisions that regard certain forms of dismissal as *unfair*, irrespective of whether *notice* of termination is given.[1158]

1153 The principle of employment at will was reaffirmed by the Labour Court in ***Moloto v City of Cape Town*** 2011 32 ILJ 1153 (LC), where **Francis J** stated at 1156, par. 7 : *"The question that arises is whether the Respondent can terminate an indefinite contract of employment by giving a month's written notice. In terms of the common law, an indefinite contract of employment will endure indefinitely and is terminable by either party on the giving of reasonable notice. In this regard see* ***Tiopaizi v Bulawayo Municipality*** *1923 AD 317."* **Wilson** ***"The Common Law of Contract..."*** 2009 30 ILJ 2301 correctly traces the limited damages principle of English law back to the English case of ***Johnson v Unisys Ltd*** [2001] ICR 480 (HL), which we have discussed in Ch. V. **Wilson** loc.cit. relied on **Freeland** ***The Personal Contract of Employment*** (2003) 362.

1154 See ***Modise v Steve's Spar*** 525; ***Somers v Director of Indian Education*** 1979 4 SA 713 (D); ***Makhanya v Bailey*** 1980 4 SA 713 (T)

1155 ***SA Diamond Workers Union v The Masters Diamond Cutting Association of SA*** 1981 4 ILJ 87.

1156 No. 158 of 1982. Clause 2(1) of the Convention states that termination of employment should not take place unless there is a *valid reason* for such termination. See the case of ***Stobar***, supra; ***Modise v Steve's Spar*** 526B-C; **Smit** ***"When is Dismissal an Appropriate Sanction and when should a Court set aside an Arbitration Award"*** 2008 29 ILJ 1635; ***Woolworths v Whitehead*** 2000 21 ILJ 571 601 par. 137, where ***ILO Convention on Equality in Employment and Education*** 1998 is discussed. For a general discussion of the role of the ILO, see **Schachter & Joyner** ***United Nations Legal Order*** 1995 476 et seq.

1157 Cf. **Grogan** ***Dismissal*** (2010) 543

1158 S 186 (1) reads that 'dismissal' means that (a) an employer has terminated a contract of employment *'with or without notice.'* See also the reference to *'notice'* in s 186(1) (e) and (f). See also ***Jafta v Ezemvelo KZN Wildlife*** *2009* 30 ILJ131 (LC), and the discussion thereof by **Wilson** ***"The Common Law of Contract Adapts to the Twenty First Century: A Note on SA Music Rights Organisation Ltd v Mphatsoe, Labournet Solutions (Pty) Ltd v Vosloo*** *and* ***Jafta v Ezemvelo KZN Wildlife***" 2009 30 ILJ 2296; 2301. In Jafta, the court stated that s 37 of the BCEA 75 of 1997 prescribes the period of notice. However, the LRA trumps the common law in prescribing that an employer may only terminate a contract of employment for a *'valid reason'.* The notice provisions of the BCEA are only triggered when the employer has a valid reason for

7.5 UNFAIR LABOUR PRACTICE AND THE COMMON LAW

In the pre-1979 employment dispensation[1159] the primary basis of the employment relationship between the parties was the employment contract.[1160] Moreover, immense significance was attached by the courts to freedom of the parties to contract with each other on terms that they themselves deemed fit, provided that the contract and its terms were not illegal.[1161] Although this has been the approach since Roman times, it reached its climax during the period of *laissez-fair.*[1162] For decades there had been intense criticism of this approach which was based on the myths of the freedom of contract[1163] and the concomitant equality of the parties to an employment contract,[1164] myths that have since been discredited by the Constitutional Court itself.[1165]

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termination, such as misconduct, incapacity, operational requirements, or when the employer complies with other statutes permitting termination by notice.

As has been pointed out by us earlier, the common law did require a valid reason for dismissal. Misconduct, and perhaps incapacity would have constituted such valid reasons under the common law, although the concept of termination for reason of operational requirements seems to have been unknown to the common law.

1159 i.e. before the introduction of the 1979 amendments to the 1956 LRA.

1160 **Grogan *Dismissal*** (2010) 4; **Du Plessis & Fouche *A Practical Guide*** (2006) 328-337; **Van Esveld & Van Aerde *"Labour Law"* De Blecourt** et al (1978) 537; **Van Der Ven *Arbeidsrecht*** (1985) 337-8: ***Smit v Workmen's Compensation Commissioner*** 1979 1 SA 51 (A) 56; **Brassey *Employment Law*** (1998) B.1

1161 In ***Gcaba v Minister for safety and Security*** 2009 30 ILJ 2623 (CC) 2638-9, the CC stated: *"Employment is not a bargain of equals, but a relationship of demand. Since the 1980's in South Africa, the legislature has realized that leaving the regulation of employment purely within the realm of contract law could foster injustice; therefore the relationship is regulated through the LRA. S. 23 is an express constitutional recognition of the special status of employment relationships and the need for legal regulation of the law of contract."*

1162 Also referred to as *'the individualist tradition'* by **Otto Kahn-Freund *Selected Writings (Labour Law)* Modern Law Review** 1978 31; **Grogan *Dismissal*** (2010) 4; On the tight and relentless grip that *laissez-fair* and capitalism had on employment law for decades, if not for centuries, see **Brassey *"The Contractual Right to Work"*** 1982 3 ILJ 247; 248.

1163 **Kahn-Freund *Selected Writings (Labour Law)*** (1978) 31.

1164 **Brassey *"The Contractual Right to Work"*** 1982 3 ILJ 248; **Otto Kahn- Freund**, summarised the power relation between employer and employee in these celebrated words: *"The relationship between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensible figment of the legal myth known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."* This passage was cited with approval by the CC in **Sidumo** 2431 par. 72, having been taken from **Davies & Freedland *Kahn-Freund's Labour and the Law*** (1983), and **Cheadle et al** (2003) 18-5.

1165 **Sidumo** 2426 par 54.

An ancient but fundamentally fair doctrine that perfectly served the adherents of *laissez-fair*, and which still dominates employment contract law in modern times, is that of ***pacta sunt servanda*** – contractual agreements should be honoured.[1166]

Laissez-fair and *pacta sunt servanda* formed the cornerstones of the common law of employment prior to the 1979 Amendments to the 1956 LRA. But matters, disputes and issues that are today regulated by labour legislation such as the LRA, the BCEA and the EEA etc. were not unknown to the pre-1979 era. In fact it would probably not be an exaggeration to state that labour disputes and issues have been with us ever since the practice of hiring labour first made its appearance. But the regulation of these matters was quite different in different epochs. The primary dispute resolution mechanisms and criteria were virtually always and solely statute, where these existed and were applicable, the common law principles governing employment, and the employment contract itself.[1167] Custom also had a relatively minor role to play.[1168] We have already alluded earlier in this chapter to the subsidiary and supporting role that the courts allocated to *equity* in the entire realm of law, but more specifically in that of employment law. We also discussed the beneficial influence that the equitable doctrine of enrichment had in some very specific areas of labour law.[1169]

The question arises on what basis the pre-1979 common law dispensation dealt with issues which today fall within the domain of *fairness* legislation such as the

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1166 On the relationship between *laissez-fair*, contractual freedom and the principle that contracts should be abided by, see **Cohen *"Implying Fairness into the Employment Contract"*** 2009 30 ILJ 2271; 2272. See also the locus classicus in English law on the subject, also discussed by Cohen, namely ***Printing & Numerical Registering Co v Sampson*** (1875) LR 19 Eq 462;465; On the sanctity of *pacta sunt servanda*, see also **Pillay *"Giving Meaning to Workplace Equity"*** 2003 24 ILJ 61.

1167 See **Du Plessis & Fouche *A Practical Guide*** (2006) 4-6

1168 In ***Tiopaizi v Bulawayo Municipality*** 1923 AD 317, the court adopted the customary rule that where an employee received a monthly salary, notice of termination of his service had to be for one month. This rule was adopted from **Fulton v Nunn** 1904 TS 123, where it was applied to the notice period required for the termination of the lease of a house. In ***Tiopaizi*** 329, the learned **Kotze JA** remarked in relation to the custom of termination of service by notice:*"But custom, or the ordinary course of dealing between the parties may vary their rights as regulated by the common law."* See also ***Stock & Stocks Holdings Ltd & another v Mphelo*** 1996 17 ILJ 511 (T), where the *practice* of paying employees at the end of each month was also recognised as an acceptable basis for a principle that notice of termination of service had to be at the beginning of the calendar month.

1169 This is discussed *infra*, directly hereafter.

LRA, the BCEA, and the EEA – issues such as the various forms of unfair dismissal and labour practice. The answer to this question in each and every case is: breach of contract and contractual damages.

The concept of *unfair dismissal* was for instance not unknown. The problem was simply that it was non-actionable in strict law and therefore, in the absence of a statutory fairness regime, legally irrelevant.[1170] The same could be said about unfair labour practice.[1171] Only claims based on *wrongful dismissal* or *wrongful labour practices* were justiciable. In all such cases the criterion for the determination of wrongfulness was that of breach of contract.[1172] The only relief in all such cases was an award of damages.[1173]

We have already discussed wrongful dismissal earlier when dealing with employment and dismissal at will. We noted that the legal principles of Roman Dutch and early South Africa law were relatively equitable compared to those embraced by the English and American doctrine of employment at will. We will therefore take a few examples from the case law that deal with non-dismissal disputes to form an idea of how such disputes were dealt with in the absence of a statutory fairness regime.

The issue of a *unilateral change to terms and conditions of employment* was well known to common law jurisprudence. In ***Muelendorf v Rand Steam Laundries Ltd***[1174] the concept of a unilateral change was analysed. The court came to the conclusion that this amounts to a breach of contract, as technically every such alteration or change amounts to a termination of the existing contract of

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1170 **Grogan *Dismissal*** (2010) 2 correctly points out that as dismissal of State employees were always viewed as the performance of an administrative act, such dismissal had to comply with the dictates of procedural fairness and rationality. He continues to point out that phrases such as "*unfair labour practice*" and "*unfair dismissal*" were unknown to the common law. **Grogan *Workplace Law*** (2007) 106 points out that the common law was concerned only with the question whether a dismissal was *lawful* i.e. whether the required notice was given in the case of an indefinite – period contract, or whether there was lawful cause for dispensing with notice – ***Fedlife Insurance Ltd v Wolfaardt*** 2001 22 ILJ 2407 [SCA]

1171 ibid

1172 We are leaving aside here cases involving statutory contravention which often constituted criminal offences.

1173 ***Spencer v Gostelow*** 631-2; ***Schierhout v Union Government*** 107; ***Khubheka & Another v Imextra (Pty) Ltd*** 1975 4 SA 484 [W]

1174 1945 TPD 317; 329.

employment, and its substitution with another. In other words, it involves a dismissal and a re-employment on new terms and conditions. This concept is nevertheless distinguishable from an ordinary dismissal.[1175] Unilateral alteration was therefore well known, but under the banner of a *breach of contract*, rather than an *unfair act* or *practice*. We submit that it may be for this very same reason that a unilateral change is not included in the definition of an unfair labour practice in the 1995 LRA.[1176] On this basis it can be argued that this practice is still regulated by common law principles.[1177] In practice the courts did not deal with such a change as a dismissal as such, since it is usually followed up by a continuation of the employment relationship.[1178] But it was nevertheless viewed as a serious form of breach of contract.

The Labour Court has recognised the fact that a unilateral change to terms and conditions of service may constitute a repudiation of the contract under common law, and that such repudiation could also amount to an unfair dismissal as defined in s186 of the LRA.[1179] The concept of constructive dismissal was introduced under the unfair labour practice regime since the courts, although recognizing the existence of such form of dismissal under the common law, did not deal with it in practice on that basis, since such dismissals in most cases did not practically result in a termination of service as such, but rather in continued employment under unilaterally changed conditions, as explained above.

1175 The court remarked as follows: *'The dismissal of an employee would not ordinarily be described as an alteration of his conditions of employment: it is the termination of his employment....Technically every alteration of conditions of employment involves the termination of one contract of service and the substitution of another, and so might be said to constitute a discharge and a re-employment of the employee, but I do not think that to dismiss an employee without an offer of re-employment ordinarily falls within the meaning of the words to alter conditions of employment."*
This dictum was followed in ***Minister of Labour v Port Elizabeth Municipality*** 1952 2 SA 533E-F.
1176 See s 186(2) of the LRA for a definition of unfair labour practice.
1177 **Grogan *Dismissal*** (2005) 420.
1178 Ibid.
1179 ***National Automobile & Allied Workers Union v Borg-Warner SA (Pty) Ltd*** 1994 15 ILJ 509 (A); ***Monyela v Bruce Jacobs t/a LV Construction*** 1998 19 ILJ 75 (LC); ***Van Wyk v Albany Bakery Ltd & others*** 2003 12 BLLR, 1274 (LC); ***Matheyse v Acting Provincial Commissioner, Correctional Services*** 2001 22 ILJ 1653 (LC); ***Van der Riet v Leisurenet Ltd t/a Health & Racquet Club*** 1998 5 BLLR 471 (LAC); ***Jooste v Transnet Ltd t/a SA Airways*** 1995 16 ILJ 629 (LAC). For a useful discussion of these authorities, see the arbitration award of Frohnapfel C in ***Bonthuys and Central District Municipality*** 2007 28 ILJ 951 (CCMA) 961.

It is therefore quite clear that the concepts of unilateral change to conditions of employment and constructive dismissal have much in common, both under the common law and under the fairness regime introduced by the LRA. These concepts overlap to a large extent. A repudiation of the contract as such, or of its material terms, would conceivably always amount to a constructive dismissal under the current fairness legislation, and vice versa: constructive dismissal would virtually always amount to a repudiation of the contract or of its material terms.[1180]

Demotion is another matter that was dealt with strictly on a contractual basis, unlike today where it is considered primarily on the basis of unfair labour practice.[1181] It should be borne in mind that notwithstanding the fact that unfair demotion may constitute an unfair labour practice under the 1995 LRA, demotion has not lost its common law character as a possible or potential breach of contract. The case law suggests that the kind of conduct on the part of the employer that amounts to a demotion of the employee was fairly similar under the common law and the current unfair labour practice dispensation. It has to be born in mind however, that the concept of lawfulness and fairness are not identical.[1182]

Smith v Cycle and Motor Trade Supply Co,[1183] decided as early as 1922, is a case in point.[1184] There an employee was appointed Joint Manager, subsequently Manager and was then told to act as Bookkeeper. He retained his managerial salary. The issue was whether he had been unlawfully demoted. **Wessel JP**

1180 See ***Pretoria Society for the Care of the Retarded v Loots*** 1997 18 ILJ 981 (LAC) where the LAC explained the connection between repudiation of a contract and constructive dismissal: It is an implied term of every contract of employment that the parties thereto will not do or omit to do anything that causes the counter-party to find it difficult or impossible to continue the employment relationship. Such conduct would amount to a repudiation of the contract. The repudiation consists in a breach of the implied terms of trust and confidence that is incorporated into every contract of employment to the effect that neither party would do or omit to do anything that breaches such trust and confidence. The overlap between repudiation and constructive dismissal is recognised by the court for it pointed out the case of an employer compelling an employee to resign as possibly the best example of constructive dismissal. There can be no doubt that the same is also a good example of repudiation of the contract.

1181 S 186(2) (a) of the LRA, 1995.

1182 **Grogan *Workplace Law*** (2007) 100

1183 1922 TSC 324

1184 See also ***Van Niekerk v Minister of Labour*** (1996) 17 ILJ 525 (C).

found that there was in fact such a demotion: an employer who hires an employee for a particular job at a particular status cannot change the nature of the work or reduce the status that goes with it unilaterally.[1185] Demotion was here also characterized as a unilateral change to terms and conditions of service, a material breach of contract, and even as a form of unlawful dismissal.[1186]

In ***Stewart Wrightson (Pty) Ltd v Thorpe***[1187] a director of the Appellant company who was also a managing director of a related company and who furthermore had a relationship of stockbroker and client with Appellant, was denied work and the use of his office for a lengthy period. The court decided that this amounted to a demotion and a fundamental breach of his contract of employment, actionable with a claim for damages.[1188]

Similar conclusions to those reached in ***Stewart*** relating to denial of work and demotion were reached in ***Muzondo v University of Zimbabwe.***[1189] ***Muzondo*** was denied the right to work and the preservation of his status, which included the doing of research for the balance of his employment contractual period. The court found that this amounted to a fundamental breach of contract by the employer.[1190]

1185 In ***Smith v Cycle and Motor Trade*** 325, **Wessels JP** remarks: *"If a man is appointed as joint manager and subsequently as manager, and is then told that he is to act as bookkeeper, is that equivalent to a dismissal? Mr. Millin has quoted to us a number of cases in which it is perfectly clearly stated that any degradation of status is tantamount to a dismissal."*
Over and above the mainly English authorities that Counsel had relied on, the court cited ***Donaldson v Webber*** (4 H.C.G.) 403; ***Ross v Pender*** (unspecified), and **MacDonnell *Master and Servant*** 159. See also ***Denny v SA Loan Mortgage and Mercantile Agency Co. Ltd*** 1883 3 EDC 97, ***Steward Wrightson (Pty) Ltd v Thorpe*** 1974 4 SA 67 [D]; ***Groenewald v Cradock Munisipaliteit*** 1980 4 SA 217 (E); **Brassey *Employment Law*** E2: 16
1186 ***Smith v Cycle*** 326.
1187 1977 2 SA 943 [AD] 951.
1188 In ***Stewart*** 951H, **Jansen JA** remarks *"...the denial of work and the use of an office to the respondent for some six months does amount to a fundamental breach, as being not only prejudicial to his future prospects, but also a degradation of his status."*
1189 1981 4 SA 755 (Z).
1190 See also the English case of ***Collier v Sunday Referee Publishing Co. Ltd*** [1940] 2 KB 649, discussed by **Brassey *Employment Law*** (1998) E2: 17. For an incisive article on the right to work, including an assessment of the cases of ***Stewart*** and ***Muzondo***, see **Brassey *"The Contractual Right to Work"*** 1982 3 ILJ 3 ILJ 247. Despite expressing some disappointment in the fact that these cases contain little relating to any principle on which the courts had worked, the learned author nevertheless welcomes the position espoused by them. On p. 250 he states: *"This is a happy position, for otherwise antiquated ideas could quite possibly have driven South African law into the corner that the English law on the point occupies."*

In the pre-1979, and therefore prior to the present fairness dispensation, suspension was also dealt with by the courts on a regular basis. However, the issue was not the *fairness* of the suspension, but rather the *lawfulness* thereof. An unlawful suspension could be regarded as a fundamental breach of contract, and could lead to a claim for contractual damages.[1191]

7.6 THE EMPLOYER'S MANAGERIAL PREROGATIVE

One of the cornerstones of the common law contract of employment is the right of *control* that the employer has, not only over the persons of its employees and their labour, but also over the conduct of its business. We submit that the employer's managerial prerogative stems from this right.[1192]

Managerial prerogative refers to the totality of the capacity of an employer, through its management, to determine the requirements of its business.[1193] This includes issues such as appointments, promotions, transfers, demotions[1194] and discipline. Managerial prerogative entails that the employer has an inherent *discretion* to exercise in regard to these issues.[1195]

Modern forms of the managerial prerogative are the result of a slow and incremental, often painful process of evolution of labour law, labour practice and labour relations. What was at some stage in the history of labour law a virtually

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The right to work has not always been recognised in South African law. In the early case of ***Faberlan v Mckay and Frazer*** 1920 WLD 23 which followed English law on the issue, the court laid down the principle that any wage-earner is only entitled to his wages. The employer is not obliged to provide him with work and the employee has no complaint if he is not given work.

1191 ***Dladla v Council of Mbombela Local Municipality*** 2008 29 ILJ 1893 (LC; ***University of the North& others v Ralebipi & others*** 2003 24 ILJ 2132 (LAC).

1192 On the court's power to scrutinize such prerogative, see ***Clark v Ninian & Lester (Pty) Ltd*** 1988 9 ILJ 651 (IC).

1193 ***George v Liberty Life Association of Africa Ltd*** 1996 17 ILJ 571 (IC) 572.

1194 Ibid.

1195 Ibid. On the scope of the managerial prerogative, see ***University of the Western Cape and University of the Western Cape United Workers Union*** 1992 13 ILJ 699 (ARB); On promotion of employees see ***Public Servants Association obo Botes & others v Department of Justice*** 2000 21 ILJ 690 (CCMA); ***Van Wyk v Provincial Administration : Western Cape (Department of Planning, Local Government and Housing)*** 2001 22 ILJ 1447 (BCA) (severance package); On transfer or relocation : ***Visser and Vodacom (Pty) Ltd*** 2003 24 ILJ 693 (ARB); 2002 23 ILJ 1968 (ARB); ***United Transport and Allied Trade Union obo Malek and Transnet Ltd t/a Transwerk*** 2002 23 ILJ 1659 (BCA); ***Manganese Metal Co (Pty) Ltd and National Union of Metalworkers of SA*** 1993 14 ILJ 500 (ARB); ***SA Police Union & another v National Commissioner of the South African Police Service & another*** 2005 26 ILJ 2403 (LC) 2412.

unfettered power, has been eroded by various social and economic forces to a relatively limited discretion, the exercise of which is subject to and confined by certain definite and stark parameters.[1196] However, this process of erosion is in itself a dynamic one, as is the concept of managerial prerogative itself, and the ultimate end-result of this dialectic process may never arrive.[1197]

There are various sources of restriction or limitation of managerial prerogative. These are *law* in general, such as statutory law, which includes the Constitution, as well as labour legislation like the LRA, EEA, and the BCEA and other relevant pieces of legislation, as well as the common law.[1198] Non-legal sources of restriction or limitation include public policy, collective agreements, and the common law employment contract. Any provision, term, principle or clause contained in any of these sources which limits the power and control of an employer over his employees or his business, would derogate from the general managerial prerogative of the employer.

Insofar as *fairness* is provided for in any of these sources, it constitutes a legitimate and enforceable restriction on managerial prerogative.[1199] This is particularly true of the common law dictates concerning fairness, and s 23(1) of the Constitution, as well as the labour legislation referred to above. Here s 186 of the LRA which defines unfair labour practices and unfair dismissal is of particular importance.[1200]

1196 **Landman J** even referred to 'abrogation' of some facets of managerial prerogative in ***George v Liberty Life***.

1197 The learned **Landman J** expressed the view in ***George v Liberty*** 583B, that in South Africa this process of erosion or reduction was caused by a change in the social standing of employees and by the slow progress towards democracy which sometimes engulfed the workplace, or which in fact sometimes started off in the workplace.

1198 Ibid.

1199 Ibid. In ***National Union of Metalworkers of SA v Vetsak Co-operative Ltd*** 1996 17 ILJ 455; 476 the court draws attention to the fact that the process of collective bargaining resulting in the conclusion of collective agreements allowed by the unfair labour practice jurisdiction of the court, had detracted from, but not negated the employer's common law right (prerogative) of dismissal.

1200 See also s 6 of the EEA, the anti-discriminatory provision.

7.7 EQUITY AND UNFAIR ENRICHMENT

The doctrine of unjustified enrichment has already been broached to a limited extent in our discussion of forfeiture and employment at will.[1201] In view of the lasting and pervasive salutary influence that this doctrine had on the common law of employment, as well as under the present fairness regime enshrined in the LRA, the BCEA and the EEA, it needs to be considered here in more detail.

From a conceptual and terminological point of view, we submit that in the sphere of employment law at least, the term *unjustified enrichment* needs reconsideration. As will appear from our discussion of the notion herein, certain forms of enrichment were not tolerated by Roman and Roman Dutch law, not because it was *unlawful* or *unjustified* per se, but because it was *unfair*. Such cases normally did not involve an unlawful or unjustified act of enrichment by the employer, for instance, to the detriment of the employee. In fact in most cases the actions of the employer would be perfectly lawful and justifiable. Nevertheless, it could amount to *unfair* action, most notably *unfair enrichment*.[1202]

The ancient common law doctrine of unjustified enrichment, dating all the way back to the Digest of Justinian,[1203] played an exceptionally useful role in bringing equity to aggrieved employment litigants in South Africa. The common law of employment was in some respects a relatively harsh and rigid area of law,[1204]

1201 supra

1202 At least as far as SA law is concerned, the term *unjustified enrichment* originated in **De Vos *Verrykingsaanspreeklikheid*** (1987) 310, where he explains his motivation for employing this terminology. The learned author explains that the use of terms such as *'onregverdige'* or *'unjust enrichment'* is unfortunate in that it creates the impression of the existence of an action which is considered in terms of pure moral considerations. However, as appears from the case law discussed in this work, enrichment was recognised and applied on the basis of equitable considerations, irrespective of the formal type of action that was involved. The term unfair enrichment simply relates to its two component parts, whereas the term *unjustified enrichment* has the connotation of enrichment not justified by or answerable in terms of (strict) law.

1203 D 12 6 14; D 50 17 206; ***Hauman v Nortje*** 307

1204 Consider for instance the doctrine of employment at will as practised under the laws of England and the United States, as well as its influence here locally.

where litigants often faced the adverse effects of long established custom, practice, as well as outdated policy considerations and prejudices.[1205]

The doctrine of unjustified enrichment served as a welcome tool to a judiciary that was at times keen to soften the harsh effects of the strict common law of contract, by means of the application of a doctrine based on equitable considerations.[1206]

It was especially the English common law of Master and Servant that excelled in its inflexibility when it came to matters such as employment contracts, the employment relationship, as well as the respective duties of the employment parties in respect of each other.[1207] The equitable doctrine of unjustified enrichment or *unfair enrichment* was for instance foreign to English law, especially so in an employment context.[1208]

One of the earliest AD precedents in which we find distinct reference to fairness and equity in a labour context, is ***Boyd v Stuttaford***,[1209] which was also one of the earliest employment cases decided by the Appellate Division of the Supreme Court in a united Union of South Africa.[1210] ***Boyd*** involved a claim by an employee for his wage in respect of a *full period* of employment during parts of which he could not work at all, due to incapacity as a result of illness. **Hopley J**,

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1205 In ***R v A.M.C.A Services Ltd*** 1959 4 SA 209 ;213, **Schreiner J A** cited **Holmes *The Common law***, who referred to "service" as "*the decaying remnant of an obsolete institution*" namely slavery.

1206 ***Mills and Sons v Benjamin and Bros; Hassan Khan v Immigration Officer; Weinerlein v Goch Buildings; Bothwell v Union Govt. (Minister of Lands); Estate Thomas v Kerr; Spencer v Gostelow; Hauman v Nortje; Breslin v Hichens; Boyd v Stuttaford; Umhlebi v Estate Umhlebi; Haynes v King Williams Town Municipality ; Muller v Grobbelaar; Hospersa v MEC for Health; BK Tooling v Scope Precision Engineering; Valasek v Consolidated Frame Cotton Corp.; 3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union & Others*** *(supra)*

1207 The doctrine of employment (*and dismissal*) at will as discussed earlier, for instance, formed one of the cornerstones of English law, as did the principle that no payment at all was due for incomplete work, even where the employer had been enriched by such incomplete performance.

1208 In ***Hauman v Nortje*** 307, **De Villiers AJA** states: "*If these be the rights of the parties then under the contract strictly speaking the plaintiff must fail. But **Voet** points out that such a result might be highly inequitable, being against the equitable rule of the civil law that no man shall be enriched at the expense of another (D.50.17.206). This maxim does not seem to obtain in English law, and accordingly the English decisions hold parties strictly to their legal rights*"

1209 1910 AD 114. In ***Boyd***, the AD had the opportunity to pronounce authoritatively on employment matters where there was hitherto fragmented and perhaps uncoordinated jurisprudence.

1210 Union of the provinces of South Africa occurred in 1910.

[1211] dismissing the claim for payment in respect of the full period observed[1212] in the court a quo that the principle that the employer should not pay for work not rendered was *'much more in accordance with common sense, equity and human kindness.'*

On appeal, **Solomon J** remarked that although he would find it a *fair and equitable principle* that not only domestic servants, but all workers be paid in respect of short periods of illness, there was a clear legal principle that he had to follow, namely *no work no pay*. As Boyd had not worked or rendered his performance for the full contractual period, the employer could not be compelled to render his. This should not be understood as meaning that the court was in principle not prepared to apply principles of fairness in a court of law. The reason why fairness did not find any application was simply because an existing legal principle – no work no pay - already regulated the situation. The general duty of the judge is to apply law in the first place, over and above fairness, was the argument of the court.[1213]

But ***Boyd*** did recognise the principle that in the case of illness or death the salary for the actual period worked was payable. This approach was based on equitable considerations in as far as nobody shall be allowed to be *unfairly* (unjustifiably) enriched at the expense of another.[1214] It is an exception to the general rule that in order to claim performance, the claimant (employee) himself should already have rendered his own (*complete*) performance, or at least be ready and willing to do so.[1215]

1211 Sitting as judge of first instance.
1212 His TPD judgment was reproduced in the AD report. See Boyd 109.
1213 ***Boyd*** 121. On the relationship between law and fairness, see the early case law cited herein:
1214 In ***Hauman v Nortje*** 296-7, **De Villiers CJ** explained the implications of ***Boyd***, a decision of the very same court. Thus, in ***Boyd*** and ***Nortje***, we have a perfect example of what the Roman praetor had in mind in introducing equity into law: tempering the harsh effects of the strict law; supplementing it by principles much more flexible according to the circumstances of each individual case; preventing the law from being turned into an engine of injustice.
1215 See in this regard the comment of **De Villiers CJ** on ***Boyd*** in ***Hauman v Nortje*** 297.

Hauman v Nortje[1216] was a landmark judgment by the AD in which the issue of equitable relief for a workman, (an independent contractor)[1217] who had not fully performed, was considered. Although the court was dealing here with the contract of ***locatio conductio operis,*** it approached the case on the basis that the principles of equity applied to all contracts of hire[1218] across the board, including employment contracts.[1219] This approach was fundamental to later judgments of the same and other courts in matters relating to employment equity or fairness between employment parties. [1220]

The court held that where an employee had in fact done some work, i.e. had partly performed but died before completion of the contract, the employer had to pay for work already done. This obligation of the employer is founded on equity:

"Although the servant who has died before the completion of his term of service, has failed to perform his part of an indivisible contract and ought in strictness of law not to be allowed to recover anything, yet the equitable principles of our law step in so as to prevent the law from being turned into an engine of injustice."[1221]

In abovementioned passage we observe the familiar traditional language and terminology appropriate to the distinction between strict *law* and *fairness*: Without the beneficial influence of fairness, strict law can be turned into an engine of injustice: ***summum ius summa iniuria.***[1222]

1216 supra

1217 Independent contractor

1218 **Locatio conductio rei, operis and operarum**

1219 There was a tendency in the early practice of the courts – perhaps stemming from the relative dearth of authority on the subject at the time – to apply the principles of lease across the board, without distinction between its various forms, such as the hiring of things, of a contractor or of an employee – **locatio conductio rei, operis et operarum.**
In ***Tiopaizi*** 320 the court specifically relied on earlier precedents such as ***Pemberton v Kessell*** 1905 TS 174; ***Paruk v Haynes & Co*** 27 N L R 380 , and ***Sitterding v Hermon Lime Co*** 1921 CPD 439 where the earlier case of ***Fulton v Nunn*** 1904 TS 123 was followed. In ***Fulton*** the principle of Roman Dutch law which requires that notice of termination of lease of real property (a house) be given at the end of one of the customary, periods, in casu, a month, was adopted. This principle was adopted and applied to termination of an employment contract in the cases cited here.

1220 **De Vos *Verrykingsaanspreeklikheid*** (1987) 275 observes that in ***Nortje*** the workman received compensation for a *factum*, and that none of the classical enrichment actions with which the value of a *factum* could be claimed, was utilized in this case. Here a new enrichment action was recognised.

1221 ***Hauman*** 297.

1222 See also **Salmond Jurisprudence** (1947) 83.

In ***Hauman*** the court set certain preconditions for the grant of equitable relief, namely that the contractor or employee should not have abandoned his work, that he acted in good faith and honestly, or that he should at least honestly have believed that he had done his part of the work, and that the employer enjoyed a *benefit* from the work.[1223]

On the issue of remuneration or payment for incomplete work, an important difference in principle exists between Roman Dutch law and English law.[1224] In English law a party who fails to perform is strictly not entitled to claim performance. The employer or hirer of work is entitled to take possession of the incomplete work or property without any regard to an equitable remuneration payable to the employee, as equity is not applicable to contractual relations.[1225] This illustrates the harsh effects of the English common law of employment.[1226] The only way in which the worker or contractor could claim compensation for partial, defective, or incomplete work already rendered, is via of the so-called *new contract construction or fiction:* He has to prove that despite the shortcomings in his work, the owner or employer has by means of a (fictitious) *new contract* (which seems to be some kind of novation) undertaken to remunerate him in any case. Discharge of such onus would not be a simple matter. In the Roman Dutch system, which was confirmed in ***Hauman*** as the basis of South African law in this respect, relief is granted to the worker, not on the basis of a constructive or fictitious *new contract or novation*, but in terms of general *equity* as manifested in the doctrine of unfair enrichment. This is an

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1223 Ibid.

1224 See the discussion in ***Hauman*** 298.

1225 In ***Hauman*** 298, the English case of ***Munro v Butt*** (8 E. & B. 738) is cited as an example where a legal principle was applied which would have been impossible in South African law: It was held by the Court of Queen's Bench that the fact of the owner having taken possession of houses which the contractor had failed to complete did not afford an inference that the owner had contracted to pay for the work actually done according to measurement.

1226 In ***Hauman*** 300, **Innes JA** observes: "*The English law deals with the matter in a manner which, though logical and consistent, operates somewhat harshly towards the contractor. The owner may stand upon his bond, and where the work is in any way defective, may oppose to a claim upon the contract (sic) the defense of non-performance.*" In ***Spencer v Gostelow*** 634, **Mason AJA** pointed out that this approach of English law was due to the English doctrine of the indivisibility of labour, which does not obtain in Roman Dutch and South African law.

extra-contractual remedy, in contrast to the English remedy which has a strictly contractual basis.[1227]

It is significant that the American courts have adopted a more equitable approach than the English in this regard. Different states have relaxed the rigorous rule of holding parties to their contractual obligations under these circumstances. This was mainly done by means of the doctrine of *'substantial compliance.'*[1228]

In ***Breslin v Hichens***[1229] **Lord de Villiers** CJ held that a contractor who *knowingly, willingly* and *without the consent of the employer* departs from the terms of his contract, is not allowed to invoke the *doctrine of unfair enrichment,* an *equitable doctrine* which discountenances the absorption by one party of the fruits of the labour of the other party in a manner not contemplated by the contract. There is no such absorption however where a party refuses or declines for good reason to take any benefit derived from the work partly or defectively performed by the other.[1230]

In the subsequent AD case of ***Spencer v Gostelow,***[1231] Hopley J had adopted an equitable approach already in the TPD judgment that was the subject of appeal.[1232] This met with approval on appeal. ***Spencer*** confirmed ***Boyd, Hauman and Breslin*** in holding that in respect of the doctrine of unfair enrichment, no distinction is drawn between different kinds of ***locatio conductio.***[1233] **Innes CJ**[1234] observed that the doctrine is *'founded entirely on equity.'*[1235]

1227 ***Hauman*** 98.
1228 ***Hauman*** 308; 309.
1229 supra
1230 ***Breslin*** 315-6.
1231 supra
1232 619.
1233 **Innes CJ** states in ***Spencer*** 629: *"The liability in respect of such services of an employer who has elected to terminate the contract would be a fortiori. That liability rests upon the equitable doctrine that no man is allowed to enrich himself at the expense of another. The scope of that principle as applied to a locatio operis was discussed in Hauman v Nortje and Breslin v Hichens...and I see no reason why it should not apply to a locatio operarum also."*
1234 632
1235 **Mason AJA** 636 concurred with Innes CJ. He pointed out that there was no logical difference between the expenditure that had been made in this case and that in other cases of *locatio conductio.*

In the same year, three judges of the AD had recourse to equitable principles specifically. In ***Van Rensburg v Straughn***[1236] the AD had to decide whether a contractor who had sunk a borehole which yielded marginally less than agreed, was entitled to some *quantum meruit*, i.e.to payment of the agreed price less the amount needed to complete the work.[1237] The Plaintiff had performed in good faith and the Defendant, though he had not accepted the work as complete in terms of the contract, had nevertheless utilized it.

Lord de Villiers CJ held that the *equitable doctrine of enrichment* applied in that it could not be tolerated that one party enriched himself to the detriment of the other.[1238] Indicating an acute awareness of the distinction between strict law and equity, the learned judge observed that to him *'it is a matter of satisfaction that the law does not compel them to interfere with such a just and equitable decision'* as the court *a quo* had rendered.[1239] The court observed that the equitable principle of enrichment could only be contractually excluded *'by language which leaves no doubt as to the intention of the parties...'*[1240]

This sentiment was echoed by **Innes JA**[1241] who held that a contract excluding the application of equity *'should be very strictly construed.'*[1242] The same applies to conditions in a contract of employment that are quite onerous to one party, but favourable to the other.[1243] Should the wording be capable of being read in more than one way, a more *equitable* reading should be adopted.[1244]

C G Maasdorp AJA provided a more profound analysis of the application of equity in the circumstances of the case. His judgment is in harmony with the

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1236 supra

1237 The term quantum meruit is often loosely used to denote the amount due to a contractor after deduction of the costs of remedying defects or supplying omissions in the work done by him – ***Breslin v Hichens*** 315. In ***Inkin v Borehole Drillers*** 1949 2 SA 366 (A) 371, the court pointed out that the words *quantum meruit* do not have a precise meaning in SA law.

1238 ***Van Rensburg*** 324.

1239 ***Van Rensburg*** 325. On 324 **de Villiers** CJ observed:*"The equitable principle to which I have referred is deeply rooted in our law, and there is quite a strong reason to apply it in a case like Hauman v Nortje.'*

1240 Ibid.

1241 326

1242 Ibid.

1243 Ibid.

1244 Ibid.

traditional distinction between law and equity, as well as their respective scopes of application: The strict law is reflected by the principle that in the case of a bilateral contract a party cannot claim performance unless he himself has performed, or is ready to perform. This is a fundamental rule of *strict contractual law.* It is to the same rule that Voet[1245] refers when he states that *'whatever has been agreed to between the parties must be observed.'*[1246] However, **Maasdorp AJA**[1247] furthermore addressed the case where the contractual parties had reached such an impasse or deadlock that the terms of the contract can no longer be strictly carried out or enforced. In such a situation one is no longer dealing with *contractual* rights of the parties. What is at stake now is *how justice can be done between the parties in accordance with the "law"*[1248] laid down in D 15 17 206: *"It is by the law of nature just that no one shall become the richer to the loss or injury of another."*[1249] In other words, equity begins where the reach of strict law ends or where strict law fails.[1250] Equity does not oppose or negate law, but assists and supplements it.[1251] It is the "handmaiden" of law. Equity is default or subsidiary law. Yet equity is a species of the genus of law itself. This approach to equity is in accordance with the concept as it was known to the Roman and Roman Dutch jurists.[1252] As a matter of fact, the two sources that **Maasdorp AJA** referred to are of Roman and Roman Dutch origin.[1253]

1245 19 2 40

1246 *Pacta sunt servanda*

1247 ***Van Rensburg*** 328-9

1248 Sic. Perhaps this should read *principle*.

1249 Both D 15 17 206 and D 12 6 14 contain the prohibition on unjustified enrichment

1250 Cf. the dictum of **Maasdorp** AJA in ***Van Rensburg*** 330: *"The abovementioned rule of equity is extended to the case of negotiorum gestor (Voet 3.5.8.11). This rule is found to underlie many legal relations which are not regulated by express agreement between the parties, and it seems to follow quite naturally that it should be applied, as is done by Voet, to the case of a person who contracts to build a house, and who is not under the circumstances of the case in a position to assert any rights under his contract.* ***The rule of equity commences where the contract ends."*** (My emphasis).

1251 ***Estate Thomas v Kerr*** 374; **Allan** ***Fairness, Truth and Silence*** (1992) 168.

1252 ***Haynes v King Williams Town Municipality*** 1951 2 SA 377

1253 On 329 of **Van Rensburg**, the learned judge explain this as follows: *"The rule to which* ***Voet*** *has recourse in order to do justice between the parties is so well known in our law that I only refer to the authorities upon the subject to show how widely it is applied where there is no question of interfering with legal rights established by contract."*

There are furthermore two important corollaries to the fact that we are dealing with equitable relief that have to be born in mind. In the fist place, both Roman and Roman Dutch law provided that where the party who had supposedly received the hired goods or services had not received any *value*, there was no enrichment. This is

From the earlier groundbreaking cases discussed above we move to a more recent era. In the landmark 1979 judgment of ***BK Tooling,***[1254] the AD once more confirmed the applicability of the principles relating to *unfair* (unjustified) enrichment as applied to contractors and employees in the early cases cited above.[1255] This included a reaffirmation of the need for the relaxation of the strict application of contractual bilateralism and reciprocity, and to allow a claim for a reduced price or remuneration based on *equitable, purposive and reasonable considerations.*[1256]

Of the divergent opinions expressed by the individual judges in **Van Rensburg** and ***Hauman***,[1257] the court expressed preference for that of **Innes C J**, as it allows for a more *flexible* and satisfactory solution to the problem posed by strict bilateralism and reciprocity. **Innes CJ** had held in ***Hauman***[1258] that equitable principles become applicable where one party (the employer/ owner), who has a legal right of retaining his own performance (remuneration) until such time as the counterparty (worker/contractor) had performed, nevertheless *utilizes*[1259] the performance (work/product) of the other. [1260]

However, in ***BK Tooling***, **Voet**[1261] and some modern commentators are interpreted in such a way that the contractor or employee is allowed to bring a claim for a reduced price, not on the basis of *enrichment* but on *contractual* grounds. In other words, there is a clear but in our view somewhat paradoxical shift in emphasis from the equitable principles of enrichment as such, to strict

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simply a rule of logic. A person who receives valueless work or a valueless thing in hire, is not enriched. Another way of putting it is that the person must have received a benefit. This had already been decided in ***Hauman***. Secondly, where the workman had not completed the work in *good faith*, or had *absconded* or *not complied with the specifications of the work as per the agreement*, equitable relief could be refused. This is in the very nature of equitable relief, which is a discretionary remedy largely based on *bona fides*.

1254 ***BK Tooling v Scope Precision Engineering*** 1979 1 SA 391 (A).

1255 420A-B

1256 Ibid. On 423E the court states: "*Vermoedelik kan dwingende oorwegings van doelmatigheid, billikheid en redelikheid afwyking van die gewone reel regverdig.*" The usual rule that the court refers to in this context, is the principle of bilateral reciprocity.

1257 supra

1258 304

1259 In other words, accepts a benefit or some value from the labour of the employee.

1260 See the discussion in ***Hauman*** above.

1261 19 2 40

contractual or consensual principles in recognizing the legitimacy of the employee's *contractual* claim for *proportionate* remuneration.[1262] Nevertheless, even this, according to the court, clearly rests on *"equitable considerations"*.

We are of the view that this case, where seemingly paradoxical roles are ascribed to strict law on the one hand and equity on the other, is a good example of a natural synthesis of equitable considerations and strict legal principle taking place. Equitable considerations sometimes *'harden'* or *'concretize'* or *evolve* into contractual principle. This does not mean that in such cases equity assumes a harsh form or application, but rather that it assimilates into the law and vice versa. The law itself becomes equitable. We have seen this in our discourse on Roman Law,[1263] as well as English law, where equitable maxims, and in the latter case, even some form of judicial precedent, developed from time-honoured application of equity.[1264]

Valasek v Consolidated Frame Cotton Corp[1265] was decided at an interesting junction of labour law history, namely relatively shortly after the introduction of an unfair labour practice dispensation by the 1979 Amendments to the 1956 Labour Relations Act. It was decided in terms of the common law since it was a contractual matter that involved an alleged breach of contract. The Industrial Court had not extended its unfair labour practice jurisprudence to certain contractual matters such as the failure to pay a salary due. Currently the issue is

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1262 On 422-3 of ***BK Tooling***, **Jansen JA** sates: *"By ontleding blyk dit dat in werklikheid die twee standpunte wesenlik 'n kontraktuele eis beoog en dit is in ooreenstemming met Voet se benadering, soos hierbo verduidelik. Dit sou wenslik wees om in die toekoms in hierdie verband eenvoudig van 'n (kontraktuele) eis om 'n verminderde kontrakprys te praat, en benamings soos quantum meruit en die taal van verrykingsaanapreeklikheid te vermy."*

1263 On the historical process of the assimilation of the strict Roman *ius civile* with the praetorian or equitable law, resulting in the eventual disappearance of the purely formal elements of the strict law, leaving only the universal, rational elements of the equitable law standing, see **Kunkel *Romische Rechtsgeschichte*** (1964) 75; **De Zulueta *The Institutes of Gaius*** (1953) 245 points out that already around 160 AD **Gaius** wrote that a Roman litigant preferred not to proceed by action in terms of the strict law, but rather in terms of the equitable praetorian law which provided for a more comprehensive and convenient remedy. See G 4 31; **Sohm *The Institutes : A textbook of the History and System of Roman Private Law*** (1907) 72; **Van Warmelo *Oorsprong en Geskiedenis van die Romeinse Reg*** (1965) 56

1264 On the assimilation of strict law and equity, see our discussion in Chapt. II (Roman Law). See also **Kunkel Romische *Rechtsgeschichte*** (1964) 75; ***De Zulueta The Institutes of Gaius*** (1953)245; **Sohm *The Institutes*** (1907) 72; **Van Warmelo *Oorsprong*** (1965) 56.

1265 1983 1 SA 694

also not regulated by the LRA, but rather by the BCEA. It is considered in more detail later in this work.

In ***Valasek*** an ordinary employee had tendered incomplete work, but nevertheless claimed remuneration. He had been employed in terms of a written 3 year fixed period contract, which he had breached by desertion. The contract ran from 1 August 1979 to 31 July 1982. The employee had given a month notice of termination at the end of July 1981. The issue that had to be decided was whether he was entitled to remuneration for the month of July 1981. The employer countered his claim for remuneration by means of the so-called ***exceptio non adimpleti contractus.***

An interesting feature of this case is that the court apparently decided the matter purely on *contractual* principles, as the issues of *enrichment* or *fairness* had not been raised in the pleadings. From a strictly *contractual* perspective, the court grappled with reconciling the principle of bilateral reciprocity with the employee's claim. In this regard the court found for instance that the three year contract was *indivisible* by nature, as it contained no references to shorter monthly periods corresponding to periods of remuneration. We humbly submit that this difficulty arose from the fact that the court primarily had the fixed contractual term of the contract as such in mind, rather than the nature of labour. In the early decisions of the AD it was *labour* that was held to be divisible. Strictly on this basis therefore, the court held that it could not come to the relief of the employee as he had not rendered his full period of three year service as per the agreement.

However, the matter did not end there. The court further found that in the particular circumstances of the case before it, a different meaning had to be given to *reciprocity* or *bilateralism*.[1266] Here, it means that the employer's obligation to pay the employee (performance) in respect of July 1981 was due at the end of that month. The employee's obligation to render services for the (remainder of) the three year period only became due or reciprocal *after*

1266 ***Valasek*** 699

payment of his remuneration[1267] for the month of July, was the argument of the court. The obligation to continue working, as well as payment therefore was only conditional upon this payment. Payment for work done in July 1981 depended on no more than the performance of the prior obligation to work during July 1981.[1268] The conclusion is that although the court had initially found that the contract as such was *indivisible,* the service and payment in respect thereof were dealt with on the basis of *divisibility*.[1269] We submit that this is generally in line with the common law authorities and the earlier AD cases cited herein.[1270] And although it seems that the court disavowed equity as being the basis of its judgment there can be no doubt that the court experienced here immense problems with the rigid application of the principles of strict law. Ultimately, the *ratio* of the judgment is based on *fairness*, which, as we noted earlier, recognises the doctrine of the *divisibility* of labour, specifically for the purpose of dealing with conundrums such as these.

The ***exceptio non adimpleti contractus*** as applied in the case-law discussed above became deeply entrenched into South African law, as it was subsequently

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1267 In other words, after the employer had performed in respect of July 1981.

1268 ***Valasek*** 699

1269 But some criticism would not be out of place here. The court's argument seems to be unnecessarily circular. It is indeed so that the parties had agreed on a fixed employment period of three years. It is also a fact that abstractly, this period is continuous and unbroken. But the argument that the parties had agreed that the contract would not continue after July 1981 if the workman had not been paid for that month, seems somewhat artificial in that the workman may just as well have decided to continue in terms of his three year contract, notwithstanding the fact that he had not been paid. It is of course the case that had the employee not been paid for the month of July, he would have been entitled to regard such non payment as breach of contract and cancel the contract. But these were not the facts of the case under consideration. Another point is that the workman could have terminated his service at any point in time during the course of July, not coinciding with the end of July. The question is what would then have been the presumed agreement between the parties. The only argument that could bring the pro rata remuneration of such abruptly terminated cases under the banner of strict contractual law, is that the contract between the parties contains an *implied term* that the owner would remunerate the worker on a *pro rata* basis at any time that the latter (unilaterally) terminates the work. But the court never invoked the construct of an implied term in ***Valasek***. The implied term argument faces the further problem that it is probably in conflict with the express terms of the agreement that the work would be rendered over a full period of three years. Our conclusion is that although the basis of the proportionate remedy granted by the court was claimed to have its roots firmly in contractual principles and not in equity, such contractual principles were definitely developed as part of *enrichment law*, which in turn had its source and origin in *equity*.

1270 ***Hauman v Nortje; Spencer v Gostelow; BK Tooling***

applied in numerous cases.[1271] One of these was decided by the LAC under the 1995 LRA. In ***3M SA (Pty) Ltd v SA Commercial Catering & Allied Workers Union***[1272] 128 employees embarked on a protected go slow and overtime ban.[1273]The employer reacted by means of a lock-out. During the period 23 January to 5 February the employees worked on a go-slow basis only, without applying the overtime ban. From 5 to 14 February they tendered their full services. The employer refused to allow them to work, claiming that their offer to work amounted to a conditional tender of their service. This was later found by the LAC not to be the case. The employees brought a claim for remuneration in respect of both periods on the basis that they had been on a protected strike, and hence had not committed breach of contract. Reliance was placed on s 67(2) (a) of the LRA.[1274] This argument was rejected by the Court, which pointed out that the claimants' reliance on s 67(2) (a) does not take into account the provisions of s 67(3),which provides that despite s 67(2) (a), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike. It has to be noted that S 67 (3) is a clear re-affirmation of the common law principle of *"no work no pay"* sometimes expressed as *"no value no pay"*.[1275] One has to bear in mind however that the common law recognized certain equitable exceptions to this principle, notably unfair enrichment. **Zondo JP** expressed the view that the effect of 67(3) was to retain the ***exceptio non adimpleti contractus.*** This is how the court dealt with the matter from a *contractual* perspective. From an *equitable* point of view, the court refused to adjudicate the matter in terms of *'general considerations of fairness'* and on that basis found against the claimants, an approach that seems

1271 ***BK Tooling v Scope Precision Engineering*** ; ***National Union of Textile Workers v Jaguar Shoes (Pty) Ltd*** 1987 1 SA 39 (N); 1986 7 ILJ 678 (N); ***Valasek v Consolidated Frame Cotton Corporation Ltd***; ***Coin Security (Cape) Pty Ltd v Vukani Guards & Allied Workers Union*** 1989 10 ILJ 239 (C).
1272 2001 22 ILJ 1092 (LAC).
1273 As the employees had complied with the procedural requirements of s 64(1) of the LRA, the go-slow actually amounted to a protected strike.
1274 This section states that a person does not commit breach of contract by taking part in a protected strike.
1275 ***Boyd v Stuttaford*** 109

to be shared with the SCA.[1276] This dictum stands in sharp contrast to ***Booysen***[1277] where the LAC did seem to accept that the LRA imposes a general duty of fair treatment between employer and employees.[1278]

What is significant however is that in ***3M*** consideration is not given to the doctrine of unjustified enrichment. This is despite the fact that the court cites as authority many of the precedents dealt with above by the erstwhile AD, where this doctrine was a decisive factor.[1279] The question arises as to whether recourse to *unfair enrichment* would have made any difference if applied. The court interpreted s 67(3) as meaning that the employees were not entitled to any remuneration at all as they had not *fully* rendered their own performance – the ***exceptio non adimpleti contractus***. That is a correct application of the principle of strict reciprocity or bilateralism on which the exception is based. But in the earlier cases of ***Hauman, Van Rensburg, Breslin, Spencer*** and others, the doctrine of *unfair enrichment* had been utilized to mitigate the harshness that could result from a strict application of the *exceptio.*[1280] In these cases the issue was not only payment for services *not* rendered, but for services in actual fact *rendered*. This is exactly the issue that was not considered by the court in ***3M***. In our submission, the employees should have been remunerated for the period of the go-slow, namely 23 January to 5 February. Such remuneration would have stemmed from the unfair enrichment of the employer with the value of such work that the employees actually rendered even though this had been done during the course of a go-slow. This applies particularly where the go-slow was a legal and protected one. As regards the period 5 to 14 February, the fact that the employees did not actually work would put their claim for remuneration, if any,

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1276 In ***SA Railways (Pty) Ltd v Aviation Union of SA*** 2011 32 ILJ 87, 94 par. 19, the SCA stated that *"...the disregard of the words used by the legislature on the basis of a general 'fairness' principle leads not only to uncertainty but also to a failure to observe the doctrine of the separation of powers."*

1277 ***Booysen v Minister of Safety and Security*** 2011 32 ILJ 112, 127G.

1278 In ***Booysen*** 127G, **Tlaletsi JA** stated in relation to transfer of employees: *"On appeal, this court recognised that the Act imposes a general obligation on employers to treat their employees fairly and that the transfer of Nxele if done unfairly would breach that general duty."* The appeal that the court refers to here was in the matter of ***Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others*** 2008 29 ILJ 2708(LAC); 2008 12 BLLR 1179 (LAC).

1279 In 3M 1096 the Court cites ***Hauman v Nortje*** (supra) and ***Van Rensburg v Straughan*** (supra).

1280 The **exceptio** was not mentioned *eo nomine* in the early cases, but it is quite clear that that was the defense used in such cases to counter a claim for remuneration or payment for construction work.

on a different footing. The principles of enrichment, as applied in the earlier cases would not find application, as the employer had not received any work or value at all. But the employment contract as such covers this period, and as the court had found that the employees had not tendered their service conditionally, it would seem that their contractual claim for remuneration would be well founded. **Grogan**[1281] convincingly argues that it is difficult to imagine how an employer could physically exclude its employees from the workplace without breaching their contractual entitlement to remuneration. We are in respectful agreement with this view.[1282]

A further question that arises is whether the court in ***3M*** placed a correct interpretation on s 67(3). This section does not deal with services *actually rendered*, but with *services not rendered.* It also does not deal with *all* the services supposed to be rendered in terms of the contract of employment. Addressing only the issue of services *not rendered*, it is doubtful whether the section exactly coincides with the scope of the ***exceptio***, which, in its unmitigated form, dictates that employees who even partly fail to perform, should not be remunerated in terms of the employment contract at all. By stating that employees do not have to be remunerated for services *not rendered*, s 67(3) clearly and unequivocally implies that they do have to receive remuneration for services *actually rendered.* Read from this perspective, s 67(3) constitutes a re-affirmation of the equitable doctrine of unfair enrichment which South African courts have fruitfully employed for more than a century[1283] as a bulwark against the exploitation of labour.

What furthermore complicates the issue is that, since the employees had not embarked on a full-blown strike, it may be difficult to determine *what* service they actually rendered during the go-slow, as well as the value thereof. The

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1281 **Grogan *Workplace Law*** (2007) 430-1.

1282 We are ad idem with **Grogan Workplace law** (2007) 431, where the learned author points out that the final phrase in the definition of 'lock-out' therefore seems superfluous. It reads *'...whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion';* S 213 of the LRA.

1283 Literally at least as far as the reports of the AD decisions date back.

dilemma that one faces here is that a go-slow indeed involves *some* work on the part of the employees, and in all probability *some benefit* or *value* that accrues to the employer.[1284] This is precisely what the common law jurists had in mind, when developing the equitable principles of enrichment law. Granted, it may be argued that a go-slow falls within the definition of a strike, and that those on go-slow have to be treated as strikers, and hence not be remunerated for work not done. But such an approach begs the question as the argument is not that the employees should be paid for work not done, but rather that they should be paid for work done. Moreover, it is not the *contractual* principle of *no work no pay* that serves as the guideline here, but rather the enrichment principle which discountenances the enrichment of one at the expense of the other.

It is significant though, that the courts had in cases such as ***Hauman*** cited above, expressed the view – at least *obiter dictum* – that it was doubtful as to whether an employee who *deliberately* committed breach of contract, or who acted in *bad faith* or *dishonestly,* or who *absconded or* abandoned *work* would be entitled to *equitable relief* in terms of the doctrine of unfair enrichment. On this basis it could be argued that the employees in 3M would probably not have qualified for relief according to the tenets of equity. But it is doubtful whether any of these criteria for disqualification applied to the employees in ***3M*** as they were on a *protected* go-slow, meaning that, unless evidence to the contrary is produced, they were acting legally, not in breach of their employment contract, without abandoning work, and honestly and in good faith.

The principle of the prohibition of unfair enrichment played a major role in the so-called ***'Kylie'***[1285] case where a sex worker had claimed remuneration and reinstatement for work rendered to her 'employer'. Her claim was dismissed in

1284 A simple example that springs to mind is where employees on a manufacturing plant scale down their production from say 100 units per day to 50, as part of a go-slow. At the end of the day, they do render some work, notwithstanding the fact that technically, they are on strike. The definition of a strike in s 213 of the LRA has to be kept in mind in this regard.
1285 2010 31 ILJ 1600 (LAC).

the Labour Court[1286] on the basis that her services had been in breach of the law, and that she was *in pari delicto.*

The Labour Appeal Court granted her relief on the basis that *'everyone'* enjoyed the protection of and the right to fair labour practices enshrined in s 23(1) of the Constitution. Within the context of unfair enrichment, the court, relying amongst others on ***Jajbhay v Cassim,***[1287] observed that although the principle of ***pari delicto*** would normally prevent a person who has performed in terms of an illegal contract to recover his or her performance by the use of an enrichment based remedy, the courts have acknowledged that they have an *equitable discretion* to relax the operation of that principle, and thus to grant relief in terms of an equitable enrichment based remedy.[1288]

7.8 EQUITY AND THE LABOUR COURTS

S 151(1) of the LRA establishes the Labour Court as a court of law *'and equity'*. [1289] The italicized words did not appear in the original unamended 1995 version of the LRA. It was introduced by the 1998 amendments.[1290] The question arises as to what the deeper significance of such amendment would be. On the face of it, the nature, character and purpose of the LC and the LAC seem to be extended from that of ordinary courts of law to that of courts of *equity* or *fairness*. The 1998 amendment should not be seen as an original or even a new development. Earlier in this chapter we noted the fact that from its inception in 1910, the Supreme Court emphasised the traditional view that the Courts of law are *ipso facto* also courts of equity.[1291]

1286 ***'Kylie' v Commission for Conciliation Mediation and Arbitration*** 2008 29 ILJ 1918 (LC).
1287 1939 AD 537
1288 ***'Kylie'*** 1610 par 34.
1289 s 167(1) contains a similar provision with reference to the LAC. Whatever is observed here in regard to this provision applies to both the LC and the LAC.
1290 s 11 of Act no 127 of 1998.
1291 ***Mills & Sons v Benjamin Bros*** 1876 6 Buch 112

Equity and law have always been applied in the Roman Dutch and South African legal systems as distinct yet integrated systems. Often the underlying principles of equity and law became assimilated and "*symbiotic.*"[1292]

It is not an easy task to ascribe to abovementioned amendments of the LRA the real meaning that they were intended by the legislature to have. To begin with, even the concept of a *'court of law'* as such has historically not been without controversy. There is as yet no general definition of what a court of law is. Traditionally only certain indicia or factors have been taken into account in deciding whether a particular institution is a court of law or not. In ***Minister of Interior***[1293] where an Act of Parliament had declared the so-called High Court of Parliament to be a court of law, it was held that the determination whether a particular statutory body is indeed a court of law, would depend on a number of factors. This applies despite the fact that the statute involved may indeed call the particular body or institution a court of law. Weighty factors would include whether such body forms part of the judiciary branch of the State, whether its members are legally trained, and most importantly, whether the task of such institution is to authoritatively ascertain or establish the truth as such in connection with certain contentions before it. In other words, it should not be a body that simply votes in favour of or against a particular contention. Still less can a court of law be a body that decides about the correctness –or rather vote in favour of the correctness – of its own actions. Independence and impartiality are key requirements for the establishment of a court of law.[1294]

The nature and status of the Industrial Court were also not without controversy. S 17(11)(a) of the Industrial Relations Act, no.28 of 1956, which established the IC, stated that it could perform all functions *'which a court of law may perform.'*[1295] In ***National Union of Textile Workers v Jaguar Shoes (Pty)***

1292 ***Mills & Sons*** 121; ***Hassan Khan v Immigration Officer*** 1915 TPD. 661; ***Weinerlein v Goch Buildings Ltd*** 1925 AD. 282; 292-3.

1293 ***Minister of Interior & Another v Harris & Others*** 1952 4 SA 783

1294 The judgment in ***Minister of the Interior*** was unanimous. The submissions made by us in this regard can be found *passim* throughout the individual judgments of the members of the court.

1295 s 17(11) was later amended by the 1979 Amendments to the Act, but remained in substance the same.

Ltd[1296] it was held by the NPD that, as the Supreme Court was a *court of law within the meaning of* s 17(11)(a), the IC was clothed with much the same power as a court of law. Although not stated with sufficient clarity, the conclusion seems to be that the IC was considered in that judgment to be a court of law.[1297]

However, in ***SA Technical Officials Association***[1298] the AD unanimously rejected the assumption of the court *a quo* that when the IC sat for purposes of performing its functions under s 17(11) (a), it sat *as court of law.*[1299] **Miller JA**, writing the judgment of the court, observed that:

"...it is necessary to bear in mind that a body which is empowered to perform functions that a court of law performs, is not on that account necessarily to be regarded as a court of law when it performs such functions...The status and true identity of a body such as the industrial tribunal, or now the industrial court, is not determined simply or exclusively by the nature or type of the functions which it performs..."

The court then proceeded to find that when sitting in terms of s 17(11) (a) the IC did not sit with powers equivalent to those of the Supreme Court. In fact it did not sit as a court of law at all.[1300] This conclusion was reached after a thorough investigation of the factors considered in ***Harris***[1301] and ***Gentiruco***, inter alia.

1296 1987 (1) SA 39, 44A-B

1297 The fact that the IC had been denied criminal jurisdiction by the Act was held to mean nothing more than that the IC could not convict and punish a person for the commission of an offence. Notwithstanding this, the court held that such an exclusionary provision does not preclude the IC from investigating conduct which amounts to criminal offences. In this the court relied on earlier decisions of the IC itself. Cf. ***Moses Nkadimeng & Others v Raleigh Cycles SA Ltd*** 1998 1 ILJ34 (IC), 45; 51A; ***NUTW & Others v Jaguar Shoes (Pty) Ltd*** 1985 1 ILJ 92 (IC), 96F-I; **Davis *"Legal Certainty and the Industrial Court"*** 1985 6 ILJ 271. See also **Gentiruco AG v Firestone SA (Pty) Ltd** 1972 1 SA 589 (A) 601D.

1298 **SA Technical Officials Association v President of the Industrial Court** 1985 1 SA 597 AD; ***NUM v East Rand*** 1236.

1299 The judgment of the court *a quo* was fully reported as ***Vereniging van Bo-Grondse Mynamptenare van Suid Afrika v President of the Industrial Court*** 1983 1 SA 1143 (T). The court a quo found that the IC, when performing its functions under s 17(11) (a), performs functions of a *judicial, quasi-judicial* and *investigative or administrative* nature. It held however that there were *'cogent reasons'* for finding that when the court acted in terms of s 17(11) (a) it performed functions of a judicial nature. The court assumed for purposes of its decision that the IC acts as a court of law under these circumstances. See in this regard ***SA Technical Officials Assoc.***, 610C-E.

1300 612H-I.

1301 Supra. These are: 1. Members of the Court are appointed by the Minister *'by reason of their knowledge of the law'.* They are not required to be judges, advocates or persons with special knowledge in industrial law; 2 Members of the IC are appointed for such periods as the Minister may determine. Judges are appointed on a permanent basis. 3 Members of the IC may consult external Boards or Governmental Departments in making their decisions; The Minister has a discretion to approve of the correction of any error or omission or the clarification of the determination made by the IC. Judges on the other hand, enjoy impartiality and independence. Cf. **Van der Vyver J D: "Die Nywerheidshof"** 1981 2 ILJ 159.

Last-mentioned case was held to be distinguishable.[1302] The approach of the Australian courts to the issue also played a persuasive role in the formulation of the principles governing the nature and composition of courts of law.[1303]

One could assume that as the LC and LAC are creatures of statutes, the extension of their status to that of courts of equity was considered necessary in order to cloth these courts with the necessary jurisdiction and power to administer *equity generally,* in addition to *strict law.* The intention of the Legislature must have been to extend the equitable jurisdiction or powers of the LC and LAC beyond what was already contained in the LRA, and which related almost exclusively to unfair dismissal and unfair labour practice.

It is our submission that the intention of the Legislature in enacting the 1998 amendments, was to bring the nature, status, functions and jurisdiction of the Labour Courts - which were creatures of statutes - in line with the common law position of the High Court in general.[1304]

In our view there can be little doubt that the intention of the Legislature was the full empowerment of the Labour Courts to operate, make decisions, and grant relief as *courts of equity* in addition to being courts of law across the complete spectrum of the LRA. The practical implication of this is that the Labour Courts

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1302 Distinction took place on the basis that the LRA did not contain provisions similar or to the same effect as those that governed the composition, powers and functions of the Court of the Commissioner of Patents, which applied in ***Gentiruco.*** The proceedings of that court were not reviewable by the Supreme Court; its members were judges and advocates on whom special judicial powers had been conferred by the Patents Act. These powers were the same as those of a judge sitting in the Provincial Division of the Supreme Court.

1303 The well known Australian case of ***Shell Company of Australia Ltd v Federal Commissioner of Taxation*** 1931 AC 275 (PC) adopted a *negative* rather than a positive approach to establishing whether a particular body constitutes a court of law or not. The reason for this is that it is often found to be the more practical and simpler way to explain the matter. At 296 of ***Shell***, the learned **Lord Sankey LC** held that there is quite clear authority for suggesting that there are tribunals with many of the trappings of a court of law but which nevertheless do not exercise judicial power. Some *'negative propositions"* are that a tribunal is not necessarily a court of law because it renders a final decision, or because it hears witnesses under oath, or because its decisions affect the rights of contending parties appearing before it, or because it gives effect to the rights of such parties. Neither do the fact that matters are referred to that body by other bodies or that there is an appeal available to a court convert that body into a court of law.

1304 It is for this very reason that ss 151 and 167 of the LRA were adopted. s 151 provides that the Labour Court is established as a court of equity; that it is a superior court that has authority, inherent jurisdiction and standing in relation to matters under its jurisdiction equal to that which a court of the Provincial Division of the Supreme Court has in relation to matters under its jurisdiction. s 167 provides *mutatis mutandis* the same in regard to the Labour Appeal Court as far as the hearing of appeals is concerned.

qua courts of equity, have power to make equitable decisions and rulings and grant equitable relief, not only in relation to those matters where statute expressly provides them with the specific power to do so, but generally in all matters that properly come before it. In other words, whereas the adjudication of unfair labour practices and unfair dismissals have been specifically and expressly entrusted to the Labour Courts, these courts are not *limited* to these issues in their proper functioning as courts of equity. Any matter that is dealt with by the Labour Courts and which falls within their jurisdiction and powers may be dealt with equitably.

This submission is made subject to a proper assumption as to the nature and the role of equity. As has been stated throughout this work, equity fulfills a supplementary, complementary and tempering role in relation to strict law. The fact that the Labour Courts have been made courts of law as well in no way means that equity has to be applied to the exclusion of or in opposition to law. Law and equity are co-existent.

Our conclusion is that the Labour Courts have to apply equity at all times and in all circumstances, subject only to the Labour statutes such as the LRA, EEA, BCEA and perhaps the common law etc.

The 1979 Amendments to the 1956 Industrial Conciliation Act did not contain provisions similar to s 151 and 167 in respect of the erstwhile Industrial Court (IC). Such a provision would not have been superfluous even though the powers conferred on that court very clearly and expressly included the power and jurisdiction to determine *fair labour practices* in the widest sense of the word.[1305]

Such wide and comprehensive fairness jurisdiction nevertheless pertained only to the *fairness of labour practices* and not to the powers and operation of the court in general. In other words the fairness related only to the de*termination* of labour practices.

1305 **Poolman *Principles of Unfair Labour Practice*** 1985 2; **Van der Merwe *Die Reg op die Handhawing van Billike Arbeidspraktyke*** 1988 5 ILJ 749; 750 n 8.

In the case of the LC and LAC established by the 1995 LRA, no such open-ended provisions providing a general equitable jurisdiction are to be found.[1306] Without the 1998 Amendments, the power and jurisdiction of the LC and the LAC *in regard to issues of equity* generally seem to have been limited to specific provisions, conferring upon them the power and jurisdiction to determine disputes relating to *fairness* only in those specific circumstances allowed by the LRA itself. But, unlike the IC, which operated in terms of a virtually unlimited unfair labour practice jurisdiction, the LC and LAC have only been empowered to adjudicate fairness within strictly limited and circumscribed circumstances. In fact, it would appear that even the CCMA has a wider and more comprehensive fairness jurisdiction than the LC and the LAC. On the other hand, it is clear from a reading of the LRA that fairness jurisdiction has been reserved for the LC and LAC in matters that were deemed to be of a much more serious nature than those that have been allocated to the CCMA and the relevant Bargaining Councils.[1307] This brings one to the conclusion that the 1998 amendments were necessary in order to confer a more complete and comprehensive equitable character on the LC and LAC. The Amendments have truly made these courts *institutions of equity*.

Despite this apparent widening of the powers, character and jurisdiction of the labour courts by its declaration as courts of *law and equity*,[1308] the question arises as to whether this characterization has found any recognition and practical application. Does the characterization in practice affect the court of law nature of the labour courts at all, and if so, to what extent. At first glance it would seem obvious that a second dimension has been added to the nature and powers of the labour courts by its establishment as courts of equity. After all, it is one of the principles of statutory interpretation and canons of construction that words

1306 Parts D and E of Chapter VII of the LRA deal with the powers and functions of the LC and LAC respectively.

1307 For a comprehensive table that details this issue, see **Du Plessis & Fouche *A Practical Guide to Labour Law*** (2006) 328-337

1308 s 151 (1) of the LRA, as amended.

should not easily be regarded as superfluous or as having been used inadvertently and without meaning.[1309]

Yet this has not been the approach of the LAC to ss 151 and 167 of the LRA. In ***3M,*** which we have already dealt with in a different context, the LAC was invited to find that the Applicants were entitled to payment of an amount of their wages which would take into account that they had tendered their services albeit on the basis of a go slow and overtime ban. It was contended before the court that it was an *unfair* act of the employer under these circumstances not to allow the employees to perform their duties and earn an income as a result of the lockout. The argument tendered on behalf of the employees was not specifically that the employer had been *unfairly enriched.* The submission was rather that the matter had to be adjudicated in terms general considerations of fairness that was fundamental to the Constitution and the LRA. At least that is how the issue was understood by the court.[1310] Reliance was also placed on s 151(1) and 167(1) which as we have seen, describe the labour courts as *courts of equity*, as wel as some case law.[1311]

The LAC held that the case law cited was of no assistance to the Applicants as the cases concerned had been decided under the 1956 LRA which conferred a general fairness jurisdiction on the Industrial Court. The correctness of this view is in itself doubtful. The court rejected the contention that the LC and the LAC were possessed of a general and comprehensive *fairness jurisdiction* based on the LRA sections referred to. The court proceeded along the following lines:

1309 This is known as the "cardinal rule" of interpretation and was explained by **Kotze JA** in ***Attorney-General, Transvaal v Additional Magistrate, Johannesburg*** 1924 AD 421; 436. See also ***Secretary for Inland Revenue v Somers Vine*** 1968 2 SA 138 (AD) 156; **Cockram *Interpretation of Statutes*** (1987) 43.

1310 See 3M 1097 par 13. s 23(1) of the Constitution and sect 1(a) of the LRA were relied on in the submission that the court had to approach the dispute in terms of the general fairness standards laid down in these instruments. S 1(a) provides that it is the purpose of the LRA to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution.

1311 Authorities cited in support of the proposition concerning general fairness include ***Betha & Others v BTR Sarmcol, A Division of BTR Dunlop Ltd*** 1998 3 SA 349 (SCA) 360F-361C; 1998 19 ILJ 459 (SCA); ***Fulcrum Engineering v Chauke*** 1997 18 ILJ 679 (LAC); ***National Union of Metalworkers of SA v Henred Fruehauf Trailers*** 1995 4 SA 456 (A) 462F-H; 1994 15 ILJ 1257 (A);***Maluti Transport Corporation Ltd v Manufacturing Retail Transport & Allied Workers Union*** 1999 20 ILJ 2531 (LAC) par. 35

"In fact the description of the Labour Court and this Court as courts of equity does not add anything to the jurisdiction of these two courts. These two courts are superior courts of law. The only fairness that they apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the Act in respect of specific types of dispute as well as such fairness as every court of law is required to observe in terms of the rules of natural justice."

The court then provided examples of specific sections requiring the application of fairness.[1312] The court concluded that it was advisable that the reference in the LRA[1313] to the labour courts as courts of equity should rather be repealed for it adds nothing to the law, except unwarranted confusion.[1314] General considerations of fairness cannot be relied upon to adjudicate the claim of the Applicants or any claim not covered by the specific fairness provisions provided for in the LRA, was the argument of the court.[1315]

The court furthermore pointed out that the ***exceptio non adimpleti contractus*** on which the employer relied was already based on considerations of fairness.[1316] The correctness of this latter contention by the court is, with respect, also doubtful. In our investigation of the early AD cases discussed above, it was noted that the simultaneous performance of the parties to a bilateral contract spreads not from considerations of *fairness* as such, but from the very nature of the kind of *agreement* to which the parties commit themselves: in case of a sale, the price has to be paid at the time that the article sold is handed over and vice versa; Here strict bilateralism or reciprocity does not normally pose a problem; in hire the rental is paid only when the hired thing has been made available for use; in the case of the contract of employment, the work has to be rendered or at least tendered, before payment may be claimed. Of all the synallagmatic or bilateral

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1312 These are ss 185, 187, 188, 191, 192(2), 193, 194 and 162(1). These are all sections that relate to unfair dismissal disputes, save for s 162(1). The latter imposes a duty on the court to take into account the *requirements of law and fairness* in deciding issues pertaining to costs.

1313 Ss 151(1) and 167(1)

1314 **3** 1099 par 17

1315 Ibid.

1316 On 1099 par 18-19 the court explains: *"Even if considerations of general fairness governed the determination of the second and further respondents' claim, I am of the opinion that this would not assist...The exception...is based on considerations of fairness, namely, that it is unfair for a party to a contract who has neither performed this (sic) part of the contract nor tendered to do so to seek to compel the other party to such contract to perform his part in circumstances where the former's performance is already overdue or falls to be performed simultaneously with the latter's performance."*

contracts, the exceptio has the harshest effect on the person who hired out his personal labour, for in such case the parties cannot in practice perform simultaneously. Virtually always, the employee would do some work – often for relatively lengthy periods of time and under the control and supervision of the employer - only to be met with the exceptio when claiming payment. The exceptio as such was not introduced on the basis of equitable considerations. It was rather the relaxation thereof that opened the door to equity.[1317] The harsh effects brought about by the strict application of the synallagmatic requirement of the ***exceptio*** have been demonstrated already in some of the AD cases discussed earlier.[1318]

As was stated above, equity begins where strict law or contract ends. In this particular situation, equity takes the form of the doctrine of unfair enrichment. It operates outside the terms and the bounds of contract, and its application is not a form of enforcing the contract. It is based on the equitable principles of the law of nature, just as the rules of natural justice are, for instance. It is for this reason that the grant of equitable relief is a *discretionary remedy*, in contrast to a remedy prescribed by law.[1319]

In ***3M***[1320] the learned **Zondo JP** sees no reason why the labour courts should be described as courts of fairness since these courts, as courts of law have to apply *'such fairness as every court of law is required to observe in terms of the rules of natural justice'.* We have a further problem with this reasoning. The rules of natural justice have traditionally been, and still are applied mainly, if not exclusively, in the field of administrative law and related areas as measures

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1317 See ***Valasek*** 419, where **Jansen JA** states: *"Dit is denkbaar dat die konsekwente toepassing van die beginsels van wederkerigheid tot onbillikheid kan lei....."*On p.421 the learned judge remarks: *"Daar is eenstemmigheid dat op grond van billikheidsoorwegings 'n aannemer soms, ondanks die wederkerigheidsbeginsel....toegelaat moet word om tog vergoeding vir 'n onvolkome prestasie te eis"*

1318 ***Hauman v Nortje; Van Rensburg v Straughan; Spencer Gostelow; Boyd v Stuttaford*** (supra).

1319 There has been some debate about whether one is dealing with an enrichment claim proper or simply with a contractual claim for a reduced price. The consensus seems to be that where the employer cancels the contract, a claim against him would be enrichment based. On the other hand, where he insists on contractual compliance, the employee would bring a *contractual* claim for a reduced remuneration. See the discussion of this issue in ***Valasek***, *loc.cit.* Ultimately however, irrespective of whether the claim is based directly on enrichment or on contract, such claim is allowed by equitable considerations (*billikheidsoorwegings*).

1320 1099 par 17

aimed at *procedural fairness*. The *audi alteram partem* principle which is the mainstay of the principles of natural justice, is illustrative in this respect. But the procedural aspect of *fairness*, as fundamentally important as it may be, cannot be equated with *substantive fairness.* Traditionally, most references to *fairness* in the common law sources relate to *substantive fairness* in the first place, although there is no need to exclude procedural fairness from the scope of fairness in general. In the earlier AD cases fairness was not applied for the simple reason that the rules of natural justice so required. It was substantive fairness that determined the merits of the disputes involved. The Roman law principle that nobody should be allowed to enrich himself at the expense of another, is a pre-eminent example of such a principle of *substantive fairness.* We are therefore of the respectful opinion that the call for the repeal of the words *'and fairness'* in sect 151(1) of the LRA is not justified.

The LRA was enacted and the Labour Courts were established in the first place to give effect to sect 23(1) of the Constitution,[1321] which enshrines a general and comprehensive right to fair labour practices.[1322] The declaration of the Labour Courts as "*courts of equity*" can safely be presumed to be a further attempt to effectuate the Constitution and give contents to s 23(1).[1323]

An interpretation that regards the s 151 (1) amendments as superfluous, therefore looses sight of the real need for the concretization of the general and abstract sect 23(1) of the Constitution.

Since the enactment of the LRA it has been mooted, and a general consensus seems to have emerged, that the LRA, as it currently reads, in any case falls short of the comprehensive protection foreseen in s 23(1) of the Constitution. To this issue we will revert in more detail at a later stage. However, in the light of

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1321 In ***Sidumo v Rustenburg Platinum Mines Ltd*** 2426-7, the Constitutional Court referred to s 1 of the LRA which states the purpose and primary objects of the Act. The purpose of the Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. These are inter alia, to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution, and to promote the effective resolution of labour disputes.

1322 ***National Education Health and Allied Workers Union v University of Cape Town*** 2003 24 ILJ 110-1.

1323 Ibid.

this deficiency of the LRA there does not seem to be any need to restrict the scope and ambit of the LRA any further. Moreover, although the Constitution uses the word *fair*, it does not describe or define fair labour practices or unfair dismissal: This is specifically left for regulation by the LRA and other concretizing legislation. Nor does the Constitution refer to a court *of fairness.* This is similarly a matter left to the Legislature. The Legislature has elected to give effect to s 23(1) of the Constitution by establishing *courts of fairness* in terms of the 1998 amendments. It is the duty of the courts, and especially of the Labour Court and Labour Appeal Court to give the fullest effect possible to enactments of the Legislature, such as s 151(1) of the LRA.

The equitable nature of the jurisdiction and powers of the labour courts has been considered in other contexts in the labour courts as well. In ***Cox v Commission for Conciliation, Mediation and Arbitration***[1324] **Waglay J** adopted an approach quite different to that in ***3m***.[1325] This appears from the following passage:

"The court must in exercising its jurisdiction based on law and equity ensure that equal weight is given to both these factors when interpreting any section of law. In the circumstances, even if the court is bound by judgments of the Supreme Court of Appeal...as these decisions are based purely on law and since the Labour Court is also one of equity, the court is entitled to broaden such interpretation as long as such interpretation does not negate the legal provisions set out in the statutes."

The facts and issues involved in ***Cox*** are of a technical nature and do not really concern us here. Of significance is the fact that this passage seems to provide the correct view of the role allocated to equity in the LRA and traditionally in common law. The learned judge states that weight has to be attached to equity in the interpretation of *any section of the law.* The law referred to here is presumably the LRA and other labour Legislation. But equitable interpretation is of course not necessarily limited to those statutes. In the previous chapters, more particularly in those dealing with equity in Roman and Roman Dutch law[1326]

1324 2001 22 ILJ, 137 (LC).
1325 It has to be stated though that it would appear as though the ***3M*** judgment had not been delivered yet at the time that **Waglay J** decided ***Cox.***
1326 Chapters II and III.

it was pointed out that our common law jurists virtually unanimously advocated the application of an equitable dispensation subsidiary and supplementary to strict law generally. They stated with one voice that general (statutory) law is, by its very nature inadequate in making provision for all practical individual circumstances that present itself in everyday life and legal practice. The approach of **Waglay J** as explained above seems to be in harmony with the timeless jurisprudence on the issue.

Moreover, **Waglay J** gives meaning to the phrase *'and equity'* as it appears in ss 151(1) and 167(1) of the LRA respectively. This is in accordance with the traditional canons of statutory construction. It is not to be easily presumed that these words are superfluous or have been inserted in the statute *per errorem* or *per incuriam.* On the contrary, they reflect the very real and positive intention of the legislature. They are furthermore based on s 23(1) of the Constitution and represent the very fact that the LRA was adopted to give effect to the *wide, open ended, open-textured* right to fair labour practices. Any restrictive judicial interpretation of ss 151(1) and 167(1) which derogates or detracts from this widely defined constitutional right, would probably be unjustified.

Later in this chapter, we point out that the text and provisions of the LRA itself in many respects fail to fully express the Constitutional imperative of *fair labour practices*. Sections 151(1) and 167(1) purport to promote and further effectuate this imperative. Regarding the contents of these sections as redundant and in stead placing reliance on the *casuistic* and loopholed regulation of fairness in the LRA, would be a step backwards – away from the comprehensive right to fairness as enshrined in s 23(1) of the Constitution. The problem lies not in s 151(1) and 167(1) of the LRA, but in the general shortcomings of the text and provisions of the LRA as a whole.

In an otherwise inspiring article on the nature of fairness and its role in the labour courts, **D Pillay J**, judge of the Labour Court, expresses his own

agreement with the unanimous judgment of the LAC in ***3M.***[1327] The reasoning of the learned judge is that the Constitution is the umbrella against unfair labour practices and that there is therefore no need for the amendments to s 151(1) and 167(1). The interpretation of the Constitutional right to fairness in a manner that promotes the values of a democratic society based on human dignity, equality and freedom renders the word *'equity'* in the 1998 amendments superfluous, argues **Pillay**. With respect, this reasoning cannot be supported. In the first place, the reasoning looses sight of the fact that direct reliance on s 23(1) of the Constitution in stead of effectuating legislation such as the LRA, has been held not to be permissible. Thus one has to look to the provisions of the LRA in order to determine whether they adequately echo and mirror the contents and spirit of the Constitution. We have already submitted that this does not seem to be the case.

The effect of the impermissibility of direct reliance on the Constitution is that parties to the employment relationship sometimes find themselves out in the rain without the benefit of the proverbial protective umbrella that **Pillay J** refers to.

Taken to its logical conclusion, the reasoning in **3M**and that of **Pillay J**[1328] implies that there is no need for mentioning the word *'equity'* or *'fairness'* at all anywhere in the LRA, the EEA and other instruments purporting to give effect to s 23(1) of the Constitution, simply because the word *'fair'* is already enshrined in the Constitution. There would for instance be no need to refer to *'fair labour practices'* but only to *'labour practices'* in the LRA or EEA, since the word *'fair'* is by default supplied by the Constitution. This approach seems untenable, with respect.

1327 **Pillay** ***"Giving Meaning to Workplace Equity: The Role of the Courts"*** 2003 24 ILJ 62-3.
1328 loc.cit

7.9 THE CONSTITUTIONAL AND STATUTORY AMBIT OF FAIR LABOUR PRACTICES

The incorporation of the right to fair labour practices into the South African Constitution is unique.[1329] In fact it has been regarded as an *oddity* by some leading labour law scholars.[1330] One of the reasons for this characterization is the fact that the South African Constitution is apparently the only one in the world that enshrines such a right.[1331] But none of the aspects of the right is defined in the Constitution. The Constitutional court has observed that the concept of unfair labour practice is incapable of precise definition.[1332] It has furthermore found that it is neither necessary nor desirable to define this concept.[1333] All interpretation of the LRA must however be in accordance with s 23(1) of the Constitution, and should hence be *purposive*, as it purports to give effect to s 23(1).[1334] This unique legal and constitutional dispensation, which is the outcome of arduous and lengthy negotiations brought about by the unique politico-legal past of South

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1329 ***NEHAWU v University of Cape Town*** 110 par 33.

1330 **Davis, Cheadle & Haysom *Fundamental Rights in the Constitution*** (1997) 212. On 213 the learned authors remark that the right does not sit easily in a Bill of Rights. Like the Constitution, it was born of political compromise. The vagaries of factions have distorted and disfigured the conceptual coherence and structures of both pieces of legislation. **Cheadle *"Regulated Flexibility: Revisiting the LRA and the BCEA"*** in 2006 27 ILJ 663, 672 points out that the right to fair labour practices is an odd right to have in a constitution, not found in any other constitution except the Malawian, which took its wording from the SA Constitution.

1331 ibid.

1332 ***NEHAWU*** 110 par 33.

1333 Ibid.

1334 ***NEHAWU*** 113-4. On purposive interpretation see also ***Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*** 1999 20 ILJ 89 (LAC) 23-3.

In ***Chirwa v Transnet*** 2008 29 ILJ 73 (CC) 110, **Ngcobo J** observed that the objectives of the LRA are not just textual aides to be employed where the language is ambiguous. S 3 of the LRA contains an imperative injunction which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The court has to show preference for interpretation that will effectuate the primary objects of the LRA. On purposive interpretation see also ***Equity Aviation Services v SA Transport & Allied Workers Union*, supra; *Dimbaza Foundaries Ltd v Commission for Conciliation Mediation Arbitration*** 1999 20 ILJ 1763 (LC); ***Purefresh Foods (Pty) Ltd v Dayal*** 1999 20 ILJ 1590 (LC); **Aviation *Union of SA obo Barnes & others v SA Airways (Pty) Ltd*** 2009 30 ILJ 2849 (LAC). However, the purposive approach to the interpretation of statutes, including labour related statutes, should not be taken too far. In ***SA Airways (Pty) Ltd v Aviation Union of SA*** 2011 32 ILJ 87 (SCA), the SCA , reversing a judgment of the LAC, and relying inter alia on ***SA Police Service v Public Servants Association*** 2007 3 SA 531 (CC); 2006 27 ILJ 2241 (CC) par 20 issued a proviso: The purposive approach to interpretation does not give a court license, through an interpretative exercise, to distort the ordinary meaning of words beyond that which those words are reasonably capable of bearing. It does however require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.

Africa, brings with it equally new and unique challenges.[1335] The greatest challenge is to give actual effect to this constitutional right to fair labour practices and not to allow it to be relegated to irrelevance or oblivion. It seems to be generally agreed by labour law scholars that the adoption of the LRA in its 1995 form – which has hardly been changed significantly by subsequent amendments – was predicated on political compromise,[1336] ad hoc decision making, lack of clear policy, resulting in a fragmented and incoherent piece of legislation containing many deficiencies and oddities.[1337] We are of the opinion that despite the many positive aspects to the LRA, this criticism is justified.[1338]

Both before and after the introduction of the concept of fair labour practices by the 1979 amendments to the 1956 LRA, s 23(1) of the Constitution, and the 1995 LRA, severe criticism was leveled at the common law for the unsatisfactory labour dispensation that obtained in South Africa prior to the adoption of these reformatory pieces of legislation. It is not to be denied that there certainly were deficiencies. But in reality there was not much that was severely detrimental in the Roman Dutch version of the common law. As has been shown earlier in this work,[1339] equitable labour law applied in Roman and in Roman Dutch Law from time immemorial.[1340] More than two millennia back, the Roman praetor and Roman jurists resolved labour disputes according to the dictates of good faith and

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1335 For views on this uniqueness of the SA Constitution from the perspective of a Canadian scholar, see **Beatty** ***"Constitutional Labour Rights : Pros and Cons"*** 1993 14 ILJ 1

1336 Cf. the dictum of **Cameron JA**, in ***Rustenburg Platinum*** (SCA) 2093 par 39, in which it is stated that the LRA embodies an historic compromise between labour and employers, both being represented by experts on the drafting committee that produced it. The statute's formulation of the employer's powers, and those of the CCMA in overseeing their exercise, reflects the careful balance that the compromise required.

1337 For a concise but incisive summary of the legislative history of the LRA, see **Cheadle** ***"Regulated Flexibility"*** (2006) 665 et seq. Shortly after 1994, which ushered in the present SA constitutional dispensation, the Department of Labour, headed by Minister Tito Mboweni, resolved to undertake a complete overhaul of the regulation of the SA labour market and the 1979 LRA. A Presidential Commission was appointed for this purpose. **Cheadle** 665 points out that the policy underlying the LRA was never properly considered by the Commission, that the reform of the BCEA and the LRA operated without a proper labour market evaluation, and that the phased nature of the negotiations prevented the presentation and negotiation of a single and coherent package of reforms. Many of the recommendations of the Presidential commission never saw the light of day.

1338 See ***NEWU v CCMA*** 2003 24 ILJ 2335 (LC), - where the Labour Court stated that the LRA was not intended for instance, to define and regulate the concept of unfair labour practices comprehensively.

1339 See especially Chapters II and III (Roman and Roman Dutch Law respectively).

1340 See Chapter II and III

equity.[1341] Thus the common law was never an inequitable law as such – perhaps deficient and inadequate or even outdated in some respects and areas, such as modern collective labour law which acknowledges collective negotiation and other collective action such as the right to strike and lock out.

But now that South Africa is supposed to have a complete and comprehensive equitable labour law regime as embodied in s 23(1) of the Constitution, the focus should rather be on the realization and effectuation of this constitutional imperative, in stead of an often misplaced criticism of the common law. As we have noted above, voices of discontent have also recently gone up against many of the current deficiencies in the LRA itself, and rightly so, we submit. It is doubtful whether the solution to these problems lies in either the non-statutory regulation of labour practices, or a simple return to common law principles, as a leading labour law scholar would seem to suggest.[1342] The right to fair labour

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1341 See Chapter II for Roman Law and Chapter III for Roman Dutch Law. **Hanbury *Modern Equity: The Principles of Equity*** (1962) 3 *et seq;* **Van Eikema Hommes *"De rol van de billijkheid"*** (1971) 33; **Sohm *The Institutes*** (1907) 74; **Van Warmelo *Die Oorsprong en Betekenis van die Romeinse Reg*** (1965) 75

1342 **Cheadle *"Flexibility..."*** (2006) 665 makes a number of suggestions concerning addressing certain current deficiencies in the LRA by either a return to common law principles, or by regarding the common law as sufficient to redress the deficiencies. These deficiencies mostly relate to the definition and scope of unfair labour practices in the LRA. So for instance does **Cheadle *"Flexibility..."*** 665 state in regard to the unfair labour practice relating to the provision of benefits which the courts have interpreted to refer only to contractual or statutory benefits, that it is not necessary to have an unfair labour practice remedy if a remedy already exists under contract or the law. This argument looses sight of the fact that fairness is not about contractual or statutory remedies, but also about equitable remedies and the mechanisms to enforce such remedies. Contractual or statutory remedies might be deficient and inadequate. A Good example is specific performance in the sphere of the employment contract. Contractual remedies in the form of a claim for damages always existed at common law. Nevertheless, there certainly was a need for the enactment of the re-instatement and re-employment provisions contained in s 193 (1) and (2) of the LRA.

Cheadle *"Flexibility"* (2006) 675 et seq. also suggests that regulation of some unfair labour practices currently contained in the LRA should rather be left to collective bargaining and sometimes even to employer discretion. This approach relates inter alia to hiring, training promotion etc.

He furthermore suggests that serious consideration be given to excluding senior management and professional employees from unfair dismissal protection (except dismissal on the ground of discrimination, victimization, association etc) as these employees can protect themselves contractually, and because interference with termination decisions in respect of these employees *'is more invasive and has greater consequences for efficient governance.'* Needless to say, this approach is not in accordance with s 23(1) of the Constitution. It is submitted that erosion of the provisions of the Constitution should be avoided at all costs, if possible. Once certain kinds of employees are excepted from constitutional protection, one may eventually end up on a slippery slope, with runaway effects. It is suggested that judicial scrutiny of the special relation in which certain employees may stand in regard to the workplace, the employer and other employees, may yield more satisfactory results. Thus for instance, the LC has held that although senior management has the right to belong to trade unions and promote their activities, they are bound to do so within the limits of their duty of fidelity to their employers- ***Independent Municipal & Allied Trade Union* v *Rustenburg Transitional Council*** 2000 21 ILJ 377 (LC); **Grogan Workplace Law** (2007) 140.

practices conferred by s 23(1) of the Constitution is a hard-earned constitutional imperative that must be given effect to by concretizing and effectuating legislation.[1343] In view of the attitude of the courts that direct access to the Constitution – including s 23(1) – is in principle impermissible,[1344] the role to be played by effectuating legislation assumes so much more significance.[1345] The LRA seeks to codify fair labour practices and it is only reasonable to assume that the legislative route is the main but not the only one to go as far as any or further reform of labour practices is concerned.

This brings us to the important issue of the scope of the most important current piece of labour legislation, the LRA, that have been specifically adopted for the purpose of giving comprehensive effect to the open-ended right to fair labour practices enshrined in s 23(1) of the Constitution. The question arises whether that aim has been achieved, and if not, in what respects the LRA falls short of the Constitutional imperative.

1343 s 1(a) of the LRA, read with s 27 (1) of Constitution states that one of the purposes of the LRA is to give effect to the Constitutional right to fair labour practices; See s 9 (4) of the EEA for a similar provision. See also **Du Toit et al *Labour Relations Law*** (2006) 66.

1344 The accessibility of the right to fair labour practice as reflected in s 23 (1) of the Constitution is limited by the doctrine that where Parliament has adopted legislation intending to give comprehensive expression to a constitutional right, direct reliance on the Constitution itself is impermissible. Direct Constitutional access is only obtainable if the effectuating labour legislation is constitutionally challenged simultaneously. See ***Naptosa & Others v Minister of Education, Western Cape*** 2001 [22] ILJ 889 [C]; ***SA National Defense Force Union v Minister of Defense*** 2007 28 ILJ 1909; ***Chirwa v Transnet Ltd*** 2008 29 ILJ, 73 [CC] par. 37; **Grogan *Labour Litigation and Dispute Resolution*** (2010) 14. Where labour legislation does not give proper access to the Constitution, direct access to the Constitution does not follow automatically, for s 8(3)(a) of the Constitution determines that a court of law must apply, or if necessary develop the common law to the extent that legislation does not give effect to a Constitutional right. The Constitution is accessed directly only when no common law remedy is to be found, or where the common law cannot be developed to provide a remedy: ***NAPTOSA*** (supra); ***Veerasamy v Engen Refinery & Another*** 2000 21 ILJ 1606 [LC]; ***Dudley v City of Cape Town*** 2004 25 ILJ 991 [LC]; In ***Moloka & Greater Johannesburg Metropolitan Council*** 2005 26 ILJ 1978 (LC) 12-13, the court refused to grant an employee increased remuneration, holding that s 23 (1) of the Constitution cannot be relied on as of right. Cf. ***Simela & Others MEC for Education, Province of the Eastern Cape & Another*** 2001 9 BLLR, 1085 [LC], where it was held that s 23(1) of the Constitution is directly accessible by an employee in a dispute involving the unfair transfer of such employee, a kind of dispute that is not governed by the provisions of the LRA as an unfair Labour practice. See also ***Booysen v Minister of Safety and Security*** 2011 32 ILJ 112 (LAC) 121I.

1345 In ***NEHAWU v UCT*** 110-1 par 34, the Constitutional Court stressed the fact that the concept of unfair labour practice must be given content to by the Legislature and thereafter left to gather meaning given to it by specialised courts such as the LC and the LAC. These courts have to utilize both domestic and international experience. The former is obtained from the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA, the latter from the conventions and recommendations of the ILO and the instruments of other international bodies.

The limitation clause contained in s 36 of the Constitution is an important consideration in regard to the application of s 23 (1) of the Constitution. This clause allows limitation of the right to fair labour practices by law of general application, provided that such limitation is *'reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.'* We submit that limitation in terms of s 36 should only be a matter of last resort. The Constitution itself imposes the imperative of fulfillment of its provisions on the State, including the courts of law.[1346] The primary purpose and aim of labour legislation should rather be the promotion, effectuation and regulation of constitutional labour rights and values, in stead of unduly restricting or abrogating them.[1347] Yet, as **Cheadle** [1348] rightly points out, it is possible to limit a constitutional right, provided that it meets the required standard of justifiability.[1349] As far as our current labour legislation is concerned it could be argued that insofar as these contain implied limitations to the right to fair labour practices by not effectuating the Constitution fully and comprehensively, such limitations should comply with s 36 of the Constitution or be liable to be struck down as unconstitutional. Examples of limitations are the various LRA contained limitations on the constitutional right to strike.[1350] It is also hard to conceive of any reason why the already terse and narrow definitions of unfair labour practices or unfair dismissal provided for in the LRA should be narrowed down any further. Employer profit or workplace efficiency does not seem to justify a s 36 limitation. Much less so does employer prerogative or discretion, or factors such as perceived administrative costs. If anything, the Constitutional Court has

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1346 s 2 of the Constitution reads: *"This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

1347 In ***NEHAWU v UCT*** 113 par 41 the CC stated: *"The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the workplace. This is to be achieved by fulfilling its primary objects which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations."*

1348 ***"Regulated Flexibility..."*** (2006) 666-7

1349 s 36 of the Constitution.

1350 The right to strike is guaranteed by s 23 (2) of the Constitution, while s 64 places various limitations of a procedural nature on that right. Such 'limitations' should rather be viewed as a form of regulation. s 65 contains further procedural regulation, but furthermore also substantive limitation on the right , in that persons involved in essential services and maintenance services are not allowed to strike. Certain disputes are also excluded from the constitutional protection of the right to strike.

in Sidumo rather moved further away from employer prerogative or deference to the employer discretion in the interpretation of the right to fair labour practices. Fairness involves a weighing up of the interests of both employer and employee by an independent third party such as the CCMA or the Labour Court. A return to the removal of certain issues from justiciability by independent tribunals or courts as has been suggested by some, is undesirable.[1351]

One should also not loose sight of the age-old maxim that all definitions are by nature limitations, and could therefore be risky enterprises.[1352]

We agree with **Davis** *et al*[1353] that the definitions of unfair labour practices and unfair dismissal contained in statutes like the LRA are perhaps simply *'short hand for prohibited conduct identified in the particular statute.'*[1354]

Our reasoning is premised on the fact that fair acts or omissions, or fairness as such, is not determined by the Legislature by means of statutory definitions, but rather by judicial discretion and reasoning. This is a fundamental Aristotelian attribute of fairness that has been embraced by the common law. This issue is further dealt with later in this chapter.[1355]

Although the concept of *'fairness* 'has at no time been foreign to our common law and our courts of law, the concept of an *'unfair labour practice'* made its first formal appearance in South African law only in 1979, being the fruit of the

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1351 Many of the reforms to the LRA suggested by **Cheadle** in ***"Regulated Flexibility..."***amounts to that.

1352 D 50 17 201 reminds us that *omnis definitio in jure civili periculosa est – "all definition is in civil law fraught with danger".* For a useful discussion, see **Spruit *Betekenis en doel van het recht*** (1985) 2, which provides the following critique of definitions, with reference to the Digest maxim: *"Definities hebben in het algemeen het nadeel, dat zij de werkelijkheid niet getrouw kunnen weergeven; want deze is veelzijdig, vol van verscheidenheid en afwisseling, terwijl definities, omdat zij zoveel mogelijk zaken onder een formule samenvatten, die verscheidenheid en veelvormigheid moeten inperken: zij maken het gelijkende (maar daarbinnen zeer verschillende) gelijk."*

1353 ***Fundamental Rights in the Constitution*** (1997) 212

1354 As the learned authors point out, the tendency to regard prohibited conduct as *unfair labour practices* seems to have become international from a comparative point of view. The unfair labour practice definitions of countries like the United States, Japan, Canada etc. do not so much testify as to the actual *unfairness* of the practices, as to the *prohibited nature* thereof. Cf. **Davis et al *Fundamental Rights*** (1997) 212.

1355 We agree with **Grogan *Workplace Law*** (2008) 120-1, that the LRA does not contain a definition of unfair dismissal. A dismissal will be unfair if it does not fall within the reasons for dismissal recognized in s 187 of the LRA. It will be automatically unfair if it is a *prohibited dismissal*, described in s 188 of the LRA as an automatically unfair dismissal.

labours of the Wiehahn Commission.[1356] In that year amendments to the Industrial Conciliation Act, 1956 [1357] were introduced, and with it the statutory concept of an *'unfair labour practice."*[1358] The concept was extremely widely and open-endedly worded.[1359] This was a deliberate act on the part of the Legislature, the intention being to leave the concretization and fleshing out of the concept to the newly instituted Industrial Court.[1360] In this respect there was not much difference between the 1979 definition of *unfair labour practices* and that contained in s 23(1) of the Constitution, which simply provides the right to *"fair labour practices"* to *"everyone"*. The Courts have meticulously emphasised and demonstrated the comprehensiveness of this right since the adoption of the Constitution, pointing out that *"everyone"* means everyone, be it soldier, police officer or sex worker.[1361] The ambit of this Constitutional right is so wide that it includes not only parties to an employment contract, but also parties to any employment relationship.[1362] A generous approach to the question of the range of beneficiaries under s 23(1) is followed.[1363] We have seen in earlier chapters that wide and open-ended definitions and concepts have become common practice in international as well as some domestic systems of labour law.[1364] Instruments and resolutions of the ILO for instance often contain flexible and open-minded

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1356 ***Sidumo*** 2428 par.62; **Currie & de Waal *The Bill of Rights*** (2005) 501. **Thompson** and **Benjamin *South African Labour Law*** (1995) A1-28; **Du Toit et al *Labour Relations Law*** (2006) 11 n 62.

1357 Industrial Conciliation Amendment Act, no. 94 of 1979.

1358 **Du Toit** et al (2006) 481

1359 The concept of unfair labour practice was introduced by the Industrial Conciliation Amendment Act, No.94 of 1979. It defined an unfair labour practice as *"any labour practice which in the opinion of the industrial court is an unfair labour practice".*

1360 **Currie & de Waal *Bill of Rights*** (2005) 501 point out that over the next ten years following its establishment, the IC indeed used its equity jurisdiction to 'judicialise' labour relations by setting out in its awards what were acceptable labour practices and what not, in the process revolutionizing South African labour relations, and giving flesh to the concept of the unfair labour practice.

1361 In ***'Kylie'*** 1606-7, **Davis JA** states that *"The term "**everyone**" which follows the wording of sect 7(1) of the Constitution which provides that the Bill of Rights enshrines the right **'of all people in the country'** is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.* The learned judge relied inter alia on an earlier judgment of the Constitutional Court, where **Ngcobo J** (as he then was) stated: *"The word "**everyone**" is a term of general import and unrestricted meaning. It means what it conveys. Once the State puts in place a social welfare system, everyone has a right to have access to that system" In **S V Makwanyane, Chaskalson P**, stated that the Constitutional right to life vests in everyone".*

1362 ***'Kylie'*** 1608 par 22-23

1363 **'Kylie'** 1608 par 25, In fact it would be more accurate not to speak of definition as such, as the concept was undefined in both the 1979 Amendments and s 23(1) of the Constitution.

1364 Vague or open-ended concepts in instruments of the ILO have been dealt with.

definitions and concepts with a view to the accommodation of domestic legislation.[1365] Concepts like unfair labour practices are also inherently wide and comprehensive.[1366] It would seem as though the approach of the Legislature in providing an open-ended definition of an *unfair labour practice* in the 1979 Amendments achieved its aims in practice.[1367] The handing over of the power to determine not only whether an unfair labour practice had occurred, but also the very meaning of the concept as such, resulted in employers, employees and unions alike making extensive use of the equity jurisdiction of the Industrial Court.[1368] As **Currie & de Waal** put it, the IC became the arena of struggle for these parties.[1369] The body of jurisprudence built up by the IC represent the gains made by South African law in the domain of fair labour practices and formed an important foundation on which the 1995 LRA was drafted.[1370] In fact there is authority for regarding the 1995 LRA provisions relating to unfair labour practice and dismissal as little more than some codification of the jurisprudence of the Industrial Court.[1371]

As the original definition contained in the 1979 Amendments defined an unfair labour practice simply as *'any practice which in the opinion of the industrial court, is an unfair labour practice,'* it is quite clear that the legislature provided the Industrial Court with a form of *'legislative'* power in the sense that that court

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1365 See Chapter III

1366 Ibid.

1367 On the forging of a coherent unfair labour practice jurisprudence by the Industrial Court, See **Du Toit et al *Labour relations*** Law (2006) 11

1368 **Thompson & Benjamin *South African Labour Law*** (1995) Service Issue, A1-28; **Du Toit et al *Labour Relations Law*** (2006) 11 note 62

1369 **Currie & de Waal *The Bill of Rights*** (2005) 502.

1370 ibid. See also 501 of the same work. **Landman *"Fair Labour Practices: the Wiehahn Legacy"***, 2004 25 ILJ, 805, 807 opines that the 1995 LRA codified many of the *'fair labour practices'* which had evolved from the application of the injunction to strike down unfair labour practices by the Industrial Court. **Currie & de Waal** (2005) 503 seems to agree that the 1995 LRA is some form of codification of the unfair labour practice jurisprudence of the Industrial Court. They point out that it is this codification process that has resulted in the new, specific unfair labour practice definitions contained in s 186 of the LRA.
See also **Davis Cheadle & Haysom *Fundamental Rights*** (1997) 212-3.

1371 Cf. ***NEHAWU v University of Cape Town*** 311 par 33-35, where **Ncgobo J** observed that domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA as well as the codification of unfair labour practice in the LRA of 1995.

could form an authoritative opinion as to what constituted an unfair labour practice, and such opinion would indeed constitute an unfair labour practice.[1372]

But this open-ended definition did not remain for long on the statute books. In 1980 it was amended.[1373] In the new amendments, the Legislature limited the determinative power or discretion of the Industrial Court in some respects. The legislature provided its own definition of an unfair labour practice in which it did away with the *concept* approach of the 1979 Amendments, and introduced a so-called *'effect approach'*. This meant that in the first place, it was not primarily the *nature* or *character* of the act itself that determined whether it constituted an unfair labour practice, but rather the *effect* that it had in the workplace or labour market.[1374] The Legislature nevertheless left the meaning and definition of the most important elements of this definition for determination by the Industrial Court. As long as the Industrial Court limited itself to the *effects* stated by the Legislature in the definition, actions that the Industrial Court found to amount to unfair labour practices were regarded as such.

Even this more limited definition than the original one contained in the 1979 amendments, was still critically received by some academic authors as being too wide and comprehensive.[1375] But it was generally accepted by most scholars that the intention was that the Industrial Court itself should eventually, through its

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1372 **Currie & de Waal *The Bill of Rights*** (2005) 501 point out that the Industrial Court traversed the entire terrain of individual dismissal law and collective bargaining law in its determinations.

1373 Act 95 of 1980 The Industrial Conciliation Act, 1956 was also amended by the Industrial Conciliation Amendment Act 51 of 1982, the Labour Relations Amendment Act, 51 of 1982, the Labour Relations Amendment Act 83 of 1988 and the Labour Relations Amendment Act 9 of 1992. These are not of direct interest here.

1374 An unfair labour practice was now defined as a labour practice or change in labour practice...which has or may have the effect that i) any employee or class of employees is or may be *unfairly affected* or that his or her employment opportunities, work security or physical, economic, moral or social welfare is or may be *prejudiced* or *jeopardized* thereby; ii) the business of an employer or class of employers is or may be unfairly *affected* or *disrupted* thereby; iii) labour unrest is or may be *created* or *promoted* thereby; iv) the relationship between employer and employee is or may be *detrimentally affected* thereby, or any other labour practice or any other change in any labour practice which has or may have an *effect* which is similar or related to any effect mentioned in par. (a).' (my emphasis)

1375 **De Kock *Industrial Laws of South Africa*** (1982) 620A; **Mureinik *"Unfair Labour Practices: Update."*** 1980 1 ILJ 113. First-mentioned was of the view that the definition was so wide as to be open to almost limitless conjecture. **Mureinik** expressed the view that it was so extremely open textured that its contents depended almost entirely on its interpretation. This interpretation was of course provided by the Industrial Court; Cf. **Ehlers *"Dispute Settling and Unfair Labour Practices"*** 1982 3 ILJ 11, 13-14; **Munks *"Selective Re-employment: An Unfair Labour Practice?"*** 1986 ILJ 1, 2-3.

equitable jurisprudence, provide guidelines as to the meaning of the concept *unfair labour practice.*[1376]

The tendency towards progressive and incremental statutory definition of the concept *unfair labour practice* surfaced again in the 1995 LRA. For the first time a statutory distinction is drawn between *unfair labour practices* on the one hand, and *unfair dismissal* on the other.[1377] Moreover, the Legislature adopted relatively rigid and detailed definitions of both concepts.[1378] Apart from these, a new concept that was unknown to the 1979 and subsequent amendment acts made its appearance in the 1995 LRA. This is the *automatically unfair dismissal*, which consists of an exhaustive set of defined dismissals.[1379] It has already been mentioned that no definition of an *unfair dismissal* as such is found in the LRA.[1380] Schedule 8: Code of Good Practice: Dismissal does contain some guidelines[1381] though, to be followed by anybody considering the fairness of a dismissal. Only the meaning of *dismissal*[1382] is provided in the LRA, but no statutory determination of the fairness thereof, if one leaves out of consideration *automatically unfair dismissals.* On the other hand, a list of acts or practices amounting to unfair labour practices appears in the LRA.[1383] Unfair discrimination is dealt with in s 6 of the Employment equity Act.[1384]

In summary, the concept of unfair labour practice has throughout its history in South African labour law mainly been a statutory concept. The comprehensiveness and openness of the various definitions have varied over the course of time. To date, the original 1979 definition was the widest and most

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1376 ***United African Motor & Allied Workers Union v Fodens*** 224G.
1377 Both concepts are dealt with in Chapter VIII of the LRA.
1378 s185 (a) and (b) respectively, state that every employee has the right: a) not to be unfairly dismissed, and b) not to be subjected to unfair labour practices.
1379 s 187 of the LRA.
1380 **Grogan *Workplace Law*** (2008) 120-1
1381 s 203(3) of the LRA provides that any person interpreting or applying the LRA must take into account the provisions of any relevant Code of Good Practice, Schedule 8 to the LRA (Code of Good Practice; Dismissal) is such a code. It declares that it was the intention of the drafters thereof that it should be *"general"*. It acknowledges the fact that each case is unique and that circumstances may be such that a departure from the code may be justified. This provides the code with the necessary flexibility and open-endedness.
1382 s 186(1).
1383 s 186(2).
1384 Act 55 of 1998; **Grogan *Workplace Law*** (2007) 279

comprehensive. That contained in the 1995 Act the narrowest. Of great significance however, is the fact that whereas all the previous statutory definitions were not constitutionally based, the 1995 definitions of both *unfair labour practices* and *unfair dismissal* emanate from a constitutionally entrenched general right to *fair labour practices.*[1385] In this respect, the Constitution has at least partly been modeled upon the pre-1995, Industrial Court jurisprudence on *unfair labour practices* that was based on open ended statutory definitions. To this jurisprudence, the conceptual and rigid distinction between unfair dismissal and automatically unfair dismissal as well as between unfair labour practices and unfair dismissal was unknown.[1386]

Like the original 1979 definition, the present constitutional definition consists of basically three conceptual elements: *'fair', 'labour'* and *'practice'.* Once these elements are determined and contextualized with sufficient accuracy, the result would be synonymous with the 1979 concept of *unfair labour practice,* particularly in respect of its flexibility and open – endedness, something which the 1995 LRA falls far short of in important respects.

7.10 DEFICIENCIES REGARDING UNFAIR LABOUR PRACTICES IN THE LRA, 1995

If the LRA definitions of unfair labour practice and unfair dismissal are correlated to the contents of s 23 of the Constitution, certain discrepancies seem to appear from the woodwork. So for instance does the Constitution not contain any distinction between *unfair labour practices, automatically unfair labour practices,* and *unfair dismissal* at all. Viewed from this perspective, the single and comprehensive Constitutional right to fair labour practices is fragmentized in the LRA to fairness related to labour practices (already provided in s 23(1) of the Constitution), fairness relating to dismissal, and fairness relating to automatically unfair dismissal. At least as a matter of nomenclature and categorization, the LRA

1385 s 23(1) of the Constitution.

1386 This does not mean that the Industrial Court did not admit this categorization. On the contrary, it was responsible for developing it. However, it did so under a general, undefined and somewhat nebulous definition of unfair labour practices which itself did not contain these distinctions.

deviates from the constitutional text. This paradoxical situation did not obtain under the 1956 Industrial Conciliation Act after the 1979 amendments, under which all fairness or unfairness simply related to *labour practices*.

Secondly the Constitution does not contain definitions of these concepts either. This raises a number of questions and issues such as whether the Constitution and the LRA are reconcilable and co-extensive, and also whether direct access to the Constitution is permissible in cases where no relief is to be found under the provisions of the LRA or other employment legislation.

The question concerning possible discrepancies and differences between the Constitutional text and the provisions of the LRA is, for the present purposes, a textual exercise in which the contents and ambits of the two instruments are compared. From this point of view it does not take much effort to conclude that the LRA, in important respects, limits the comprehensive open-ended provisions of s 23(1) of the Constitution, which guarantees to everyone '*the right to fair labour practices.*'

Insofar as the LRA itself confesses to be an enactment giving effect to s 23 of the Constitution,[1387] we submit that this objective has in many respects not been attained. The Constitutional definition in all probability conceptually comprises a huge reservoir of forms of labour practice that the LRA does not provide for. In addition, as regards the *fairness* aspect thereof, the LRA text imposes serious limitations on the open-ended and indeterminate concept of fairness that has been adopted in the Constitution. There seems to be no compelling reason in logic or in sound policy, for the definition of *unfair labour practices* to be limited to the extent that s 186(2) of the LRA does. The LRA definition relates only to *promotion, demotion, probation, training, the provision of benefits,*[1388] *suspension, disciplinary action short of dismissal,*[1389] *re-instatement or re-employment of former employees,*[1390] *and occupational detriments.*[1391] Granted,

1387 s 1(a) of the LRA
1388 These are dealt with in s 186(2) (a).
1389 s 186(2) (b).
1390 s 186(2) ©.

the provisions of s 186 can perhaps not readily be faulted in regard to its comprehensiveness in respect of the individual items relating to each of these forms of unfair labour practice. After all, the general section of the definition of an unfair labour practice in s 186 specifically refers to *'any unfair act or omission that arises between employer and employee'*. This, we submit, may indeed go far enough to give constitutional effect to these individual and particular forms of unfair labour practice determined in s 186(2). The problem rather lies in the fact that the exhaustive itemized list contained in sect 186(2) falls short of expressing or effectuating the general and comprehensive right enshrined in s 23(1) of the Constitution. There are serious forms of unfair labour practice that occur in practice that the LRA does not provide for.

It has been suggested though, that in determining the real ambit of the unfair labour practice and unfair dismissal jurisdiction embodied in the LRA, the objects and purpose of the Act as expressed in s 1 thereof, should be taken into account.[1392] These are the advancement of economic development, social justice, labour peace and the democratization of the workplace.[1393] This seems to be the correct approach to be adopted in the general interpretation and application of the LRA. However, it does little, if anything, to the criticism concerning the casuistic nature and deficiencies that mar the definition of the concepts of the unfair labour practice and of dismissal in the LRA.

The deficiencies of the LRA have not escaped the attention of some academic writers. **Davis** et al[1394] provide an explanation for the omission of salary and unilateral change to conditions of service disputes from the unfair labour practice definition of the LRA, even though these matters certainly relate to labour practices. The answer that they provide to this criticism is firstly that the issues of wages and conditions of service are the products of consent between the parties. Secondly, the weakness and fragility that this consent may have is

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1391 s 186(2) (d). See also **Currie & de Waal** ***The Bill of Rights*** (2005) 504.
1392 **Currie & de Waal** (2005) 504.
1393 s 1 contains objects additional to those here stated as well.
1394 ***Fundamental Rights*** (1997) 215-6.

corroborated by the extensive protection of the process of collective bargaining provided for in the LRA. Finally there are pieces of legislation such as the Wage Act, 1957, the BCEA of 1993, and the Public Service Act of 1994 that come to the assistance of employees in the event that collective bargaining fails, the learned authors point out.[1395] But even so, the protection that the LRA affords, fall short of the Constitutional imperative in important respects, which we now proceed to deal with.

7.10.1 WAGE PAYMENT DISPUTES

We are in agreement with the learned authors **Davis** *et al,*[1396] that as far as disputes concerning the quantum of remuneration are concerned, there seems to be no cogent reason why these should be classified as unfair labour practice disputes. Collective bargaining, contractual terms, and the determination of minimum wages in terms of the BCEA seem to take care of the problem of fixing the amount and other aspects of mutual concern relating to remuneration.[1397] The demand for increased remuneration is for instance a matter of mutual interest, which, under appropriate circumstances justify industrial action as a form of redress.[1398] Nevertheless the occasional need for the determination of a fair or reasonable wage could never be discounted, especially where no minimum wage has been fixed in terms of statute or regulation.

In respect of the actual non payment of remuneration or refusal to pay, the BCEA has established an elaborate administrative enforcement mechanism in the form of an Inspectorate of the Department of Labour as first instance, bolstered by the Labour Court as a second tier of enforcement.[1399]

1395 ibid.

1396 ibid

1397 ss 32-35 of the BCEA contain detailed provisions relating to the methods and time of payment of remuneration, information concerning remuneration that the employer must provide, deductions and calculations of wages in terms of hours, days, weeks etc. that an employee worked.

1398 **Grogan** ***Dismissal*** (2010) 447; ***Gauteng Provinsiale Administrasie v Scheepers*** 2000 21 ILJ 1305 (LAC).

1399 The powers of the inspectorate of the DOL are set out in ss 66-77 of the BCEA. Labour inspectors may investigate the failure to pay and issue compliance orders, which may be made orders of the Labour Court –

But this elaborate mechanism is not aimed at the exercise of any fairness jurisdiction by either the Departmental Inspectorate or the Labour Court, but rather at the enforcement of the common law duty of an employer to remunerate the employee as agreed. S 32 of the BCEA simply reinforces this common law duty to pay remuneration and further regulates the form, method, time and place of payment. These provisions do not replace the common law as such or render it redundant.

But in practice the issue of the payment of wages present serious enforcement problems. All that the Inspectorate has as an instrument of enforcement of the compliance orders that they may issue, is the power to apply to the Labour Court to have such orders made orders of court.[1400] Moreover, the Labour Court has encouraged litigants to utilize this rather time consuming administrative process of enforcement of payment of their wages, while direct recourse to the Labour Court for this purpose has been discouraged.[1401]

The only instance where the relatively expeditious dispute resolution machinery provided by the LRA is available to an employee, is where his claim for wages or salary due is determined during the same process that an unfair dismissal dispute is determined.[1402] But if it could be determined as part and parcel of

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See ***Ephraim v Bull Brand Foods Pty Ltd*** 2010 31 ILJ 951 (LC); ***Bartman & Another t/a Khaya Ibhubesi v De Lange*** 2009 30 ILJ 2701 (LC).

1400 See ss 68, 69 and 70 of the BCEA which deals with the securing of undertakings by employers, and the issue of compliance orders by inspectors respectively. Compliance orders may relate to the duty of employers relating to any provision of the BCEA, including the duty to pay remuneration. s 70 of the BCEA regulates the circumstances under which a Labour Inspector may or may not issue a compliance order "*in respect of any amount payable to an employee.*" s 73 of the BCEA empowers the Director General of the Department of Labour to apply to the Labour Court to have a compliance order made an order of court. Such application is to be brought in accordance with s 158(1) (c) of the Labour Relations Act of 1995. It is quite clear that the enforcement of the payment of remuneration via the administrative inspectorate route is quite a tedious and time consuming one that is not always in accordance with the objectives expressed in the LRA, i.e that labour disputes should be resolved expeditiously. In terms of this enforcement scheme an appeal lies against any compliance order to the Director General of the Department. Form there the dispute may go to the Labour Court. This is a particularly lengthy process for a person who has been deprived of his salary.

1401 ***Emphraim v Bull Brand Foods; Bartman & Another t/a Khaya v De Lange*** (supra)

1402 Where an Industrial Council or the CCMA has jurisdiction to determine an unfair dismissal dispute, a claim for remuneration may be combined with the referral of the unfair dismissal dispute. Conciliation and arbitration of such disputes would then be allowed. The same principle applies to disputes that have to be adjudicated by the Labour Court. See **du Plessis & Fouche *A Practical Guide*** (2006) 355.

unfair dismissal disputes, it could very well have been the subject of a separate unfair labour practice dispute.

We propose that the non-payment of wages or remuneration should be made an unfair labour practice arbitrable by the CCMA generally.

7.10.2 LAY-OFF, SHORT TIME, AND TRANSFER

Frequently employers resort to the notorious devices of *lay-offs* or *short- time*. A lay-off differs from short time in that the contract of employment of a laid-off employee is in a sense suspended, while the employee is not required to work, whereas employees on short time are required to work for reduced weekly or monthly hours. Both of these may be serious breaches of contract by the employer, unless done under recognised conditions of service or by agreement. Affected employees, especially those in the case of *lay-offs,* often find themselves facing a perplexing dilemma. On the one hand, a lay-off does not constitute dismissal, since the contract of service is not terminated by the employer. On the other hand, a *lay-off* (although manifestly unfair) also falls short of constituting an unfair labour practice as defined in the LRA. None of the remedies for either unfair dismissal – including dismissal for operational reasons –or unfair labour practice is available to these employees. It is because of this very same lack of remedies that lay-offs are often exploited by employers who use it as a device to avoid the adverse legal consequences of unfair dismissal or unfair labour practices, as well as the payment of severance benefits. In cases where retrenchment or dismissal for operational reasons may be involved, the lay-off device is also easily misused to avoid the demanding consultation and other procedural provisions prescribed by s 189 of the LRA.

Abovementioned difficulties caused mainly by shortfalls and deficiencies of the LRA have been aptly illustrated in ***Coetzee v Pitani (Pty) Ltd.***[1403] There the employer had suspended the employment contract and laid-off two employees, claiming financial difficulties as the reason. The court found on the facts of the

1403 *t/a* ***Pitani Electrification Projects*** 2000 21 ILJ 1324 (LC).

case that the employer had not intended to terminate the contract, that the employment relationship continued, and that no dismissal had taken place. Despite the finding that a serious breach of contract and an unfair act had been committed by the employer, the court had to dismiss the claim on the basis that relief in respect of unfair dismissal was not available in such cases.[1404] The only possible remedy provided to the employees in these circumstances, apart from the common law claim for breach of contract, is one for constructive dismissal.[1405] But a pursuit of that remedy is also a risky enterprise to any employee who can only do so after having submitted his/her resignation. The onus of proof resting on the employee involved is also daunting.[1406]

In ***Govender v Dennis Port Pty Ltd***[1407] the CCMA held that the list of unfair labour practices contained in s 186(2) is not exhaustive, and that unfair labour practices other than the enlisted ones could well be found to exist. This reasoning was based on the fact that in ***NEHAWU v University of Cape Town***[1408] the Constitutional court had observed that the concept of fairness is a wide and

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1404 Referring to the consultation and other provisions contained in s 189 of the LRA, the court expressed itself as follows in regard to the employer's failure to comply therewith: *"In failing properly to comply with these statutory duties in circumstances where the employer was, indeed, contemplating the dismissal of the two affected employees, the employee in casu was acting manifestly unfairly towards the two applicants. Moreover, the employer was also acting in serious breach of the employment contract."* – per **Basson J**,1331, par. 39-40.

1405 On 1333 par 51 **Basson J** explains as follows: *"Such employees can, of course, elect to accept the breach of contract and cancel or terminate the contract of their own accord and claim contractual damages. More important, however, is the fact that such employees may become entitled to claim constructive dismissal in terms of s. 186(e) of the LRA."* See also **Grogan *Workplace Law*** (2007) 81.

1406 ***Vorster v Maritzburg Christian Church*** 2000 21 ILJ 2552 (CCMA); ***Kruger v Commission for Conciliation Mediation Arbitration*** 2002 23 ILJ 2069 (LC); ***Smithkline Beecham (Pty) Ltd v Commission for Conciliation Mediation Arbitration*** 2000 21 ILJ 988 (LC); ***SALSTAFF obo Bezuidenhoudt v Metrorail (2)*** 2001 22 ILJ 2531 (BCA); ***Secunda Supermarket CC t/a Secunda Spar & another v Dreyer*** 1998 19 ILJ 1584 (LC); ***Moyo and Standard Bank of SA Ltd*** 2005 26 ILJ 563 (CCMA); ***Foschini Group v Commission for Conciliation Mediation and Arbitration*** 2008 29 ILJ 1515 (LC); ***Chabeli v Commission for Conciliation, Mediation and Arbitration*** 2010 31 ILJ 1343 (LC); ***Jooste v Transnet Ltd t/a SA Airways*** 1995 16 ILJ 629 (LAC).

1407 2005 26 ILJ 1098 (LC) 1103A. Here the employer had referred a dispute concerning an employee's resignation without notice to the CCMA as an unfair labour practice dispute. Not surprisingly, the CCMA held that it lacked jurisdiction to arbitrate the dispute as employers fall outside the purview of s 186 of the LRA. Unfair labour practices cannot be committed against them. In a review to the Labour Court it was held that the LRA is not unconstitutional since it was not intended to comprehensively regulate the concept of unfair labour practice. It has to be noted however, that it is implicit in this argument that the provisions of the LRA fall short of those contained in the Constitution. The court declined the application to declare the LRA unconstitutional on the basis that the position of employer generally was powerful to the extent that no further legal protection by the existing common law was needed.

1408 2003 24 ILJ 95 (CC).

flexible one, not capable of precise definition. Accordingly, the CCMA found that unilaterally imposing *short time* on an employee amounted to an unfair labour practice.

But in ***Schoeman v Samsung Electronics SA (Pty) Ltd***[1409] it was held that the LRA itself contained a closed list of unfair labour practices.[1410] Academic authority seems to support the correctness of the **Schoeman** judgment.[1411]

A unilateral change to the terms and conditions of employment or the circumstances of work of a single employee, such as a *transfer* to a new workplace, may be equally harsh in effect. Trade unions may interdict employers to refrain from unilateral changes to terms and conditions of service.[1412] Should the need arise, they furthermore have industrial action at their disposal. These are not courses readily open to an individual employee, whose only meaningful remedy seems to be common law contractual redress in the civil court, alternatively, resignation followed by a claim of constructive dismissal.

It was held in ***Maritime Industries Trade Union of S v Transnet Ltd***[1413] that a unilateral change to terms and conditions of service, from the point of view of a dispute of right, fall within the ambit of an unfair labour practice. Yet no provision has been made in the LRA for these two types of labour practice, which may indeed, depending on the circumstances of each case, constitute serious forms of unfair labour practice.

The unilateral change of a shift system by an employer may seriously affect not only the entire work force, but also individual employees. Nevertheless, in the absence of agreement to the contrary, it falls within the employer's prerogative to change such system unilaterally, even without consulting the employees or the union involved. The LC has held in a number of cases that such action does not

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1409 1997 18 ILJ 1098 (LC) 1103A.
1410 The list was at the time of the judgment contained in Item 2, Schedule 7 to the LRA. It has been moved to s 186 of the LRA.
1411 **Du Toit** et al ***Labour Relations Law*** (2006) 484.
1412 See s 64 of the LRA
1413 2002 23 ILJ, 2213 (LAC) 2243.

amount to a change to conditions of employment, but only to a change to a *work practice*. [1414]

Despite the fact that the LRA does not deal with the issue of transfer of employees at all, the Labour Courts have indicated that they are willing to grant relief on the basis of the *general duty* resting on employers to treat their employees fairly.[1415]

7.10.3 DISCRETIONARY AND PENSION BENEFITS

Here the position of beneficiaries under the pension laws requires attention. Many pension funds operated under the Pension Funds Act[1416] provide patently inequitable benefits upon withdrawal by employees from such funds, or when transfers to alternative funds take place. The employer's contribution is in most cases withheld from the benefits of the withdrawing employee.[1417] Disputes in this regard are not justiciable in terms of the LRA, by the Bargaining Councils, the CCMA or the Labour Court. The reason for this lack of jurisdiction is that a pension fund falls outside the strict employment relationship between employer and employee. It is not an employer. Its actions in regard to the employee, equitable or inequitable, are not covered by labour legislation at all. This unsatisfactory situation exposes the need for more comprehensive labour legislation which would include third parties with a direct link to the orthodox

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1414 ***SA Police Union & another v National Commissioner of the SA Police Service*** **2005** 26 ILJ 2303 (LC). In ***NUMSA v Lumex Clipsal (Pty) Ltd*** 2001 22 ILJ 714 (LC) the court held that additional tasks assigned to machine operators and a revised shift system did not amount to a unilateral change to terms and conditions of employment; In the Namibian case of ***CDM (Pty) Ltd v Mineworkers Union of Namibia*** 1997 2 LLD 65 (HCN) it was held that a unilateral change would have to be so fundamental as to amount to a change in the contract for it to be considered illegitimate; See also ***A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA*** 1995 16 ILJ 99 (LAC), where an instruction to employees to operate two machines in stead of one was regarded as a work practice and not a unilateral change to terms and conditions of employment. In ***Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union*** 2011 32 ILJ 1107 (LC) the court held that a change to the shift system of bus drivers amounted merely to a legitimate change to a work practice.

1415 Such relief may include the granting of an interdict: ***Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services*** 2008 29 ILJ 2708 (LAC); ***Booysen v Minister of Safety & Security*** 2011 32 ILJ 112 (LAC). However cf. ***SA Airways (Pty) Ltd v Aviation Union of SA*** **2011** 32 ILJ 87 (SCA) 94 par 19 for a contrary approach.

1416 Act No 24 of 1956 as amended.

1417 For a detailed discussion, see **Murphy *"Alternative dispute Resolution in the South African Pension Funds Industry: An Ombudsman or a Tribunal?"*** 2002 23 ILJ 58-9.

employment relationship, even though strictly speaking falling outside the ambit of the definition of an employer or an employee. As a general rule, both employers and employees are represented on the governing bodies of pension funds. Yet, because the fund is an independent third party, and not per se the employer, aggrieved employees are unable to invoke any equitable labour law principles in disputes with pension funds. Moreover, such disputes would often relate to an issue of mutual interest, rather than of right, limiting the possibilities for equitable adjudication even further.[1418] Disputes of this nature are not unlike disputes concerning demands for higher or fairer wages.[1419]

However, pension fund rules do confer on employers the discretion to instruct pension funds to increase benefits on terms and conditions determined by an actuary. In ***Wilson v Orion Fixed Benefit Pension Fund***[1420] the employee was paid out only his own contribution plus 8 percent accrued interest upon withdrawal. The employer's contribution was withheld. The employee filed a complaint with the Pension Fund Adjudicator that her right to fair labour practices provided by s 23(1) of the Constitution had been violated. This was countered by the employer who invoked the rules of the Fund which did not permit payment of the employer's contribution under the circumstances. The Fund and the employer conceded though that the employer was vested with the *discretion* to instruct the Fund to increase the benefits. On this basis the Fund was ordered to pay an adjusted and thus a fair benefit.

In ***Protekon Ltd v CCMA***[1421] the LC acknowledged the apparent deficiency of the LRA in regard to *discretionary benefits* and awarded such to the employee. [1422] **Levy**[1423] correctly points out that the unfair labour practice relating to benefits

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1418 Ibid.

1419 In ***Kransdorff v Sentrachem Pension Fund*** 1999 9 BPLR 55 (PFA) and ***Wilson*** (supra) problems experienced by the Pension Fund Adjudicator in this regard were highlighted.

1420 1999 9 BPLR 89 (PFA)

1421 2005 7 BLLR 703 (LC) par 31-33.

1422 For a critical discussion of the text of the LRA in this regard, see **Levy *The Unfair Labour Practice and the Definition of Benefits – Labour Law's Tower of Babel*** 2009 30 ILJ 1451; ***Minister of Justice & another v Bosch*** 2006 27 ILJ 166 (LC); ***Schoeman v Samsung Electronics SA (Pty) Ltd*** 1997 18 ILJ 1098 (LC); ***Northern Cape Provincial Administration v Commissioner Hambidge*** 1999 20 ILJ 1910 (LC).

1423 ***"The Unfair labour Practice and the Definition of Benefits"*** 2009 30 ILJ 1794.

emanates from considerations of fairness as such, and not only *ex lege* or *ex contractu.*

In ***National Entitled Workers Union***[1424] and ***Mathews***[1425] the Labour Court recognised the deficiencies in regard to the scope of the definition of unfair labour practices in the LRA and favoured the view that direct Constitutional access is admissible in cases where a particular unfair practice is not covered by the unfair labour practice definition contained in the LRA.

7.10.4 EMPLOYERS' RIGHT TO FAIR LABOUR PRACTICES

Another example of deficiency in the LRA relates to the *position of employers.* It has been held that these cannot file an unfair labour practice dispute in terms of the LRA. This position was found by the Labour Court not to be unconstitutional, as employers have alternative remedies at their disposal.[1426] This response begs the question, which is not whether an *alternative* to *fairness* is available but rather fairness per se. Fairness as a value in itself has been entrenched in s 23(1) of the Constitution and it is not a sound argument that as long as alternatives are available to some, they have no reason for complaint.[1427] It is not only substantive fairness that should be available to everyone but also the institutions administering fairness as well as the remedies for redressing unfairness. It is for instance not a satisfactory response that an employer suffering desertion by an employee may approach the civil court for relief relating to breach of contract.[1428] In ***National Entitled Workers,***[1429] **Landman J** expressed the view that a lawful resignation by an employee may also be unfair

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1424 ***National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration*** 2003 24 ILJ 2335 (LC).
1425 ***Mathews v GlaxoSmithKline SA (Pty) Ltd*** 2006 27 ILJ 1876 (LC) 1878.
1426 ***National Entitled Workers Union v CCMA;*** See also ***Maseko v Entitlement Experts*** 1997 3 BLLR 317 (CCMA), where an employer attempted to refer a dispute concerning desertion by the employee for conciliation and arbitration by the CCMA. It was held that the CCMA lacked jurisdiction as employers could not refer such disputes in terms of the LRA.
1427 In ***Sidumo***, supra, the Constitutional Court, relying on its own previous judgment in ***NEHAWU*** par.37-8, reiterated that the constitutional right to fairness contained in s 23(1) extends to employers and employees alike.
1428 Cf. ***Nehawu v CCMA*** (supra) and ***Maseku*** (supra)
1429 ***National Entitled Workers Union v CCMA*** 2340A

towards the employer.[1430] Yet, such conduct does not qualify as an unfair labour practice under the current labour legislation such as the LRA, 1995. This seems to be a questionable limitation of the right that "*everyone*" has to fair labour practices as enshrined in s 23(1) of the Constitution.

It should be born in mind that it is not only employees who are entitled to fair labour practices or who need the protection of s 23(1). This right extends to everyone and certainly to employers as well.[1431] The Constitutional Court has rejected an argument that the word '*everyone*' in the Constitution is limited to human beings only, and that juristic persons do not enjoy the protection of s 23 (1).[1432] The court noted the provisions of s 8(4) of the Constitution which state that a juristic person is entitled to the rights contained in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. Not all employers are juristic persons. Nevertheless, there can be no doubt that all employers qualify as '*everyone*', and are therefore entitled to rely on s 23(1).[1433] If it had been the intention of the legislature to exclude employers, whether in the form of juristic persons or natural persons, from the ambit of s 23(1), it would have expressly stated so in Constitution or in the LRA.[1434] Statutory measures that provide some protection to employees, such as minimum wage provisions, may well be seen by employers as infringements of their right to fair (individual or collective) bargaining. It may also be regarded as interfering with the employer's right to be freely economically active and as inhibiting the right to contractual freedom. These are all examples of issues that may present problems that are not addressed by the LRA in its present form. **Davis et al**[1435] point out the possibility of attacks on the Constitutionality of the

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1430 The learned judge stated: "*This conduct may, in my view, qualify as an unfair labour practice, i.e. a practice that is contrary to that contemplated by s 23 (1) of the constitution. A lawful resignation that is also, in the circumstances, unfair, may constitute an unfair labour practice.*" The learned judge referred to ***Penrose Holdings (Pty) Ltd v Clark*** 1993 14 ILJ 1558 (IC).

1431 s 23(1) of the Constitution states that everyone has the right to fair labour practice.

1432 ***NEHAWU v UCT*** 111-112. The court pointed out that it had already rejected such a contention in the ***First Certification*** **Judgment**

1433 See also ***National Union of Metalworkers of SA v Vetsak Co-operative Ltd*** **1996** 4 SA relied upon by the court.

1434 Ibid.

1435 ***Fundamental Rights*** (1997) 216

LRA that could tear the whole fabric of our social democratic order apart. This accentuates the extent to which the issue of the deficiencies in the LRA is controversial.[1436]

7.10.5 EXCLUDED CATEGORIES OF EMPLOYEES

Not everyone who works is an employee for the purposes of the LRA. The protection afforded by s 23(1) of the Constitution therefore does not extend to certain categories of persons who nevertheless provides labour, such as those who work in their own businesses, partners in business, independent contractors, the self-employed – even judges and ministers of state.[1437]

The exclusion of certain categories of public servants from the protection of the LRA is another respect in which the Act falls short of s 23(1) of the Constitution. Here it is especially the Constitutional guarantee of fair labour practices to *'everyone'* that is not given effect to. The LRA excludes members of the National Defence Force, the National Intelligence Agency, the SA National Academy of Intelligence and the South African Secret Service from the Constitutional ambit of protection.[1438] The Employment Equity Act[1439] does the same.

This would mean that, unless these categories of persons are given direct access to s 23(1) of the Constitution, they would be denied one of the most basic constitutional rights enjoyed by others.

The Constitutional Court, recognizing this deficiency in the LRA, has decided that these persons are *'workers'* for the purposes of s 23(2) of the Constitution.[1440] In so doing it relied amongst others on Conventions and Recommendations of the ILO. Defence Force members were therefore afforded basic organizational rights,

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1436 ibid.
1437 See the judgment of **Cheadle** J in ***'Kylie' v CCMA*** 2008 29 ILJ 1918 (LC), (overruled on appeal); For an in-depth discussion of the scope of s 23(1) of the Constitution as far as it relates to employee beneficiaries of its provisions, see **Le Roux** ***"The Meaning of 'Worker' and the Road towards Diversification: Reflecting on Discovery, SITA and 'Kylie"*** 2009 30 ILJ 49, 50.
1438 s 2 of the LRA.
1439 1998
1440 ***South African National Defence Union v Minister of Defence & another {1999} 6 BCLR 615 (CC)*** 469; **Currie & de Waal** ***The Bill of Rights*** (2005) 500, 502.

such as the right to belong to trade unions. This goes some distance in affording them protection against unfair labour practices and dismissals which they would otherwise not have enjoyed.

Davis et al[1441] are emphatic that to the extent that members of the National Defence Force, the National Intelligence Agency and the South African Secret Service are employees, their constitutional right to fair labour practices has not been given effect to and that the door to the Constitutional Court stands wide open to them. We respectfully agree with these sentiments.

7.11 UNFAIR DISMISSAL

As regards *unfair dismissal*, the narrow parameters of the text of the LRA are similarly problematic, although perhaps not to the same extent as in the case of unfair labour practices. Compared to the 1979 Amendments and s 23(1) of the Constitution, which are virtually coextensive, the casuistic and narrow ambit of the definition of *dismissal* in s 186(2) of the LRA is questionable.[1442]

Unlike *unfair labour practices* which are positively defined in respect of all three its elements, namely *unfairness, labour and practice,* we do not find a positively expressed definition of an *unfair*[1443] *dismissal* in the LRA, with the exception of *automatically unfair dismissals.* The definition of the act of *dismissal* is separated from the issue of the fairness thereof. Dismissal as defined in s 186(1) needs not necessarily be unfair, in contrast with the definition of unfair labour practices. Had s 186(1) stood alone in relation to unfair dismissals, the adjudicator would have had a free discretion concerning the fairness aspect of any form of dismissal. This would then be in harmony with the legal position under the 1979

1441 ***Fundamental Rights*** (2005) 215.
1442 The former two instruments do not draw a distinction between unfair labour practices and unfair dismissals. Both are dealt with as *unfair labour practices*. An extremely wide definition is attached to the concept, covering a more extensive field than that covered by the s 186(1) definition of dismissal.
1443 With emphasis on *"unfair"*

Amendments, as well as s 23(1) of the Constitution. However, the legislature in its wisdom incorporated s 188 into the LRA.[1444]

Up to this point the wording of s 188 does not seem to have presented any profound interpretational and principial problems to the courts: Unless the employer proves the *fairness* of the dismissal, such dismissal is unfair, provided that it relates to the employee's conduct or capacity, or to the operational requirements of the employer. But a number of potential problems are identifiable concerning the ambit of s 188. So for instance, is it only an act of the employer that can amount to a dismissal. Termination of the employment relationship by the employee can never amount to an unfair dismissal or unfair labour practice, no matter how unlawful, unreasonable or unfair.[1445] The employer is left without a remedy in *fairness*, as such is not provided for by the dispute resolution machinery created by the LRA. It would seem that the only real remedy of substance is a contractual claim for damages.[1446] It also has to be noted that the courts have recently moved away from their traditional reluctance to grant orders of specific performance of employment contracts. This relief was even before the adoption of an unfair labour practice regime in 1979, regarded as a matter of judicial discretion.[1447]

Another potential problem relating to the wording of s 188, is that upon a precise reading of the section, it will be noticed that it does not focus on the *fairness* of the *dismissal* as such, but rather on the *fairness of the reason* for the dismissal.[1448] In fact the word *reason* is repeated in quick succession in s 188(1)(a).[1449] This wording of the section seems to have escaped the attention of the

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1444 s 188(1) reads: *'A dismissal...is unfair if the employer fails to prove – (a) that the reason for dismissal is a fair reason- (i) relating to the employee's conduct or capacity; or (ii) based on the employer's operational requirements...'*

1445 Cf. ***National Entitled Workers Union v CCMA***, supra

1446 ibid

1447 ***National Union of Textile Workers v Stag packing (Pty) Ltd*** 1982 4 SA 151 (T); ***Nationwide Airlines (Pty) Ltd v Roediger*** 2008 1 SA 293 (WLD); **Landman *"A Troublesome Little Point of Employment Law"*** 2002 23 ILJ 49-50.

1448 Cf. the judgment of **Ngcobo J** in ***Sidumo*** 2460 par 172-3. The learned judge stated: *For this class of dismissal to be fair, the employer must establish that the dismissal was for a 'fair reason'..."*

1449 s 188(1) (a) reads that a dismissal...is unfair if the employer fails to prove—(a) that the *reason* for dismissal is a fair *reason* (my emphasis).

courts in some instances, resulting in the court focusing primarily on the (general) fairness of the act of dismissal as such, in stead of on the fairness of the *reason* for dismissal.[1450] The fact that s 188 makes mention of *misconduct, capacity* and *operational requirements* does not mean that these are synonymous with *fair reasons for dismissal*. S 188 only requires that the *fair reason for dismissal* must relate to misconduct, capacity or operational requirements. In other words, these are thresholds that have to be crossed before a dismissal could even be considered as fair. But *per se*, they do not constitute the *fair reasons for dismissal* that the Act requires. When the actual reason for dismissal relates to one of these criteria or thresholds, such reason becomes *potentially fair*. The fairness of the actual reason for dismissal has yet to be established. The problem is however that, logically, the fairness of a *reason* for dismissal is not synonymous with fairness of *dismissal*. It is possible to separate the two concepts. An employer who dismisses may have a serious suspicion of theft, which he cannot prove. The circumstances of the case may be such however that this suspicion makes continued employment intolerable to the employer, an intolerability which might not necessarily be experienced by the employee. If we assume for the purposes of argument that the balance of proof favours the employee, it becomes clear that the employer sits with a huge problem. Should he dismiss the employee he would probably be confronted with the defense that the balance of proof weighs in favour of the employee and that the dismissal as such is therefore as a matter of fact unfair. However, section 188 does not require proof of the fairness of the dismissal as such – only of the *fairness of the reason for dismissal.* But in the particular case under consideration it may well be argued that the employer has a fair *reason*, for the dismissal, namely his suspicion of theft, even though the employee may in fact be innocent.

In corroboration of abovementioned textual interpretation of s 188 (1), the provisions of s 192(2) of the LRA become crucial. This subsection does not make mention of *fair reasons for dismissal*. It is therefore differently worded from s

1450 Cf. ***Modise v Steve's Superspar*** 525 par 16, where the court made specific reference to the *reasons for dismissal* that have to be proved, in contrast with the common law where only notice was required.

188(a) which illustrates the point made above. s 192(2) simply states that *'if the existence of the dismissal is established, the employer must prove that the dismissal is fair.'* It is a trite principle of statutory interpretation that the wording of two sections of the same statute should be harmonized and given full effect to, rather than assuming that such wording was inserted by the legislature through inadvertence, neglect or recklessness.[1451] This principle requires that meaning be given to the wording *'fair reason for dismissal'* contained in s 188(1) (a) insofar as such wording was omitted in s 192(2). Should one remain faithful to this tenet of interpretation, the end result would be that s 188(1) (a) does not require the *dismissal* as such to be fair, but only that the *reason* for the dismissal be fair. In terms of this approach serious suspicion of theft may be a fair reason for dismissal in the context of dismissal for misconduct or operational reasons, and hence could render a dismissal fair for the purposes of the LRA.

Abovementioned interpretation seems to be consistent with the so-called *reasonable employer* test in English law.[1452] S 185 of the LRA seems to contemplate a general right to fair labour practices along thee lines of s 23(1) of the Constitution and s 192(2). However, it should not be interpreted in isolation form s 188(1), which is the very section that limits the ostensibly comprehensive rights conferred by ss 185, 192(2) of the LRA and s 23(1) of the Constitution.

To summarise, s 188(1) pose a dual problem. In the first place it unduly limits the right to fair labour practices – and hence also the right not to be unfairly dismissed – by virtue of a narrowing of the types of dismissal that qualify as *potentially fair reasons* for dismissal.[1453] In this sense there is a strong resemblance to the English Employment Rights Act, (ERA).[1454] Apart from the narrowing aspect, s 188(1) is also awkwardly worded. It emphasises the fairness of the *reasons* for the dismissal, instead of the fairness of the dismissal as such.

1451 The cardinal rule of interpretation: ***Secretary for Inland Revenue*** 156; **Cockram *Interpretation of Statutes*** (1987) 43

1452 See the English case of ***Dobie v Burns***, supra, in regard to the application of that test.

1453 i.e. misconduct; incapacity and operational requirements

1454 ERA was comprehensively discussed in Chapter V, supra.

In conclusion, the text of the LRA itself should also not be considered in isolation from Schedule 8: Code of Good Conduct: Dismissal.[1455] A perusal of this Code reveals that it seems to be premised on the principle of collective bargaining between employers and employees.[1456] Where a workforce is unionized and collective bargaining thrives, the deficiencies in the text of the LRA might not be so glaring. At least unions can bargain for detailed and comprehensive rules and regulations dealing with every conceivable practice in the workplace, including dismissal. The same cannot be said about a non-unionised workforce or the individual employee. They are in need of more comprehensive protection of security of employment and fair labour practices in the LRA itself. As far as the deficiencies are concerned, the Code is in any case of very limited assistance as it cannot be interpreted to bring about results repugnant to or unforeseen by the provisions of the LRA itself. Its application thus has to be confined to dismissal as described in the LRA. From the employers' point of view it might also be too narrow in regarding only *misconduct, capacity* and *operational requirements as potentially good grounds for dismissal.*[1457]

7.12 DIRECT CONSTITUTIONAL ACCESS

From its inception, the CC held the view that as a general principle parties to disputes should wherever possible avoid the unnecessary adjudication of constitutional issues in an attempt to resolve disputes.[1458] This approach has been reiterated and applied fairly consistently by the CC and other courts.[1459] It is

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1455 s 188(2) lays down that any person considering whether dismissal has taken place for a fair reason must take into account a relevant Code of Good Conduct, which is in this case Sch. 8 to the LRA.

1456 Item 1(2) of the Code provides that the LRA emphasises the primacy of collective agreements. The Code is not intended as a substitute for disciplinary codes and procedures where these are the subjects of collective agreements or the outcome of joint decision-making.

1457 Item 2(2) of the Code specifically states that there are only three grounds on which termination of employment might be legitimate, namely *misconduct, capacity* or *operational requirements.*

1458 ***S v Mhlungu*** 1995 3 SA 867 (CC). ***Gcaba v Minister of Safety & Security*** 2009 30 ILJ 2623 (CC) 2633 par 36-8; See also ***SA Maritime Safety Authority v McKenzie*** 2010 31 ILJ 529 (SCA) 543 par 27 and authorities there cited: ***Ingledew v Financial Services Board*** 2003 4 SA 584 (CC);***Minister of Health v New Clicks SA (Pty) Ltd (Treatment Action Campaign)*** 2006 2 SA 311 (CC); ***SA National Defence Union v Minister of Defence*** 2007 5 SA 400 (CC).

1459 ***Zantsi v Council of State, Ciskei*** 1995 4 SA 615 (CC) par. 8; ***Schinkel v Minister of Justice*** 1996 6 BCLR 872 (N); ***S v Friedland*** 1996 8 BCLR 1049 (W); ***Kauesa v Minister of Home Affairs*** 1995 1 SA 51 (NMS); ***S v Melani*** 1995 4 SA 412 (E); ***S v Eckart*** 1996 2 BCLR 208 (SE) 210-1; **Currie & de Waal *The Bill of Rights Handbook*** 75-78.

known as the *salutary principle* of *avoidance.*[1460] It is of American origin and entails that questions pertaining to constitutional law should generally not be anticipated in advance of the necessity of deciding it.[1461] The idea behind the principle is that the law should be allowed to develop incrementally and not by uncontrollable leaps and bounds. Constitutional principles and their interpretation and application should mature with time, so as to provide opportunity to the Legislature itself to bring the law in line with constitutional principles.[1462] This form of development of the law is seen as primarily the task of the Legislature and other organs of government. The judiciary is mainly tasked with the interpretation of the Constitution as given effect to by the Legislature by means of effectuating statutes like the LRA and the EEA.[1463] Wherever possible, a court of law should first apply the provisions of ordinary statutory or common law to resolve a dispute.[1464] This is especially the case where the Constitution itself has delegated the power of adopting effectuating legislation in regard to certain matters to the Legislature, or where a particular legislative instrument purports to give effect to a provision of the Bill of Rights. The LRA, EEA, BCEA and PAJA[1465] are examples of such legislation. Parallelism or parallel systems of jurisprudence should wherever possible be avoided.

In ***Minister of Health v New Clicks SA (Pty) Ltd***[1466] the Constitutional Court adopted the view expressed by **Hoexter**, that it is impermissible to simply sidestep effectuating legislation such as PAJA, the EEA and the LRA, by having direct resort to the Constitution.[1467] The same approach was adopted in ***SANDU***

1460 ***Zantsi*** 615 par 8

1461 ***Currie & de Waal The Bill of Rights*** (2005) 75.

1462 ibid. Cf. the following dictum by **Ncgobo J** in ***NEHAWU v University of Cape Town*** par 33-35: *"The concept of unfair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the specialist tribunals including the LAC and the Labour Court."*

1463 ibid.

1464 Op. cit. 77

1465 PAJA does not apply to labour relations.

1466 ***(Treatment Action Campaign & Another as Amici Curiae)*** 2006 2 SA 311 (CC)

1467 **Hoexter** ***The new Constitutional & Admiistrative law*** (2002) 87-8 argues that the principle of legality provides a much-needed safety net when legislation such as PAJA does not apply to a given situation. However, effectuating legislation such as PAJA (and, it follows, the EEA and LRA) cannot simply be ignored by having direct constitutional access. This follows logically from the fact that these pieces of legislation give effect to constitutional rights. The same holds good as regards the common law, which is displaced by effectuating legislation. The common law may only be used to inform the meaning of constitutional rights and acts like PAJA,

v Minister of Defence.[1468] It has to be born in mind that the Constitution itself does not provide direct remedies for the enforcement of the rights and values that it enshrines. This includes the rights derived from ss 23(1) and 33(1) of the Constitution.[1469] On the other hand, effectuating legislation such as LRA normally contain elaborate and specific remedies aimed at the enforcement of such constitutional rights that are given effect to by them.[1470]

Ultimately however, we are here dealing not with a law of the Medes and the Persians: There should be, and there is in fact no absolute bar to direct access to the constitutional right to fair labour practices. The salutary principle of avoidance is based only on judicious prudence and practice. Where recourse to effectuating legislation would obviously not achieve anything, would lead to absurdities, hardship, impracticalities and a waste of resources, direct access should be allowed.[1471] Both the Constitutional Court and the SCA have for instance in principle recognised the need to award direct *'constitutional damages'* to a claimant where appropriate.[1472]

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but cannot be used as an alternative thereto. Cf the separate judgment of **Ngcobo j** in ***New Clicks*** par 436: *"In my view, there is considerable force in the view expressed in NAPTOSA...Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on sect. 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to sect. 33, is applicable, is in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA, and another under s. 33 and the common law."*

1468 (2007) 28 ILJ 1909 (CC). In par. 52, **O'Regan J** stated: *"A litigant who seeks to assert his or her right to engage in collective bargaining under sect. 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s. 23(5). If the legislation is wanting in its protection of the s. 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights."*

1469 s 23(1) protects the right to fair labour practices, while s 33(1) contains the so-called administrative justice provisions, stating that administrative justice must be lawful, reasonable and procedurally fair.

1470 ***Fose v Minister of Safety and Security*** 1997 3 SA 786 (CC) par. 99.

1471 Cf. **Currie & de Waal *The Bill of Rights*** (2005) 78.

1472 In ***Fose v Minister of Safety & Security*** the Constitutional Court recognised the principle that direct constitutional damages could be awarded in appropriate cases. Fose claimed damages from the Minister on the basis of alleged assault by members of the police force, during which he suffered pain, lost of amenities of life, impairment of dignity, medical expenses etc. In addition to these usual claims, he brought a separate claim of a punitive nature which he labeled 'constitutional damages'. The court recognised that such a claim was permissible. However, Fose was unsuccessful on the facts of the case.

In ***Jayiya v MEC for Welfare, Eastern Cape*** 2004 2 SA 617 (SCA), the SCA recognised the principle of constitutional damages in appropriate cases, i.e. where no statutory or common law remedies existed.

It was nevertheless held by the High Court in ***NAPTOSA***[1473] that direct access to the Constitution is not the solution to the problem of access to s 23(1).[1474] More problems in the form of parallel or even contradictory lines of jurisprudence and precedent could develop as a result of direct Constitutional access, over and above available LRA access. The court found it virtually inconceivable that an Applicant could be permitted to go beyond the regulatory framework which the LRA established, safe for the purpose of attacking the constitutionality of the LRA itself, in the event that the latter is deficient in the protection of the Constitutional rights enshrined in s 23(1) of the Constitution.[1475] Legislative amendment, and not judicial creativity, was found to be the appropriate course to take in this regard.[1476]

One of the main arguments against direct constitutional access in labour matters, is that s 23(1) of the Constitution does not confer concrete and specific rights. On this basis direct access was denied to a person who claimed an increase in remuneration.[1477] On the other hand again, where a transfer of employees was prompted by the employer's ulterior motives, direct constitutional access was allowed.[1478] The need for direct access arose from the fact that the LRA itself does not declare each and every unfair practice arising between employer and employee an *unfair labour practice*. The practice of transferring or relocating employees from one workplace to another, which has the potential of causing great hardship and unfairness[1479] is not even mentioned anywhere in the LRA.[1480]

1473 ***NAPTOSA & Others v Minister of Education, Western Cape*** 2001 22 ILJ 889 ©

1474 For confirmation of this approach, see ***NEHAWU v University of Cape Town*** 106 par 17.

1475 123I-J. Cf ***Ingledew v The Financial Services Board*** 2003 8 BCLR 825 (CC) where the court considered the issue, but left it undecided , whether the Applicant had two rights – one under the rules of Court , and another under the Constitution - which are compatible and which can be invoked by him at his own option.

In ***Chirwa v Transnet*** 114A, the Constitutional Court explained: *"This is of course subject to the constitutional principle that we have recently reinstated, namely, that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."*

1476 Cf. **Du Toit et al *Labour Relations Law*** (2006) 484.

1477 ***Moloka v Greater Johannesburg Metropolitan Council*** 2005 26 ILJ 1978 (LC) par 12-3.

1478 ***Simela v MEC for Education, Province of the Eastern Cape*** 2001 9 BLLR 1085 (LC); Cf. ***Mzimni & Another v Municipality of Umtata*** 1998 7 BLLR 780 (Tk).

1479 Cf. ***Gray Security Services v Cloete*** 2000 21 ILJ 940 (LC)

The preponderance of jurisprudence and academic opinion seems to be against direct constitutional access, especially in labour matters. However, some judgments, even though a minority, seem to favour direct Constitutional reliance. In ***National Entitled Workers Union v Commission for Conciliation, Mediation and Arbitration***[1481], followed in **Mathews v GlaxoSmithKline SA (Pty) Ltd**[1482] views in favour of direct constitutional access were expressed.[1483] In the controversial and somewhat unclear judgment[1484] of ***Piliso v Old Mutual Assurance Co (Pty) Ltd***[1485] an employee who claimed to have been sexually harassed in the workplace by a person of unknown identity, brought a claim against the employer resting on three legs: Firstly on s 60 of the EEA; alternatively a delictual claim, and in the further alternative a claim for *'constitutional damages'* based directly on s 23(1) of the Constitution. The main claim in terms of s 60 of the EEA was dismissed on the ground that it had not been established by the employee that it was indeed an employee of Old Mutual that was responsible for the harassment. The delictual claim was dismissed because the identity of the assailant had not been established while the evidence showed that persons other than employees also had access to the workplace. Constitutional damages, based directly on s 23(1) of the Constitution, was granted, the Labour Court using the criteria of *just cause* and the *legal convictions of the community.*[1486] A bold attempt was made by the learned judge to formulate some guidelines as to what is expected of employers in like

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1480 Cf. ***Gray Security Services*** where the dismissal of an employee for refusing a transfer was held to be procedurally unfair for lack of consultation prior to the transfer.

1481 2003 24 ILJ 2335 (LC)

1482 2006 27 ILJ 1976 (LC)

1483 In ***Mathews***, **Nel AJ** followed the judgment of **Landman J** in ***National Entitled Workers Union***, **holding** that if a party wished to prohibit a labour practice which was unfair, and which was not regulated by a conventional statute, then it could approach a court of competent jurisdiction, relying on s 23(1) of the Constitution.

1484 For a critical discussion of ***Piliso***, see **Ngcukaitobi** ***"Direct Application of the Constitution in the Labour Court: A Note on Piliso v Old Mutual Assurance Co (Pty) Ltd & Others (2007) 28 ILJ897 (LC)"*** 2007 28 ILJ 2178

1485 2007 28 ILJ 897 (LC)

1486 In par. 76 of the judgment, the learned judge stated: *"If I do find that the (employer's) conduct...post the sexual harassment incident falls short of the standard, the legal convictions of the community may reasonably require and expect of an employer, ...is such conduct actionable and does it constitute just cause for the employer to be held liable to pay the employee constitutional damages."*

situations.[1487] This was probably done as part of an exercise of interpreting and giving judicial effect to s 23 (1) of the Constitution. Despite criticism that has been leveled against this judgment for granting direct access to the Constitution in awarding constitutional damages, the judgment contains some useful positive aspects. The antagonists of direct constitutional access usually adopt the attitude that when an effectuating piece of legislation such as the EEA or the LRA falls short of, or are at odds with s 23(1) of the Constitution, with the result that such legislation does not give effect to the constitutional right to fair labour practices, a challenge of the constitutional validity or constitutionality of such legislation should precede direct constitutional reliance. This could indeed be a tedious and cumbersome requirement for the citizen who has a *constitutional* right to fair labour practices, and not simply an EEA or LRA right to fair labour practices.

It could be argued that in ***Piliso***, the claims were brought and adjudicated in the alternative, and that only when reliance on the EEA (effectuating legislation) and the common law failed and left the complainant without further remedies, was s 23(1) of the constitution invoked and applied. It has to born in mind though, that the complainant succeeded with her constitutional claim in respect of a cause of action not covered by s 60 of the EEA and the common law, namely the employer's post-incident manner of dealing with the complaint. There seems to have been no basis in terms of effectuating legislation such as the EEA or the LRA on which this claim was based. It could be argued that direct constitutional access was therefore not allowed. It was only granted after it was found that the claim could not be founded on any other more direct cause of action.

The question arises as to whether there was indeed an alternative to direct access available. The employer's non-chalant attitude toward and treatment of Piliso seems to fall within the ambit of a possible delictual claim for inter alia impairment of her *dignitas*. It is suggested that the court could have considered

1487 In par. 78 of the judgment, it was held that certain minimum obligations rested on employers in the circumstances of the case. This requires a prompt investigation to identify the culprit and deal with him. All reasonable steps are to be taken in this process. The best possible support should be given to the employee, including consultations with him or her. Lastly, immediate steps should be taken to avoid a recurrence of similar incidents in future.

developing the common law in this regard, if necessary. The duty of exhibiting good faith, confidence and trust in the employment relationship in terms of the common law of contract could also have been considered as a valid and recognised ground for finding breach of contract on the part of the employer. Here again, the weaknesses of the effectuating legislation such as the EEA and the LRA become apparent. There can be no doubt that in the circumstances, the employer failed in its duties and that it treated the employee unfairly. Yet its conduct could easily have escaped sanction if the court opted to remain within the confines of LRA and the EEA.

7.13 EQUITY AND JURISDICTIONAL ISSUES

The inherent conceptual and operational dichotomy between *equity* and *strict law* is bound to manifest itself in the adjudicatory structures established to administer these two dispensations respectively. We have seen that under the common law, as applied here domestically, equity was never excluded from the jurisdiction of the erstwhile Supreme Court and the AD.[1488] Equity and law were administered by the very same courts as part of an integrated adjudicatory system. Equity formed part of the inherent jurisdiction of the Supreme Court.[1489] But equity occupied a subsidiary and supplementary role to strict statutory or common law, the terms of an employment contract etc. As such, there was no split jurisdiction applicable to law and equity or between courts of various stature or function. Courts of law were simultaneously and inherently courts of equity.[1490] This is still the position today.

1488 ***Mills & Sons v Benjamin Bros*** 121

1489 Cf. however, **Merryman *The Civil Law Tradition*** (1985) where it is stated that in the civil law tradition courts never had inherent equity jurisdiction and the inherent power to exercise an equitable discretion. Such powers always had to be conferred by statute. The learned author continues: *"Although the matter has produced much discussion in the past, and is still the source of argument among civil law scholars, the dominant view is still that, in the interest of certainty, judges must be carefully restricted in the exercise of equity."* We agree with the learned author that this conservative approach may have been followed in English (common) law tradition. However, the necessity of having equity as a species of law has been recognised in civil law tradition since Aristotelian times. In many modern systems of law, especially in employment law, great codes of equity have been adopted in countries like England and South Africa. In fact, as pointed out earlier, in South Africa the right to fair labour practice has been constitutionally entrenched and a very wide judicial discretion is recognised in this regard.

1490 ***Hauman v Nortje; Spencer v Gostelow*** (supra).

The establishment of the Industrial Court in 1979 did not complicate this issue to any considerable degree. The reason therefore was that the jurisdiction that was conferred on that court, although extremely widely and comprehensively formulated, was at the same time very clearly delimited: The Industrial Court adjudicated *unfair labour practice* disputes. The mission and function of the court was to determine whether any dispute could be regarded as an *unfair labour practice* and from that point of view there was little overlap if any with the functions of the civil courts, such as the erstwhile Supreme Court or the AD. Lastmentioned courts simply had no jurisdiction at all to determine directly and exclusively the *fairness* as such of any labour practice or dismissal, although nothing prevented the civil courts to apply equity in subsidiary form in the exercise of its inherent jurisdiction. Because of the very comprehensive and exclusive nature of the Industrial Court's equity jurisdiction, virtually all labour matters of a vastly varied nature fell to be determined by that court. This was unlike the present CCMA – its replacement – which has jurisdiction to determine only certain defined forms of *unfair labour practice* and *unfair dismissal.*[1491] The result was that the bulk of cases in practice ended up in the Industrial Court in stead of the civil courts. This was despite the fact that the common law jurisdiction of the then SC and AD to determine the *lawfulness*[1492] of labour practices remained unaffected by the labour legislation. The Industrial Court on the other hand was also not possessed of the powers of a court of law and did not enjoy the status of a court of law.[1493] This in effect meant that the risk of overlapping jurisdiction between the Industrial and the Civil courts was minimal.

The 1995 LRA brought in its wake a serious complication in this regard. This stems from a number of factors.

1. The first is the much more limited definition of unfair labour practice under the 1995 LRA, as compared to the definitions prior to 1995. As has been noted, only a fixed number of strictly defined *unfair labour practices* have been embodied in s

1491 These are mainly defined in s 186 of the LRA
1492 As distinguished from fairness.
1493 ***SA Technical Officials Association v President of the Industrial Court*** 1985 1 SA 597 AD

186 of the LRA. The Labour Court has held – correctly in our submission - that s 186 of the LRA contains a closed list of unfair labour practices.[1494] We have seen above that by contrast, the Industrial Court had jurisdiction to decide if any labour practice whatsoever constituted an unfair labour practice. Because of this fragmented and casuistic definition of unfair labour practices in the 1995 LRA, there was a natural tendency amongst litigants to look for more favourable relief elsewhere, namely in the civil courts. By the same token there was the allure to litigants of the fairly wide and flexible equitable jurisdiction of the CCMA. This caused a natural and in some cases a calculated practice of forum shopping in search of seemingly more suitable and favourable adjudicatory structures.[1495]

2. In the second place the LRA contains various provisions that oust or exclude the jurisdiction of the High court in respect of some disputes, but confers concurrent jurisdiction with the Labour Court in respect of others. S 157 has become notorious for generating elaborate jurisdictional litigation in this regard.[1496]

3. Thirdly, and most importantly, is the fact that unfair labour practices in the broad, original sense of the term, as applied by the Industrial Court under the 1979 Industrial Conciliation Act Amendments, have become constitutionalised. Both the 1993 Interim Constitution and the 1996 final Constitution contain open-ended and comprehensive references to everybody's right to *fair labour practices.*[1497] S 185 of the current LRA similarly provides comprehensively that everyone has the right not to be unfairly dismissed or to be subjected to unfair

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1494 ***Booysen v South African Police Service*** **2009** 30 ILJ 301 (LC) 307 par 16. Here the court held that s 186 contains a closed definition of unfair labour practices and, unlike its predecessor in the 1956 LRA, as amended, is not open-ended. The practices listed do not include an unfair act in relation to the conduct of a disciplinary hearing, for instance. For that reason the Labour Court lacks the jurisdiction to entertain a dispute relating to the fairness of such hearings under the banner of an unfair labour practice.

1495 See for instance: ***Langeveldt v Vryburg Transitional Council*** (supra)

1496 s 157(1) provides that the LC has exclusive jurisdiction in respect of all matters that elsewhere in the Act or in terms of any other law are to be determined by the LC. s 157(2)(a) states that the LC has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter II of the Constitution and arising from labour relations. s 157(2)(b) provides concurrent jurisdiction to the LC with the High Court in any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as employer.

1497 s 23(1) of the Constitution

labour practices. However, unlike previous legislation under which the Industrial Court operated, the LRA provides what seems to be an exhaustive list of narrowly defined *unfair labour practices.* It also limits the jurisdiction and powers of any court considering a dismissal dispute, by strictly defining the meaning and various forms of dismissal.[1498] It is this incoherent narrowing of the scope of s 23(1) of the Constitution that has contributed considerably to jurisdictional and related conundrums in practice.

The LAC expressed itself critically for the first time in regard to this jurisdictional conundrum and the forum shopping that goes with it as far back as 2001 in ***Langeveldt v Vryburg Transitional Local Council.***[1499]

In that case the employee, a Town Clerk of the Municipality had been dismissed for alleged misconduct. He referred an unfair dismissal dispute to the Local Government Bargaining Council for conciliation. When conciliation failed, the employee requested arbitration by the CCMA. Before arbitration could take place he withdrew the request and brought an application in the High Court for review of the dismissal.[1500] Such application was based on the fact that the dismissal constituted an act by an organ of state in its capacity as employer as contemplated in s 239 of the Constitution and was therefore liable for review by the LC in terms of s 158(1) (h) of LRA. The LC dismissed the review on the merits, but a successful appeal to the LAC followed.

Highlighting the jurisdictional complexities that had been occasioned by the split and/or concurrent jurisdictions of the HC, the LC and even the CCMA and the Bargaining Councils since the inception of the 1995 LRA, **Zondo** JP cited a plethora of cases where the courts were faced by critical jurisdictional issues.[1501] After painstaking analysis of virtually the whole of South African jurisprudence

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1498 s 186 of the LRA.
1499 2001 22 ILJ 1116 (LAC).
1500 The application for review was brought in terms of s 158(1) (h) of the LRA, which empowers the Labour Court to review any decision or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.
1501 **Langeveldt** 1125-6. Here the learned judge cites relevant case law ranging from ***Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union*** 1997 18 ILJ 84D to ***Hoffman v SA Airways*** 2000 21 ILJ 891 (W), and ***Claase v Transnet Bpk*** 1999 3 SA 1012 (T).

where courts of the same or similar status, such as the HC and the LC, had overlapping jurisdiction in respect of virtually the same matters, the learned judge expressed serious discontent with this jurisdictional conundrum that could end up in dual and conflicting jurisprudence.[1502] He recommended the transfer of jurisdiction in all labour disputes, i.e. disputes between employer and employee in respect of labour relations generally, from the High Court and other civil courts, to the Labour Court.[1503] This recommendation was made after an in depth analysis of the comparative status of the HC and the LC, as well as the LAC and the SCA respectively. The analysis concluded that these courts enjoy equal status respectively. At the time that Langeveldt was decided, it was still assumed that the LAC enjoys the status of a final court of appeal in labour disputes. There should accordingly have been no need for further referral of labour disputes to the HC and SCA.[1504] The additional role of the CCMA was also highlighted in this regard.[1505]

The Legislature did not heed the well motivated call of the LAC for jurisdictional reform. A serious period of confusion caused by conflicting decisions followed. In many cases the High Court rightly or wrongly decided that it lacked jurisdiction in certain labour matters, while it erroneously assumed jurisdiction in others, based primarily on s 157(1) of the LRA.[1506] There seems to be no need any more to deal with these cases specifically, as they have largely been superseded by recent judgments of the Constitutional Court.

1502 1139 par 67

1503 Ibid.

1504 On 1120-1121 the learned judge comes to the conclusion that the LC is endowed with the same status as the HC. This is in accordance with s 151(2) of the LRA. The conclusion that the LAC enjoys the same status as the SCA was not born out by subsequent judgments of the Constitutional Court. The SCA is in fact an appeal court to the LAC.

1505 Ibid.

1506 Cf. ***Mondi Paper v PPWAWU*** 1997 18 ILJ 84 (D); ***Kilpert v Buitendach*** 1997 18 ILJ 1296 (W); ***Sappi Fine Papers v PPWAWU*** 1998 19 ILJ 246 (SE); ***Mcosini v Mancotywa*** 1998 19 ILJ 1413 (Tk); ***Coin Security Group v SANUSO*** 1998 19 ILJ 43 ©; ***Kritzinger v New Castle Plaaslike Oorgangsraad*** 1999 20 ILJ 2507 (N);***CWU v Telkom*** 1999 20 ILJ 991 (T); ***Jacot-Guillarmod v Provincial Government, Gauteng***, 1999 3 SA 594 (T); ***Mgijima v Eastern Cape Appropriate Technology Unit*** 2000 2 SA 291 (Tk); 2000 21 ILJ 291 (Tk); ***Louw v Acting Chairman of the Board of Directors, North West Housing Corporation*** 2000 21 ILJ 482 (B); ***Runeli v Minister of Home Affairs*** 2000 21 ILJ 910 (Tk); ***Eskom v NUM*** 2001 22 ILJ 618 (W); ***TGWU v Kempton City Syndicate*** 2001 22 ILJ 104 (W); ***NAPTOSA v Minister of Education, Western Cape*** 2001 2 SA 112 (C);***Mbayeka & Another v MEC for Welfare, Eastern Cape*** 2001 1 All SA 567 (Tk).

The CC considered the jurisdictional conundrum in ***Fredericks v MEC for Education & Training, Eastern Cape.***[1507] Here the employees were teachers who alleged that their constitutional rights to equality and just administrative action in terms of ss 9 and 33(1) of the Constitution respectively, had been violated. Their employer, the Eastern Cape Department of Education had refused them voluntary retrenchment and severance packages that had been granted to some of their colleagues earlier in terms of a collective agreement. A full bench of the High Court dismissed the application on the strength of s 24 of the LRA, holding that the CCMA had exclusive jurisdiction in regard to the interpretation and application of collective agreements.[1508]

On appeal, the CC held that although s 24 of the LRA seemed to confer exclusive jurisdiction on the CCMA, such exclusive jurisdiction did not relate to disputes involving constitutional issues, which the court found the dispute under consideration in fact was concerned with. S 157(2) conferred concurrent jurisdiction on the High Court, with the Labour Court in matters where there is an alleged violation by the State in its capacity as employer, of constitutional rights. Viewed from this perspective, s 157(1) of the LRA did not oust the jurisdiction of the HC.[1509] The ouster of jurisdiction by s 24 seemed more apparent than real, since ouster could only be constitutional if it assigned the jurisdiction of the High Court to a court of similar status, in this case the Labour Court. This had not been done by the LRA as[1510] the CCMA is not a court of law.[1511] The ultimate

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1507 2002 2 SA 793 (CC); 2002 23 ILJ 81 (CC).

1508 The court *a quo*, per **White J**, had also found that the HC lacked jurisdiction to adjudicate a dispute involving the interpretation or application of s 24 of the LRA. The court *a quo* relied on ***Imatu v Northern Pretoria Metropolitan Substructure*** 1999 2 SA 234 (T); 1999 20 ILJ 1018 (T) where it was held that the HC lacked jurisdiction relating to the application or interpretation of s 24 of the LRA. However, it was not specifically considered in the Imatu case whether the HC's jurisdiction had indeed been ousted by the LRA. Cf. ***Fredericks*** 91 par.14.

1509 The Constitution itself does not contain a definition of matters that are constitutional. In ***S v Boesak*** 2001 1 SA 912 (CC); 2001 1 BCLR 36 (CC) par.13 the approach to be adopted was spelled out by the CC itself. Cf. ***Fredericks*** 89 par 10. The approach should be that the Constitution itself regards constitutional matters to be extensive, rather than restrictive.

1510 The reason for this is that s 169 of the Constitution provides that the High Court may decide any constitutional matter, except matters that only the CC may decide or that are assigned by an Act of Parliament to another court of a status similar to that of a HC. The HC may furthermore decide any matter not assigned to another court by an Act of Parliament. Cf. ***Fredericks*** 99 par 30-31.

determinant of the correct adjudicatory institution with jurisdiction depends on which rights an applicant alleges have been infringed. In *casu*, ***Fredericks*** based his case on ss 9 and 33(1) of the Constitution. He was not attempting to enforce rights of a contractual nature as per the collective agreement, but rather his constitutional right to equality and administrative justice. In respect of these rights, the High Court has jurisdiction.[1512] The applicants in ***Fredericks*** had expressly disavowed all reliance on s 23(1) of the Constitution, and therefore on the LRA which gives effect to the constitutional right to fair labour practices.[1513] The finding by the court *a quo* that it lacked jurisdiction was therefore overturned.

Contrary to expectations, ***Fredericks*** did not finally resolve the confusion relating to jurisdiction in labour matters. In fact many contradictory judicial pronouncements followed in its wake, leading to even more confusion. In ***Chirwa v Transnet Ltd*** [1514] the CC made a deliberate effort to resolve this unsatisfactory state of affairs.[1515] There the employee had been dismissed for poor work performance. After conciliation of the dispute had failed at the CCMA, she approached the High Court with an application for the review of her dismissal on the ground that it was procedurally unfair. She relied on her constitutional right to administrative action that is *lawful*, *just* and *procedurally fair,* as enshrined in s 33(1) of the Constitution, and as given effect to by PAJA.[1516] She succeeded in the HC. But the decision was reversed by the SCA on appeal, which held that her reliance on PAJA was misplaced as her dismissal did not amount to *administrative action* reviewable in terms of that Act.

1511 ***Fredericks*** 99 par. 30. The court held that if all disputes concerning the interpretation or application of collective agreements , even where those disputes are founded upon an alleged infringement of constitutional rights, must be conciliated and arbitrated by the CCMA, and are not justiciable by the HC or a court of similar status, s 24 would be inconsistent with s 169 of the Constitution. ***Fredericks*** par. 30.

1512 The fact that the HC has jurisdiction does not mean that the CCMA does not have jurisdiction over constitutional complaints arising out of the interpretation and application of collective agreements. On the contrary, in resolving such disputes, the CCMA is bound to consider and apply constitutional provisions in the exercise of its own jurisdiction.

1513 ***SA Maritime Safety Authority v McKenzie*** 2010 31 ILJ 529 (SCA) 543 par.27.

1514 2008 29 ILJ 73 (CC).

1515 For comment on ***Chirwa***, see **Holness and Devenish *"The Law in relation to Employee Claims relating to Dismissal: Jurisprudential Principle or Legal Pragmatism"*** 2008 71 THRHR 142.

1516 Promotion of Administrative Justice Act, 3 of 2000.

The CC upheld the judgment of the SCA. It found[1517] that the HC had no concurrent jurisdiction in the matter since the employee's case was based on the unfair dismissal provisions relating to poor work performance contained in the LRA. She had access to the specific and dedicated procedures, institutions and remedies provided by the LRA for dismissal for poor work performance disputes. These finely tuned measures contained in the LRA could not be discarded or ignored by a litigant with a dispute of this nature. The initial remedies that she sought under the auspices of the CCMA should not have been abandoned. These she should have pursued until the very end. The court held[1518] that the dismissal did not constitute administrative action, with the result that PAJA did not apply.[1519]

A second respect in which the judgment is of landmark importance is that it practically abolished the traditional difference between public sector and private sector employees for the purposes of labour law. The divide between these two, and differentiated treatment on the basis of public sector employment, was declared unjustified, as such dichotomy is not to be found in the purpose, objectives and text of the LRA.[1520]

The court furthermore revisited the overlapping and competing jurisdictions conferred on various courts and institutions by the labour laws. Having considered especially ss 157(1) and (2) of the LRA in this regard, the court concluded that these provisions should rather be read as jurisdiction conferring provisions relating to the Labour Court. Their aims and objectives are to confer a comprehensive labour jurisdiction, including jurisdiction relating to matters such as fundamental rights, on one *specialized* court, namely the Labour Court. In the

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1517 Per the majority judgment delivered by **Skweyiya J.**
1518 Per **Skweyiya J**, with whom the majority concurred.
1519 In the minority judgment **Ngcobo J** observed that the dismissal indeed involved the exercise of public power. However that fact does not per se necessarily determine whether an administrative act reviewable under PAJA is performed. The learned judge found that the dismissal involved the exercise of contractual rights and on that basis did not amount to administrative action.
1520 Loc. cit.

light of these findings, the court echoed the call for legislative reform that was made as far back as 2001 by the LAC in ***Langeveldt.***[1521]

Chirwa represents a major development in the law relating to labour jurisdiction. The issue is still not without controversy, although the preponderance of judgments seems to regard it as a settled issue now that where a party to a labour dispute places some reliance on any of the provisions of the LRA or s 23(1) of the Constitution, the High Court will lack jurisdiction to adjudicate the dispute. To determine whether as a matter of fact there is such reliance, the referral, claim, summons, or founding documents in the case would have to be scrutinized. In other cases the court will be less prone to decide the matter on the basis of the reliance of the applicants and will determine for itself whether the issue involved falls under the provisions of the LRA or s 23(1) of the Constitution. If so, the High Court lacks jurisdiction. The courts are also alive to the fact that a party may present his or her case as a constitutional matter over which the HC is claimed to have jurisdiction, whereas in fact the principal portion of the dispute may actually relate to issues of fairness, in respect of which the LC has jurisdiction.[1522] Thus in ***Mbashe Local Municipality v Nyubuse***[1523] the non-payment of a public official's salary was directly linked to poor work performance, and from there to the relevant provisions of the LRA. PAJA was declared inapplicable to the dispute and the HC was held to lack jurisdiction.[1524]

It would seem as though ***Fredericks*** remains distinguishable from ***Chirwa*** and subsequent judgments, mainly on the basis that in ***Fredericks*** there was an

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1521 Loc. cit.

1522 In ***Chirwa,*** the administrative action complained of allegedly contravened a number of stated sections of PAJA, such as ss 3(2) (b), 6(2)(a)(iii), 3(3)(a), 6(2)(b),and 6(2)(f)(i). Despite this, the court remarked that in respect of the last two complaints, the employee sought to rely on items 8 and 9 of Sch. 8 to the LRA. This meant that her claim was dealt with on the basis that it was brought under the provisions of the LRA, depriving the HC of jurisdiction. This approach was adopted and approved in ***Makambi v MEC, Dept. of Education, Eastern Cape Province*** 2008 29 ILJ 2129 (SCA) 2134 par 16.

1523 2008 29 ILJ 2147 (E) 2155 par 14.

1524 Cf. ***MEC , Department of Education , Eastern Cape Province v Bodlani in re Bodlani v MEC, Department of Education, Eastern Cape Province & Another*** 2008 29 ILJ 2160 (Tk). Here PAJA was held applicable to the matter, since it was found to have involved administrative action, unlike Fredericks. The issue involved was refusal of public officials to pay the salary of a public service employee. It is submitted with the greatest of respect that this judgment is at variance with the overwhelming weight of authority, more specifically ***Chirwa, Makambi*** and ***Mbashe*** (supra).

explicit disavowal of any reliance on s 23(1) of the Constitution and the provisions of the LRA. This seems to be a prudent course that should be adopted by every party to a labour dispute before claiming that the HC has jurisdiction to deal with such dispute. Any reliance on or even reference to s 23(1) of the Constitution or the LRA in the pleadings may lead the court to adopt the attitude that the case is primarily based on the fairness dispensation introduced by the LRA, and that the HC therefore lacks jurisdiction. In ***Makambi***,[1525] ***Chirwa*** was interpreted as not conferring an institutional *election* on a party to a labour dispute. The fact that a party makes such election seems to be immaterial in terms of this approach. ***Fredericks*** is regarded as distinguishable from ***Chirwa***, not on the basis of *election*, but on the basis of the *disavowal* of reliance on s 23(1) of the Constitution.[1526]

Chirwa is authoritative in yet another important respect. Apart from the *migration of jurisdiction* from the High Court to the Labour Court that it initiated in accordance with the long standing recommendations of **Zondo JP** in ***Langeveldt***, it re-affirmed the nature and status of the Labour Court. Over and above the fact that this court has a status equal to that of the High Court,[1527] the point that this court is of a *specialized* nature dedicated to the resolution of unfair labour disputes was stressed by the CC in ***Chirwa*** more than once.[1528] ***Chirwa***

1525 supra

1526 Cf. the following summary by **Skweyiya J** in par. 58 of ***Chirwa*****:** *"Notably, the Applicants in Fredericks expressly disavowed any reliance on s 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in Fredericks rely on the fair labour practice provisions of the LRA...or on any other provisions of the LRA."* See also ***Makambi*** 2134 par 15.

1527 The comparative status of the LAC and the SCA has been dealt with above.

1528 On 86-7 par 40-41 of ***Chirwa*****, Skweyiya J, cites Cameron JA in *Administrator Natal & Another v Sibiya & Another*** 1992 4 SA 532 (A) par 67 with approval: *"...the employee's insistence on approaching the ordinary courts – when the LRA afforded her ample remedies, including retrospective reinstatement and compensation if her employer failed to discharge the burden of proving that her dismissal was both procedurally and substantively fair – is not without consequence: the ordinary courts must be careful in employment related cases brought by public employees not to usurp the labour courts' remedial powers, and their special skills and expertise."*

On 90 par. 52, **Skweyiya J** cites another case of the CC with approval in this regard, namely ***National Health Education and Allied Workers Union v University of Cape Town*** (supra), par.30. Here the CC had emphasised that the LC and LAC are specialised courts established by the legislature specifically to administer the LRA which calls for specialized functions in a specialized area of the law. These institutions have been specifically charged with the responsibility of overseeing the interpretation and application of the LRA on an ongoing basis. They are also responsible for the development of labour relations policy and precedent. In this

furthermore dealt a severe blow to the attitude held by some that there is no real need for the existence of the Labour Court as the High Court is seen to be fully capable of dealing with labour disputes. Specialised labour courts and tribunals seem to be widely accepted amongst Western jurisdictions.[1529] In the United Kingdom and the United States most labour disputes are referred - in the first instance at least -to industrial tribunals.[1530] The expertise and specialized knowledge of such tribunals are recognised facts.[1531] The CC has now put this issue beyond doubt.

Although the status and progress of the Superior Courts Bill is uncertain at the moment, we submit that should the Labour Court be amalgamated with the High Courts, as is foreseen in the Bill, due recognition should be given to this fact. The specialized nature of the Labour Court calls for at least a separate division of the High Court dedicated to the comprehensive resolution of *all labour matters.* This would include the constitutionality, legality or lawfulness, as well as the fairness aspects of labour disputes.

The jurisdictional conundrum was not finally settled by ***Fredericks*** and ***Chirwa***. On the contrary whole schools of divergent jurisprudence developed on the issue.[1532] We need not concern ourselves any further with this plethora of jurisprudence, which has been largely rendered of academic importance only by

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process the judges of the Labour Courts accumulate the experience which enables them to resolve labour disputes with the necessary expedition.
The remarks by **Ncgobo J** in ***Hoffmann v SA Airways*** 2001 1 SA 1 (CC); 2000 21 ILJ 2357 (CC) as to the specialized nature of the labour Courts, are also cited by **Skweyiya J** with approval - ***Chirwa*** 94 par 64.
1529 On the specialist role of the English employment tribunal, see ***Eastwood v Magnox Electric*** 997J.
1530 ***Gcaba v Minister of Safety and Security*** 2632 par 29; 2636 par 56.
1531 See Chapter V, supra.
1532 See the observation of **Van der Westhuizen J** in ***Gcaba v Minister of Safety & Security*** 311 par 40. The learned judge specifically referred to cases where the view was endorsed that the Labour Court and the High Court have concurrent jurisdiction to adjudicate upon labour related disputes, and those where an opposite view was taken, namely that the labour Court has exclusive jurisdiction over employment matters where the LRA provides expressly for this exclusivity. The court furthermore pointed to the fact that different opinions had also been formed on the question whether ***Chirwa*** overruled ***Fredericks***. For the different approaches in this regard dealt with by the court at 312 par. 42 of the judgment, see ***Makambi v MEC, Department of Education, Eastern Cape Province***; ***Mkumatela v Nelson Mandela Metropolitan University & Another*** case no 2314/06 28 Jan. 2008 (unreported), and ***POPCRU & Others v Minister of Correctional Service*** 2006 27 ILJ 555 (E).

Gcaba.[1533] ***Gcaba*** confirmed that the question whether the High Court or labour Court had jurisdiction to deal with a particular dispute depended on how the dispute was framed in the pleadings, with the claimant as *dominus litis*.[1534] The LRA does not destroy causes of action, and nothing prevents a litigant from pursuing a common law cause of action or remedy on the basis of contractual principles in the High Court.[1535] But if the pleadings characterize the claim as one falling within the purview of the LRA, the High Court would generally be deprived of jurisdiction, as the specialised fairness scheme contained in the LRA would apply. If the claim is envisaged by s 191 of the LRA, which provides a specific procedure for its resolution, all the remedies and procedures provided for in the LRA first have to be exhausted, and the High Court would have no concurrent jurisdiction over such process. A dual jurisdiction has to be avoided,[1536] and the relegation of the statutory dispensation contained in the LRA simply for reasons of *'distrust'* for instance, is impermissible.[1537]

The benchmark-decision of ***Gcaba*** is however that generally, employment and labour relations issues do not amount to administrative action within the meaning of the Promotion of Administrative Justice Act, 3 of 2000. A grievance of an employee regarding the conduct of the State in its capacity as an employer has few or no direct implications or consequences for other citizens. On this basis the court found that a failure to promote does not amount to administrative action that is reviewable under PAJA. S 157(1) of the LRA confers jurisdiction on the Labour Court over any matter that the LRA prescribes should be determined by

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1533 On this issue, see **Gcaba** 2627.

1534 ***Gcaba*** 2634 par 39. On 2641 the court explains what is meant by the pleadings. In motion proceedings, the notice of motion as well as the supporting affidavits have to be scrutinized and interpreted to establish the legal basis of the applicant's claim. The issue of jurisdiction has to be decided on that basis and it is not for the court to determine whether the claim is also sustainable in or determinable in another court.

1535 ***Fedlife Assurance Ltd v Wolfaardt***; On 2640 par 73 of ***Gcaba***, the court states:*"...the LRA does not intend to destroy causes of action or remedies and s. 157 should not be interpreted to do so. Where a remedy lies in the High Court, s. 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much."*

s 157(2) of the LRA provides that the Labour court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Ch. 2 of the Constitution, under certain specified circumstances.

1536 ***Gcaba v Minister of Safety and Security*** 2632 par 30-32.

1537 **Gcaba** 2637 par 57

it, and s 157(2) should not be read as conferring jurisdiction on the High Court as well in such matters. Thus in ***Gcaba***, equality of treatment between public sector and private sector employees was achieved, and an age-old dichotomy eradicated.[1538]

7.14 EQUITABLE RELIEF AND REINSTATEMENT UNDER THE LRA

When reference is made to the concept and role of fairness within the context of the current LRA, it is usually to either *substantive fairness* or to *procedural fairness*. Substantive fairness comprises the 'merits' of a dispute, whereas procedural fairness relates to the fairness of the process followed in reaching decisions in regard to substantive fairness.[1539] This two-pronged approach is particularly poignant in regard to *unfair dismissal* disputes.[1540] However, there is a third dimension of fairness that is often either ignored or neglected, or simply not seen as relating to the issue of fairness at all. That is the *relief* that is to be granted when a particular act of dismissal or labour practice is found to be unfair.[1541]

That the "*relief*" granted is a crucial aspect of fairness has been shown in the so-called "*Kylie*" case,[1542] where the LAC, per **Davis JA**, re-emphasised the implications of s 23(1) of the Constitution as regards the fairness of a remedy in the circumstances of a particular case. In "***Kylie***"[1543] the right of everyone to fair

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1538 In **Gcaba** 2639, the court pointed out that the consequence of the finding that the conduct behind employment grievances – like those of Ms Chirwa and the Applicant – is not administrative action, will substantially reduce the problems associated with parallel systems of law, duplicate jurisdiction, and forum shopping.

1539 **Grogan Dismissal** (2010) 3 points out that the concepts of substantive and procedural fairness had its origin in the labour tribunals that were established under the 1956 LRA and that drew on principles of administrative law and international labour law.

1540 **Grogan**, loc.cit. shows that this approach originated in dismissal cases.

1541 Many American scholars divide equity simply into *substantive* equity and *remedial equity:* **Parker *Modern Judicial Remedies*** (s.a.) 14; In ***Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid Afrika*** 1984 5 ILJ 344, 357b, **Landman** J aptly remarked that the very purpose of the unfair labour practice jurisdiction of the Industrial Court was to make a determination that would rectify the unfair labour practice. At the level of disciplinary hearings the issue of "*relief*" does not arise as such, but broadly speaking it could pertain to the "*sanction*" imposed by an employer if an employee is found guilty of misconduct. The idea is that remedies must also be fair.

1542 ***'Kylie' v CCMA*** 2008 29 ILJ 1918 (LC), overruled by the LAC in ***'Kylie' v Commission for Conciliation, Mediation and Arbitration*** 2010 31 ILJ 1600 (LAC)

1543 Loc.cit, passim

labour practices as enshrined in sect 23 of the Constitution was applied in such a way that notwithstanding opposition to the granting of relief to a sex worker on the basis of public policy and the *pari delicto* principle, equitable relief in respect of work done by such worker was nevertheless granted.

Relief granted may however not be in direct contravention of statutory law, such as reinstatement of a sex worker in her former "*employment*". As prostitution is a criminal offence, reinstatement would mean condonation of such offence, which is not an option open to a court of law. However, it was held by **Davis JA** that the provisions of the LRA are sufficiently flexible and that it covered such a range of possible remedies that fair compensation could be granted as relief to a person in *pari delicto*, instead of reinstatement.[1544]

Before the adoption of the 1979 Amendments to the Industrial Conciliation Act, and the equitable regime introduced by it, disputes involving alleged unfair labour practices and unfair dismissals had to be resolved according to the relevant principles of the common law of contract.[1545] The 1979 Amendments empowered the Industrial Court to *determine* unfair labour practice disputes, but did not prescribe any remedies or relief to be granted by the court, other than providing for an extremely wide judicial discretion.[1546] This discretion had to be exercised against the backdrop of a common law that did not afford remedies other than the traditional contractual claim for damages. This was particularly so in the case of dismissals.

1544 For a critical evaluation of the judgment of **Cheadle** AJ in the Labour Court in ***'Kylie'***, see the incisive article by **Le Roux *"The Meaning of 'Worker"*** 2009 30 ILJ, 49. In overruling the judgment of the court a quo, the LAC gave effect to some important views expressed by the author. See also **Grogan *"Of Prostitutes and Foreigners"*** 2008 24:6 EL 13; ***"Unhappy Hookers"*** 2008 24:5 EL 2; ***"The Wages of Sin: Labour Law in the Sex Industry"*** 2010 26:4 EL; **Mischke *"Illegal Employment and its Consequences : The 'Kylie' Judgment on the illegality of Employment"*** 2008 18:1 CLL 6; **Van Jaarsveld *"n Arbeidsregtelike Perspektief op die ongure Kontrak van 'Kylie"*** 2009 72:3 THRHR 466; **Bonthuys & Monteiro *"Sex for Sale: The Prostitute as Businesswoman"*** 2007 124:3 SALJ 659.

1545 Cf. Chapt. V, English Law; ***Addis v Gramophone Co. Ltd; Malik v Bank of Credit; Johnson v Unisys; Eastwood & Another v Magnox Electric plc*** (supra)

1546 On the wide discretion of the Industrial court, see **Diamond *Workers Union v SA Diamond Cutters Association*** 1982 3 ILJ 87; ***Mynwerkersunie v O'Okiep Copper Co Ltd*** 1983 4 ILJ 140; ***Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid Afrika*** 1984 5 ILJ 344 354; **De Kock *Industrial Laws of South Africa*** (1982) 606-606A.

The *locus classicus* in regard to the common law of reinstatement is the AD judgment of ***Schierhout v Minister of Justice***[1547] There the court held that it was a well established rule of English law that the only remedy open to an ordinary servant[1548] who was wrongfully dismissed, was an action for damages.[1549] It was virtually categorically stated that the courts would not decree *specific performance* against the employer, nor order the payment of the employee's wages for the remainder of the term.[1550] ***Schierhout***[1551] emphasised that although the Equity Courts in England had for some time granted decrees of specific performance, the practice had long been abolished, primarily for two reasons: the first is the inadvisability of compelling a person to employ another whom he does not trust in a position which involves a close personal relationship. The second is the so-called *'absence of mutuality'.* By this is meant the fact that a court could not by its mere order compel an employee to perform his work faithfully and diligently. To these reasons should probably be added the fact that the court is normally not in a position to monitor compliance with its orders. The court specifically pointed out that the same *practice* of English law in regard to specific performance outlined above had been adopted in South Africa.[1552] With this dictum, this aspect of English common law of dismissal became firmly entrenched in South African labour law.[1553] In that process the salutary principles of Roman Dutch Law which disallowed employment at will were practically abandoned.

In ***Kubheka v Imextra (Pty) Ltd***[1554] the adversity of the common law courts to reinstatement of employees was re-emphasised and the principle laid down in

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1547 1926 AD 99.
1548 sic.
1549 ***Schierhout*** 107.
1550 The court relied on **Macdonell** ***Master and Servant*** 2nd ed. 162.
1551 loc. cit.
1552 This happened for the same reasons as in England.
1553 The *"practice"* of not ordering reinstatement was hardened into a rigid legal rule in ***Myers v Abramson*** 1952 3 SA 121 126-7; See also ***Grundling v Beyers*** 1967 2 SA 131 (W); ***Somers v Director of Indian Education & Another*** 1979 4 SA 713 (D); ***Makhanya v Bailey*** 1980 4 SA 713 (T). For discussion of ***Makhanya***, see 1980 1 ILJ 41, and 1980 3 ILJ 206. (**Mureinik** and **Cheadle** respectively)
1554 1975 4 SA 484 (W).

Schierhout confirmed.[1555] The court reiterated that even in situations where the dismissal of an employee was unlawful, it did not follow that reinstatement was *competent* at (English) common law and hence at South African law.[1556] The extremities to which the civil courts were prepared to enforce this principle is evidenced by the fact that the court expressed the view that where dismissal of an employee was for instance *prohibited by statute* providing a criminal sanction, such employee's remedy of reinstatement is to be obtained from the *criminal court*.[1557]However, another line of judgments was to the effect that dismissals in contravention of statute were *void* and that 'reinstatement' by the civil courts was therefore appropriate.[1558] These *'exceptions'* to the general rule applied only in one instance though, namely where the dismissal was *prohibited by statute*.[1559]

Long before the introduction of reinstatement by s 193(1) of the present LRA, there was an incremental statutory move away from the law as sketched above towards reinstatement. The 1956 Industrial Conciliation Act, as amended in 1979, provided for a ministerial order of reinstatement [1560] pending determination of the dispute by the IC. [1561]

In ***SA Diamond Workers Union v The Masters Diamond Cutters Association of SA***[1562] the Industrial Court made serious inroads into the common law position relating to reinstatement. This happened as early as 1981, when it ordered the reinstatement of a number of employees after careful

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1555 ***Kubheka*** 107. The court distinguished the judgments in ***Venter v R*** 1907 TS 913 and ***Myer.***

1556 In ***Schierhout*** it was merely stated that this was a rule of practice. Here the court holds that it is incompetent to grant specific performance in the form of reinstatement. The court concludes: *"Accordingly I have no hesitation in following Ngenya's case...and hold that the applicants had no right at common law to claim to be reinstated in their employment, following a wrongful dismissal by the respondent."* For a detailed discussion of the reasons that English courts traditionally proffered for their refusal of reinstatement, see **Jones and Goodhart *Specific Performance*** (1986) 135

1557 See also ***Makhanya v Bailey*** (supra).

1558 ***Rooiberg Minerals Development Co. Ltd v du Toit*** 1953 2 SA 505 (T); **Somers** (supra); 1980 1 ILJ 41; **Cheadle *"The First Labour Practice Case"*** 1980 3 ILJ 206.

1559 In ***Somers*** (supra) a teacher was granted reinstatement in terms of the Indian Education Act, 1965. In ***Makhanya*** the employer had been charged with contravention of certain provisions of the Wage Act. He had dismissed the employee for participation in trade union activities.

1560 s 43(4).

1561 s 43 (6). s 43(7) provided that an employer who paid a dismissed employee the remuneration which would have been due shall be deemed to have complied with the order.

1562 1981 Aug. ILJ 87.

consideration of the common law position as outlined above. Utilising the well known presumption of statutory interpretation that in introducing a radically new concept such as that of unfair labour practice, the Legislature intended to substantially change the common law as it obtained at the time, the court found it appropriate to deviate significantly from the common law relating to reinstatement or specific performance.[1563] Of particular significance is the fact that despite the availability of the common law relief of damages, the court found this relief inappropriate to award in view of its interpretation of the statutory provisions as specifically intending to enact invasive amendments to the common law. An important consideration that played a part in this approach of the court was the argument that the employment contract generally had as its aim the *continued employment* of skilled workers and the *security* of tenure of employment.[1564] Security of employment has since been elevated to a foundational Constitutional value and right.[1565] The court left no doubt as to the fact that common law wrongful dismissals were in principle different from unfair dismissals which called for different remedies. The court[1566] pointed out that although the English common law position had been changed by statute,[1567] the English Industrial Tribunal still preferred compensation to reinstatement.[1568] In Germany the employee is given the option of requesting reinstatement or compensation.[1569]

Soon after the judgment of ***SA Diamond Workers,*** the LAC - as it was constituted under the 1979 amendments - actually began displaying some preference for reinstatement as a remedy as opposed to an award of damages. In ***National Union of Metalworkers of SA v Boart MSA (Pty) Ltd***[1570] the

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1563 The court relied on **Steyn *Uitleg van Wette*** 4th ed. 104, who cited **P. Voet.**
1564 ***SA Diamonds*** 139C-F.
1565 ***Kylie***, supra; ***NEHAWU*** par.42; In ***Sidumo*** 2431 par 72, the CC stated that in determining how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the LRA.
1566 ibid.
1567 EPCA, dealt with in Chapt. V above.
1568 The court cites **Rideout *Industrial Tribunals Law*** (1980) 178; **Williams & Walker *Industrial Tribunals - Practice and Procedure*** (1980) 38.
1569 ***SA Diamond Workers*** 139C-F.
1570 1995 16 ILJ 1481E-G

court proceeded from the premise that the fullest redress possible for addressing the unfairness of a dismissal, is restoration of the *status quo ante.*[1571] However, in accordance with the basic dictates of fairness, the courts always kept an open mind, and exercised its discretion judicially and in accordance with the circumstances of each case.[1572] Reinstatement was never seen as an automatic or only remedy.

The current LRA has made further inroads into the common law. However, this should be understood in its proper context. The 1995 LRA provisions seem to be some form of codification and further regulation of the judicial discretion to reinstate as it obtained prior to the adoption of the LRA. The CCMA or LC is not given a totally free discretion to either reinstate or to refuse re-instatement altogether. An employee can only be reinstated if such employee wishes to be reinstated or re-employed,[1573] if the circumstances surrounding the dismissal are such that a continued employment relationship is not rendered intolerable,[1574] or

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1571 The court adopts the enlightened approach displayed by **Nicholas AJA** in **NUMSA & *Others v Henred Freuhauf Trailers*** 1994 15 ILJ 1257 (A) 1263C-D, where the learned judge stated: *'Where an employee is unfairly dismissed, he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the status quo ante. It follows that it is incumbent on a court when deciding what remedy is appropriate to consider whether in the light of all the proven circumstances there is reason to refuse reinstatement."*

In ***Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union*** 1994 2 SA 204 (A) 218H-219C; 1994 15 ILJ65 (A), **Goldstone J** demonstrated the remarkable move that had already been made away from the common law aversion to reinstatement: *"In a number of decisions of the Industrial Court and the Labour Appeal Court it has been regarded as almost axiomatic that, in the absence of special circumstances, an unfair dismissal should have as its consequence, an order of reinstatement."* The learned judge had regard to the judgment of ***Sentraal-Wes (Kooperatief) Bpk v Food & Allied Workers Union*** 1990 11 ILJ 977 (LAC) 994E where it was held that, prima facie, if an unfair labour dismissal occurs, the inference is that fairness demands reinstatement. The employer can rebut such inference.

1572 In ***Matsubukanye & Others v Town Council of Viljoenskroon*** 1996 17 ILJ, 879 (O) 905D-G the court considered the purpose and benefits of an order of reinstatement compared to an order for damages. Specific attention was given to the fact that damages constitute payment of a definite and finite amount, while reinstatement would enhance the prospect of a continuous income. The circumstances were such however, that the court was not sure of the continued employment after reinstatement. It also felt that because of the efflux of a lengthy period of time after the dismissal, reinstatement would be unfair to the employer.

1573 s 193(2) (a).

1574 s 193(2) (b).

if it is reasonably practicable for the employer to reinstate or re-employ the employee.[1575]

In the light of these considerations it should not lightly be presumed that the common law rationale for refusing orders of specific performance in the form of reinstatement has totally fallen away. Human nature still is what was it was at common law. Similarly, monitoring compliance with a reinstatement order still presents some of the same problems that it did under the common law. On the other hand, issues such as employment security, socio-economic justice, labour peace and collective bargaining have in modern times become weighty factors in favour of a new specific performance dispensation. Ultimately the matter calls for a careful and diligent exercise of circumspection and discretion on the part of decision makers such as the CCMA and the Labour Courts.

This is well illustrated by the recent case of ***Maepe v Commission for Conciliation, Mediation and Arbitration,***[1576] in which an earlier decision of the Labour Court[1577] was upheld by the LAC. In ***Maepe***, the employee, a Senior Convening Commissioner of the CCMA had been found to have lied under oath at both his disciplinary and arbitration hearings. In considering the employee's request for reinstatement, the LAC had to decide on the applicability of ss 193(1) and (2) of the LRA.[1578] The court found that the wording of 193(2) is imperative and casts a positive obligation on the arbitrator to reinstate or re-employ the employee if the dismissal is substantively or automatically unfair. The court does not have a discretion. However, if one of the circumstances enumerated in s 193(2) (a) – (d) is present, the court lacks the *competence* to reinstate.[1579] Under the circumstances enumerated in s 193(2) (a)-(c), there is no *discretion* to

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1575 s193 (2) ©. s 193(2) (d) also provides that reinstatement may not be ordered if the dismissal was found to be only procedurally unfair.

1576 2008 29 ILJ 2189 (LAC).

1577 ***Volkswagen SA (Pty) Ltd v Brand*** 2001 22 ILJ 993.

1578 s 193(2)(a) – (d).

1579 s193 (2) reads as follows: *"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee, unless – (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure."*

be exercised by the court to reinstate or not to reinstate. Should the evidence show that any of these circumstances exist, the court does not have the *competence, power* or discretion to reinstate and hence would be acting *ultra vires* should it purport to do so.[1580] The court diligently examined subsections (a) to (c) of s 193(2) in order to assess whether any of these prevented the arbitrator from ordering the reinstatement or re-employment of the employee involved.[1581] Subs. (a) was obviously not applicable. The view that the court adopted of (b) and (c) was that these are not limited in application to the time of or circumstances that lead up to a dismissal. These two subsections may also impact on employee conduct that occurs *subsequent to dismissal.* The court found for instance that the fact that the employee had lied under oath during the disciplinary hearing, was a relevant fact for the purposes of subsection (b). Such lying could very well relate to *'circumstances surrounding the dismissal that are such that a continuation of the employment relationship would be intolerable.'* [1582] On the other hand, subsection 193(2) (c) would be more applicable where an employee had lied under oath at *arbitration.*[1583] The court went to great length in justifying its finding that in ***Maepe*** it was not *reasonably practicable to reinstate or re-employ the employee:* The circumstances of the case were unique in that the employee was a Senior Commissioner who had to administer the oath to witnesses in the daily course of his employment. He also stood at the head of other CCMA Commissioners who had to perform the same functions. The employee would be *ineffective* in the performance of his duty if confronted by

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1580 Cf the judgment of **Zondo** JP, in ***Maepe*** 2189 par 15: *"In those cases where the court or the arbitrator has found that the dismissal is automatically unfair or is unfair for lack of a fair reason and one or more of the situations set out in s 193(2) (a) to (c) is present, the Labour Court or the arbitrator has no power to order the employer to reinstate the employee."*

1581 In ***Volkswagen*** (supra) 1020, par 109-113, **Landman J** had read ss (a) - (d) disjunctively, and held that each of them constitutes an exclusion of the competence of the court to order reinstatement or re-employment. **Landman J** had also held that the context in which these subsections appear makes it clear that they are mandatory. Just as reinstatement or re-employment must be ordered where the circumstances mentioned in the subsections are not present, where they are, reinstatement or re-employment should not be ordered. All four subsections relate to circumstances which constitute exceptions to the general rule that reinstatement or re-employment is the primary remedy. Such primary remedy is not imperative when one of the four sets of circumstances is present. Cf. also ***CWIU v Johnson & Johnson (Pty) Ltd*** 1997 9 BLLR 1186 (LC) 1209H-J; **Okpaluba *"Reinstatement in Contemporary South African Law of Unfair Dismissal: The Statutory Guidelines"*** 1999 SALJ 818

1582 s 193(2) (b). On the facts of the case however, the court found in favour of the employee.

1583 As distinguished from the disciplinary hearing.

witnesses with his own misconduct relating to the oath. His employment demanded a large measure, if not an absolute degree of integrity and honesty. The CCMA therefore simply lacked the *competence* to reinstate under the circumstances, as continued employment had been rendered impracticable.[1584] The existence of the circumstances mentioned in subs. (c) is a factual issue.[1585] The employee's appeal was therefore dismissed. Ultimately however, every case would be decided on its own merits, even where telling lies under oath is proved.[1586]

In ***Boxer Superstores (Pty) Ltd v Zuma*** [1587] the LAC confirmed and applied the principles laid down in ***Maepe.*** It reiterated that s 193(2) mandates an arbitrator or the court to examine the factors set out therein in order to decide on a remedy. This involves an application of the mind to the factors mentioned in 193(2). Should this not be done, the decision involved could be set aside on review or appeal. It should not be assumed without further investigation, that reinstatement is the appropriate remedy. An *enquiry* into the issue should be held.[1588] Reinstatement is not the *preferred* remedy but rather the *default* remedy.

7.15 THE UNDEFINABLILITY OF EQUITY

The natural or universal notion of equity has throughout all the ages been one of the most illusive and nebulous concepts of jurisprudence. The Aristotelian concept of equity as a *virtue*, such as *justitia,* has been explained earlier in this work.[1589] Aristotle himself, though making an attempt at a definition of equity, conceded that it is a notion of great complicatedness. Nevertheless we have

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1584 s 193(2) of the LRA

1585 **Zondo JP** 2200 par 17 of the judgment. The court distinguished the case of ***Flex-o-Thene Plastics (Pty) Ltd v CWIU*** 1999 20 ILJ 1028 on the basis that in that case, the misconduct, if established would not result in *incompetence* to order reinstatement.

1586 **Maepe** should not be seen as opening the floodgates to misplaced reliance on s 193(2) © to parties who allege impracticability of reinstatement. The court emphasises that *'it will not follow in many cases that it is not reasonably practicable for the employer to reinstate..."* Cases of this nature will be relatively rare – See ***Maepe*** 2204 par 27.

1587 2008 29 ILJ 280-5.

1588 On 2683 par. 9 of ***Boxer***, **Davis JA** states: *"The enquiry required an engagement with the requirements of s 193(2) and the evidence before the court as to the nature of the relationship between the parties."*

1589 See especially Chapters II and III.

noted that Aristotle's notion of equity eventually came to dominate the common law.[1590] The greatest and most authoritative Roman Dutch and European jurists unreservedly adopted the Aristotelian paradigm of *equitable virtue*.[1591] These renowned jurists themselves hardly made any attempt beyond Aristotle at a definition of the notion of equity. They were generally contented to adopt the Aristotelian paradigm as handed down to posterity by Roman law. Roman law itself provided no definition of the concept. The Roman jurists were not renowned for defining concepts.[1592] They preferred to deal with concrete practical principles based on the analogy of nature, hence we inherited the concept of natural law.[1593] Roman natural law handed down to Western jurisprudence the notions of *equity*, *reason*, *reasonableness*, and *rationality*. [1594]

The English equity lawyers of a later age similarly made very little attempt, if any, at a definition of the concept of equity, even though they utilized it on a daily basis in the Courts of Equity.[1595] What we do see is that the English and Roman equity jurists to a lesser or greater extent, made use of adages and maxims to express in practical terms the principles of equity applied by them.[1596] It would seem that to these jurists equitable results counted more than metaphysical reflection or speculation on equity and reason.

It would seem that the notion of equity was always underpinned by at least three characteristics in all Western legal systems.[1597] Firstly, equity is a species or aspect of law. It is not extraneous, adverse or repugnant to law. Secondly, the primary duty of equity is to supplement the deficiencies of the strict law and temper its harshness. Finally equity always applies according to the demands of

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1590 The Aristotelian notion of fairness has been criticized in respect of its symmetry, equality and individualism. This , it has been suggested is not an appropriate yardstick for the purposes of applying for instance the EEA, as it fails to adequately take into account complex differences between males and females, such as pregnancy. 1994; ***Woolworths*** 601 par 139-140.

1591 See Chapt. II and III

1592 See D 50 17 202: ***"Omnis definitio in jure civili periculosa est"*** – *Definition is never without danger in the civil law"*

1593 Cf. D 50 17 10; D 50 17 32; D 50 17 35; D 50 17 84 1

1594 See Chapter II, supra

1595 Cf. Chapter V.

1596 See Chapter V : English Law

1597 See Chapt. II and III

the circumstances of each individual case.[1598] These are the salient features of *universal, natural equity* in its primal state, undetermined, undefined and uncontaminated by statutory interventions, limitations and definitions. Equity could fulfill this role through its inherent flexible nature as well as the discretionary power that vests in the decision maker. [1599]

The problem is however that this natural equity seldom enjoys unfettered and free application. In most instances it applies subject to and within the confines of statutory instruments and even contractual terms. This has always been the situation in South African, if not universal employment law.[1600]

The ***Wiehahn Commission***, when introducing the concept of fairness into South African statutory labour law,[1601] warned against going astray in *'a wilderness of philosophical considerations'.*[1602] This advice was well directed. On the other hand, over-simplification of the difficulty of definition may also be counter-productive. Writing in 1987, i.e. before the present constitutional dispensation obtained in South Africa, **Brassey**[1603] commented favourably on **SADWU,**[1604] in that the court in that case re-affirmed that the determination of what is fair or

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1598 **Van Eikema Hommes** ***"De rol van de billijkheid"*** (1971) 33.

1599 An unfettered discretion has to be exercised honestly, fairly, according to the dictates of justice, not capriciously, with due regard to the object of the relief involved, and within the confines of the empowering legislation. See ***Shidiack v Union Government*** 1912 AD 642; ***Botha v Stadsklerk van Middelburg*** 1975 4 SA 241 (T) 247G-H; In ***Horn v Kroonstad Town Council*** 1948 3 SA 861 (O) the court quoted from the English judgment of ***Sharp v Wakefield*** 1891 AC 179, where the court stated that even an unfettered discretion has to be exercised according to the rules of justice, reason and law, and not according to private opinion or humor. The exercise of a discretion should not be arbitrary, vague or fanciful, but regular and according to law. In ***National Union of Mineworkers & others v Driefontein Consolidated Ltd*** 1984 5 ILJ 101,107, **Landman J**, with reference to ***South Cape Corporation v Engineering Management Services*** pointed out that the exercise of an unfettered discretion by the court must never be allowed to become legalistic, inflexible or rigid, or determined by general policy or guidelines. See also ***Haynes v King Williams Town Municipality*** 378G. **Hefer JA** stated in ***Benson v SA Mutual Life Assurance Society*** that there are no rules governing the exercise of a discretion, except the rule that the discretion has to be exercised judicially, upon consideration of all the relevant facts. See also **Van der Merwe** ***Die Reg op die Handhawing van Billike Arbeidspraktyke*** (1998) 753; **Christie** ***The Law of Contract in South Africa*** (2001) 524; ***Aspek Pipe Co (Pty) Ltd & another v Mauerberger*** 1968 1 SA 517 © 527; ***Pretoria Precision*** 378. See ***Babcock Engineering Contractors (Edms) Bpk v President, Industrial Court*** 1993 14 ILJ 111 (T), where an order of the industrial Court was set aside on review on the basis that the court had unduly fettered its own discretion.

1600 Cf. ***Mills & Sons v Benjamin Bros*** 115

1601 **Van Niekerk** ***In Search of Justification*** 2004 25 ILJ 854.

1602 ***Commission of Enquiry into Labour Legislation*** 1981 part 5 RP 27/1981 par 4 127 17

1603 ***"Fairness: Commercial Rationale"*** (1987) 61

1604 supra

unfair is a matter of statutory interpretation, not a matter of personal inclination.[1605] It is respectfully submitted that this view, although helpful in a statutory context, should nevertheless be approached with caution. A statute can only rarely, if ever, fully, comprehensively and exhaustively determine what is fair or unfair. The rules of statutory interpretation are likewise of limited assistance in this regard. In contrast with the view that fairness is a matter of statutory interpretation we have dicta of the Constitutional Court and other courts where reference is made to a general *'sense of fairness'* of a presiding officer as the determining factor of unfair labour practices.[1606] This was the very problem that the Roman and Roman Dutch jurists grappled with: statutes can only lay down general legal principles, which, when applied to particular, concrete cases, do not always result in fairness.[1607] In fact, Roman Dutch jurists like **Paul Voet** specifically contended that when fairness is reduced to writing, meaning that when it is cast into statutory mould, it ceases to be "fairness." It becomes law.[1608] Moreover, s 23(1) of the Constitution confers a general, undefined, open-ended, open-textured right to fair labour practices. Here again, statutory interpretation as such is of very little assistance. Statutory law which is in conflict or in disharmony with this right may be struck down as unconstitutional. For this reason, the determination of fairness cannot be limited to or equated with an exercise in statutory interpretation. Fairness – *natural fairness* as determined by natural law, of which the principles of natural justice are but one manifestation -

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1605 Apart from ***SADWU***, the learned author also refers to ***Bleazard v Argus Printing & Publishing Co*** 1983 4 ILJ 60 (IC) 73F-H.

1606 See ***Sidumo v Rustenburg Platinum Mines Ltd*** 2405 par 78, where the court stated: *"Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."*; In ***County Fair Foods (Pty) Ltd v CCMA*** 1999 20 ILJ , 1701 (LAC) par 28-30 **Ngcobo AJP**, referred to one's *'sense of fairness'* that could be shocked by a sanction imposed by an employer; See also ***Engen Petroleum Ltd v CCMA*** 2007 28 ILJ 1507 (LAC) 117; ***Worldnet Logistics (Cape) (Pty) Ltd v Maritz*** 2009 30 ILJ 1144 (LC) 1148 par 23-23. ***Nape v INTCS Corporate Solutions (Pty) Ltd*** 2010 31 ILJ 2130 par 53; **Pillay *"Giving Meaning to Workplace Equity"*** (2006) 66 refers to a *'sign of our humanity'* and our *'sense of fairness'*. Cf. D 4 6 38 where allowance is also made for *humanity* in cases relating to *restitutio in integrum*.

1607 It looses its characteristics or attributes, in the process of becoming more and more of a statutory formula.

1608 Cf. Chapters II and III of this work. **Poolman *Principles of Unfair Labour Practice*** (1985) 11 aptly observes as follows in this regard: *"The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance."*

transcends statutory interpretation. Statutory interpretation and the results yielded by it, could at best be seen as tools or instruments used in the process of determining natural or constitutional fairness. **Brassey's** point about personal inclination has more merit, as long as it is understood to convey that fairness does not depend on a particular individual's personal attitudes whims and fancies, but on something more objective. Fairness can by no means be equated with capriciousness. Later on in our investigation we will see however that when it comes to the parameters of fairness and reasonableness, all labour courts, including the Constitutional court, have held that opinions of adjudicators and judges may differ within a *range*, *band* or *spectrum* on what is regarded as *fair* or *reasonable*.

In grappling with the illusive and nebulous concept of equity, South African courts have often observed that it may not be desirable or even possible at all to provide a definition.[1609] Yet, there has been no shortage of judicial attempts to come to grips with the gist of the equity-concept. In this formidable process, refuge has even been taken in the dictionary meaning of the notion of equity.

In ***SADWU v The Diamond Cutters Association of SA,***[1610] the Industrial Court commented as follows on the concept of fairness contained in the reference to unfair labour practices in the 1956 LRA, as amended:

"...The Shorter Oxford English Dictionary at 2297 defines 'unfair' inter alia as 'not fair or equitable, unjust', 'unfavourable'. In the Afrikaans text the corresponding word is 'onregverdig', which according to Kritzinger, Schoonees & Cronje Groot Woordeboek (11 ed 1972) at 425, may also be translated as 'unjust, inequitable'. The aforegoing can be said to support the meaning of 'unfair' to be 'inequitable'...For the purposes of this analysis, one could probably accept that the word 'unfairly' in the context used in the definition, could mean, subject to the meaning further attributed thereto in the examination of the remainder of the definition, 'inequitable' or 'unjustified'.

This attempted definition, as brave as it may have been, does not take one very far, for in a certain sense it begs the question: what is actually *'inequitable'* or *'unfair'* or *'unjustified'*.

1609 ***NEHAWU v University of Cape Town*** par 33-35; See also ***National Entitled Workers Union v CCMA*** 2003 24 ILJ 2335.
1610 Supra 87 (IC).

We submit with respect that, apart from the difficulties encountered in defining *'natural'* equity or fairness, the situation is further complicated by the statutory contextual settings in which these concepts often find themselves. It is for these reasons that the courts have wisely refrained from any attempt at a comprehensive definition of fairness.[1611] In what follows, it would appear as though raw instinct more often than not served as guideline to the courts in dealing with the fairness *nebula*.[1612] Despite the difficulties that the problem poses however, there is no room for complacency. There is a Constitutional imperative that demands that some content and contextualization be given to the concept of fairness,[1613] albeit on an incremental and case by case basis. There is also the need for legal certainty in matters of this nature.[1614] The rule of law requires that as much judicial consensus as practically possible be garnered concerning the meaning and role of equity.

Before the 1979 Amendments, the need to apply equity in the courts of law arose only occasionally and casuistically, and the courts were prepared to apply equitable principles to labour matters where the law generally so allowed and as the need arose. There were no statutory instruments like the Constitution and the LRA which generally and comprehensively require fairness in dismissals and labour practices. The courts mostly resorted to established but casuistic principles of fairness that had concreticised over the centuries. Perhaps most notable of these is the principle of unfair enrichment. This principle was often applied in the

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1611 In ***National Union of Metalworkers of SA v Vetsak Co-operative Ltd***, **Nienaber JA** expressed scepticism concerning certain attempts that had been made at a definition of fairness in the context of the unfair labour practice jurisdiction of the court: *"The test is too flexible to be reduced to a fixed set of subrules; which is why one is somewhat sceptical of recent attempts by the Labour Appeal Court (the LAC) and academic writers to typify and rank the considerations which are to be factored into a finding of fairness."*
In this regard the learned judge referred to certain dicta and debates in the following case law and academic writings: ***Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel*** 1993 14 ILJ 963 (LAC); ***NUM v Black Mountain Mineral Development Co (Pty) Ltd*** 1994 15 ILJ 100 5 (LAC); ***Cobra Watertech v National Union of Metalworkers of SA*** 1995 16 ILJ 607 (T); **le Roux & Van Niekerk *The SA Law of Unfair Dismissal*** (1994) 304-10.

1612 See **Brassey *"Fairness: Commercial Rationale"* Brassey Cameron Cheadle & Olivier The New Labour Law** (1987) 60

1613 s 23(1) of the Constitution

1614 Ibid. The learned authors point out that there is no justification for the flight from principle. There is a need for legal certainty and guidance, despite the fact that difficulties are encountered concerning generalizations about fairness.

pre-1979 law, but as is to be expected, no serious attempt at a definition of fairness was made. Even where the courts considered equity in terms of the *natural sense of fairness* possessed by the presiding judge, this was still done within the ambit of established equitable principle like unfair enrichment. It would seem that it was accepted that the equitable principles applied by the courts were derived from natural law.[1615] In ***Boyd v Stuttaford***[1616] **Hopley J** is reported to have viewed equity from the point of view of *common sense, equity and human kindness.*[1617] The ***Wiehahn Report*** referred to *"..the subjective interpretation of a community's sense of justice..."*[1618]

The 1979 Amendments introduced a justiciable unfair labour practice concept into our labour law, thereby revolutionizing the approach to the issue of fairness.[1619] Fairness was elevated from its traditional subsidiary position in relation to the strict law, to that of a test stone or ultimate consideration.[1620] This again brought about the need for a more refined and concrete concept of fairness, if that is still at all possible to achieve.

Yet the concept proved to be hard to pin down with any amount of accuracy. In ***Woolworths,***[1621] **Willis JA** observed that *"fairness is an elastic and organic concept. It is impossible to define with exact precision."*

In ***NEHAWU v University of Cape Town***[1622] **Ncgobo J** observed as follows in regard to the wide concept of fairness enshrined in s 23(1) of the Constitution:

"Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. ***The concept of unfair labour practice is incapable of precise***

1615 In ***Van Rensburg v Straughan*** 330, **Maasdorp AJA** states that *"...by the law of nature it is just that no one should become richer to the injury of another."* Further on the learned judge holds that *"...it seems to follow quite* ***naturally*** *that it (the principle) should be applied."* (my emphasis).

1616 Supra 109

1617 Although the **Van Rensburg** case was decided in the AD, the judgment of Hopley J was fully quoted there.

1618 At 560. Cf. **Cooper** ***"The Boundaries of Equality in Labour Law"*** 2004 25 ILJ 813.

1619 *"There must be few concepts if there are any, in the history of our law which have brought about such fundamental change in our law as the introduction of a justiciable unfair labour practice has done in our employment and labour law"* – per **Zondo** AJP, in **Modise** 525 par 16.

1620 **Mureinik** 1980 1 ILJ 113; ***SA Diamond Workers*** 99-100.

1621 Supra 599 par 126.

1622 supra par 33-35

definition[1623]*...Indeed, what is fair depends on the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept..."*

In ***NUM v CCMA***,[1624] the LAC confirmed the notion underlying ***NEHAWU***,[1625] namely that fairness essentially means applying a *value judgment*.[1626] It has been suggested that the fact that a value judgment is exercised, means that there is not necessarily a single right or wrong answer to the issue or dispute between the parties, as value judgments may differ.[1627] Fairness is not an absolute concept.[1628]

7.16 CONCEPTS RELATING TO AND INFORMING EQUITY

Without presuming to be exhaustive of the contents, the normative nature or even the contextualization of equity, the following discourse attempts to highlight some of the most significant considerations, guidelines, criteria, and even attributes that have been recognised by the courts and by juristic law, as playing significant roles in determining equity or fairness in a given situation.

The title of this section of our work derives from the fact that the notions and concepts that we consider hereunder most often present themselves for consideration in the formation of an equitable judgment.

1623 My emphasis

1624 2008 29 ILJ 1966 (LC) par 20

1625 **Sidumo** 2421 par 38; 2422 par. 40.

1626 *"In Sidumo the court held that in arriving at a decision whether or not dismissals are fair, commissioners exercise a value judgment."*

1627 **Myburgh *"Sidumo v Rustplats: How have the Courts Dealt with It?"*** 2009 30 ILJ 1 20. In ***Sidumo***, 2419 par 34, the Constitutional Court cited with approval the judgment of the SCA in ***Rustenburg Platinum v Sidumo*** par 46, where the SCA had relied on **Todd & Damant *"Unfair Dismissal – Operational Requirements"*** 2004 25 ILJ 896, 907 par 46 n 2. Here the learned authors state that the courts have to necessarily recognise that there is a range of possible decisions that the employer may take, some fair, some unfair. The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as fair.

1628 In ***Sidumo*** 2419 par 34, the CC, per **Navsa AJ** stated: *"Turning to the conceptual aspect, the Supreme Court of Appeal stated that the concept of fairness is not absolute. It affords a range of possible responses."* The CC continued to quote, apparently with recognition of the elastic and flexible nature of the concept of fairness, but not the issue of *deference*, from the judgment of the SCA in ***Rustenburg Platinum*** par. 46: *"The fact that the commissioner may think that a different sanction would also be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction."*

7.16.1 EQUITY AND LAWFULNESS

Although a comprehensive unfair labour practice regime was introduced only in 1979, the distinction between the lawfulness and the fairness of labour practices was not foreign to our law before that date.[1629] In terms of the Industrial Conciliation Act of 1956,[1630] dismissal disputes could be referred to the Minister of Manpower for *conciliation*, provided the dispute was not *'in connection with any...question of law.'* This provision led to a considerable volume of jurisprudence relating to the issue of what constitutes questions of *law*, as distinguished from questions of *fairness* or *reasonableness.* The courts generally accepted that the issues in such referrals were *equity* and *reasonableness,* and not *lawfulness.* The Minister had to conciliate the *fairness* or *reasonableness* of the *dismissal*, and not the lawfulness thereof. In fact, in most such cases the *lawfulness* of the *dismissals* would be beyond doubt. The notion that even a lawful termination of service could be inequitable or unreasonable became firmly established through this process.[1631]

1629 **Van Niekerk** ***"In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa"*** 2004 25 ILJ 853. On this distinction in general, see **Salmond** ***Jurisprudence*** (1947) 83.

1630 s 35

1631 See ***South African Association of Municipal Employees v Minister of Labour*** 1948 1 SA 528 (T) 532: *"There is no doubt that the question was not whether the Council was entitled under its contract to terminate Mr. de Vos' employment, but it was whether notwithstanding its legal right to do so...it should have done so, in view of the various circumstances of the case.*; ***George Divisional Council v Minister of Labour*** 1954 3 SA 300 © 305D-F: *"...sect. 35 was intended to operate in those areas where insistence on legal rights might cause* ***inequity*** *and lead to industrial strife...It was not contested that the council had acted within its legal rights in refusing to make Erasmus' appointment permanent; the question was, whether in doing so it acted* ***inequitably*** *or* ***unreasonably***" (My emphasis); ***Cape Town Municipality v Minister of Labour*** 1965 4 SA 770 © 779H: *"An employer... may lawfully dismiss an employee and although the legality of that dismissal is...not in dispute, the justification for such dismissal and the circumstances and the terms upon which it occurred and its correctness, bearing in mind the equities of the case, are matters which can...be inquired into and resolved by the conciliation board and/or arbitration.";* **Goldstone J** (as he then was), reiterated the importance of the distinction between lawfulness and fairness again in ***Marievale Consolidated Mines Ltd v The President of the Industrial Court*** 1986 7 ILJ 165-6. He distinguished ***Egnep Ltd v Black Allied Mining and Construction Workers Union*** 1985 2 SA 402 (W) 404J-405A, where it was held that the submission that the court should apply *labour law* and not the common *law* contained the seeds of a pernicious doctrine. **Goldstone J** pointed out that the court in ***Egnep*** was referring to the law to be applied in the then Supreme Court. He observed however that the court in ***Egnep*** correctly refused to apply anything but the common law, as there was no statutory regulation of the case involved; ***Frankfort Municipality v Minister van Arbeid*** 1970 2 SA 49 (O) 56H-57B; ***National Union of Mineworkers & Others v Driefontein Consolidated Ltd*** 1984 5 ILJ 147A-C. A lawful resignation by an employee may also constitute an unfair resignation, although this

The erstwhile LAC decided in 1995 that a dismissal of workers participating in an illegal strike could be *lawful*, but nevertheless *unfair*.[1632] **Nestedt JA** formulated this crucial distinction between lawfulness and fairness as follows:

"...I shall assume that at common law the Respondent was therefore entitled to dismiss them. The enquiry does not, however, lie within the field of contract. A dismissal can be lawful in contractual terms and yet be unfair within the meaning of the unfair labour concept." [1633]

The approach adopted in this dictum was consistently applied in subsequent case law.[1634]

In ***Maluti Transport Corporation***[1635] the LAC[1636] stated:

"I do not think it is always useful to try and cast events in contractual moulds. What is lawful in contract may be unfair under the old and Qwa-Qwa Acts, and what is fair under these Acts may be unlawful in strict terms."

However, lawfulness will always remain one of the most important factors in determining fairness.[1637] A decision falling outside the bounds of fairness would

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concept is not found in the LRA or BCEA - See ***National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration*** 2003 24 ILJ 2335 (LC) 2340.

1632 ***National Union of Mineworkers v Free State Consolidated Mines*** 1375. ***Marievale Consolidated*** 152; ***SA Chemical Workers Union & Others v BHT Water Treatments (Pty) Ltd*** 1994 15 ILJ 141(IC) 147; Here the learned judge points out that ***Marievale*** applied principles laid down in ***SA Association of Municipal Employees v Minister of Labor; Cape Town Municipality v Minister of Labour*** 1965 4 SA 770 (C), and ***Frankfort Munisipaliteit v Minister van Arbeid*** 1970 2 SA 49 (O).

1633 Reference is made to **Le Roux and Van Niekerk** ***The SA Law of Unfair Dismissal*** (1994) 294-6, and the following passage from **Cameron Cheadle and Thompson** ***The New Labour Relations Act: The Law after the 1988 Amendments*** (1989) 144-5,where the learned authors observe: *"A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship...Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified in terms of equity, when all the relevant features of the case - including the action with which the employee is charged - are considered."*

1634 Dealing with the fairness of dismissal in a strike context, the then AD summarised the position as follows, per **Nienaber JA**, in ***National Union of Metalworkers of SA v Vetsak Co-operative*** 1996 17 ILJ 459-60: *"The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them - and that would depend in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair - and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness."* See also ***Fedlife Assurance Ltd v Wolfaardt***; **Cohen** ***"Implying fairness..."*** 2009 30 ILJ 2273'; See also ***Barlow Manufacturing Co Ltd v Metal and Allied Workers Union*** 1990 2 SA 315 (T) 322F-G; 1990 11 ILJ 35 (T); ***National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*** 1999 12 ILJ 1221,1236; **Brassey et al** ***The New Labour Law*** (1987) 354-5 contend that equity could even *'suspend'* the common law and contractual consequences. Cf. however the remark by **Landman J** in ***Die Raad van Mynvakbonde*** 362H that the unfair labour practice jurisdiction of the Industrial Court, and hence of the current labour courts, could not amend or change the common law.

1635 ***Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union*** 1999 20 ILJ 2531 (LAC) 2540 par 34.

1636 Per **Froneman DJP**.

certainly be in conflict with the fundamental principle of *legality*.[1638] At common law fairness played a subsidiary and supplementary – and in that sense subservient – role to lawfulness or legality. Generally, it was never applied in contradiction of or against the tenets of lawfulness, including contractual employment terms.[1639] However, the real significance of the introduction of an overriding, comprehensive statutory fairness regime lies therein that fairness, and not lawfulness becomes the final test stone or ultimate yardstick for the final resolution of the dispute under consideration. Under the statutory regime, fairness trumps lawfulness.

In ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd***[1640] the distinction between law and equity, and thus between lawfulness or right action on the one hand, and fairness on the other was again emphasised by the court:*"It needs therefore scarcely be repeated that doing what is right may still result in unfairness if it is done in any inequitable manner."*

The interaction between law and equity, and thus also between the functions of the Labour Courts as courts of law and of equity, is well illustrated by a dictum of **Wagley, J** in **Cox v Commission for Conciliation, Mediation and Arbitration.**[1641] Here the learned judge pointed out that the Labour Courts as *courts of law* as well as of *equity*, have to ensure that equal weight is given to both these factors when interpreting any section of law. Even though the Labour Courts may be bound by the precedents of the SCA whose decisions are based

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1637 **Nestedt JA** explains this as follows in ***NUM v Free State Consolidated Mines*** 1375G: *"The legality of the industrial action in question is often a critical factor in assessing the fairness of a dismissal. Indeed, the view has been expressed that as a matter of public policy the court should not order the reinstatement of an employee who has participated in an illegal strike....This case was however, decided under the common law. And it is now clear that illegal strikers may enjoy protection against dismissal."*
The case law that **Nestedt JA** refers to is ***Tshabalala v Minister of Health and Welfare*** 1987 1 SA 513 (W) 523B; 1986 7 ILJ 168(W)
1638 In **Sidumo** 2493, the Constitutional court, per **Ngcobo J** observed: *"...an award which is manifestly unfair to either the employer or employee can hardly be said to be consistent with the powers conferred upon a commissioner to make an award that is fair. In effect, if a commissioner fails to determine a dispute fairly, he or she is in breach of the statute that is the source of his or her power to conduct the arbitration and is also in breach of the doctrine of legality..."*
1639 ***Mill and Sons*** supra 121.
1640 1985 6 ILJ 369, 377E.
1641 2001 22 ILJ 137 (LC). See also the discussion in **Pillay "*Giving Meaning to Workplace Equity*"** 2003 24 ILJ 60

purely on law, they are nevertheless entitled to broaden such interpretation as long as it does not negate the legal provisions set out in the statutes, runs the argument of **Wagley J**, and correctly so, we submit. However, whenever an unfair labour practice or unfair dismissal dispute has to be determined, *fairness* and not *lawfulness* or even *fairness* and *lawfulness* considered together, is the *ultimate* yardstick.

The need for the distinction between lawfulness and fairness is well illustrated by a number of judgments. In ***Discovery Health Ltd v CCMA,***[1642] the court held that an employment contract was not invalid, despite the fact that a foreigner had been employed without a valid permit, thus affording the employee the protection of s 23(1) of the Constitution.[1643] The LAC endorsed this approach, affording a sex worker relief even in circumstances where the nature of her work involved a statutory criminal offence.[1644]

7.16.2 EQUITY AND VALUE JUDGMENT

The dictionary meaning of a value judgment is *a judgment of how good or important something is, based on 'personal opinions' rather than facts.*[1645] In our labour jurisprudence the *'personal opinions'* portion of the definition is replaced with *'judicial discretion'* within the context of the adjudication of disputes.[1646] In labour law jurisprudence, the issues that serve before an adjudicator can be classified under *factual, legal* and *value* issues.[1647] Factual issues relate to the facts of a case. The adjudicator makes a *finding* as to the existence or non-existence of facts. Legal issues or questions of law involve a finding as to what the law or legal principle is that is applicable to a particular set of facts. Distinct from these, is the issue of values or value judgments. In the case of the first two, the adjudicator embarks on a fact finding and law finding mission respectively.

1642 2008 29 ILJ 1840 (LC)
1643 See also ***SITA (Pty) Ltd v CCMA*** 2008 29 ILJ 2234 (LAC). **Le Roux *"The Meaning of 'Worker'...*** 2009 30 ILJ 49 et seq.
1644 ***'Kylie'* v Commission for Conciliation Mediation and Arbitration** 2010 31 ILJ 1600 supra.
1645 ***Oxford Advanced Learner's Dictionary*** 7th ed
1646 This does not mean that individuals do not form value judgments in their daily lives.
1647 **Wilson *"A Note on Fact and Law"*** 1963 26 MLR 609; ***Media Workers*** 796.

This does not involve value judgment. Law and facts are objectively existing phenomena, and the application of law to facts is a judicial or adjudicatory function that traditionally belongs to the (civil) courts of law that apply the ***ius strictum*** or strict law. Such strict law is usually statutory in origin, but includes also the ordinary principles of common law, or can even be embodied in contractual terms that govern the relationship between parties – in this case the employment contract.[1648] The determination of the *fairness* of a dismissal or an unfair labour practice on the other hand, involves the application of a *value judgment by the adjudicator.*[1649] **Davis JA** of the LAC has called it a *'judgment call'* that has to be made by the adjudicator of fairness.[1650] Such adjudicator does not make an objective finding in relation to the existence and nature of fairness as such, as happens in the case of fact finding and the determination of what the law or the applicable legal principle is. The adjudicator of the fairness of an act or

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1648 See for instance the application of strict law and equity in ***Hauman, Van Rensburg*** and other cases cited earlier. Insofar as the law enforces contractual terms, contractual terms are analogous to legal precepts.

1649 In ***NEHAWU v University of Cape Town*** par.33-35; ***Woolworths*** (LAC) 601 par 135: *"An enquiry into fairness involves a moral or value judgment taking into account all the circumstances."* ; ***Sidumo v Rustenburg Platinum Mines Ltd*** par 40; See also ***Media Workers Association*** 798H-I; ***National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd*** 1996 4 SA 577 (A), 593G-H; 1996 17 ILJ 455 (A) 476D, **Smalberger JA** states: *"Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness a court applies a moral or value judgment to established facts and circumstances (NUM v Free State Cons at 446I)"*; ***Dube & v Nasionale Sweiswerke (Pty) Ltd*** 1998 3 SA 956 (SCA) 960E-F; 1998 19 ILJ 1033 (SCA)1037D; ***SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd*** 1999 20 ILJ 2302 (LAC) 2314-2315A; ***Benicon Group v National Union of Metalworkers of SA*** 1999 20 ILJ 2777 (SCA) 2779 and 278D. ***Trident Steel (Pty) Ltd v John*** 1987 8 ILJ 49-50 (**Ackerman J**): *"In a sense the industrial court was exercising value judgment in the sphere of labour relations..."* The AD confirmed this approach in ***Media Workers*** 801-2: *"The real problem in the present case is to decide whether particular acts or the consequences of acts are unfair...As Wilson classifies it, it is a 'description-question' – do the facts or their consequences fall within a particular description? This calls, not for a determination of what 'unfairly' means, but for a value judgment on the facts and their consequences."* **Smit *"Labour is not a Commodity: Social perspectives on flexibility and market requirements within a global world"* Tydskrif vir Suid Afrikaanse Reg** 2006:1 155 stresses the role of the value that human labour is not a commodity. In ***Carephone (Pty) Ltd v Marcus*** 1998 19 ILJ 1425 (LAC), approved by the SCA in **Rustenburg Platinum** 2090 Par 32, **Froneman DJP**, expressed the concept as follows: *"...value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another."* The court was dealing here with the review of CCMA awards. ***NUM & Others v Free State Consolidated Gold Mines – President Steyn; President Brandt; Freddies Mines*** 1995 16 ILJ 1375E, where the court states with reference to ***Media Workers Association*** (supra): *"Ultimately the task of the court is to pass a moral or value judgment."* See also ***NUM & another v CCMA*** 2008 29 ILJ 1966 (LC) 20; **Myburgh *"Sidumo v Rustplats: How have the Courts dealt with it?"*** 2009 30 ILJ 12; ***Raad van Mynvakbonde v Minister van Mannekrag*** 1983 4 SA 202 (TPD) 207F-G.

1650 ***Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration*** 2008 29 ILJ 2899, 2906B.

practice applies his or her *subjective evaluation and judgment* to a given event.[1651] As fairness involves a subjective (but not arbitrary) value judgment, it is generally recognised that the judgments of persons can differ considerably.[1652] This is particularly so in the case of labour law, where value judgments have to be made in regard to the fairness of dismissals, unfair labour practices etc.[1653] Fairness is a comprehensive value judgment applied to both facts and law.[1654] In this regard the following dictum of **Ngcobo J** in ***Sidumo***[1655] should be noted:

"...The commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed the exercise of a value judgment is something about which reasonable people may readily differ. But it could not have been the intention of the law-maker to leave the determination of fairness to the employer"

It has also been described as a *descriptive judgment'* applied to facts and law.[1656] While we are in agreement with this view insofar as fairness relates to both facts and law, we submit that a better characterization of fairness would be that it is an evaluative, rather than a descriptive judgment, since its function is not merely the description of an act for what it is, but rather an evaluation of the *moral worth* or *goodness* of such act. In equity institutions, the adjudicator goes beyond the facts of the case and the law applicable thereto and determines the *ultimate question,* which is fairness.[1657] This does not mean that it is an arbitrary judgment or simply a personal opinion. The value judgment has to be rational

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1651 Cf. the dictum of **Grosskopf JA** in ***Media Workers Association*** 801-2: Cf. **Farrar & Dugdale, *Introduction*** (1990) 261:*"Legal justice is the impartial application of general legal rules. It is strict compliance with the Rule of Law. Equity is a supplement to the law and goes beyond it."*

1652 **Pillay *"Giving Meaning to Workplace Equity"*** 2003 24 ILJ 63 correctly points out that as all adjudicators are compelled to adopt a value based method of interpretation, their life experience and world view may come into play. He cites **Chaskalson** et al 11-6; 11-6A;

1653 **Le Roux *"Dismissals for Misconduct: some Reflections"*** 2004 25 ILJ 873.

1654 **Cheadle *"Labour Law and the Constitution"*** **Cheadle et al *Current Labour Law*** (2003) 91, 94; **Currie & de Waal *Bill of Rights*** (2005) 506 n 36

1655 ***Sidumo*** 2462 par 179

1656 **Wilson *"A Note on Fact and Law"*** 1963 26 MLR 2609, cited with approval in ***Media Workers Association*** 796H-I.

1657 ***Modise v Steve's Spar*** 567 par 148: *"The guiding principle under the 1956 Act and under the 1995 Act is fairness. The ultimate question is always what it would be fair to require an employer to do."* In ***National Union of Mineworkers v East Rand Gold & Uranium Co Ltd*** 1999 12 ILJ 1221, 1237G, **Goldstone J** observed:*"...the industrial court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of the principles of fairness."* The learned judge expressed his agreement with **Brassey** et al, that unfairness jurisdiction may have the effect of suspending the principles of common law or the law of contract.

and take into account objectively existing facts as they are presented in evidence or the evidential material placed before the adjudicator.[1658] F*airness as such* has been described as a universal *value laden ideal* which institutions of equity strive to attain.[1659]

From its inception, the Industrial Court and Labour Courts recognised that the concept of equity virtually always involve the exercise of a *moral judgment* as a final determinant of a dispute about fairness.[1660] The Constitutional court has endorsed this approach.[1661] In some prominent cases, such final determinant has been described as the '*ultimate* question' or issue that a court of equity has to

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1658 In ***National Union of Mineworkers & Others v Driefontein Consolidated Ltd*** 116D, **Landman AM**, citing inter alia ***Shidiack v Union Government*** 1912 AD 642, pointed out that the exercise of an unfettered discretion of fairness must be exercised duly and honestly with regard to the object of the relief and within the limits of the power vested in the court. The discretion has to be exercised according to *justice* ad *reason*, and not *capriciously*. It also emphasised that: *"The discretion entrusted to this court ...must be exercised in view of what is just and equitable on a consideration of all relevant facts and circumstances. The discretion, even though it is an unfettered discretion, must be exercised judicially."*
The learned judge relied on ***Horn v Kroonstad Town Council*** 1948 3 SA 861 (O) 865 in pointing out that an unfettered discretion should be exercised according to the rules of reason and justice, not according to private opinion, according to law and not to humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limits to which an honest man competent to discharge his office ought to confine himself. These were the words of **Lord Halsbury LC**, expressed in the English case of ***Sharp v Wakefield*** 1891 AC 179; See also the citation from **Story *Equity Jurisprudence*** s 742 in ***Haynes v King Williams Town*** 379.
1659 Cf. **Pillay *"Giving Meaning to Workplace Equity: The Role of the Courts"*** 2003 24 ILJ 57. See also **Farrar and Dugdale *Introduction to Legal Method*** (1990) 256, where values are categorized into those values embodied in the language, structure and method of the law and those moral values that are 'internalised' in legal phrases such as *'just and equitable'* or *'fair and reasonable'.* There are process related values, and lastly *substantive values* which represent operative goals of a legal system.
1660 ***Media Workers Association*** 798A-D, where **Salmond** (supra) is cited with approval. See also ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*** 1985 6 ILJ 369 377E, where **Fabricius AM**, observes that *"Fairness is a vital element in labour relations. It implies a general duty to act fairly and in accordance with equitable justice. Although the concept may be regarded as ambiguous in some respects and involve questions of morality..."*
In ***National Union of Metalworkers of SA v Vetsak Co-operative Ltd*** 1996 17 ILJ 459, **Nienaber J** stated: *"In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances."* The court cited in support of this conclusion the following authority: ***Media Workers Association of SA & others v Press Corporation of SA (Perskor)*** 1992 4 SA 791 (A); 1992 13 ILJ 1391 (A) 798G, 802A; **Atlantis *Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA*** 1995 3 SA 22 (A); 1994 15 ILJ 1274 (A) 33A-B; ***National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine; President Brand Mine; Freddies Mine (NUM v Free State Cons)*** 1996 1 SA 422 (A); 1995 16 ILJ 1371 (A) 4461; **Guest *"The Role of Moral Equality in Legal Argument"*** **Acta Juridica** 2004 19-20. On the role of morality and its relation to the **bonum et aequum** in Roman Law, see **Levy *Natural Law in Roman Legal Thought*** (1963) 18
1661 In ***Sidumo*** the Constitutional Court cited with approval from ***Media Workers Association***, where the erstwhile AD had stated that a decision on fairness is not a decision on law in the strict sense of the term, but rather the passing of a moral judgment on a combination of findings of fact and opinions. **Van Zyl *Justice and Equity in Greek and Roman Legal Thought*** (1991) 1

answer.[1662] Thus where assessors in an equity tribunal are by statute not allowed to decide questions of law, they nevertheless have to decide the *'ultimate* question' of fairness.[1663] While the determination of the facts of a case, or the decision whether a certain factual situation has occurred or exists involves a demonstrable or provable issue, law is determined by authoritative legal principles contained in the common law, custom or statute. By contrast, *equity* or *fairness* requires the application of *reason* or *rationality*, and often even the *conscience* of the court.[1664] Such conscience is mostly informed by morality.[1665]

In ***Media Workers***[1666] the then AD accepted that the unfair labour practice jurisdiction of the Industrial Court involves the exercise of a *moral judgment*. Such moral judgment is exercised on a combination of a finding of facts, the law, and opinions.[1667] As a *moral*, *value* or *conscience judgment*, the fairness, reasonableness or justice of a matter is not determinable by the mechanistic application of legal rules to facts, nor can it be determined by way of demonstration or proof in the way that this is done in the case of factual issues.[1668]

1662 ***Media Workers Association*** 795A-B, 799A-B. **Pillay *"Giving Meaning to Workplace Equity"*** 2003 24 ILJ 57

1663 In ***Media Workers Association*** 798H-I, the court held: *"The position then, is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the LAC is again expressly enjoined to have regard not only to law, but also to fairness. In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of facts and opinions."* This dictum was cited with approval by the Constitutional Court in ***Sidumo*** 2428 par 64.

See also ***SA Chemical Workers Union v BHT Water Treatments (Pty) Ltd*** 147D, where the court states with reference to ***National Union of Mineworkers v East Rand Gold and Uranium Co Ltd***, commonly referred to as ***NUM v ERGO***, 1999 12 ILJ 1221 (A), that *fairness* always is the decisive factor. See also ***National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others*** 470.

1664 ***Media Workers Association***

1665 **Salmond *Jurisprudence*** (1947) 798H explains that in deciding on matters of law, the duty of the court is to ascertain the rule of law and to decide in accordance with it. The determination of facts implies an exercise of intellectual judgment on the evidence submitted in order to ascertain the truth. In the case of questions of fairness, reasonableness and justice, a moral judgment is exercised to establish the fairness, right and justice of a case.

1666 Supra 798C-D

1667 ***Media Workers Association*** 798H-I.

1668 ***Media Workers Association*** 799D-E. On 795-6 The learned **Grosskopf JA** quoted extensively from **Salmond on Jurisprudence** on the interaction between facts, law and equity, and the role of the adjudicator

Whether a particular act, such as dismissal of an employee for instance, is fair or unfair, would sometimes depend on the *mores* or *boni mores* of the community or social setting in which such act takes place.[1669] The *boni mores* of the community, including that of the workplace, is not a static but a dynamic, flexible and elastic matter. For this reason care should be taken in the application of judicial precedent, and outdated views expressed therein hailing from a different and expired epoch should not be adhered to. Such an approach may result in gross unfairness towards the parties.[1670]

7.16.3 EQUITY AND CONSTITUTIONAL, STATUTORY AND COMMON LAW VALUES

The moral values recognised by the Roman jurists proved to be so enduring that Ulpian's *'living honestly, harming no one and giving everyone his due'* is still regarded as authoritative by modern jurists.[1671]

In modern times there have been a number of new formulations of legal values that were, unlike the Ulpian values, not limited to the traditional sphere of private law only, but that embraced public law as well.[1672] In 1910 **Roscoe Pound** identified the so-called *'jural postulates'* of American society. These

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in this connection: *"In this sense, a question of fact is opposed to a question of judicial discretion. The sphere of judicial discretion includes all questions as to what is right, just and equitable, or reasonable – so far as not predetermined by authoritative rules of law but committed to the liberum arbitrium of the courts. A question of judicial discretion...is a question what ought to be, as opposed to a question of what is....Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court."*

1669 ***Nape v INTCS Corporate Solutions (Pty) Ltd*** 2010 31 ILJ 2120 (LC) 2130 par 54

1670 **Brassey "Fairness..."** (1987) 70 cites the following apt remark by **Edmund Davies LJ** in the English case of ***Wilson v Racher*** [1974] ICR 428 CA, [1974] ILR 114: *"Reported decisions provide useful, but only general guides, each case turning upon its own facts. Many of the decisions which are customarily cited in these cases date from the last century and may be wholly out of accord with current social conditions. What would today be regarded as almost an attitude of Czar-serf, which is to be found in some of the older cases where a dismissed employee failed to recover damages, would, I think, be decided differently today."*

1671 **Farrar & Dugdale *Introduction to Legal Method*** (1990) 259; **Nathan *The Common Law of South Africa*** (1908) 29, correctly points out that the Ulpian definition of law, is not so much a definition of law as of the moral principles on which it is based. On the application of the principle in its Roman Law context, see **Levy *Natural Law in Roman Thought*** (1963) 17.

1672 **Voet *Com*** 1 1 12-17 pointed out the following foundational values on which the Roman state was based: i) duty to the immortal gods, ii) duty to one's country, iii) duty to one's parents, iv) observance of the law of self-preservation, v) conservation of the human race by the procreation and education of off-spring, vi) duty to society at large and to its individual members. See also **Nathan *The Common Law of South Africa*** (1908) 30

included *security of person, of possession and ownership of property, good faith in transactions, good care not to cause injury to others,* and *control of dangerous things.*[1673] In 1942 **Pound** added *absorption by society of risk of misfortune to individuals*, and of significance for our purposes, *employment security,* to the list.[1674] The English jurisprudent **R W M Dias** elevated *sanctity of person and property, safety of the state, social welfare* and *equality* to basic legal values. *Justice* was categorized under *equality,* as was *morality.* **Peter Stein** and **John Shand**[1675] identified *law and order, justice* and *individual freedom* as *master values* or *principal values*, but recognised other additional values such as *life, privacy, property*, and values applicable in commercial transactions.[1676] These have been referred to as *'the inner morality of the law'.*[1677] The application of these values in society requires a delicate balancing act.[1678]

It is difficult to conceive of any value which in Western society has achieved esteem or status higher than that of justice, and particularly *fairness.*[1679] Of all theories of justice throughout the ages, that of justice according to the dictates of natural law or natural reason has been the most widely recognised.[1680] Variant theories such as *positivism, utilitarianism and legal realism* have had a much more limited impact and are not as generally, let alone universally recognised.[1681]

1673 **Farrar & Dugdale *Introduction*** (1990) 259
1674 ibid
1675 ***Legal Values in Western Society*** (1975) 5
1676 **Stein & Shand *Legal Values*** (1975) 1 et seq.; See also **Farrar & Dugdale *Introduction*** (1990) 260
1677 **Fuller *Morality and the Law*** Chapt. II; See **Farrar & Dugdale *Introduction*** (1990) 258.
1678 **Stein & Shand *Legal Values*** (1975) 8-10
1679 Ibid.
1680 This is particularly true of natural law and reason as expounded in the Roman law texts which is said to contain the *ratio scripta* or written reason. See **Stein & Shand *Legal Values*** (1975) 8-10.
1681 *Positivism* has been dealt with in Chapter I. **Stein & Shand *Legal Values*** (1975) 8-10 cites as example of a positivist **Adam Smith**, who observed that law is concerned not with what the good man should be disposed to do, but with what a judge can compel him to do. Utilitarianism emphasises that man's nature requires him to identify with the idea of the common good for the community as a whole. The *legal realists* reject the idea of law as a fixed set of legal rules. Law is what the judge decides. In contrast with the positivists however, they hold that the social attitudes and personal prejudices of judges could be as decisive as legal rules.

In modern jurisprudence procedural values also came into sharper focus. Process values entail that the legal process as such has to be *good* and *fair*, irrespective of the results that it brings forth.[1682]

In ***George v Liberty Life,***[1683] **Landman J** summarised the importance of process values as follows:

"This court has been particularly constrained to emphasize the value of process. The unpredictability of the course and outcome of a process, especially where it should have involved consultation which is a chance afforded an employee, employees or their union to influence a managerial decision, has been stressed on numerous occasions[1684]*...A defect in procedure, i.e. failure to follow a fair, agreed or standing practice can lead to the substantive decision being unfair...The 'no difference approach' has its place, but if used outside of its limited ambit, it can devalue the rationale and opportunities which process creates."*[1685]

The IC also pointed out that the definition of unfair labour practice does not require *specified* procedure, and that it does not fall within the competence of the court to lay down rules of procedure that an employer has to follow for a dismissal to be regarded as procedurally fair. Such a step would be a usurpation of the prerogative of the legislature.[1686] In ***Lefu***[1687] the same judge held that the ILO Convention on the Termination of Employment contains an appropriate formulation of the principles of *fairness* which the court strived to maintain.

1682 The term *process values* seems to have been derived from the American jurist **Robert Summers *"Evaluating and Improving legal Process – A Plea for Process Values"***, 1974 60 **Cornell Law Review** 1. See also ***George v Liberty Life Association of Africa Ltd*** 1996 17 ILJ 600; ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*** 1985 6 ILJ 373 where ILO Convention 119 of 1963 is discussed.

1683 Supra 600

1684 The learned judge made reference to and relied on ***United Peoples Union of SA & Another v East rand Proprietary Mines Ltd*** (unreported case of the Industrial Court, IC NH 11/2/18608.

1685 This dictum was clearly inspired by Art. 7 of the ILO Convention on the Termination of Employment 158 of 1982, which states that employment shall not be terminated...before the worker is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity. This wording is echoed in the Code of Good Conduct: Dismissal, appended as schedule 8 to the LRA. It is to be noted that the predecessor to ILO Convention 158 of 1982, was ILO Convention 119 (1963), which did not contain the proviso that the 1982 Convention and the Code referred to above have. On the Convention, see also ***Modise*** 530 par 30; ***Karras t/a Floraline v SA Scooter Transport and Allied Workers Union*** 2000 21 ILJ 2612, 2623 par 26; ***Stobar*** 84; ***Lefu & others v Western Areas Gold Mining Co. Ltd*** 1985 6 ILJ 312-3; **Driefontein** 144-5; ***South African National Defence Union v Minister of Defence*** 1999 4 SA 469 (CC) 483-4; **Woolfrey *"The Application of International Labour Norms in South African Law"* Yearbook of International Law** (1986-7) 135;***Chirwa v Transnet Ltd*** 2008 29 ILJ 73 106, where the Constitutional Court applied ILO Convention 87 of 1948; ***Wahl v AECI LTD*** 1983 4 ILJ 302; ***Van Zyl v O'Okiep Copper Co Ltd*** 1983 4 ILJ 125, 129.

1686 ***National Union of Mineworkers v Driefontein Consolidated Ltd*** 145; ***National Automobile*** 376.

1687 Supra 312H

The LAC has emphasised the value of process repeatedly, and has rejected the so called *"pointless approach"*,[1688] *the "utterly pointless approach" and the 'no difference approach"*[1689] All these approaches may be attempted justifications of denying an employee the right to be heard, and therefore the right to process fairness. It should nevertheless be borne in mind that both the ILO Convention on the Termination of Employment[1690] and The Code of Good Conduct: Dismissal[1691] contain the proviso that an employer need not hear an employee before terminating his or her service, if it cannot reasonably expected to do so.[1692]

As fairness has traditionally been viewed as a form of law subsidiary to statutory law, it cannot be dealt with in isolation from statute and especially the Constitution. In this respect we are dealing with three possible relations or connections between statutory law and fairness.

Firstly, there is the Constitution containing the so-called constitutional values such as the doctrine of legality, an incident of the rule of law.[1693] As highest law it is imperative that its provisions be given effect to. It has to be born in mind that Constitutional provisions such as s 23(1), enshrine the very concept of fairness in labour practices.[1694] There is therefore no room for a perceived conflict between fairness and the Constitution.

Secondly, we have to distinguish legislation adopted for the purpose of giving effect to s 23(1) of the Constitution, from the rest of the legislation on the statute book. With the first-mentioned we have in mind the LRA, the EEA, and

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1688 An example of the *pointless approach* can be found in a dictum of **Conradie JA** in ***Modise v Steve's Spar*** 566 par 148: *My point of departure in this discussion is that it is not fair to expect an employer to do anything which is pointless."*

1689 ***Modise v Steve's Spar Blackheath*** 537 par 53; ***Karras t/a Floraline v S A Scooter & Transport Allied Workers Union*** 2612, 2625.

1690 ***Convention on the Termination of Employment*** 18 of 1982 Art 7.

1691 Sch. 8 to the LRA

1692 See ***Modise*** 530 par 30

1693 ***Sidumo v Rustenburg Platinum Mines Ltd*** 2458 par 163

1694 See ***National Entitled Workers Union v CCMA*** 2003 24 ILJ 2335. The court held that the common law, and in particular the law relating to the employment contract, in so far as it is compatible with constitutional goals and values, are embraced by the concept of unfair labour practices as enshrined in s 23(1) of the Constitution.

the BCEA.[1695] These statutes enjoy preference to other legislation in the event of conflict. Insofar as these statutes are constitutionally sourced, effect would have to be given to Constitutional values and fairness in labour relations via these statutes.[1696]

Thirdly, legal values contained in non labour related legislation may have to be taken into account for the purpose of determining what is fair or unfair, especially in cases where labour legislation is silent or when such statutory provisions coincide with Constitutional values. We have a precedent in this regard. In ***Crous v Blue Crane***[1697] the High Court dealt with s 6(1) of the Local Government Municipal Systems Act[1698], which states that a municipality's administration is governed by the democratic values and principles embodied in s 195(1) of the Constitution. Applying these principles and values to the relationship between the municipality and its Municipal Manager, the court observed that these values mean that a high standard of professional ethics, accountability, and honesty is required, as well as the cultivation of good human resource management.[1699]

The Constitution is the primary source of values for the purpose of determining fairness.[1700] The fundamental values on which the South African legal dispensation is built are pervasive of the whole of the Constitutional text, and an integrative approach should be taken of these when applying them in a particular

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1695 In ***Chirwa v Transnet*** 2008 29 ILJ 73 the CC held that these labour statutes are actually a codification of employment rights, aimed at giving effect to s 23(1) of the Constitution.

1696 ***Sidumo & another v Rustenburg Platinum Mines Ltd*** 2427 par 57

1697 ***Crous v Blue Crane Route Municipality*** 2009 30 ILJ 840, 857-860.

1698 Act 32 of 2000

1699 The court furthermore applied the constitutional values of accountability, responsiveness and open democratic governance as envisaged by its own prior judgment in ***President of the Republic of SA & others v SA Rugby Football Union*** 2000 1 SA 1 (CC); 1999 10 BCLR 1059 (CC) par 133.

1700 Even before the final adoption of the 1996 Constitution, **Landman J,** applied Constitutional values in ***George v Liberty Life*** 586-7. He referred specifically to s 7(1), which introduced ch. 2 of the Bill of Rights where the democratic values of human dignity, equality and freedom are enshrined, as well as s 9, which protects the value of equality. See also ***NEHAWU*** (supra); **Pillay "Giving Meaning to Workplace Equity"** (supra) loc. cit. provides an incisive article in this regard; **du Toit et al *Labour Relations Law*** (2006) 483 et seq; **Davis et al *Fundamental Rights*** (1997) 214 ; **Currie & de Waal *Bill of Rights*** (2005) 501

The Industrial Court (by then in its twilight years) stated in ***Association of Professional Teachers & Another v Minister of Education*** 1995 16 ILJ 1048 (IC) 1076A, that *"In exercising our present jurisdiction we do not purport to exercise any jurisdiction in regard to the Constitution, but just as this court has had regard to other expressions of applicable values and norms in labour relations, even more so, unless prohibited from doing so, we must strive to uphold the democratic values enshrined in the Constitution."*

This dictum was followed by the same court in ***George v Liberty Life*** 584.

case. There are some values that are labeled as such in the very text of the Constitution. These are the truly fundamental values that form the cornerstones of the South African constitutional dispensation. They are *democratic values, social justice* and *fundamental human rights.* These are contained in the Preamble to the Constitution. In the so-called Founding Provisions to the Constitution[1701] a premium is placed on *human dignity, equality* and *human rights and freedoms,*[1702] *non-racialism, non-sexism,*[1703] the *supremacy of the Constitution and the Rule of Law,*[1704] as well as certain political and democratic values,[1705] such as *accountability, responsiveness* and *openness* of government. [1706] Section 39 re-affirms that the values contained in the Founding Provisions relating to *human dignity, equality and freedom* have to be promoted by a court of law or tribunal interpreting the Bill of Rights. This interpretation clause is of particular value for the purpose of applying equitable principles in the CCMA and Labour courts.[1707] Apart from values that are alluded to in other parts of the Constitution, those contained in the Bill of Rights are for the most part the values referred to above. Detailed provisions relating to some of these individually stated values have been incorporated into the Constitutional text.[1708]

Additional values relating to democratic government are also included.[1709] This text in itself justifies the claim that South Africa is a *value-state* in addition to being a *rechtstaat*. As we have already stated, the *value concept* is pervasive of the text of the Constitution, not always by name, but unmistakably by

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1701 S 1

1702 s1 (a). See ***Modise*** 545I-J, where the court, per **Zondo AJP** rejects the no-audi approach to dismissals for strike action, emphasizing that the audi alteram partem rule enshrines the fundamental constitutional value of equality.

1703 s 1(b)

1704 S 1©

1705 S 1(d)

1706 ibid.

1707 **Pillay *"Giving Meaning to Workplace equity"*** 57 observes in connection with s 39 that whereas in the pre-constitutional era adjudicators had to strain the interpretation of the law for egalitarian effect, the Constitution now requires that interpretation should be based on *values*. These are the values of an open and democratic society based on human dignity, equality and freedom. The concept value embraces equity as one of the many universally desired ideals. As a contingent concept, equity and values make constitutional jurisprudence evolutionary.

1708 Equality is for instance regulated in detail by s 9, human dignity by s 10. See also s 11 (Life); s 12 (security and freedom of the person); s 13 (slavery, servitude and forced labour) etc.

1709 s 1 (d).

implication.[1710] The same holds true as regards the traditional values of *equity* or the *equitable*,[1711] *reason*, the *reasonable* or the *rational*[1712] and *fairness*.[1713]

An often overlooked, but crucial constitutional value is contained in s 13 of the Constitution,[1714] which provides that no one may be subjected to *slavery*,[1715] *servitude*[1716] or *forced labour.*[1717] This does not only impact on labour supplied against the will of the employee, but also on labour, or the fruits thereof, obtained *unjustly, oppressively* or by means of *unavoidable hardship.*[1718] In our view, the ambit of these provisions is wide enough to include some forms of unjustified or unfair enrichment of one person at the expense of another, as discussed earlier in this work. A core value of the unfair labour practice dispensation not encountered by name in the Constitution, but rather in the LRA,

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1710 s 7(1) reiterates the ***values*** of human dignity, equality and freedom. Extensive provisions relate to equality (s 9),human dignity (s 10), life(s 10), freedom and security of the person (s 12), slavery, servitude and forced labour (s 13), privacy (s 14), freedom of religion, belief and opinion (s 15), freedom of expression (s 16), and others, including assembly, demonstration picket and petition, freedom of association, political rights, citizenship, freedom of movement and residence, labour relations, environment, property, housing , health care, food, water, security, children, education, language and culture, cultural, religious and linguistic communities, access to information, just administrative action, access to courts, arrested, detained and accused persons and the like.

1711 s (2) (b); s 25 (3); ss 25 (5) & (7); 29(2) (a).

1712 Ss 24(b);25(5);26(2);27(2);29(1)(b);29(2)('reasonably practicable')('reasonable educational alternatives');33(1);33(2);35(1)(f);35(2)(a);35(3)(d);36(1);

1713 ss 23(1);33(1);34;

1714 s 48 of the LRA.

1715 Art. 1(1) of the **Slavery Convention** of 1926 defines slavery as *'...the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.';* See also **Currie & de Waal *Bill of Rights Handbook*** (2005) 312

1716 Servitude includes debt bondage, which involves the pledging of personal services as security for debt, serfdom and the delivery of a woman or a child against their will to another with a view to the exploitation of their labour in consideration for money or kind. This definition is derived from the ***Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery***; Cf. **Haysom** (supra), in **Davis *Fundamental*** Rights (1997) 89.

1717 The ***Forced Labour Convention*** 1930 of the ILO defines forced labour as *'...all work or service which is exacted from any person under the menace of any penalty and for which the said person has not afforded himself voluntarily.'* See **Currie & de Waal *Bill of Rights Handbook*** (2005) 313; These concepts are not exhaustively defined in the common law, statutory law or the Constitution itself, although good descriptions are to be found in international instruments such as those cited above.. See **Haysom *"Servitude, Forced Labour and Slavery"* Davis et al, Fundamental Rights** (1997) 88 et seq. However, the practices are forbidden in numerous international human rights instruments such as the ***Slavery Convention*** of 1926, as amended by the 1953 **Protocol;** the **Supplementary Convention on the Abolition of Slavery,** the ***Slave Trade and Institutions and Practices similar to Slavery*, 1956.** See also s 2 of the ***Convention concerning Forced Labour***, 1930, of the ILO. See **Beddard *Human Rights and Europe*** (1993) 107; **Haysom *'Servitude...'*** (supra), in **Davis** et al, **Fundamental Rights** 80-1. **Naidu *"The Right to be free from Slavery, Servitude and Forced Labour"*** (1987) CILSA 108.

1718 **Haysom "Servitude..." Davis et al** (1997) 89.

is that of *security of employment*, which forms the basis of the definitions of unfair labour practices and unfair dismissal found in s 186 of the LRA.[1719] The value of security of employment inform these provisions of the LRA.
As the concept of equity can never be applied in any sense contrary to the provisions of the Constitution, its application would necessarily also involve the *spirit, objects* and *purpose* of the Bill of Rights.[1720] In addition, any values such as equity, rights and freedoms recognised by the common law, customary law or statutory law are not negated by the Constitution, except insofar as they may be in conflict with the Constitutional text itself.[1721] The spirit, objects and purpose of these would therefore also have to be promoted.[1722]

Despite the fact that the constitutional values form the foundation of our labour dispensation, it is important to bear in mind that *values* are not to be equated with *rights.* Rights generally originate in values, but the two are not synonymous or identical.[1723] It is for this reason that the courts have held that the Constitutional values, as useful as they may be, do not found causes of action. Direct reliance on the Constitution to found a cause of action is therefore not permissible, under normal circumstances.[1724]

The values provided for in labour legislation such as the LRA, EEA and BCEA give effect to Constitutional values. They constitute not only law, but are at the same time also the prime values which have been accepted by organized labour, the State, and organized business for the purpose of governing and guiding the workplace.[1725]

1719 ***National Education Health & Allied Workers Union v University of Cape Town*** 114 par 42
1720 s 39(1) (2) of the Constitution.
1721 s 39(2)(3)
1722 **Pillay** ***"Giving Meaning to Workplace Equity"*** 2003 24 ILJ 59.
1723 ***Chirwa v Transnet Ltd*** 97C; In ***Minister of Home Affairs v National Institute for Crime Prevention & Reintegration of Offenders*** 2004 3 SA 280 (CC); 2004 5) BCLR 445 (CC) the Constitutional Court explained the relationship between constitutional values and rights: *"The values enunciated in s. 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discreet and enforceable rights in themselves"*
This dictum was followed in ***Institute for Democracy in SA & others v African National Congress (IDASA)*** 2005 5 SA, 39 (C); 2005 10 BCLR 995C par 40, and ***Chirwa v Transnet*** 97B-D.
1724 ***Chirwa v Transnet*** 97, where reliance is placed on ***IDASA***, loc. cit. par 40.
1725 These parties are the constituents of **NEDLAC.** See ***George v liberty Life Association of Africa*** 588.

Values enshrined in international law, such as those contained in the Conventions and Recommendations of the International Labour Organisation (ILO), The European Convention on Human Rights, The Universal Declaration of Human Rights may also form the basis of a determination of fairness.[1726]

Community values also play a vital role in the determination of *lawfulness, fairness* and *equity* in the workplace, as the latter is a microcosm of the broader community and of civil society.[1727]

Values may be categorized into *internal* and *external values.*[1728] Internal values would be those ideals and principles legitimately determined by management for the proper running of the business, such as *efficiency, profitability, trust and confidence, loyalty* etc. External values on the other hand, are immanent values, i.e. those imposed on a business by a recognised external value source, such as those discussed earlier.

Thus we note that a wide variety of values from a wide variety of sources may find application in the determination of fairness. These values may be integrative by nature and contents, may overlap, and in some instances even be in conflict with each other, hence one could even refer to *competing* or *conflicting* values.[1729] It should however be borne in mind that the individual Constitutional values form part of an integrated and organic whole, all being firmly embedded in the spirit of the Constitution. Apparently conflicting constitutional values would

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1726 ***George v Liberty Life*** 591.
1727 ibid.
1728 Ibid.
1729 Ibid. Here the learned **Landman P** referred to the judgment of **Ackermann J** in ***Vryenhoek v Powell*** 1996 1 SA 1017D, where it was stated:*" I also accept that it is not possible in all circumstances to fully harmonise all the chap. 3 rights with one another, and that in a given case, one right will have to be limited in favour of another. As Berlin points out: '...since some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false a priori view of what the world is like."*
Ackermann J was in this passage referring to **Berlin *"Introduction"***, to ***"Two Concepts of Liberty"*** Four **Essays on Liberty"** (1969)1 21 1i.

therefore always have to be reconciled to achieve the real purpose of the Constitution.[1730]

It would be the duty of the judge to keep an open mind to divergent values that may bear upon the issues to be decided by him, make an attempt at harmonization of such values, and if that proves impossible, to prioritize the same.

Should one accept the notion of conflicting or competing values, it also follows a priori that values are not absolute. This includes Constitutional values contained in the Bill of Rights. Moreover, constitutional rights and values inform each other[1731] and are for that reason not separable.[1732]

In our submission, judicial limitation of constitutional values would not be permissible, unless such limitation is effected for the purpose of prioritization of competing values in the given circumstances of a case that serves before such judge.[1733] The limitation clause contained in the Constitution[1734] applies only to limitation by means of a law of general application. Even so, it determines strict

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1730 In ***Sidumo***, **Sachs J** pointed out in ornate language the nature and role of Constitutional values: *"The values of the Constitution are strong, explicit and clearly intended to be part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discreet legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalization."*

1731 See the judgment of **Ngcobo J** in ***Khoza & Others v Minister of Social Development; Mahlaule & others v Minister of Social Development*** 2004 6 SA 505 (CC), as referred to by **Sachs J** in ***Sidumo*** 2454 par 154: *"The Bill of Rights is the cornerstone of our constitutional democracy and it affirms the democratic values of human dignity, equality and freedom. The founding values will inform most, if not all, of the rights in the Bill of Rights."*

1732 **Sachs J** stated in ***Sidumo*** 2452 par 150, that enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. The learned judge emphasised the overarching relationship between constitutional values and constitutional rights, the osmotic seepage between rights, rather than their hermetic isolation as well as the hybridity, co-existence and permeability of constitutional rights and values.

1733 In ***S v Makwanyane*** 1995 3 SA 391 (CC)) par 104, the Constitutional Court summarised the position in these words: *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality...there is no absolute standard that can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirements of proportionality, which calls for the balancing of different interests;"* **Currie & de Waal *The Bill of Rights*** (2005) 176.

1734 s 36(1)

parameters within which such limitation is to take place. Restrictive interpretation would therefore have to be applied to any limitation or purported limitation of constitutional rights and values.[1735] This includes s 23(1) of the Constitution, the guarantee of fair labour practices.[1736]

Since ***Chirwa v Transnet***[1737] the courts have adopted the approach that the resolution of private and public sector disputes takes place in terms of the very same constitutional values,[1738] administered by specialised tribunals and courts.[1739] There is therefore no longer a dichotomy between public law values and private sector values. In general therefore, there is no need for a special review mechanism for the resolution of public sector disputes.

1735 **Currie & de Waal *The Bill of Rights*** (2005) 164 et seq. The learned authors emphasise that any reason for limitation of a right needs to be exceptionally strong.

1736 Although the limitation clause has been written primarily with *rights* in mind, and not *values* as such, it may be accepted that most of the constitutional rights that it refers to, are founded on constitutional values, to which the limitation clause would ipso facto apply.

Although s 36(1) deals primarily with *legislative* limitation to the Bill of Rights, we submit that it may be useful even in cases where competing rights and values call for judicial limitation or prioritization.

From a reading of s 36 (1) it would appear that even the limitation clause itself, by no means renders it easy for a judge to effect such limitation. The Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is *reasonable* and *justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose (e), less restrictive means to achieve the purpose.

No law may limit any right contained in the bill of rights except as set out above, or in any other relevant provision of the Constitution.

1737 2008 29 ILJ 122

1738 ***Chirwa*** 122 par 145. The court pointed out that s 195 of the Constitution, which sets out the basic values and principles governing public administration, includes in those values *'employment and personnel management practices based on fairness'.* See s 195(1). These provisions echo the right to fair labour practices enshrined in s 23(1) of the Constitution.

1739 In ***NEHAWU v University of Cape Town*** par 30, the CC stated that *"The LAC is a specialised court, which functions in a specialised area of law. The LAC and the Labour Court were established by parliament specifically to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and expertise, judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily."*

It is clear from this passage that one of the reasons, if not the primary reason why the legislature established the labour courts as specialised courts, was to attain one of the primary objectives of the LRA, namely the *expeditious* resolution of labour disputes. There can be no doubt that expertise and experience equip the judges of these courts to deal more expeditiously with labour disputes than would otherwise be the case.

See also ***Chirwa v Transnet*** 112 par 17; 131 par 172, where **Langa CJ** stated: *"It is undoubtedly advantageous for specialised issues to be decided by specialist tribunals. As Skweyiya J notes, this principle has been endorsed by this court and others."* The endorsement referred to here relates to ***Hoffmann v SA Airways*** 2001 1 SA 1 (CC); 2000 21 ILJ 2357 (CC); 2000 11 BCLR,1211 (CC); 2000 12 BLLR 1365 (CC) par 20, and ***Minister of Correctional Services & others v Ngubo*** 2000 21 ILJ 313 (N).

Because of the specialised nature of the LAC, a court of higher instance will not lightly interfere with its judgments, especially its value judgments, on appeal.[1740] It will adopt a deferential approach. This is particularly the case where the appeal does not concern a concrete issue of fact or law, but is aimed at overturning a value judgment on fairness properly reached by the LAC. An appeal against a value judgment of the LAC may in certain circumstances be little more than a request that a higher court should express a difference of opinion.[1741]

It follows logically that if fairness is an inherently nebulous, flexible, elastic and indefinable concept,[1742] dependent upon a consideration of the facts of each individual case, opinions and value judgments relating to fairness could differ. This variability and unpredictability factor embodies the very core of the critique of the fairness-sceptics throughout all the ages. Facts and the relatively precise and pre-determined legal rules applied to them, produce *legality*. Fairness-sceptics often prefer the relative legal certainty which this produces, above the perceived and inherently flexible yardstick of fairness. By the same token though, it would seem that this is also where the very strength of fairness manifests itself: flexibility, adaptiveness, and responsiveness.[1743]

1740 The erstwhile Supreme Court held the same view in respect of the Industrial Court , as a specialised tribunal: ***Trident Steel (Pty) Ltd v Johns*** 1987 8 ILJ 27 49. On the present Labour Courts, see ***Gcaba v Minister of Safety & Security*** par 56.

1741 In ***Rawlins v Kemp t/a Centralmed*** 2010 31 ILJ (SCA) 2330 (passim), **Nugent JA** stated: *"It is questionable whether an appeal of this kind should be before us at all in view of the decision in National union of Metalworkers of SA v Fry's Metals (Pty) Ltd.. this court will not lightly interfere with the decisions of the specialist tribunal...That applies particularly where the decisions of the Labour Appeal Court is the product of a value judgment that is arrived at in the continuing development of its own jurisprudence. Whatever view we might have taken on the matter it seems to me that we would be remiss if we were not to defer to that court's value judgment in a matter of this kind."*

In pointing out the specialised status of the LAC, the court referred to ***Dudley v City of Cape Town*** 2005 5 SA 429 (CC); 2004 25 ILJ 991 (CC) par 9. In regard to the same deferential approach that the erstwhile Supreme Court adopted in regard to value judgments of the Industrial Court, see ***Trident Steel (Pty) Ltd v John*** 49I-J.

1742 ***Woolworhts v Whitehead*** 571

1743 In ***National Union of Mineworkers & Others v Driefontein Consolidated*** 17A, the court emphasised that a discretion vested in a court of equity should never be allowed to become rigid and inflexible, nor is it desirable that any fixed policy be followed in this regard. See also ***South Cape Corporation v Engineering Management Services*** 1977 3 SA 534 (A) 547G-H; **Davis *"Legal Certainty and the Industrial Court"*** 1985 6 ILJ 271; **Veenhoven *"Rechterlijke matiging van schadevergoeding"*** (1975) 289 et seq. in connection with flexibility and equity in modern Dutch law.

The labour Courts have given full recognition to considerations relating to flexibility in fairness disputes. Thus in ***Maluti Transport Corporation Ltd***[1744], a case involving the so-called principle of *'estoppel by election or waiver',* the LAC recognised the principle that fairness could even justify a change of mind on the part of an employer. In this case the employer had granted a so-called *'cooling-off'* period to striking workers, but changed his mind and recalled them earlier than the expiry date of the period. The court held that *'considerations of elementary fairness'* allowed for a fair renunciation or retraction of an earlier election, provided that two basic requirements are met, namely a) that good reason exist for the change, and b) timeous notice to the other party.[1745]

Cheadle[1746] recently pointed out the usefulness of the concept of flexibility in striking a balance between the competing interests of the parties to the employment relationship, and in setting a framework within which such interests could be dealt with. Three broad kinds of flexibility is recognised: *employment flexibility, wage flexibility* and *functional flexibility*, under which he understands the freedom to alter work processes, terms and conditions of employment etc. quickly and cheaply.[1747] **Jacobs**, a prominent Dutch author on labour law points out that a similar kind of development had taken place in the Dutch labour market after the recession of the 1980's when thousands of jobs were lost:*"flexible contracts"* were introduced, a practice that was eventually dubbed the *Japanization of business.*[1748] During the mid-1990's however, the Dutch legislator embarked on a clear compromise between the company's need for

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1744 ***Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union*** 1999 20 ILJ 2531 (LAC).

1745 The court relied on the following precedents where recognition had been given to this principle: ***Chamber of Mines of SA v National Union of Mineworkers*** 1987 1 SA 668 (A) 690J; 1987 8 ILJ 68 (A); ***Administrator, Orange Free State & others v Mokopanele*** 1990 11 ILJ 963 (A); ***Mshumi & others v Roben Packaging (Pty) Ltd t/a Ultrapark*** 1988 9 ILJ 619 (IC) 625G-I; See also **Grogan *Collective Labour Law*** (2010) 294.

1746 **Cheadle *"Regulated Flexibility"*** (2006) 663; But see also **Smith *"Labour is not a Commodity: Social perspectives on flexibility and market requirements within a global world"* Tydskrif vir Suid Afrikaanse Reg** 2006:1 152, where doubt is expressed concerning the readiness of the African labour market for certain forms of flexibility.

1747 **Cheadle *"Regulated Flexibility..."*** 2006 27 ILJ 668

1748 **Jacobs *Labour Law in the Netherlands*** (2004) 12.

flexibility, and the job security of its employees, which aptly became known as *'flexicurity'*.[1749]

In our submission this kind of flexibility could certainly contribute to combating undue rigidity and promoting fairness in the workplace. All labour law documentation of the ILO recognises the need for flexibility.[1750] However, the point is that fairness as such is *per se* a flexible concept, the main object of which is regulation of the infinitely varying circumstances that present themselves for adjudication. Fairness does not find primary expression or pronunciation in statute, but rather in judicial discretion.

The yardstick of flexibility in labour matters has been widely accepted by virtually all the labour courts and labour adjudicative institutions in South Africa. Even civil courts of law like the SCA have adopted this approach.[1751] The Constitutional Court has also provided guidance in this regard.

The SCA has decided[1752] that the text of the LRA[1753] has its roots in the inherent malleability of the criterion it enshrines, namely *fairness,* a concept that is far from absolute. Fairness denotes a range of possible responses, all of which could properly be described as fair.[1754] The court expressed the view that even the use of the word *'fairness'* in everyday language denotes this. A decision may be described as *'very fair'* (when it is regarded as generous to the offender). It may

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1749 **Jacobs** (2004) 13. However, **Jacobs** is critical of some aspects of flexibility. He states: *"However, the concept of the 'flexible firm' is undermining the very foundations of traditional labour and social security law. Employers are nowadays buying labour by the hour. This harks back to the nineteenth-century ideas in which labour was seen as a commodity."*

1750 **Schachter & Joyner *United Nations Legal Order*** (1995) 478 refer to the practice of the ILO to adopt so-called *flexibility devices* in the form of general terms in Conventions which are intended to apply in countries with varying degrees of economic and social development. Such devices include terminology such as *'reasonable', 'appropriate', 'practicable'* and *'suitable.'*

1751 ***Rustenburg Platinum Mines Ltd v CCMA***; **Rycroft *"Rethinking Joinder in Appointment Disputes: Department of Justice & others & National Commissioner of the SA Police Service v SSBC & others""*** 2005 26 ILJ 2191; **Van der Merwe *"Die Reg op die Handhawing van Billike Arbeidspraktyke (en Skakeling tussen die Partye in die Diensverhouding)*** 1988 9 ILJ 749, 753 correctly points out that the Industrial Court was unwilling to lay down strict rules with which employers and employees had to comply, and which would inform them precisely which actions in future would constitute unfair labour practices and which not. A balance has to be struck between legal certainty and fairness. See also ***National Union of Mineworkers v Driefontein Consolidated Ltd*** 145D.

1752 See ***Rustenburg*** 2095 par 46

1753 It refers to the LRA as a code.

1754 ibid

also be seen as *'more than fair'* (when it is lenient). Yet it may also be said to be *'tough but fair'* or *'severe but fair.'* This means that while one's own response might have been different, the actual response cannot simply be branded as unfair. In a dictum that was overruled at a later stage by the Constitutional Court,[1755] the court then expressed the view that CCMA commissioners have to exercise great caution in evaluating the fairness of the dismissal of employees, as they fall in the latter category.[1756] Bearing in mind that fairness is a relative concept, the mere fact that the commissioner himself may have imposed a different sanction, does not mean that the sanction imposed by the employer was unfair.[1757] However, in ***Sidumo***, the Constitutional Court reiterated that commissioners as decision makers, may not *defer* to the findings or opinions of the employer.[1758]

7.16.4 EQUITY AND MORAL JUDGMENT

Farrar and Dugdale, two leading English scholars, observed that courts of *law* are often described as *courts of justice*, and that they regarded this as an euphemism.[1759] We think that the learned authors have a point. Law, or legality and justice are not synonymous. Law can be seen as strict rules or principles, whereas justice is an ideal,[1760] of which *equity* or *fairness* forms a part.[1761] Both

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1755 ***Sidumo***, supra.

1756 ibid

1757 The court cites as authority **Myburgh & Van Niekerk A *"Dismissal as a Penalty for Misconduct: The Reasonable Employer and other Approaches"*** 2000 21 ILJ 2145, 2158. Concerning the range of possible decisions that fairness may entail, the court cites **Todd & Damant *"Unfair Dismissal – Operational Requirements"*** 2004 25 ILJ 896, 907. The court summarises as follows the duty of a CCMA commissioner in determining the fairness of a dismissal: *"It follows that in determining the fairness of a dismissal, a commissioner may not be persuaded that dismissal is the only fair sanction. The statute only requires that the employer establish that it is a fair sanction. The fact that a commissioner may think that a different sanction may also be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction."* – 2096 par 46

1758 In ***Sidumo*** 2431, the court pointed out that the Constitution and the LRA seek to address the power imbalance between employees and employers. It pointed out that the rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle. Neither the Constitution, nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal.

1759 **Farrar and Dugdale *Introduction*** (1990) 257.

1760 **Hahlo and Kahn *The South African Legal System*** (1968) 29; **Levi *"The Nature of Judicial Reasoning"* The University of Chicago Law Review** 1965 3 408.

1761 ibid. See also **Allen *"Fairness, Truth and Silence: The criminal trial and the Judge's Exclusionary Discretion"* Jurisprudence – Cambridge Essays (Gross and Harrison** eds.**)** (1992) 149

justice in this sense and equity are branches or dimensions of *morality*.[1762] This Aristotelian and Roman paradigm of the concept of equity is still prevalent in Western jurisprudence.[1763]

The relationship between *equity* and *morality*, is more intimate than that between *law* and *morality*. Nevertheless, a certain overlap exists between strict law and morality,[1764] and thus also between law and equity.[1765]

In a famous debate with **Prof H L A Hart** on the separation of law and morality, **Prof Lon Fuller** convincingly identified the so-called *inner morality of the law*. These are the inner principles based on morality which makes good law possible.[1766] The inner morality of the law correspond to justice, morality and what ought to be the law. This contrasted with Hart's positivist theory in which law is order and nothing more.[1767]

A decision or judgment in terms of legality is purely deductive by nature, based on a limited number of features which have been antecedently determined as relevant. Its primary merits are to be found in *certainty* and *predictability*.[1768] On

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1762 Cf. Chapters II and III of this work. See also **Nathan *The Common Law of South Africa*** (1904) 29. The learned author explains the division of law by **Grotius** into *iustitia expletrix* and *iustitia attributrix*. The former comprise enforceable rules of law or equity, the latter such rules of morality as are incapable of legal enforcement.

1763 Ibid. See also 34. **Farrar & Dugdale *Introduction*** (1990) 261, in criticizing the extreme scepticism of the Scandinavian jurist **Prof. Alf Ross** towards the concepts of justice and equity, point out: *"However, this goes too far. There are aspects of the concept of justice which are relatively uncontroversial. The most systematic and enduring analysis of justice is that of Aristotle in his Ethics, Book Five"* See also **Van Apeldoorn *Theorie en Practijk*** 1937 THRHR 12.

1764 **Guest *"The Role of Morality in Legal Argument"*** **Acta Juridica** 2004 19 argues that, given the likeness between law and morality, there has to be some good argument to show why the obligations imposed by law should not *ipso facto* be moral obligations, and in turn why the doctrine known as legal positivism should be right.

1765 Ibid. **Farrar & Dugdale *Introduction*** (1990) 7: *"Finally, law communicates and reinforces social values. Law has always enforced some morality. Even the most primitive legal order seeks to regulate matters such as homicide and theft."*

1766 The Roman Dutch writer **Voet** had Biblical morality in mind when he stated in ***Com*** 1 1 12-17 that it was from the Roman natural law values of duty towards the gods etc. that the following principles had developed: that no one should do to another what he would not wish done to himself; that each should afford to another what he desired for himself from others, and that each should apply the same law in his own case which he desires to lay down for others. See **Nathan *The Common Law of South Africa*** (1904) 30 who relates this doctrine of **Voet** to the Sermon of the Mount.

1767 On this debate, See **Roederer & Moellendorf *Jurisprudence*** (2007) 86 and the literature there cited.

1768 **Allen *Fairness, Truth and Silence*** (1992)149; **Guest *"The Role of Legal Argument"*** (2004) 20 points out that even **Hart** who denied a *'necessary relationship between law and justice'* conceded that there

the other hand, the merit of *equity* lies in the fact that the judge is provided with a (free) discretion to decide the case according to the infinite variability of the facts of each case.[1769] **Allen**[1770] points out that, legality also has to be distinguished from the notion of the Rule of Law, as it is not identical with *rationality*. On the other hand, *equity* is more truly *rational* as the judicial discretion distinguishes between various cases on the basis of the circumstances of each individual case by the use of reason.[1771]

Fairness involves a *personal moral* judgment.[1772] In one case, the Industrial Court described fairness as the 'righteousness' of a case.[1773] It is generally recognised that *fairness* as a *moral ideal*, in the course of time, exerts a harmonizing influence on the rules of the strict law.[1774] The renowned modern Dutch jurist **Van Apeldoorn** observed that *morality*, and hence *equity*, addresses individuals. Its aims and purposes are *human perfection* whereas[1775] *legality* addresses the community and is aimed at the communal good.[1776] However, both law and morality are *normative* by nature and contents.[1777] Legal norms have as their object primarily *external acts*, whereas morality pertains to the *internal attitude, intention or disposition* which results in external acts.[1778]

It is today widely accepted in modern Western jurisprudence, that although *moral judgment* is fraught with difficulty and complication, it may nevertheless be properly passed, provided that it rests on the following legs or cornerstones: 1 *relevance* of facts, 2 *normality* of the judicial state of mind, 3 *impartiality* of the

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was a moral content to law in one sense, namely where morality has been *'incorporated'* into law, i.e. where it was internalized into law by legislative or judicial adoption.

1769 Ibid.

1770 Loc.cit.

1771 Ibid. **Allan *"Fairness, Truth and Silence"*** (1002)149; See also ***United African Motor and Allied Workers Union v Fodens (SA)*** 225.

1772 Ibid.

1773 ***Fodens SA***, supra 225.

1774**Allen *Fairness*** (1992) 169

1775 It is for this reason that justice and equity have traditionally been viewed as moral virtues.

1776 ***Van Apeldoorn's Inleiding to de Studie van het Nederlandse Recht*** (1985) 18th rev. ed. **Van der Ven & Spruit** (1985) 19. **Van Eikema Hommes *"De rol van de billijkheid in de rechtspraktijk"*** (1971) 31 et seq.

1777 ibid

1778 **Van Apeldoorn** (1985) 21. the learned author points out that this description has its origin in **Kant *Metaphysik der Sitten*** 1 1

decision maker, and 4 *universalizability* of judgment.[1779] A scrutiny of South African labour jurisprudence reveals a high degree of consonance with these generally recognised determinants of the morality (or the equity) of an act.

Relevance of facts does not only mean that only facts relevant for the purpose of passing a moral or equitable judgment should be taken into account, but also that *all relevant facts* should be considered in coming to a decision.[1780] This has become trite in our labour jurisprudence. The notion of *relevance* is based on the universally accepted jurisprudential principle that stems from Aristotelianism, that whereas *strict law* postulates general principles dealing with facts generally, *fairness* applies to the *concrete (relevant) circumstances* or facts of a given case.[1781] This principle was recognised in an early judgment of the Industrial Court and has been fairly consistently applied ever since.[1782]

The value judgment passed by the adjudicator on issues of morality, including fairness, should be done in a *psychologically normal state of mind.*[1783] This condition is likewise hard to describe, but from a practical point of view it has

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1779 **Perry *"Moral Reasoning and Truth"*** An **Essay in Philosophy and Jurisprudence** (1976) 37 et seq.

1780 ***Sidumo v Rustenburg Platinum Mines Ltd*** para 12-13; ***Cowley v Anglo Platinum*** (supra) par 21; **Brozalez v CCMA** 2008 29 ILJ 2241(LC).

1781 The Dutch labour lawyer **Van der Ven*"Arbeidsrecht/Sociaal recht"*** (1985) 101 explains the role of the judge applying equitable principles, as opposed to strict law: *"Zo n rechterlijke bevoegdheid betekent een verzwaring van de rechterlijke verantwoordelijkheid: de rechter is niet de lijdelijke spreekbuis van de wet naar het woord van Montesquieu, dat 'le juge prononce les paroles de la loi'. Analogisch is de rechter ook niet in alle gevallen strikt gebonden aan de woorden van de overeenkomst. De wettelijke of contractuele norm, hoe geldig ook, kan door omstandigheden worden teruggedrongen, concrete feiten kunnen meer gaan tellen dan abstracte regels."* See also **Van Eikema Hommes *"De rol van de billijkheid in de rechtspraktijk"*** (1971) 131 et seq.

1782 In ***United African Motor and Allied Workers Union v Fodens*** (supra) 225C-G the court cites **Hoyningen-Heune *Die Billigkeit in Arbeitsrecht*** 228 par 77 with approval, where the learned author states in free translation: *"Fairness is the righteousness of the particular case; it can therefore only become exclusively relevant in specific situations. In so far as fairness is applicable all relevant matters surrounding the specific case in the framework that reasonably belongs to the actual supposition are to be taken into account and the deciding criteria are to be uncovered, evaluated and weighed."* The court then proceeds to stress the fact that only when all relevant circumstances are taken into account may one decide whether an alleged unfair labour practice is in fact unfair. In ***Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid Afrika*** 1984 5 ILJ 344, 361, **Landman** BL cites ***Fodens*** (supra) with approval and confirms that equity is applied only with consideration of the circumstances of a given situation. In ***National Union of Mineworkers & Others v Driefontein Consolidated Ltd*** 116H-I,the court held that its discretion as to what is just and fair has to be exercised so as to take into account all the circumstances of the case. This approach was echoed in ***National Union of Mineworkers v ERGO*** 1243A-B. See also ***Media Workers Association*** 798G; ***Marievale*** 498J-490I; See ***Woolworths (Pty) Ltd v Whitehead*** (LAC) 601 par 135: *"An enquiry as to fairness involves a moral or value judgment taking into account all the circumstances."*

1783 **Perry *Moral Reasoning and Truth*** (1976) 43.

always been recognised that certain conditions of the state of mind are *abnormal*, and that judgment should not be rendered on moral and equitable issues under these conditions.[1784] The Roman law texts already referred to *iracundia* or *anger*, for instance.[1785] Certain acts performed in anger were regarded as null and void or at least legally excusable.[1786] The Labour Appeal Court has discouraged the making of rash, irrational and regrettable decisions by both employers and employees in volatile situations such as those involving strike action.[1787] In modern legal philosophy and jurisprudence *tiredness, depression, mental illness, intoxication, grief, excitement* are deemed to be examples of abnormal states of mind. An adjudicator suffering from any of these inflictions should best desist from passing moral or equitable judgment.[1788]

The personal characteristics and disposition of the judicial officer have been aptly described by the late **Chief Justice, Ismael Mahomed** as follows:

"The independence of the judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they project and the parameters they seek to identify on the exercise of judicial power."[1789]

In his well known work on trial advocacy, **Morris**[1790] cites his British counterpart[1791] who aptly pointed out that the irritable judge eventually either

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1784 ibid

1785 Cf. D 50 17 48: ***"Quidquid in calore iracundiae vel fit vel dicitur, non prius ratum est****....."Whatever is done or stated in the heat of anger is without reason....."*

1786 ibid

1787 In strike situations, the employer should allow for a *'cooling-off'* period wherever practicable and reasonable: ***Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union*** 2539 par 28.The passage quoted with approval by the court was taken from ***Plaschem (Pty) Ltd v Chemical Workers industrial Union*** 1993 14 ILJ 1000 (LAC) 1006H-I, also relied on by the court in ***Performing Arts Council of Transvaal v Paper Printing Wood and Allied Workers Union*** 1994 15 ILJ 65 (A); 1994 2 SA 204 (A).

1788 ibid.

1789 Address to the International Commission of Jurists, 1998, referred to in the attorneys' journal **De Rebus**, May 2009 4. The citation has assumed a significant role in the debate concerning the appropriateness of conduct of some judges of the High Court. As stated in **De Rebus**, loc. cit., the words of the late Chief Justice echo the views of the Government of the day, as expressed by the Minister of Justice, Enver Surty in his address on the separation of powers at the Law Faculty of the University of Pretoria in March 2009, and at the Annual General Meeting of the Law Society of South Africa at the end of March 2009. The fact that the citation is subscribed to in the Editorial of **De Rebus** is a reasonable indication of what the views of the attorneys' profession on the issue may be.

1790 **Morris *Technique in Litigation*** 3rd ed. (1969) 315

unnerves everybody or get them irritated in return. In fact the irritable and short-tempered judge may himself even hamper the course of justice.[1792] The learned author also cites **Lord Bacon** who emphasised that "*patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well tuned cymbal*".[1793] Dispassionateness, objectivity and relative detachment (although perhaps not Stoicism) are essential judicial characteristics.[1794]

Impartiality and *disinterestedness* of judgment means that a judgment is not made *'in respect of persons'*, in the sense that it is delivered without fear, favour or prejudice in relation to anybody, including the adjudicator.[1795] Impartiality of judgment has also become a trite principle in South African law in general, and also in labour law. The Roman law principle of ***nemo debet esse judex in causa propria sua***[1796] is vigorously enforced by the courts.[1797] The principle applies not only to judicial officers as such, but even to chairpersons of internal disciplinary hearings.[1798] **Grogan**[1799] correctly points out that if a presiding officer at a disciplinary hearing exhibits bias, or gives the accused employee the impression of being biased, the proceedings are regarded as unfair even if the

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1791 **Harris** ***Illustrations in Advocacy*** (1915) 254
1792 **Morris** ***Technique*** (1969) 315
1793 **Morris** op. cit. 316
1794 ibid
1795 Ibid; **Hahlo and Kahn** ***The South African Legal System*** (1968) 38.
1796 "*Nobody is allowed to be a judge in his/her own case.*" **Perry** ***Moral Reasoning and Truth*** (1976) 43.
1797 **Erasmus et al** ***Superior Court Practice*** (2002) A1-14A; ***Rose v Johannesburg Local Road Transportation Board*** 1974 4 SA 272 (W) 288; ***Barnard v Jockey Club of SA*** 1984 2 SA 35 (W). There is no closed list of factors that could lead to a reasonable apprehension of bias, but the courts have pointed out the following: friendship or a close relationship with one of the parties or his/her counsel: ***SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer*** 1974 4 SA 808 (T) 813E; Likewise, enmity or hostility: ***Geldenhuys v RM Sutherland*** 1914 CPD 366; **Erasmus** A1-14B; Expressions and conduct indicative of bias will likewise disqualify the judicial officer: ***President of the Republic*** 185F; ***BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union*** 1992 3 SA 673 (A); ***South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*** 2000 3 SA 704 (CC) 715E-G
1798 See **Du Toit et al** ***Labour Relations Law*** (2006) 409. The learned authors point out that chairpersons of internal hearings should be free of bias against the employees concerned. Bias is not always obvious and may manifest itself in a variety of ways. Chairpersons should refrain from making statements anticipating the outcome of the hearing as they should keep an open mind from the start to the finish of such hearings. See ***Aranes v Budget Rent-a-Car*** 1997 6 BLLR 657 (CCMA); The uttering of obscenities and insulting behaviour by chairpersons may also point to bias – ***Coin Security Group (Pty) Ltd v TGWU*** 1997 10 BLLR 1261 (LAC). The courts have built up an impressive volume of jurisprudence requiring an unbiased judicial officer. A *'reasonable apprehension of bias'* on the part of one of the litigants suffices for recusal of a judicial officer: ***President of the Republic of South Africa v South African Rugby Football Union*** 9C-I; ***Sager v Smith*** 2001 3 SA 1004 (SCA)
1799 **Grogan** ***Dismissal, Discrimination and Unfair Labour Practices*** (2005)283.

ultimate decision reached is factually and legally impeccable. The same principle applies *proprio vigore* to judicial officers.[1800]

In ***Monning***[1801] it was held that even a stricter test for impartiality and bias applies to non-judicial officers performing functions indistinguishable from the judicial process, the rationale being that reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures and influences.[1802]

In an unfair dismissal dispute, impartiality of judgment would also mean that the decision maker has to apply his personal discretion in deciding whether a dismissal was fair.[1803] The view of one of the disputing parties such as an employer, should not dominate the exercise of the decision maker's discretion. It is for this reason that the Constitutional Court, in ***Sidumo,*** finally abolished the so-called *reasonable employer* test for fairness[1804] that is in force in English law under the English Employment Protection (Consolidation) Act[1805], and which was also applied by the SCA and other courts prior to ***Sidumo.***[1806] The same fate

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1800 In ***Standard Bank of South Africa Ltd v Fobb*** 2002 3 SA 699 (LC); 2003 24 ILJ 846 (LC), **Pillay J** expressed the following criticism of the personal involvement of a commissioner in the case before him: *"The commissioner's personal and private perception of the unfairness of the allocation system is evident from this extract from his award. His lack of adjudicative discipline in failing to keep his personal unhappiness with banks in check renders his award reviewable on this ground."*

1801 ***Monning & Others v Council of Review*** 1989 4 SA 866 [C] 880 D-G.

1802 For a discussion, See **De Ville *Judicial Review of Administrative Action in South Africa*** (2003) 270

1803 In ***Sidumo*** (supra), the Constitutional Court pointed out the need for impartiality of the decision maker in the following words: *"There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator."*

1804 The Constitutional Court stated in ***Sidumo*** 2431-2: *"It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the view of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained."*

1805 s 57(3) of the 1978 Act. This Act was replaced in England by the **Employment Rights Act**, 1996, which contain similar provisions. This Act provides that the determination of the question whether a dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.

1806 ***Food & Allied Workers Union v C G Smith Ltd, Noodsberg*** 1989 10 ILJ 907 (IC);***Mercedes Benz SA (Pty) Ltd and National Union of Metalworkers of SA*** 1991 12 ILJ 667 (ARB); ***Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation Mediation and Arbitration*** 2006 27 ILJ 2076 (SCA), and see authorities cited in these cases. In some instances the courts declined application of the test: ***Chemical Workers Industrial Union v Reckitt & Colman SA (Pty) Ltd*** 1990 11 ILJ 1319 (IC); ***SA***

befell the principle that the decision maker had to *defer* to the views of the employer.[1807]

As was pointed out by **Ngcobo J** in ***Sidumo***(CC),[1808] certain phraseology used in connection with the test for the fairness of dismissal had become unacceptable to many stakeholders since they tended to obscure the ultimate test, which is the objective assessment of the fairness of the dismissal by the independent decision maker him- or herself.[1809]

4. The idea of the universalizability of correct moral judgment found its greatest modern exponent in **Immanuel Kant** whose **Grundlegung**[1810] was first published in 1785.[1811] He formulated the idea of the so-called categorical imperative. **Kant's** formulation has been translated as follows: "*Act only on that maxim through which you can at the same time will that it should become a universal* law".[1812] A *universalizable judgment* is one, the author of which believes

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Chemical Workers Union & others v CE Industrial (Pty) Ltd t/a Panvet 1988 9 ILJ 639 (IC); The LAC substituted the employer test for its own conclusions on fairness in ***Engen Petroleum Ltd v Commission for Conciliation Mediation and Arbitration*** 2007 28 ILJ 1507 (LAC).The test was finally abolished by the CC in **Sidumo.**

1807 In the case of ***Rustenburg Platinum Mines Ltd (Rustenburg section) v Commission for conciliation, Mediation and Arbitrations*** 2007 1 SA 576 (SCA); 2006 27 ILJ 2076 (SCA); 2006 11 BLLR 1021 (SCA), the SCA followed ***Nampak Corrugated Wadeville v Khoza*** 1999 20 ILJ 578 (LAC); 1999 2 BLLR 108 (LAC) where it was held that the question of fairness was not whether the court would have imposed the sanction of dismissal imposed by the employer, but whether , in the circumstances of the case, the sanction imposed by the employer was reasonable. The SCA also relied on ***County Fair Foods (Pty) Ltd v CCMA*** 1999 20 ILJ 1701 (LAC), where the court applied the principle of *deference* to the employer. Here, **Ngcobo AJP**, at par 28-30 had stated that interference with the sanction imposed by the employer was only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. Interference by a CCMA commissioner would for instance be justified where the sanction imposed was so excessive as to shock one's sense of fairness. The SCA expressed the need for *'caution'*, before a commissioner could interfere with the sanction imposed by the employer.

1808 2459 par 168-170

1809 In ***Sidumo*** 2459 **Ngcobo J** pointed out that both COSATU and the CCMA criticized the use of phrases or words such as *'deference', 'discretion' or 'caution'*, or the reference to *'reasonable employer'* in attempting to describe the test for fairness. The objection was that use of these words and phrases had the potential to obscure the real test for fairness, as they tend to elevate the sanction imposed by the employer to the ultimate test of fairness, and thereby introduce the so-called *'reasonable employer'* test. However, the *ultimate test* is one of *fairness.*

1810 ***Grundlegung zur Metaphysik der Sitten- Foundations to the Metaphysics of Morality.***

1811 We made use of the English translation by **Paton *The Moral Law*** (1995) 24

1812 **Paton *Moral Law*** (2005) 24; **Kant *Metaphysik*** (2005) 51-52

that it is the proper judgment for anyone on any occasion to make concerning the same subject, or other subjects similar to it in all relevant respects.[1813]

Prof. O'Neil of Cambridge pointed out that *universalizability* should not be confused with *uniformity*.[1814] Universal principles of human action do not dictate universal algorithms[1815] which are to determine precise and uniform answers for all questions. Universal principles act as *constraints* rather than *algorithms.* They cannot and do not prescribe uniformity.[1816] Universalizability is a matter of scope, and not of content.[1817]

As already stated, our labour courts have given recognition to the idea that *morality* is indispensible to *fairness*, especially in the context of the determination of unfair labour practices. In ***Media Workers Association***[1818] the then AD observed that the determination whether or not an unfair labour practice has been committed, amounts to *"the passing of a moral judgment."*[1819]

7.16.5 EQUITY AND GOODNESS

Stressing the closeness of the relationship between *fairness* and *goodness*, the Roman jurist **Celsus** famously stated that ***'ius est ars boni et aequi" –*** *"law is the art of the good and the fair".*[1820]

Centuries later, the Dutch jurist **Voet** echoed **Celsus**, by emphasizing that the 'ministers 'of law, i.e jurists and lawyers, profess an acquaintance with the good

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1813 ***Perry Moral Reasoning and Truth*** (1976) 43

1814 **O'Neil** ***"Theories of Justice, Traditions of Virtue"*** **Jurisprudence: Cambridge Essays (Gross & Harrison** eds.) (1992) 55, 60.

1815 An algorithm is a set of rules or instructions that will result in the solution of a problem. An algorithm gives a decision procedure or computable method for solving a problem – ***Oxford Dictionary of Philosophy***, 2nd Revised Ed – **Blackburn S** (2008)

1816 Ibid.

1817 Ibid.

1818 ***Media Workers Association of SA & others v The Press Corporation of SA Ltd*** 199213 ILJ 1391 (A) 1400D. This case was decided under the provisions of the 1956 Industrial Conciliation Act as amended, but its ratio is equally applicable to the unfair labour dispensation under the 1995 LRA. See also ***George v Liberty Life*** 591, where it was applied.

1819 See also the interpretation placed on the ***Media Workers Association*** *in* ***Jonkers v Amalgamated Beverage Industries*** 14-5.

1820 D 1 1 1 The compilators of the Digest regarded this text worthy of an opening statement to that famous code.

and the fair, that on the basis of the good and the fair judges decide, pronounce judgment, assess and interpret, that exceptions are grounded in the good and the fair; that restitutionis so made, and that thus, everywhere, the good is equated with the fair and the fair with the good, and that it must be that what is looked upon is good is at the same time and for the same reason also fair.[1821]

In more modern times crucial reliance was placed on the **Celsus**-text in ***Oosthuizen v Homegas,***[1822] where an employee had brought a common law claim for damages against an employer who had made him work in unsafe conditions, as a result of which he had sustained serious injuries. To counter his claim, the employer pleaded ***volenti non fit iniuria***. Dismissing the defense and applying **Celsus**, the court – per **Smuts JP** – stated:[1823]

"The law is said to be 'the art of goodness and fairness'. See D.1.1.1 in pr...With that end in view principles were developed, one of which is expressed in the maxim ***nemo ex suo delicto meliorem suam conditionem facere potest.***[1824] *Were this principle to be applied indiscriminately to every set of facts where a wrongful act of a person who has suffered damages is involved, one would find that a result is achieved which is neither* ***good nor just****. In fact it might defeat the very purpose which the common law sets out to achieve by evolving principles which are intended to achieve fair dealing between man and man."*

It will be noted that the text does not purport to prescribe what is good or fair. That has always been a matter of judicial discretion, to be exercised according to the circumstances of the case before him or her. In this particular case the employer attempted to escape liability for serious harm that he had caused by arguing that the employee had consented to it, and had enriched himself by participating in an illegal activity. Finding the employee guilty of contributory negligence only, the court held that the fault of the employer was twice as much as that of the employee, and awarded damages on that basis. This was done on the basis that *fairness is goodness*.

1821 **Voet *Com*** 1 1 5 translated by **Gane**; This text has also been discussed in Chapt. II, Roman Law. **Hahlo and Kahn *the South African Legal System*** (1968) 31 cites **Voet** 1 3 5, where he states that the law ought to be *just* and *reasonable*, directing what is *honourable* and forbidding what is *base*.

1822 1992 3 SA 463 (O); 1993 14 ILJ 83

1823 Par 476

1824 Translated as: *"No one is allowed to improve his condition (estate) through his own wrong."*

There can be no doubt that the court here rendered the correct judgment, not allowing even established maxims and exceptions to stand in the way of simple justice between man and man. Ultimately the **Celsus** and **Voet** texts amount to this: was the solution to the case a *good* one. This calls for a judicious exercise of a discretion by a judicial officer who finds himself outside the realm of strict law, and immersed in that of *equity*. **Hahlo and Kahn**[1825] conclude their exploration of the nature of justice and fairness with the remark that, the nearest one can get, it seems, to defining justice is by considering it to be the *'prevailing sense of men of goodwill as to what is fair and right – the contemporary value system.'*

7.16.6 EQUITY AND HUMAN VIRTUE

For longer than a millennium, the Aristotelian and Roman concept of justice and fairness was that of a *human virtue.*[1826] All great Roman Dutch jurists likewise defined justice and fairness in terms of human *deugd* or virtue.[1827]

The virtue paradigm of justice and fairness of **Plato**,[1828] and especially of **Aristotle**, dominated legal and philosophical thought until the advent of **Galileo** and **Isaac Newton** and even for some time thereafter.[1829] The main concern of the ancient philosophers and jurists was perfection of human character through moral excellence.[1830] During the Renaissance this paradigm was gradually replaced by a rule and principle based world view, which still later had to give

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1825 ***The South African Legal System*** (1968) 31

1826 See Chapters II and III; **Aristotle** ***Nicomachean Ethics*** 5 7; 6 1. Roman Law considers the virtues of living honestly, injuring nobody and giving everyone his due mentioned by **Ulpian** in D 1 1 10 as the very definition of justice. There are also numerous texts dispersed throughout the Digest where great emphasis is placed on the paramountcy of *honestas* – honesty – and other virtues. See e.g. D 50 17 197; D 50 17 144; The Roman Dutch jurists followed suit: **Grotius** ***Inleid*** 1 1 6 refers to the Ulpian virtues, as well as the virtues of faith, obedience, gratitude and others. In ***Inleid*** 1 1 2 **Grotius** taught that fairness is the virtue of the will to do what is just – *'Rechtvaerdigheid is een deugd des willes om te doen dat rechtmatig is.'*; **Voet** ***Com*** 1 (Gane's transl.) similarly regarded justice and fairness as virtues. See also **Voet**, ***Com*** 1 1 4; **Huber** ***H R*** *1 1 1, following D 1 1 1.*

1827 Ibid. See also **Huber** ***Jurisprudence of my Time*** (1939) 1 1 7 who equates natural law with *intuitive law,* which he regards as immutable as long as circumstances remain the same. Every kind of virtue belongs to this law, and every kind of vice is repugnant to it.

1828 **Van Zyl** ***Justice and Equity in Greek and Roman Legal Thought*** (1991) 93 et seq.

1829 **Dupre** ***50 Philosophy Ideas*** (s.a.) 96; **Farrar & Dugdale** ***Introduction*** (1990) 261

1830 ibid

way to **Kant's** apodictic or duty based concept of morality, and to a lesser extent, **Bentham's** utilitarianism[1831]

Towards the middle of the 20th century, there was a steady but vigorous revival of the theory of virtue jurisprudence in the wake of similar developments in the field of "*virtue ethics*".[1832] In modern times, the virtue paradigm of justice and fairness has changed to the extent that justice and virtue are often viewed by liberalists as distinct and even inimical to each other.[1833] Many Modernists tend to relegate the virtues to the private sphere of human life or prefer to be agnostic about the greatest '*Good for Man*'.[1834] On the other hand, the '*Friends of the Virtues*' – as modern proponents of the virtue theories are known – categorically reject the abstractions, fictions, idealizations and universalizations of the advocates of modern rule and obligation based theories of justice and fairness.[1835]

O'Neil[1836] suggests – correctly in our view – that the differences between the Modernists or Liberalists and Virtueists of today are more illusory than real and that the two factions are not as far apart as they seem to be.[1837] She points out that their positions are not incompatible and makes a credible attempt at reconciling the two streams of jurisprudence. It would be as naïve to assume that one could exclude human virtue and goodness from issues of justice and fairness, as to assume that modern notions of justice and fairness involve nothing more than human virtue.

O'Neil[1838] provides two examples of the need to move from a *constructive account of practical reason*[1839] towards an account of the principles of virtue:

1831 **Dupre** (s.a.) 96
1832**Dupre** 97
1833 **O'Neil** "***Theories of Justice, Traditions of Virtue***" (1992) 55 *et seq.*
1834 Ibid.
1835 Ibid.
1836 ibid
1837 **Guest** "***The Role of Moral Equality in Legal Argument***" 2004 **Acta Juridica** 20 points out that even **Hart**, the doyen of legal positivism, conceded that justice seems to be the most 'peculiarly' legal of all moral virtues. This is because legal argument is often fraught with references to *'just' fair', 'equitably'* etc.
1838 ***Theories*** (1992) 71

firstly the rejection of concern for others, and secondly indifference to the development of human potential. The first is a Thrasymachean view that the stronger do not need the weak, nor the rich the poor. This view is illusory and intrinsically irrational, to the extent that it is to *will* universal unconcern. The second view is irrational since beings whose own projects depend on complex social arrangements and interactions cannot consistently *will* a world in which the capabilities that such arrangement and interactions require are not developed.[1840] The implications that these views hold for the labour marked are obvious.

The virtues may indeed constitute *'incomplete obligations'* in modern law, but that does not mean that they cannot form the basis for the rights and entitlements of the needy and the poor.[1841] This view of **O'Neil**, expressed here in connection with the role of virtue jurisprudence in our society, was echoed locally by **Chaskalson**, who extolled it in relation to *human dignity*, thus highlighting the close connection between *virtue* and *dignity* in our Constitutional dispensation.[1842]

The virtue jurisprudence of **O'Neil** seems to be of particular relevance to labour law. The primary objectives of the LRA are the advancement of economic development, social justice and labour peace, and democratization of the workplace, by giving effect to s 27 of the Constitution, which protects

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1839 Practical reason refers in general to reasoning concerning human action or more specifically, what ought to be done. It concerns the *doing* of things as opposed to theorizing, speculation, metaphysical philosophizing etc. ***Oxford Dictionary of Philosophy*** (2008). Cf the titles of **Kant's** famous works: ***Kritik der reinen Vernunft*** – *Critique of Pure Reason, and* ***Kritik der Praktischen Vernunft*** – *Critique of Practical Reason.*

1840 Loc. cit.

1841 As **O'Neil** puts it in **Theories** (1992) 71: *"The obligations of virtue are imperfect, that is incomplete, in this quite precise sense. However, the conclusion that the social virtues (helpfulness, care, concern, beneficence) are 'only' imperfect obligations does not mean that the poor or needy are without rights or entitlements, so that they can look only to selective and sporadic charity to meet their needs...the limitation of poverty is a matter of justice: because poverty institutionalizes vulnerability and hence victimizability...However, these institutions will never – as the friends of the virtues rightly point out – eliminate all contexts where people need particular help from particular others. Although the locus for the social virtues cannot be relations that hold universally between any two agents, they can nevertheless be embodied as traits of character both in agents and in the various special relationships and traditions that are characteristic of a particular society, including those that define its specific forms of familial, educational, working, professional, cultural, and civic life."*

1842 **Chaskalson** ***"Human Dignity is a foundational value of our Constitutional Order"*** 2000 16 SAJHR 193, 196; **Liebenberg** ***"The Value of Human Dignity in Interpreting Socio-Economic Rights"*** 2005 21 SAJHR 1; **Currie & De Waal** ***The Bill of Rights*** (2005) 273.

fundamental human rights. The courts, in particular the Labour Courts, have repeatedly recognised the vulnerability and socio-economic weakness of the position of employees' vis-à-vis employers.[1843] The SCA and LC have repeatedly pointed out the relationship of trust and confidence that necessarily exists between employer and employee. Thus both on a social level as **O'Neil** advocates, and the individual level, human virtues such as trustworthiness, confidence, good faith, honesty, conscientiousness and industriousness are indispensible human attributes required of both employers and employees. Very often – if indeed not always – value judgments concerning justice, fairness and reasonableness cannot be made without a thorough consideration of human virtue. A prime example is the issue in dismissal disputes, whether the misconduct of the employee has rendered the employment relationship intolerable, which is generally used by the Labour Courts as the ultimate test for the fairness of dismissal.[1844] Another example is the issue whether the employer's conduct had made continued employment intolerable to the employee in the form of constructive dismissal. The examples are legion. The conclusion that human virtue or goodness is the bedrock of morality – and thus of fairness as a value judgment – is unavoidable. Finally, it should be borne in mind that the human virtue of ***dignitas*** or healthy self-esteem has been recognised as a prime value in the Constitution [1845] and the case law.[1846]

Comte-Sponville, a renowned virtue philosopher at the Sorbonne provides us with a description of virtue which brings us within a whisk of the concept of human dignity, as we find it in the Constitution and as it is dealt with in South African labour law, which we describe further on in this chapter.

He states that *virtue* is a force that can have an effect. It is what constitutes the *value* of a thing: it is the distinctive excellence of a thing. A good knife excels at

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1843 The jurisprudence on this issue is trite, see ***National Entitled Workers Union*** (supra) and authority there cited.

1844 In ***Sidumo***, **Ngcobo J** stated:*"There can be no question that the ultimate test that a commissioner must apply, is one of fairness. This test is foreshadowed both in s 23 of the Constitution and s. 188 of the LRA."*

1845 s 10

1846 This is dealt with under a separate heading, infra.

cutting, a good medicine at curing, a good poison at killing. The virtue of a human being is the will to act in a human way – *virtue is good itself.*[1847]

Concerning justice (and fairness) as virtue, *Comte-Sponsvill* emphasises that without this virtue, values would be nothing more than interests or motives; they would cease to be values or would become values without worth.

The potency of this argument is highlighted by the question how judges could make and apply value judgments if the very values themselves are worthless.

7.16.7 EQUITY AND HUMAN DIGNITY

Earlier in this work[1848] we noted the primary role that human dignity (***dignitas***) played in Roman and Roman Dutch law in matters relating to fairness. In these two systems of law, ***dignitas*** was regarded as a cardinal human ***virtus*** or moral attribute. But, despite its pivotal importance, the exact meaning in the sense of contents and delineation of the concept of human dignity has always been somewhat nebulous.[1849] The Constitutional Court has not as yet ventured to provide us with a definition of dignity.[1850] The ***Oxford Dictionary of Philosophy***[1851] cites **Kant** as the prime exponent of the modern concept of human dignity. According to Kantian theory, dignity is considered to be a universal attribute, an offshoot of the capacity for self-consciousness and practical reason.[1852] It includes the capacity for self-legislation and control of the will by categorical imperative, and is the foundation of the right to respect and to treatment as an end in itself, rather than a means.[1853] Dignity - like rationality -

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1847 **Comte-Sponsvill** ***A short Treatise on the Great Virtues*** (2003) 2-3

1848 Chapters II and III

1849 Cf. **Currie & De Waal** ***The Bill of Rights*** (2005) 273. In ***Harksen v Lane*** 1998 1 SA 300 (CC) 323 par 51, **Goldstone J** cited with approval from **L'Heureux-Dube J** in the Canadian case of ***Egan v Canada*** (1995) 29 CRR (2d), 79, where the learned judge remarked: *"Dignity (is) a notoriously elusive concept...it is clear that it cannot, by itself, bear the weight of s.15's task on its shoulders. It needs precision and elaboration."*

1850 **Currie & De Waal** (2005) 273; ***Harksen v Lane*** 323

1851 2nd Revised ed. 2008

1852 ibid

1853 **Kant** ***Metaphysik der Sitten*** *(Metaphysics of Morality* – transl by **Paton** as ***The Moral law***) 74-77; **Paton** ***The Moral Law*** (1984) 31, **Kant** developed his theory of the so-called *Formula of the Kingdom of Ends.* This formula originated in his *Formula of Autonomy.* Human beings are subject to universal laws which they themselves make, thus constituting a *Kingdom, State* or *Commonwealth.* Insofar as the laws of this Kingdom bid them to be ends unto themselves, they constitute the Kingdom of Ends. The ends cover not only persons as

distinguishes humans from other creatures. In this sense it is perhaps paradoxical to speak about *'human dignity'.* A person whose dignity is infringed could not be said to have been treated fairly, and vice versa: unfair treatment would always impair human dignity.[1854] The philosophy that every human is endowed with intrinsic value and dignity eventually manifested itself in the modern doctrine that labour is not simply a commodity – that it has an inseparable connection to the human character and dignity that produces it.[1855] This view is cemented in the ILO Private Employment Agencies Convention[1856] and has been recognised and enforced by the Labour Court.[1857]

In the South African Constitutional dispensation, the right to dignity has been accorded constitutional importance second only to the right to life.[1858] Human dignity is a core and pivotal Constitutional value in that it is a common denominator to the other values protected by the Constitution, informing the contents of all the concrete rights,[1859] such as the right to equality[1860] and

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ends in themselves, but also the personal ends which each of these may set before himself in accordance with universal law. As law-making members of this Kingdom, rational agents (humans) have *dignity* – an *intrinsic, unconditioned, incomparable worth or worthiness.*

Ackermann J was expressing himself in Kantian terminology in ***S V Dodo*** 2001 3 SA382 (CC) par 38 as follows: *"Human beings are not commodities to which a price can be attached: they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."* See also **Guest *The Role of Moral Equality*** (2004) 24 et seq.; **Allan *Fairness, Truth and Silence*** (1992) 155.

1854 **Davis et al *Fundamental Rights*** (1997) 73 point out that dignity is impaired if a person is subjected to treatment which is degrading or humiliating or to conduct which treats a person as subhuman. The learned authors submit that in Roman-Dutch law, dignity is properly interpreted as 'self-esteem'. The impairment of dignity involves insult, exposure of a person to ridicule, ill-will, disesteem, contempt etc. Cf. ***OKeefe v Argus Printing & Publishing Company Ltd*** 1954 3 SA 244 (C).

1855 **Smit *"Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world."*** TSAR 2006: 1 155. The learned author points out that at the heart of this debate is the question of an absolute free-market system versus a market within which certain values (for example 'labour is not a commodity') are upheld.

1856 No. 181/1997; **Schachter & Joyner *United Nations Legal Order*** (1995) 476

1857 ***Nape v INTCS*** 2132; ***Africa Personnel Services (Pty) Ltd v Govt of the Rep. of Namibia*** 51/2008 (unreported), as cited in ***Nape*** 2132.

1858 **Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order"** 2000 16 SAJHR 204.

1859 **Chaskalson *"Human Dignity"*** 2000 16 SAJHR 196; **Currie & De Waal *The Bill of Rights*** (2005) 273; ***S v Makwanyane*** 1995 3 SA 391 (CC); 1995 6 BCLR 665 par 144.

1860 In ***Harksen v Lane*** 322, **Goldstone J** referred to ***Prinsloo v van der Linde*** 1997 3 SA 10 12 (CC) par 31, where it was stated that persons have an inherently fundamental and equal dignity as human beings.

privacy.[1861] There is therefore a close relationship between the Constitutional right to fair labour practices and human dignity.[1862]

The Constitutional values and rights have been recognised by the Constitutional Court,[1863] the SCA and the Labour Courts. They have been accorded a special significance in the sphere of labour relations. As a foundational constitutional value[1864] human dignity informs all rights recognised by the Constitution.[1865]

Human dignity constitutes both a foundational value and a right that is justiciable and enforceable and that has to be respected and protected.[1866] The right to human dignity is often not directly and immediately protected. Where this right is offended, the offence often assumes the breach of a more subsidiary right such as the right to bodily integrity, to equality, and not to be subjected to slavery, servitude or forced labour.[1867] The right to fair labour practices[1868] is yet another right by means of which dignity is protected. It has been held that for the purpose of s 157 (2) of the LRA,[1869] there is no independent right to dignity.[1870] As such the role of dignity as a right seem to be limited paradoxically to instances where labour legislation such as the LRA are constitutionally challenged or where the common law needs development.[1871] The right to dignity as such, considered in isolation, does not ground a cause of action. This principle forms

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1861 Loc. cit.

1862 See ***Harksen v Lane*** 23 par 51, where the court stated that dignity is the underlying consideration of fairness. In ***Booysen v Minister of Safety and Security*** 121 par 28 3, the court stated:*"The right to dignity is both a value and a right and it informs all the fundamental rights in the Constitution. Since the primary constitutional breach in this application is the right to fair labour practices, there is therefore no independent right to dignity to violate for the purposes of s 157(2)."*

1863 In ***Carmichele v Minister of Safety and Security*** 2001 4 SA 938 (CC) par 56 the CC accords human dignity a pre-eminent place in the objective ,normative value system enshrined in the Constitution; ***National Coalition for Gay and Lesbian Equality v Minister of Justice*** 1998 1 SA 6 (CC). See also **Chaskalson "Human Dignity"** 2000 16 SAJHR 196. For a discussion, see **Currie & de Waal *Bill of Rights*** (2005) 272-3.

1864 s 5.1 of the Constitution

1865 ***Minister of Home Affairs v National Institute for Crime Prevention*** 2005 3 SA 280 (CC) par 21; ***Booysen V SA Police*** **2009** 30 ILJ 311 par 34.

1866 ***Dawood & Another v Minister of Home Affairs*** 2000 3 SA 936 (CC) par 35; ***Booysen*** 311-2

1867 ibid

1868 s 23(1) of the Constitution

1869 This section provides concurrent jurisdiction to the Labour Court with the High Court in cases where the breach of Constitutional rights is involved.

1870 ***Booysen*** 312 par 36

1871 **Booysen** 312 par 37

part of the wider principle that prohibits direct access to the Constitution where legislation exist that give specific effect to Constitutional provisions.[1872]

But the right to dignity – or any fundamental human right for that matter – should not be seen in isolation. Human rights are intrinsically inter-dependant, integrated and inseparable, being embodied in one coherent Constitutional order.[1873]

In ***Minister of Home Affairs v Watchenuka***[1874] the SCA pointed out the inextricable interdependence of labour and human dignity in the following terms:

"The freedom to engage in productive work – even when that is not required in order to survive -is pre-eminently an important component of human dignity, for mankind is a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfillment of what it is to be human – is most often bound up with being accepted as socially useful."

In ***Affordable Medicines Trust v Minister of Health***[1875] the Constitutional court emphasised that *'One's work is part of one's identity and is constitutive of one's dignity.'*[1876]

The Labour court endorsed this association between labour, human dignity and fairness in ***Murray***[1877] by stating:

"The parties agreed in argument that the plaintiff was entitled to rely directly on this right,[1878] as also on the right to dignity,[1879] which is a close associate of the right to fair labour practices."

Great reliance was placed by the LAC[1880] in ***'Kylie'*** on the inseparability, indivisibility and interdependence of the right to fair labour practices[1881] and the right to human dignity. There the question was whether the services that a sex

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1872 ***SANDU v Minister of Defence*** 2007 5 (CC) 400; 2007 28 ILJ 1909 (CC); 2007 9 BLLR 785 (CC) par 51; ***Booysen*** 312 par 37.
1873 Per **Van Der Westhuizen J**, in ***Gcaba v Minister of Safety and Security*** 314 par 54. Rigid compartmentalization is to be avoided.
1874 2004 4 SA 326 (SCA) par 27
1875 2006 3 SA 247 (CC) par 59
1876 The court continued to state that *'there is a relationship between work and the human personality as a whole.'*
1877 1374 par 5
1878 This refers to the right to fair labour practices conferred by s 23(1) of the Constitution.
1879 s 10 of the Constitution
1880 Per **Davis JA**
1881 s 23(1) of the Constitution

worker had rendered fell within the ambit of the protection afforded by s 23(1) of the Constitution. In the court *a quo* it had been found that she had been in *pari delicto* with her client and thus not entitled to any equitable or other relief.

The LAC, per **Davis JA**, held that the "employee" enjoyed the protection of s 23(1) of the Constitution, which has at its core, the protection of the *dignity* of those in the employment relationship.[1882]

With the recognition of the dignity of the person, comes *respect* for fellow humans.[1883] The workplace is predicated upon respect for the dignity of both employers, employees and fellow-employees or colleagues, social justice, and fairness.[1884] Respect is not only due at a personal level. It is important that the right to fair labour practices as such be respected.[1885] Without mutual respect between employer and employee, the likelihood of unfair treatment or misconduct assumes significant proportions. In such a relationship, general fair dealing based on the reciprocal right to trust and confidence, and interaction inspired by *fairness, good faith and reasonableness* cannot fully realize.[1886] One of the fundamental principles on which Sch. 8: Code of the Good Conduct:

1882 ***'Kylie'*** 1608 par 25; On 1611 par 40, the learned judge reiterates that *"In particular s.23(1) which provides that the right to fair labour practices was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, fairness and respect for all".* The court also cites ***NEHAWU v UCT*** 2003 24 ILJ 95 (LC) in support.

1883 ***Crous v Blue Crane Route Municipality*** 2009 30 ILJ 840 (Tk) 857-8.

1884 ***'Kylie'*** 1611-12 par 40; ***NEHAWU V UCT*** 105 par 14. On the role of mutual respect in general, see also **Guest *"The Role of Legal Equality..."*** 2004 **Acta Juridica** 19

1885 s 7(2) of the Constitution provides *'The state must respect, protect, promote and fulfill the rights in the Bill of Rights.'* See also ***NEHAWU V UCT*** 105 par 14.

1886 See for example ***Adcock Ingram Critical Care v CCMA*** 2001 22 ILJ 1799 (LAC) par 15, a case dealing with the relationship between a negotiating employer and a shop steward that had gone wrong as a result of disrespectful behaviour. The court stated: *The fact that meetings often degenerate does not mean that one should jettison the principle that as in the workplace also at the negotiating table the employer and the employee should treat each other with the respect that they both deserve. Assaults and threats are not conducive to harmony or to productive negotiation."* In ***National Union of Mineworkers & others v Black Mountain Mining (Pty) Ltd*** 2010 31 ILJ, a case where false allegations of racism had been made against the employer by a shop steward during negotiations, the court held that although a measure of tolerance is required of an employer during such negotiations, the *"everything goes"* approach was not acceptable and confirmed the dismissal.

See also ***SACTWU v Ninian & Lester (Pty) Ltd*** 1995 16 ILJ 1041 (LAC) 72H; ***Mondi Paper Co Ltd v PPWAWU*** 1994 15 ILJ 778 (LAC) 780; ***BIFAWU & another v Mutual & Federal Insurance Co Ltd*** 2006 27 ILJ 600 (LAC) par 19-20. All these cases are about undesirable conduct of shop stewards locked in negotiations with the employer.

Dismissal is based, is mutual respect between the parties to the employment relationship,[1887]a principle that has been enforced by the Constitutional Court.[1888]

Whether employees and employers have observed the golden mean of mutual respect in a given situation calls for a value judgment by the court.[1889]

But it should be borne in mind that human dignity is primarily a constitutional *value.* The Constitution itself does not determine the precise nature ambit and role of the concept of human dignity. That is a matter best left to incremental jurisprudence. ***Dendy v University of the Witwatersrand***[1890] provides a good example of the approach of the SCA to this issue.[1891] There the plaintiff claimed damages from the University, averring that certain irregularities in the appointment process and the failure of the university to appoint him to a post violated his right to dignity protected by s 10 of the Constitution and the common law. He felt insulted and humiliated as a result of this conduct of the University, and averred further that any reasonable person would have felt the same.

In giving effect to the Constitutional right to the protection of human dignity and fair labour practices, the court held that the common law, as explained in ***DeLange v Costa***[1892] was in consonance with the Constitution. Relying on ***DeLange***, the court a quo provided the following exposition of the law concerning unlawful impairment of dignity:

"To be considered a wrongful infringement of dignity, the objectionable behaviour must be insulting from both a subjective and objective point of view, that is, not only must the plaintiff feel subjectively insulted but the behaviour, seen objectively, must also be of an insulting nature. In the assessment of the latter, the legal convictions of the community (boni mores) or the notional

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1887 Item 1(3); **Guest *The Role of Moral Equality*** (2004) 24 et seq.

1888 ***Sidumo*** 2460 par 173. In ***S v Makwanyane*** par. 328, **O' Regan J** emphasised that the importance of human dignity as a founding value of the new Constitution cannot be over-emphasised. Recognizing a right to human dignity is an acknowledgement on the intrinsic worth of being human - and human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched.

1889 ***National Union of Mineworkers v Black Mountain Mining*** 399 par 43.

1890 ***Dendy v University of the Witwatersrand*** 2007 28 ILJ 2215

1891 The plaintiff (Dendy) had brought an action for damages in the High Court, based on the alleged failure by the University to appoint him as a professor. He alleged that various irregularities had taken place during the processing of his application, resulting in non-appointment.

1892 1989 2 SA 857 (A).

understanding and reaction of a person of ordinary intelligence and sensibilities are of importance."[1893]

The SCA, in dismissing the claim, upheld the finding of the court a quo that a reasonable person in the position of the plaintiff would not have felt insulted, firstly because the non-appointment was not inherently insulting, but also because there were alternative means open to the plaintiff to deal with the decision of the university, most notably the review process.[1894] The court pointed out that as the common law protection of dignity differed very little from its constitutional counterpart, there was no need to develop the common law in this regard.[1895]

7.16.8 EQUITY, REASONABLENESS AND RATIONALITY

One of the most controversial yet fundamental notions in the whole of Western thought is that of *reason* or *rationality.* Whole libraries could be filled with polemical writings concerning the nature and role of reason, as well as its domain and authority in the very existence of humans. It follows a priori that the bulk of some of the divergent views on the matter could not even be broached here.

Since the dawn of history, reason and rationality formed a central theme in natural science, philosophy, theology, jurisprudence and many other spheres of human endeavour. In each case the debate was between mythical, divine authority, power or will on the one hand, and the natural or rational order of things on the other. **Smith & Weisstub**[1896] provides us with a lucid exposition of this dialectical interaction between ***mythos*** and ***logos***. The learned authors point out that it was under the influence of the Greek philosophers that a theory of eternal and geometric certainty of justice was developed, a system based on rigid

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1893 ***Dendy*** 2218 par 6

1894 ***Dendy*** 2218. In **Dendy** 2221 par 18, **Farlam JA** explained:*"In my opinion the reaction of a reasonable person in the position of the Appellant who became aware of the manner in which the decision not to appoint him had been arrived at and that that decision could accordingly be set aside on review in consequence thereof would not have had feelings of insult and humiliation but rather feelings of elation and relief."* The learned judge continued in the same vein in regard to Appellant's response to the refusal of the University to provide reasons for its decision.

1895 **Dendy** 220 par 15.

1896 **Smith & Weisstub** ***The Western Idea of Law*** (1983) 395 et seq.

and abstract definition of human nature, defined as a receptacle of pure reason, without passion or error.[1897] The emphasis of this Platonic justice was *perfection, absolutism,* and *static science* – in contrast with the arbitrariness and capriciousness of the gods, some mythological figure, or the king.[1898] This theory has *rationality, reason* and *reasonableness* as foundation.[1899] But, in juxtaposition to this world-view, was also the biblical or Judeo-Christian tradition in which existentialist or personal dimensions of justice were paramount. The God of Israel and of Christianity was a *personal* God, who had personal relations with humans.[1900]

These two divergent world-views contained an inherently dialectical dichotomy which persists to this day.[1901] Thus, scholars of Western jurisprudence, at all times faced this truly historic dilemma: pure *rationalism* versus *individualism*. **Smith & Weisstub**[1902] put this as follows:

"The history of Western jurisprudence may be seen as the movement between universalizability and reason on the one hand, and individuation and personality on the other. The commitment to law as the manifestation of pure reason represents a rebuff to the psychodynamic dimension of law, fraught with uncertainty and discretion."

But it was the *rationality* of the Greek philosophers that by and large triumphed in Western legal thought, and that is by far the dominant theory in modern jurisprudence as well as moral philosophy.[1903] The Anglo-American legal systems, **Smith & Weisstub**[1904] point out - and we submit, perhaps even to a greater extent, the Roman Dutch system and South African law – have preserved their historic stability through a model in which the rational legal system is dominated by legal *values* and structures which have survived over an extended period of

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1897 Ibid.
1898 See also comment on the rational reaction of **Socrates, Plato** and **Aristotle** to the sophistry of the Sophists in **Edwards *Hugo Grotius: the Miracle of Holland*** (undated) 28 et seq.
1899 Cf. **Vinogradoff *The Collected Papers of Paul Vinogradoff*** (1928) repr. (1964) 38 et seq.
1900 ibid
1901 ibid.
1902 ***The Western Idea of Law*** (1983) 396
1903 ibid
1904 ibid.

application. This generally means avoiding *individuation* and embracing *universalization*. [1905]

But in Western juristic culture it has also been recognised that the *generality*, *certainty* and *stability* created by law in the strict sense, indispensible as it may be, are insufficient for the complete legal regulation of human affairs.[1906] **Aristotle** pointed out the additional need for *fairness* or *equity* in individual cases.[1907] Thus equity has always been recognised as a kind of second dimension of law.[1908] **Spruit**,[1909] a Dutch jurist, has pointed out that the view that law only consists of general legal rules governing human behaviour is one-sided, as is the view founded purely on ethical considerations, teaching that the whole purpose of the law is simply to achieve *rechtvaardigheidt (fairness).* Statutory law and other strict forms of law have by necessity to leave room, space and open-endedness for the application of *equity*. Law and equity go hand in hand. In modern Dutch law, the concept of *equity* and *good faith (goede trou/bona fides)* have been regarded by the *Hooge Raad*[1910] as basically synonymous. The Dutch legislature embodied these concepts in the Dutch Civil Code as '*redelijkheid en billijkheid'* (reasonableness and fairness).[1911] We have noted earlier[1912] the significant role that these concepts play in Dutch labour law.[1913]

1905 The learned authors put this as follows (loc. cit.): *"They have avoided emphasizing the particular personality of the judge, his unique prejudices and the complex psychodynamics that occur among the various participants in the legal process."*

1906 **Merryman *The Civil Law Tradition*** (1985) emphasised the near absolute value of certainty in the Western civil law tradition as follows: *"Certainty is, of course, an objective in all legal systems, but in the civil law tradition it has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal. Even though most civil lawyers would recognise that there are competing values whose preservation might require some sacrifice of certainty, the matter is usually not discussed in these terms. In the civil law world it is always a good argument against a proposed change in the legal process that it will impair the certainty of the law."*

1907 ***Nicomachean Ethics*** VI; **Hahlo & Kahn *The South African Legal System*** (1968) 133; **Salmond *Jurisprudence*** (1947) 83.

1908 **Vinogradoff *The Collected Papers of Paul Vinogradoff*** (1928) 42 points out that in the Classical period of Greek Law, a conscious juristic theory of the law of nature was rendered unnecessary by the conception of *equity,* which gave a particular colouring to the whole system of Greek law. It amounted in practice to a liberal interpretation and application of law. This was based on consciousness of justice and was supposed to be applicable only where there was no definite law to go by. However, the legal tribunals took great liberties with the application of equity in practice.

1909 ***Betekenis en doel van het recht*** (1985) 13

1910 Supreme Court of Appeal

1911 In Arrest (Decision) HR 20 dec. 1946, NJ 1947, 59, it was held that the principles of good faith and fairness, incorporated in art. 1374.3 and 1375 of the Dutch Civil Code, and which had formally been applied

As stated, r*ationality* was regarded as an integral part of legal reasoning as far back as early Greek and Roman law. Quite a number of texts in which the phrase *naturalis ratio* in various forms and permutations are used, are still extent in the Institutes of Gaius and the Corpus Iuris.[1914] Over different periods, the term bore somewhat different nuances, but in essence it seems to have referred to legal reasoning based on nature, both in the practical or physical and the logical sense.[1915]

One such text lucidly illustrates that reasoning in Roman Law had both *equity* and *naturalis ratio*(natural reason) as cornerstones: ***Quotiens aequitate desiderii naturalis ratio aut dubitatio iuris moratur, justis decretis res temperenda est*** *-Whenever the application of equity is delayed by considerations of natural reason or doubts about the law, a temperate (just) solution has to be found.*[1916]

The Roman Dutch jurists, under influence of the Biblical doctrine of the Fall of Man and the corruption of his reason, nevertheless regarded *recta ratio* or right reason (correct reasoning) of which man has not been totally divested, as an indispensible component of law as such, as well as justice, and fairness.[1917] The

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only in the sphere of the law of contract, were equally applicable in for instance the law of inheritance. Cf. **Spruit** ***Betekenis en doel van het recht*** (1985) 13

1912 Ch. IV

1913 We agree with **Spruit** ***Betekenis*** (1985) 13 that the dichotomy between legal certainty, order, and stability on the one hand, produced by law, and the flexibility and fairness that are the hallmarks of equity, is unavoidable: *"Er is dus in het recht een onvermijdelijke tweespalt, een zich telkens herhalend conflict tussen de eisen van de rechtvaardigheid en die van de rechtszekerheid..."* This dichotomous character of law is known as the *kompromiskarakter* (compromisory character) of the law. See also **Slagter** ***"Rechtvaardigheid en Doelmatigheid. Enige beschouwingen over het compromiskarakter van het recht*** (1961); **Kollewijn** ***Zekerheid van het recht*** (1933); **Houwing** ***Zekerheid omtrent het recht*** (1947); **de Groot** ***Enige Beschouwingen over de conflict tussen rechtszekerheid en het levende recht*** (1947); **Wiarda** ***"De toenemende invloed van algemene ongeschreven rechtsprincipes"*** In **Op de grenzen van komend recht** 1983 913 et seq.

1914 D 41 1 7 7; Inst 1 158; D 4 5 8; D 10 3 19 pr; D 17 2 83; D 5 3 36 5;D 7 5 2 1; D 3 5 38; D 48 20 7; D 25 3 5 16; D 8 2 8; D 13 6 18 2;

1915 For an in-depth discussion of various nuances the terms bore throughout Roman legal history, see **Stein** ***"The Development of the Notion of Naturalis Ratio"*** Daube **Noster**: **Essays in legal History for David Daube** (**Watson, A** ed) (1975) 305-316.

1916 For a criticism of this text, See **Stein** ***"The Development of the notion of Naturalis Ratio"*** (1975) 315

1917 See Chapt. II of this work; See **Grotius** ***Prolegomena*** to his **De Jure**, where he also uses the term *sana ratio* – sane or sound reason; **Voet** ***Com*** 1 1 13, where we are given a definition of natural law which contains a reference to *recta ratio*.

doctrine of rationality as a categorical imperative of the law, also stands central in the philosophy of the most influential philosopher of modern times, namely **Emmanuel Kant.**[1918]

The common law concept and standard of human conduct, namely *recta ratio* has been enshrined in the South African Constitution and has been endorsed extensively by both the civil and the Labour Courts. The *rationality* principle is to be found in s 33(1) of the Constitution, where it is expressed as reasonableness. S 33(1) governs arbitration proceedings in the CCMA and Bargaining Councils. The reason for this is that, as was reiterated in ***Sidumo***, these institutions form part of the administrative or executive branch of the State, and not of the judicial, even when performing acts of a judicial nature. The CCMA, like its predecessor, the Industrial Court, is not a court of law. On the other hand, as employers and the Labour Courts are directly regulated by s 23(1) of the Constitution, the criterion for their acts are not only rationality as laid down by s 33(1) but *fairness* as such. By no means does this mean that the labour Courts are free to act irrationally. In fact the rationality and reasonableness imperatives permeate the whole of the Constitution and form foundational values of that instrument.

Rationality and reasonableness seem to be two sides of the same coin. It involves the application of a sound reasoning process to facts, purposes, other relevant considerations and especially to conclusions reached. The Aristotelian and Roman law concept of rationality is that of a thought-process, the end-result of which is reasonableness. When a certain state of affairs is found to be *reasonable*, it simply means that it is *justifiable* by the application of a rational thought process. **Hahlo and Kahn**[1919] correctly point out that *arbitrary, senseless* and *absurd actions and reasoning* brings the law, and indeed the very State itself, into ridicule and disrespect.

1918 In his ***Metaphysik der Sitten*** 44-45; **Paton *The Moral Law*** (1984) 22, **Kant** draws a distinction between *fully* or *perfectly rational* agents on the one hand, and imperfectly rational agents, or humans, on the other. In doing this he accepts that humans possess flawed or imperfect reason.
1919 ***The South African Legal System*** (1968) 32

However, there are various shades of the concept of rationality or reasonableness as has been emphasised from time to time. There is rationality in the strict and narrow philosophical sense of *logic*, which in turn may range from *syllogism* [1920] to *induction.*[1921] In ***Modise***[1922] we have one of the occasions when the LAC employed syllogism in support of its conclusion:[1923]

The terms rationality and *reasonableness* are mostly used to refer to simple *practical reasoning*, or, as **Kant** referred to it, *'praktische Vernunft.'*[1924] The word *jurisprudence* involves this kind of reasoning.[1925] It emphasises prudence of action in the course of practical daily legal life. Prudence in this sense refers to practical reasoning in support of actions or conclusions based on actions, which have to be justifiable by the application of a rational thought-process.[1926] Traditionally moral and abstract or value reasoning based on the *"is-ought"* paradigm has dominated legal theory. In more recent times simple practical reasoning has received strong support.[1927]

Despite the role that *reason* and *rationality* have played throughout the ages, a strong, logical and consistent *theory of reasons* or *taxonomy of reasons* has never been constructed. It has been suggested that one important reason for this is the lack of confidence that was brought about by modernist *relativism* in

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1920 The syllogism was used extensively by **Aristotle** and prevailed as the major form of logic until the 19th Century. It consists of an inference made up of three propositions, i.e. two premises and a conclusion, such as the following famous example: *"All men are mortal. Greeks are men. Therefore all Greeks are mortal"* See **Du Pre *50 Philosophical Ideas*** (s.a.) 109

1921 **Farrar & Dugdale *Introduction*** (1990) 269. Induction is, like syllogism also a way of reasoning that leads from premise to conclusion, in this case by *inductive* argument or reasoning. Here, a general law (the conclusion) is for instance inferred from a number of observations of how things work. From a number of observations it may be inferred that all human beings are born with five fingers. In this case, unlike syllogism, the conclusion is not *necessarily* correct. See **Dupre** 110

1922 ***Modise v Steve's Spar Blackheath*** 546 par 77 4

1923 Here the court stated: *"The audi approach is based on logic whereas the same cannot be said of the no audi approach. This can be demonstrated by having regard to the premise of the audi approach and the conclusion it reaches. The premise is that every worker is entitled to be heard before he can be dismissed; a striker is a worker; therefore a striker, too, is entitled to be heard before he can be dismissed."*

1924 This seems to be a literal translation of practical reasoning, or reasoning pertaining to human *action*, rather than *speculative reasoning*, such as metaphysics.

1925 See Chapter II.

1926 **Farrar & Dugdale *Introduction*** (1990) 269

1927 **Farrar & Dugdale** (1990) 269 point out that we are now beginning to realize that practical reasoning in the sense of reason giving is not operating within the logical vacuum of the *is/ought* distinction and that what one is concerned with is the weight and adequacy of both factual and value reasons, judged in the aggregate.

thought, which resulted in a culture of defeatism in human mentality.[1928] To the American legal philosopher **Edmund N Cahn**[1929] it is for instance not sheer logic or rationality that determines a person's *sense of justice* and fairness, but rather an indissoluble blend of reason and empathy, which to him is an organic and evolutionary, rather than a fixed and static phenomenon.[1930]

Hahlo and Kahn[1931] also sound a note of warning: It must not be thought that because the application of legal rules is mainly a deductive process, the same holds true for the development of the legal rules as such. Many factors other than logic determine the growth of law.[1932] The learned authors cite a famous dictum of **Oliver Wendell Holmes**[1933] in which he emphasised that factors such as *experience, necessity, moral and political theory, public policy, intuition* and even various forms of *prejudice* which judges share with fellow-men have a good deal more to do with legal development than *syllogisms* and *mathematical axiom*.[1934] These views were shared by **Kotze JP** in the labour case of **Cape Explosive**.[1935]

Farrar and Dugdale[1936] point out that we are beginning to see a gradual attempt to produce criteria of rational justification not as ends in themselves, but as means. Firstly, philosophers are now attempting to classify types of reasons. Some seek to construct a meta-language which would allow the analysis of value conflicts without resort to value-laden language. Secondly, there is a tendency to break down complex reasons into constituent parts to allow for a clear identification of the value dimension. Thirdly many value issues are being measured in terms of practical consequences of acceptance. Fourthly some

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1928 **Farrar & Dugdale** (1990) 269 cites **Passmore** ***"Civil Justice and its Rivals"*** **Kamenka and Tay** ***Justice*** 48

1929 ***The Sense of Injustice*** (1949)

1930 **Halo and Kahn** ***The South African Legal System*** (1968) 31; Cf. **Vinogradoff** ***"Aims and Methods of Jurisprudence"*** **The Collected Papers of Paul Vinogradoff** (1928) 320

1931 ***The South African Legal System*** (1968) 33

1932 Ibid; **Guest** ***The Role of Moral Equality*** 2004 **Acta Juridica** 22

1933 ***The Common Law***

1934 **Hahlo and Kahn** ***The SA Legal System*** (1968) 33

1935 ***Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd*** 1921 CPD 265. Here the learned judge emphasised the preferred route of legal development and evolution: practical human experience, rather than philosophical speculation, while the need for logical and systematic reasoning at times, should not be overlooked; **Hahlo and Kahn** (1968) 33

1936 ***Introduction*** (1990) 269-270

reasons are being assessed by reference to practical standards which are adjusted in the light of changing conditions and circumstances.[1937]

Useful contributions to a theory of reasons have recently also been made by **Professors Robert Summers**[1938] and **J R Lucas.**[1939] **Summers**[1940] classifies reasons into *substantive, authoritative, factual, interpretational* and *critical* reasons. For our purposes, the most important of these are *substantive reasons*, which are divided into *goal reasons* and *rightness reasons.* Goal reasons are future-oriented and causal[1941], whereas rightness reasons such as *conscienability, due care* and *justified reliance* are internalized values of a legal system.[1942]

J R Lucas[1943] distinguishes between *first-personal* and *omni-personal reasons.* The first are relative to a particular person, whereas the latter are universals in the sense that it applies to anyone and everyone. They are cogent reasons compelling assent from every reasonable person. Omi-personal reasons derive their authority not so much from form as from the inherent weight and support that they give to the other reasons for a particular decision, or conclusion.[1944]

Despite abovementioned considerable attempts at clarification of the ideas of reason, reasoning and rationality, these ideas remain elusive and nebulous. Some scholars hold the view that rationality or reasonableness is dialectic by nature in the sense that it involves a consideration of opposites and an option between them. Option implies the exercise of the free will – the ***voluntas*** of Roman law – between alternatives. It is for this reason, amongst others, that **Professor John Finnis** of Oxford observes that *"legal reasoning is, broadly speaking, practical reasoning. Practical reasoning moves from reasons for action to choices (and actions).....A natural law theory is nothing other than a theory*

1937 ibid
1938 **Summers *"Two Types of Substantive Reasons: The Core of Common Law Justification"*** 63 **Cornell Law Review** 1978 707
1939 **Lucas *On Justice*** (1977) 37 et seq.; **Farrar & Dugdale *Introduction*** (1990) 270-2
1940 loc. cit.
1941 Examples of goal reasons are safety, public health and family harmony.
1942 **Farrar & Dugdale *Introduction*** (1990) 270
1943 loc. cit.
1944 ibid

of good reasons for choice (and action).[1945] Words like *reasons, choices* and *actions* suffer from an inherent and fundamental ambiguity derived from the fact that humans are strictly speaking *animals*, although admittedly *intelligent animals.*[1946] All human action involves emotional motivation, feelings, imagination and other aspects of human bodylines. These emotions and feelings are observable as manifestations of human behaviour. Rationally motivated action has an *intelligent motivation*, and seeks to realize, protect and promote an *intelligible good.*[1947] Our purpose, or the state of affairs which we seek to bring about, have a double aspect: the goal which we imagine and which engages our feelings, and the intelligible benefit which appeals to our rationality by promising to instantiate either immediately or instrumentally, some basic *human good.*[1948]

Finnis[1949] maintains though that an account of basic reasons for action should not be *exclusively rationalistic.* Human flourishing should not solely and simply be portrayed in terms of the exercise of our capacity to reason. Humans are *organic substances* and as animals our bodily life and health, vigour and safety are transmitted to new human beings. Moral thought is simply practical rational thought 'at full stretch', integrating emotions and feelings, but *undeflected* by them.[1950] In this respect, the Aristotelian *orthos logos* and the *recta ratio* of the Roman and Roman Dutch jurists should simply be understood to mean *"unfettered reason"*, i.e. reason undeflected by emotion and feeling.[1951]

1945 **Finnis *"Natural Law and Legal Reasoning"*** The **Philosophy of Legal Reasoning: A Collection of Essays by Philosophers and Legal Scholars** (ed. **Scott Brewer**) Cleveland Law Review 1990 38 1 1-13.

1946 ibid.

1947 ibid.

1948 The word *reason* is often used loosely to refer to one's purposes, without distinguishing between a purpose ultimately motivated by nothing more than feeling, and a purpose motivated by an understanding of a *basic human good.* **Finnis *"Natural Law"*** (1990) 38 1 1-13 uses the word *reason* in the latter sense.

1949 loc. cit.

1950 op.cit. 3

1951 For insight into the primacy that *reason* and *rationality* held in Roman Law, see **Ernst Levy *"Natural Law in Roman Legal Thought"*** **Kunkel** & **Kaser** **Ernst Levy: Gesammelte Schriften** (1963) vol. 1 4. Here various writings of **Cicero** are referred to where it is emphasised that law is the highest *reason* implanted in nature, which commands what ought to be done, and which forbids what ought to be avoided; that the very roots of law are in nature, which is the mind of God, which cannot exist without *reason*, and which, of necessity, must have the power to determine right and wrong; Reason is what the gods have given to the human race, the supreme and only law, with God as its inventor, interpreter and sponsor. Justice cannot exist if it does not come from nature, i.e. right reason.

Fairness requires that one's concern for basic human goods should not be limited simply by one's feelings of self-preference or preference for those who are near and dear. Fairness also does not exclude treating different persons differently. It requires only that different treatment be justified either by *inevitable limits* on one's action or by intelligible requirements of the basic human goods themselves.[1952] Human life should thus be understood as *a basic human good.*[1953] This sense of *reason for action* is common to all other *basic human goods: knowledge of reality, excellence in work and play; harmony between and amongst individuals and groups of persons,* including *peace, neighbourliness* and *friendship; inner peace of mind,* which involves *harmony between one's own feelings and one's judgments and choices; harmony between one's own choices and one's judgments and behaviour (peace of conscience and authenticity; consistency between one's self and its expression) , and harmony between oneself and the wider reaches of reality, including the reality that the world has some more-than-human source of meaning and value.*[1954] In short, the *basic human goods* are inextricably involved in human nature.[1955]

This approach to practical human reasoning – although not without controversy - is thoroughly Aristotelian.[1956] The human goods that **Finnis** refers to, are by and large adumbrations of Aristotelian, Roman natural law,[1957] and Christian *virtues* and *values*.[1958] The Aristotelian paradigm of practical reason as expounded by **Finnis** does not amount to deducting an *"ought"* from an *"is"*. As **Finnis** himself explains, it is not an attempt to deduce reasons for action from a pre-existing

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1952 **Finnis** ***"Natural Law"*** (1990) 4
1953 op.cit. 2.
1954 ibid.
1955 ibid.
1956 On **Aristotle, Finnis** ***"Natural Law"*** (1990) 2 observes that the ***Nicomachean Ethics***, Aristotle's principle treatise on human nature is from beginning to end an attempt to identify the *human good*, and is according to Aristotle himself, from beginning to end an effort in practical understanding.
1957 **Finnis** acknowledges the role that natural law theories have played in the determination of the *human goods*: *"So one begins to see the sense of the term 'natural law': reasons for actions which will instantiate and express human nature precisely because they participate in and realize human goods."* – ***"Natural Law"*** (1990) 2
1958 On virtues, see Chapter II *passim*

theoretical account of human nature. It does not purport to find a conclusion to a syllogism that is not contained in the premises.[1959]

Strict law may limit or even eliminate the alternatives. *Equity* considers all alternatives and thereafter exercises an option in regard to what is morally good or the best in the circumstances. This is what is meant by *practical reasoning*.

Professor John Wisdom is well known to have remarked that legal reasoning is not necessarily a chain of demonstrative reasoning, but a process of presentation of those features of a case which severally co-operate in favour of a conclusion. The reasons for a conclusion are likened to the legs of a chain, rather than the links of a chain.[1960]

The South African civil and labour courts, as well as the Constitutional Court, have been consistent in their protection and promotion of rationality and reasonableness as constitutional values. Already early in its existence, the Constitutional Court insisted that differential treatment of persons should not be *arbitrary* or manifestly naked preference. Arbitrary conduct would militate against the constitutional state and the Rule of Law.[1961] There must be *'a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve',* the CC held in ***Harksen v Lane.***[1962] In ***Pharmaceutical Manufacturers***[1963] the CC pointed out that rationality and justifiability means that administrative action should not be *arbitrary*[1964] and has to be exercised in an objectively rational manner. *Arbitrariness* or *capriciousness* seem to be the quintessential opposites of and

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1959 **Finnis *Natural Law*** (1990) 2

1960 **Wisdom *Philosophy and Psycho-Analysis*** 157; **Farrar & Dugdale *Introduction*** (1990) 82: *"In this respect legal reasoning employs the process of practical reasoning we all use in everyday life. We tend to weigh a collection of reasons for or against a particular decision rather than think in terms of deductive logic."*

1961 ***Prinsloo v Van der Linde*** par 17 and 23.

1962 1998 1 SA 300 320 par 43.

1963 ***Ex parte the President of the Republic of South Africa & Others, in re The Pharmaceutical Manufacturers Association of SA*** par 78.

1964 In ***Sidumo***, the CC cited with approval the following passage from ***Pharmaceutical Manufacturers Association*** 674 par 85-6:*"It is a requirement of the rule of law that the exercise of public power...should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."*

thus incompatible with the idea of *rationality*.[1965] The court accorded threshold status to constitutional rationality of administrative action:[1966]

"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power...Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful."

However, the court readily acknowledged that, although opinions on rationality may differ, irrational decisions that lead to review, would only be rarely made.[1967] An enquiry into the *rationality* or *reasonableness* of an action or conduct is an objective one.[1968] So is an enquiry into the fairness of an act or conduct.[1969] Once bad reasons are given in justification of a decision, such decision would not be regarded as passing the test of rationality.[1970]

The LAC and LC have had opportunity to consider and deal with rationality and reasonableness mostly in the course of exercising its review and appeal jurisdiction over the CCMA in terms of s 145 of the LRA.[1971] As the CCMA is an organ of state, its actions and arbitration awards are subject to the dictates of s 33(1) of the Constitution, which determines that everyone has the right to administrative action that is *lawful*, *reasonable*, and *procedurally fair*.[1972] The

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1965 Ibid.

1966 Par 89 -90

1967 Ibid: *"The setting of this standard [i.e. rationality] does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made but rarely but if this does occur, a court has the power to intervene and set aside the decision."*

1968 The following dictum from its own judgment in ***Pharmaceutical Manufacturers*** 85-6 was relied on by the CC in ***Sidumo*** 2422: *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

1969 ***Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*** 2003 24 ILJ 197 (LC) par 69; ***Nampak Corrugated Woodville v Khoza*** 1999 20 ILJ 578 (LAC) par 32; ***Sidumo*** 2428 par 64.

1970 See the SCA case of ***Rustenburg Platinum***, as cited by the CC in ***Sidumo*** 2425 par 48.

1971 For the controversial status that the CCMA once had, see the SCA case of ***Edcon Ltd v Pillemer*** 2009 30 ILJ 2642 (SCA) 2647 par 11

1972 The legal status of the CCMA was analysed by the LAC as far back as ***Carephone (Pty) Ltd v Marcus*** 1998 19 ILJ14 25 (LAC); 11 BLLR 1093 1099H. **Froneman DJP** held that the CCMA is a public institution exercising administrative powers, and is an organ of state for constitutional purposes. Arbitration before the CCMA has to comply with the constitutional imperatives ,namely a fair process, an impartial and unbiased

initial approach to reasonableness was a broad one, namely *'justifiability'.* To pass muster, CCMA awards had to be justifiable in relation to the reasons given for it,[1973] or in relation to the material properly placed before the commissioner.[1974] In ***Carephone,***[1975] **Froneman DJP** explains justifiability and rationality as follows:

"Many formulations have been suggested for this kind of 'substantive rationality' required of administrative decision makers, such as 'reasonableness', 'rationality', 'proportionality' and the like...One will never be able to formulate a more specific test other than, in one way or another, asking the question: Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at."

The uncertainty created by divergent judicial precedent was eventually settled by the Constitutional Court in ***Sidumo.***[1976] This court, relying on its own prior judgment in ***Bato Star,***[1977] provided the following formulation of or test for reasonableness:

"Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to administrative action which is lawful, reasonable and procedurally fair."

The Constitutional Court recognizes a range of reasonableness, allowing for different individual judicial opinion. But once a decision falls outside such range or the bounds of reasonableness, it would fall foul of the Constitution, and could be set aside.[1978] As regards the test for the review of CCMA awards in terms of s

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arbitrator, proceedings that are lawful and procedurally fair, an award that is justifiable in relation to the reasons given and that is consistent with the right to fair labour practices enshrined in the Constitution.
Sidumo confirmed that the CCMA is not a court of law but an administrative tribunal whose actions are governed by s 33(1) of the Constitution- See the judgment of **Sachs J** in ***Sidumo*** 2449.
See also **Pretorius** ***"Making You Whistle: The Labour Appeal Court's Approach to Reviews of CCMA Awards"*** 2000 21 ILJ 1505 1516.

1973 ***Mzeku & Others v Volkswagen SA (Pty) Ltd*** 2001 21 ILJ 1575 (LAC); ***Adcock Ingram Critical Care v CCMA*** 2001 22 ILJ 1799 (LAC) par 41; ***Waverley Blankets Ltd v CCMA*** 2003 24 ILJ388 (LAC); ***Branford v Metrorail Services (Durban)*** 2003 24 ILJ 2269 (LAC); ***Edcon Ltd v Pillemer*** 2648 par 12.

1974 ***Toyota Motors (Pty) Ltd v Radebe*** 2000 21 ILJ (LAC) 340 ; ***Shoprite Checkers (Pty) Ltd v Ramdaw*** 2001 22 ILJ 1603; ***Edcon Ltd v Pillemer*** 2648E.

1975 1102I – 1103C

1976 ***Sidumo,*** supra.

1977 ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*** 2004 4 SA 490 (CC).

1978 ***Sidumo*** par 109; ***Edcon v Pillemer*** 2650 par 118; ***Truworths Ltd v Commission for Conciliation Mediation and Arbitration*** 2009 30 ILJ 677 (LC) 689, where the *'bounds of reasonableness'* test as explained in ***Sidumo*** and ***Bato Star*** was applied. See also **Myburgh** ***"Sidumo v Rustplats: How have the Courts dealt with it?"*** 2001 30 ILJ 1

45 of the LRA, the criterion of *substantive reasonableness* has been read into that section in order for the awards of commissioners to comply with the reasonableness requirement contained in s 33(1) of the Constitution.

One could conclude that in ***Sidumo***, the Constitutional Court treated the right to fair labour practices enshrined in s 23(1) of the Constitution, as basically being suffused by *reasonableness.*[1979] As there are recognised *'bounds of reasonableness'* so there would be recognized *'bounds of fairness.'* This allows for some measure of flexibility inherent in the concepts of *'fairness'* and *'reasonableness'.*[1980] The SCA has interpreted the difference between the concepts of *'justifiability'* used in ***Carephone***, and *'reasonableness'* as explained in ***Sidumo*** as a matter of semantics, rather than a substantial or real difference. This leads to the conclusion that a decision may well be viewed as *'fair'* where it is *'reasonable'* or even *'justifiable.'*[1981]

7.16.9 EQUITY, TRUST AND CONFIDENCE – DEVELOPMENT OF THE COMMON LAW

At common law the extremely close relationship between equity and *bona fides* was always recognised.[1982] As equity was regarded as a virtue (*deugd*),[1983] and as *bona fides* involves a (good/benevolent) subjective state of mind, the reason for this closeness is obvious. Both the Roman and Roman Dutch jurists taught the **Aristotelian** doctrine that the fact that a person committed an objective,

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1979 In ***Sidumo***, **Sachs J** made a connection between the just administrative provisions contained in s 33(1) of the Constitution, and the fairness provisions of s 23(1). He stated that although the fairness of labour practices is at the centre of a decision about the fairness of a dismissal, the outcome of the arbitration process should not fall outside the bounds of reason. Such outcome would hardly represent a fair outcome.

1980 **Myburgh**, supra correctly observes that the Sidumo judgment shows the elasticity with which even the Constitutional court applies the concept of *reasonableness*, and we submit also *fairness*. Sidumo had been guilty of fairly gross dereliction of duty. The CC nevertheless agreed with the commissioner that the sanction of dismissal was too harsh. On degrees of unreasonableness, see ***Vanderbijl Park Health Committee & others v Wilson*** **1950** 1 SA 447 (A) 459-460.

1981 On reasonableness, rationality and the doctrine of the separation of powers, see **Chan *"A Sliding Scale of Reasonableness in Judicial Review"*** 2006 **Acta Juridica** 233 et seq.

1982 D 6 3 31: *"Good faith, which is required in contracts, demand the highest form of fairness."* **Du Plesssis & Fouche *A practical Guide*** (2006) *20*

1983 Even a modern arch-positivist such as **Professor HLA Hart** recognised the fact that equity is a moral *virtue*. **Ronald Dworkin** saw *integrity* as a special *virtue* of fairness, as compared with strict law: See **Guest *The Role of Moral Equality*** (2004) 20.

external act that seems *fair* or that is coincidentally *fair*, does not mean that such person is indeed fair or indeed acts fairly towards another. A person could not act fairly *coincidentally, unconsciously* or *unintentionally*. This principle has been recognised by **Fabricius AM** in the Industrial Court in relation to procedural fairness for instance.[1984] He cited **Seneca**, the Roman Stoic philosopher who stated: *'He who has come to a finding without hearing the other party has not been just, even though his finding may have been just'.* In our submission, the reason for this doctrine is that fairness involves the exercise of reason or deliberation. From that point of view therefore, only an act calculated to be fair can indeed be fair in the proper sense of the word. Fairness seems to involve both a subjective and objective element.[1985]

Bona fides refers to a particular state of mind in which both parties to a bilateral, consensual contract had to discharge their mutual duties. The common law provides no definition of the concept *bona fides*, but it seems to imply conscious and full compliance or at least an attempt at full compliance, with the duties and obligations imposed by a consensual contract such as an employment contract, and refraining from a conscious attempt at depriving the other party from any legitimate and fair benefit to be derived from the contract. This was especially the position in employment law, where the *praetor's* formula in Roman law condemned a party to such a contract to give, do or refrain from doing *anything,* according to the dictates of good faith.[1986]

It has always been trite South African law that an employee owes a duty to act in good faith and with honesty to an employer in the discharge of his or her duties.[1987] In ***Sappi***[1988] it was held that if the employee does anything

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1984 ***National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*** 1985 6 ILJ 369, 377H, where the learned Member cited **Baxter *Administrative law*** 537 n 11.

1985 See the dictum of **Ngcobo J** in ***Sidumo*** 2462 par 179

1986 See Chapter II. This formula was used in the ***actio locati conducti***– the action of the lessor or lessee, depending on the circumstances.

1987 Amongst a plethora of jurisprudence, see ***Atlas Organic Fertilizers v Pikkewyn Ghwano*** 1981 2 SA 173 (T); ***Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union*** 1991 12 ILJ 1032 (LAC) 1037G; ***Sappi Novoboard (Pty) Ltd v Bolleurs*** 1998 19 ILJ 784 (LAC); ***Council for Scientific and Industrial Research v Fijen*** 1996 2 SA 1 (A); 1996 17 ILJ 18 (A); 1996 6 BLLR 685 (A) for dicta on the common law duties of employees relating to respect, good faith and trust.

'*incompatible with the due or faithful discharge of his duty to his master*', the latter has the right to dismiss him."[1989] It was expressly stated that this principle rests on *equity*.[1990]

Although the common law imposed the equitable duty of good faith, trust and confidence on both employer and employee reciprocally, it has been relatively rare that a South African court enforced this principle in respect of employers vis-à-vis employees.[1991] However, the reciprocity of the duty was re-affirmed in the recent case of ***Council for Scientific and Industrial Research v Fijen***.[1992]

There the employee was dismissed for insisting that the relationship of trust and confidence had been irreparably destroyed by the employer's allegations at a disciplinary hearing that he had dishonestly engaged in private work.[1993] The court reiterated[1994] that in every contract of employment there is an implied term 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 trust and confidence between the parties.[1995]

1988 Supra 786

1989 This formulation was taken from the English case of ***Pierce v Foster*** 1895 2 QB 315 CA 359.

1990 The English decision of ***Regal (Hastings) Ltd v Gulliver*** (1942) 1 All ER 378, 386B was cited as authority. In **Sappi** the employee, a credit controller, was paid at his own request, an amount of R10, 000-00 'commission' for introducing one of the employer's customers to an investor. **Brassey *Employment Law*** (1998) D2:15 contends that in English law these principles are often based on equity.

1991 This rather skew relationship between employer and employee duties is reflected for instance in the classification of duties by **Brassey *Employment Law*** (1998) D.i and E.i. In addition to the primary duty to render services, certain secondary duties are imposed on the employee. These include the duties of maintaining, promoting and respecting the interests of the employer. This duty relates to the property interests, valuable information, interest in custom, the employer's good name, harmonious relationships in the enterprise, the employer's personal interests and the fabric of the employment relationship. The duties of the employer on the other hand are not discussed as though they are co-extensive or commensurate with those of the employee. There rests a secondary duty on the employer to preserve the bodily integrity of the employee and to refrain from injury or harm to him. The integrity of the employee's personality, property and relationships also needs to be respected.

1992supra.

1993 **Harms JA** stated: *"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 (Angehrn and Piel v Federal Cold Storage Co. Ltd. 1908 TS 761 at 777-8...) There are some judgments in the LAC to this effect (for example, Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union & Others...")*

1994 691

1995 See the English cases of ***Malik*** and ***Unisys*** discussed in Chapter V, supra.

In our discussion of modern Dutch labour law, we observed that the golden principle of the *good employer - good employee imperative* that dominates Dutch labour law, is the yardstick of or test for fairness in that legal system. **Jacobs,** a modern Dutch labour scholar, points out that the good employer/employee imperative squarely rests on the principle of *bona fides* that govern the employment relationship. The legislative concept of *unfair labour practice* and *unfair dismissal* as applied in the South African labour dispensation is unknown to Dutch law. Nevertheless the Dutch seem to have achieved a remarkable degree of satisfaction from the utilization of the *good employer - good employee principle*, which is based on *good faith, trust and confidence.*[1996] Like the open-ended definition of an unfair labour practice that was introduced into South African labour law in 1979, this particular norm is used as a premiss to flesh out, develop and underpin all Dutch labour law. It forms the backbone and *sine qua non* of the fairness regime in that system.[1997]

In our examination of modern English law[1998] we noted that the implied term of trust and confidence applies throughout modern English employment law, and although its scope and ambit is perhaps not as wide and comprehensive as that of the Dutch principle, it is applied with great determination and rigor by the English Employment Tribunal and civil courts.[1999]

There seems to be no reason why *good faith, trust and confidence* should not be accorded an increasingly greater role in South African labour law. There is plenty of scope and a serious need for the application of these values. The LRA has left many loopholes and question marks in its purported comprehensive protection of labour rights, and it is now generally realized that it falls short of giving full effect to s 23(1) of the Constitution in significant respects. In situations where direct reliance on the Constitution is not allowed, the principle of good faith, trust and

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1996 See Chapter V.
1997 See also chapt. IV
1998 Chapter V
1999 ***Johnson v Unisys; Malik v Bank of Credit and Commerce International SA; Eastwood & Another v Magnox*** (supra); The principle was re-affirmed in the SA cases of **Old *Mutual Assurance Co SA Limited v Gumbi; Boxer Superstores Mthatha & Another v Mbenya*** and ***Murray v Minister of Defence*** which are discussed *infra*.

confidence could play a crucial role. It could foster and protect the right to dignity, as well as bodily and psychological integrity. It has been suggested that good faith, trust and confidence could act as some kind of 'moral code' for both employers and employees, providing remedies where the LRA fails to do so, and where direct constitutional reliance is disallowed.[2000] We are in respectful agreement with such view. **Bosch**[2001] correctly contends that the implied term of good faith, confidence and trust could furthermore be useful in determining the fairness of the employer's exercise of discretion in relation to issues such as discretionary bonuses, allowances, relocations etc. These issues have not been satisfactorily addressed in the text of the LRA. Most important however, is the employer's duty of good faith, trust and confidence in relation to dismissal of employees.

In ***Afrox Healthcare Bpk v Strydom***[2002] the issue was whether a disclaimer clause contained in the admission contracts of a private hospital was valid. It was a case involving general principles of the law of contract, outside the direct field of labour relations. One of the grounds on which invalidity of such clauses was alleged, was that it lacked *bona fides* or *good faith* and was therefore invalid. Another was that it was contrary to public policy. The court accepted that where the terms of a contract are repugnant to public policy, such contract would be treated as unenforceable. However, the court indicated that it would not take such a step merely because it subjectively considered the terms of the contract to be *unfair*. A contractual term would only become unenforceable if it is *unfair* to the extent that it is considered to be contrary to public interest.[2003] This would

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2000 **Bosch** ***"The Implied Term of Trust and Confidence in South African Labour Law"*** 2006 27 ILJ 28, 31. The learned author refers to the English case of ***Horkulak v Cantor Fitzgerald*** [2003] EWHC 1918 QB where an employee had suffered psychological stress and anxiety as a result of the frequent outbursts of foul and abusive expressions and swears from the employer. The court found that the employer had breached the relationship of trust and confidence, and had therefore repudiated the employment contract.

2001 Supra 36-43

2002 2002 6 SA 21 (SCA)

2003 **Afrox** 33A-J. The court relied on its own earlier judgment in ***Sasfin (Pty) Ltd v Beukes*** 1981 1 SA 1 (A), and on Botha ***(now Griessel and Another) v Finanscredit (Pty) Ltd*** 1989 3 SA 773 (A). In ***Sasfin***, the court observed that *"One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."*

require *extreme unfairness*.[2004] Together with concepts such as *reasonableness, fairness* and *justice, good faith* forms the basis and source of legal rules, but do not in themselves constitute such rules, was the view of the court.[2005] These are *'abstract ideas'* on which a court of law does not directly rely when it comes to the enforcement of contractual terms.[2006] The court has no discretion to do so.[2007]

The real value of this judgment for our purposes lies in the fact that the court, although clearly determined to give effect to the sacrosanctity of contractual terms, nevertheless does leave some room for the application of fairness, in direct contradiction of such terms. This would happen when such terms are *extremely unfair* and thus not in the public interest. We have noted earlier in this chapter, that the courts have traditionally declined, in appropriate cases, to enforce unconscionable terms of a contract, for instance.[2008]

Also instructive, is the matter of ***Harper v Morgan Guarantee Trust Co of New York***.[2009] Unlike ***Afrox***[2010] this matter was decided within the realm of labour law. Here disciplinary proceedings were brought against the employee for allegedly leaking confidential information relating to the employer's dealings with another company to the Reserve Bank. The employee was dismissed but subsequently brought a claim for breach of contract. He averred that the dismissal was *unlawful* in that it was done from ulterior motive, was not *bona fide*, and amounted to a repudiation of the employment contract. The claim was for loss of earnings and a bonus payment. Although the action was dismissed, the court drew a close connection between the *bona fide* actions of a party to a

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2004 **Afrox** 34H. **Brandt JA** observes: *"Die vraag is telkens of die handhawing van die betrokke uitsluitingsklousule of ander kontraksbeding,* ***hetsy weens uiterste onbillikheid****, hetsy weens ander beleidsoorwegings, met die belange van die gemeenskap strydig sal wees."* (my emphasis).
2005 ibid
2006 ibid
2007 **Afrox** 40 par 32. The contrary (minority) view was held by **Olivier JA** in the matter of ***Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*** 1997 4 SA 302 (SCA) 318 et seq. In ***Brisley v Drotsky*** 2002 4 SA 1 (SCA) the court placed its own perspective on the minority judgment of **Olivier JA** in ***Eerste Nasionale Bank*** (supra).
2008 ***Haynes v King Williams Town Municipality; Rex v Milne*** and ***Erleigh***.
2009 2004 3 SA 253 (W); 2004 25 ILJ 1024 (W). For a discussion of this case see also **Bosch** 47 et seq.
2010 supra

contract, and the *fairness* of the actions of such party:[2011] *"In its nature unfairness can almost unavoidably be seen when a party acted in bad faith vis-à-vis the other contracting party."*[2012]

Following the dictum laid down in ***Afrox***[2013] the court reiterated that unfairness may be so *gross* that a court may interfere on the basis of *public policy.*[2014] The court was unequivocal in its observation that it lends preference to the *'tacit term approach'* (in contrast with the pure bona fides approach) by investigating the objects of the particular contract and the duties that set the limits to what parties may expect and endure from each other.[2015] The pure *bona fides* approach, by contrast, was expressly disavowed.[2016] Similarly *fairness* as a precondition for a party to exercise a discretion or election that he lawfully has, such as termination of a contract of employment, was specifically rejected.[2017] Contractual terms, and what the parties had in mind in the conclusion of the contract, are the accepted norms governing employment contracts.[2018] These cannot be replaced by an *'undefined'* concept without *'defined edge'* such as *good faith*, which lacks certainty.[2019]

One of the positive aspects of ***Harper*** is that it confirms ***Afrox*** in holding that where the express terms of a contract are grossly unfair[2020] to the extent that it violated public policy,[2021] the court would decline to enforce same.

2011 The court referred to the wide discretion that the Roman Aediles had that was probably strongly guided by *'unfairness'* (sic).
2012 Per **Flemming DJP** in **Harper** 260H.
2013 supra
2014 261B
2015 266A-F
2016 Cf. 260D-G, where the court argues that the summons on which the employee relied in the case before it forced the reader to infer that the dismissal was *'unlawful'* because *'it was done from an ulterior purpose and was not bona fide for the reasons set out..., there must have been something which made an ulterior motive dismissal unlawful. No term which relied upon consensus was expressly alleged to be that something. Counsel did not argue for an implicit allegation."*
2017 260G
2018 261F-I
2019 261F-I. At 262F the court points out that *"...once one moves to the level that it is the law which imports a contractual duty, the result in respect of a term 'of trust and confidence' is not satisfactory because the law should produce certainty and neat definition."*
2020 In ***AFROX*** the terminology used was *"extremely unfair"* – uiters onbillijk.
2021 In ***AFROX*** the court referred to *"public interest"*

The case of ***Holgate v Minister of Justice***,[2022] decided under common law and not in terms of the equity provisions contained in the LRA, can be usefully compared to ***Afrox.***[2023] There the court[2024] compared the application of the principle of good faith in so-called 'public' law employment contracts with employment contracts in general. It concluded that the two fundamental principles applied to public contracts, namely the right to a hearing before contractual rights are affected by administrative decision, and secondly that injustice or *unfairness* ought to be avoided if there is no countervailing *public benefit*, should equally apply to employment contracts in general.[2025] Concerning the application of bona fides in employment contracts generally, the court expressed the view that this should be the underlying basis of all contracts.[2026] General notions of fairness and natural justice should be introduced into contracts, especially so employment contracts.[2027]

In our submission one of the best routes by which this could be achieved, is indeed the application of considerations of public policy, public interest and implied terms in the interpretation and application of employment contracts. This has been done with some success in America and England in the struggle against employment at will. **Pretorius** and **Pitman** have in our view convincingly shown that this could also be done in South African employment law.[2028]

The SCA has recently made useful but controversial contributions to the development of the common law employment contract in terms of the

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2022 1995 16 ILJ 1426 (E)

2023 supra

2024 Per **Froneman J**, as he then was.

2025 The learned judge – correctly we submit – emphasises the fact however, that the duty to act fairly and in accordance with the principles of natural justice is not restricted to the two requirements mentioned. The contents of the duty vary according to the circumstances of each case – See **Holgate** 1439D.

2026 1439G-H the court states that *'...it would also be in accordance, in the wider context of 'ordinary' contracts, with the view that good faith or bona fides underlies not only the more technical rules of a contract, but also the operation of a contract as a whole.'* The court refers to ***Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality*** 1985(1) SA 419 (A), at 433A-C; **Van der Merwe et al *Contract: General Principles*** (1993) 230-4.

2027 In **Holgate** 1439E, **Froneman J** reiterates: *"To introduce notions of fairness and natural justice into a contractual setting would, I think, not sound strange to the layman, but to lawyers schooled in the public law/private law dichotomy, it might."*

2028 **Pretorius & Pitman** ***"Good Cause for Dismissal: The unprotected Employee and Unfair Dismissal"*** 1990 **Acta Juridica** Juta 1991 133 et seq.

constitutional imperative enshrined in s 39(2) of the Constitution. This was done in a trio of cases, namely ***Old Mutual Assurance Co SA Ltd v Gumbi,***[2029] ***Boxer Superstores Mthatha v Mbenya***[2030] and ***Murray v Minister of Defence.***[2031] This development was accepted by the Labour Court in ***Mogothle v Premier of the North West Province,***[2032] albeit with some reservations. However it was at a later stage rejected by the same court in ***Mohlaka v Minister of Finance.***

The trio of SCA judgments predominantly related to the mutual relationship of trust and confidence that is fundamental to the employment contract, and hence to employer – employee relations.

In ***Gumbi***[2033] the SCA held that the common law employment contract should be developed in terms of the Constitution to the extent where it specifically provided for a pre-dismissal hearing.[2034] ***Gumbi*** found confirmation in ***Mbenya*** where it was pointed out that the common law of contract had been developed in ***Gumbi*** in accordance with the Constitution so as to include the right to a pre-dismissal hearing.[2035] The same court went further in ***Mbenya,***[2036] stating that this means that every employee now has a common law contractual claim to a pre-dismissal hearing, and that this right existed independently of any statutory unfair labour practice rights such as those contained in the LRA dispensation, for example.[2037]

The recognition of common law contractual rights to *fairness* as such seemed to have reached full circle in ***Murray***, where the implied contractual right not to be constructively dismissed was endorsed. Here the court accepted that the concept of constructive dismissal was adopted from English law where, in the interests of

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2029 2007 28 ILJ 1499 (SCA); 2007 8 BLLR 699 (SCA).
2030 2007 28 ILJ 2209 (SCA); 2007 8 BLLR 693 (SCA).
2031 2008 29 ILJ 1369 (SCA); 2008 6 BLLR 513 (SCA).
2032 2009 30 ILJ 605 (LC).
2033 Par.5
2034 In par.5 of the judgment, the court stated as follows: *"It is clear however that coordinate rights are now protected by the common law: to the extent necessary, as developed by the constitutional imperative (s. 39(2)) to harmonize the common law into the Bill of Rights (which itself includes the right to fair labour practices (s. 23(1))"*
2035 Par. 6 of Mbenya.
2036 ibid.
2037 ibid.

fairness and justice certain facts are deemed to exist. Dismissal in a constructive dismissal dispute, may be such a fact. [2038] The contractual right to fairness was held to be founded in the duty of all employers to engage in *fair dealing at all times* with their employees.[2039] This places a *continuous duty of fairness* on employers whenever decisions are made that affect employees in the workplace.[2040] The duty of fair dealing has not only a constitutional basis but is also rooted in an *implied contractual term* relating to mutual trust and confidence.[2041] The question in each case is whether the employer is without reasonable and proper cause conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.[2042] The cumulative effect of the employer's conduct should also be taken into account, and the question is whether, judged reasonably and sensibly, the employee could be expected to put up with it.[2043] There is both a substantive and procedural dimension to this right.[2044]

Another interesting aspect of ***Murray*** that should be noted, is that it does not render the traditional concept of contractual *repudiation* between parties redundant in claims arising from employment contracts. A proper understanding of the development of a contractual requirement of fair dealing means that *unfair* dealing would also amount to contractual repudiation and could be the foundation of a claim for breach of contract.[2045]

2038 **Cameron J A**, who wrote the judgment, put it as follows on 1375 par 8: *"The term used in English law, 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well established in our law. In employment law, constructive dismissal represents a victory for substance over form."*

2039 517C. In this respect the court confirmed the judgment of **Froneman J** in ***W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*** 1997 18 ILJ 361 (LAC) 366A.

2040 ibid.

2041 The court states as follows on 1374 par 5: *"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."*

2042 1376 par 12.

2043 ibid.

2044 ibid.

2045 1375-6 par 10, the court formulates this as follows: *"And it is no longer necessary under either the constitutionally developed common-law or under the LRA to continue to invoke concepts such as repudiation (as was previously necessary) to unmask the true substance of the parties' dealings."*

In ***Mogothle***[2046] the Labour Court noted that the trio of judgments of the SCA had not been uncontroversial, but that it considered itself bound by the developments in these cases. It thus recognised the existence of a *contractual right to fair dealing between employer and employee*.[2047] The LC accordingly granted relief to ***Mogothle*** on the basis that the employer involved had failed to show that it had a substantive right to suspend the employee, or that it had afforded the employee a fair hearing prior to suspension.

The reservations relating to the SCA trio of judgments referred to above that were noted by the LC in ***Mogothle,*** refer to a series of publications by **Cheadle,**[2048] **PAK Le Roux**[2049] and **P Pretorius** and **A Myburgh.**[2050] The gist of such criticism was to the effect that the SCA trio of cases may lead to the development of a dual system of labour jurisprudence which allows common-law principles to compete with the protection offered by the unfair dismissal and unfair labour practice legislation such as the LRA.

Gumbi, Mbenya[2051] and ***Murray*** led some scholars to believe that a general contractual right to fairness, and in particular to procedural fairness in the form of a pre-dismissal hearing had now been imputed into all contracts of employment.[2052] This seemed to be a positive development at the time, despite the reservations that the Labour court had expressed in ***Mogothle***. However,

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The court refers with approval to the judgment of **Trengrove J A** in ***Mafomane v Rustenburg Platinum Mines* LTD** 2003 10 BLLR 999 (LC) par 47.

2046 613 par 23-24

2047 613 par 24 the LC, after having referred to criticism that had been expressed of the SCA judgments, stated: *"Be that as it may, the 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. This court is bound by the authorities to which I have referred and is obliged, in the absence of any higher authority, to enforce the contractual right of fair dealing as between employer and employee."*

2048 **Cheadle *"Labour Law and the Constitution"* Current Labour Law** 2008 3

2049 Commentary in **Current labour Law** 2008 3.

2050 ***"A Dual System of Dismissal Law: Comment on Boxer Superstores Mthatha& Another v Mbenya (2007) 28 ILJ 2209 (SCA)"*** 2007 28 ILJ 2172.

2051 supra

2052 See for instance the journal publications by **Cohen: *"Implying Fairness into the Employment Contract"*** 2009 30 ILJ 2271, and **Grogan *"Re-interpreting Chirwa: New Twist in the Jurisdictional Debate"* Employment Law** vol 25 (5) 4. **Cohen** 2280 observed that the significance of these decisions is that the court deemed it appropriate to imply terms into the employment contracts, in order to reflect public policy considerations and the constitutional commitment to fair labour practices, despite the existence of a statutory right to the same effect.

cold water was poured on enthusiasm in this regard by the SCA in ***SA Maritime v McKenzie.***[2053] In this case ***Mckenzie*** was employed by ***SA Maritime*** but later dismissed. He first referred an unfair dismissal dispute to the CCMA under the provisions of the LRA, but settled the matter on the basis that the employer would pay compensation. He thereafter brought a claim for damages in the High Court, claiming that his contract was subject to an implied term that he would not be dismissed without *'just cause'*. In the particulars of claim it was alleged that this meant that the employment contract incorporated an implied claim that the employee would not be *unfairly dismissed*. The employer raised a special plea to this claim on the basis that it did not disclose a cause of action and was therefore excipiable.

Referring to its own decision of ***Gumbi***, the court emphasised that the passage that commentators relied on to construe an implied term[2054] not to be unfairly dismissed, did not evince any intention of he SCA to lay down any new principle of law.[2055] The SCA conceded though that insofar as the passage referred to the common law, it was not altogether an accurate reflection of what was said in the cases that it relied on.[2056] The court then provided some clarity of what was intended to be stated in ***Gumbi***: *"A more accurate summary of the law as it was articulated in those cases would be that an employee is entitled to a pre-dismissal hearing where that right is conferred by statute or by an employment contract."*[2057]

2053 ***SA Maritime Safety Authority v Mckenzie*** 2010 31 ILJ 529 (SCA).

2054 An implied contractual term is a term introduced into a contract by operation of law, i.e. not by the parties themselves, such as a tacit term for instance. It is an invariable feature or term of such a contract, subject only to the entitlement of the parties, in certain circumstances only, to vary it by agreement. This test was laid down authoritatively in ***Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*** 1974 3 SA 506 (A), and followed in **SA Maritime** 536 par 11.

2055 **SA Maritime** 549 par 40

2056 Ibid. In the passage from ***Gumbi*** referred to, the SCA pointed out that in ***SA Maritime***, reference was made to ***Modise v Steve's Spar*** (supra) where it was stated that the right to be heard did not apply to private contracts, except where a private contract contains a provision which either expressly or by necessary implication incorporates a contractual right to be heard.

In ***Lamprecht v McNeillie*** (also referred to in ***Modise***), it was held that the principles of natural justice could only be relied upon in contractual disputes, where a party to such contract could prove the inclusion of a contractual term incorporating the rules of natural justice.

2057 ***SA Maritime*** 550 par 43.

Citing Australian[2058] and English[2059] jurisprudence as well as academic authors[2060] in support of its view, the court found it completely pointless to develop the common law so as to include an implied term of fairness in a contract of employment.[2061] Such a step would undermine the complete and self-contained statutory scheme[2062] legislated in terms of the LRA for the resolution of unfair labour disputes.[2063] It is clear from such scheme that it was not the intention of the legislature thereof, to incorporate into contracts of employment an implied term of fairness.[2064] The court concluded[2065] that where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed.[2066]

The SCA provided a valuable interpretation of the judgment of ***Murray***,[2067] in which it fine-tuned our understanding of the limits of the development of the law

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2058 ***Byrne v Australian Airlines Ltd*** 1995 HCA 24; 1995 185 CLR 410

2059 ***Johnson v Unisys Ltd*** [2001] UKHL 13; [2001] 2 ALL ER 801 (HL), discussed in Ch. V, supra.

2060 **Pretorius & Pitman *"Good cause for dismissal"*** 1990 **Acta Juridica** 1991 133 et seq., and **du Toit *"Oil on troubled Waters? The slippery Interface between the Contract of Employment and Statutory Labour Law."*** 2008 125 SALJ 95 96-7.

2061 The court was unquestionably swayed to its ultimate conclusion by the foreign authority cited by it, especially ***Johnson v Unisys*** discussed by us in Ch. V of this work. However, the logic used does seem sound.

2062 The court identified the existence and parameters of this scheme as follows: The arrangement of the relevant sections of the LRA constitutes a statutory scheme giving effect to the right not to be unfairly dismissed. The scheme has been enacted as a complete package embodying the right itself together with sections that explain what a dismissal is. The court then identified various sections of the LRA as important cornerstones of this scheme, notably ss 186, 187, 188, 189, 189A, 191, 192, 193, 194, and concludes that it is nowhere stated in the formulation of the scheme that it has any contractual implications.

2063 The court pointed out that: *"In the case of an unfair dismissal it (the statutory scheme) also specifies the remedies that are available to an aggrieved employee and, where that remedy consists of compensation, establishes limits on the amount of such compensation. The statutory mechanism for resolving disputes over unfair dismissals is by way of conciliation and if that fails, arbitration before either the CCMA or the Labour Court."*

2064 The court – 543 par 27 – argued that the whole notion of the incorporation of a statutory right not to be subjected to unfair labour practices into a contract of employment, is confronted by a fundamental and intractable dilemma: If what is incorporated is simply a general right not to be subjected to unfair labour practices, without the incorporation of the accompanying statutory provisions, of which the definition is the most important, then the incorporation goes further than the statute from which it is derived. That is logically impermissible when we are dealing with incorporation by implication. If what is incorporated is limited to the statutory notion of an unfair labour practice, with all its limitations, then incorporation serves no purpose as the employee will gain no advantage from it.

2065 ***SA Maritime*** 547 par 35.

2066 See however ***Gobindlal v Minister of Defence*** 2010 31 ILJ 1099 1116 par 61 where the LC expresses the need for the recognition of an implied term of fairness in the employment contracts of workers not recognised as 'employee' in the LRA, such as members of the Defence Force.

2067 supra

– if any – in the trio of SCA cases referred to above. It has to be borne in mind that ***Murray*** was an officer in the employ of the National Defence Force, claiming that he had been constructively dismissed. He did not qualify as an 'employee' in terms of the LRA, and hence did not enjoy the constitutional protection of the right to fair labour practices as given effect to by the LRA.[2068]

In Murray, the litigants had agreed that Murray was entitled to rely directly on s 23(1) of the Constitution, in view of the lack of protection afforded him by the LRA. **Cameron JA** therefore held that, although the common law had always recognised the need for a relationship based on mutual trust and confidence between employer and employee, further constitutional development of the common law was needed in accordance with s 23(1), *'to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover.'* Although it would seem as though the learned judge had all employees in mind in this passage, and that the law needed development in respect of all (including those not covered by the LRA), this is not how the SCA, per **Wallis AJA** understood or interpreted ***Murray***. In ***SA Maritime***, **Wallis** pointed out that, in respect of the requirement of trust and confidence, the common law needed no development as these principles were already firmly established in our law. When it comes to the *'general duty of fair dealing at all times'* however, the court distinguished between employees covered by the LRA, and those that are not. It then held that, whatever may have been said in ***Murray*** *en passant*, ***Murray*** was authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed. The court conceded though that it is possible that there might be some need to develop the common law by importing into the contract of employment of employees in the position of Murray[2069] terms (i.e. implied terms) that give effect to their right to fair labour

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2068 s 2 of the LRA specifically provides that it does not apply to members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service. Members of the latter two institutions are therefore for the purposes of this discussion regarded as falling in the same category as members of the NDF.
2069 i.e. employees excluded from LRA protection by s 2 of the LRA, or perhaps even those excluded for other reasons.

practices. The existence of such a need was however specifically and expressly not considered in ***Maritime.*** The court held however, that none of the cases that had been discussed in its judgment, could be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices.

We humbly submit that the *ratio decidendi* of ***SA Maritime*** itself is much narrower than appears at first glance. What the SCA is primarily concerned with here, is the inappropriate importation of the statutory scheme of fairness as contained in the Constitution and the LRA, into contracts of employment under the banner of the development of the common law. This is what is impermissible in the view of the court. But the court did not exclude the application of general considerations of fairness as traditionally recognised and applied in terms of the common law itself. The court has it against the wholesale importation of the right to fair labour practices as found in the statutory scheme, as such a development was in the first place not intended by the legislature, and would in any case lead to insurmountable anomalies.[2070] No attempts should be made to circumvent the statutory fairness scheme contained in the LRA and s 23(1) of the Constitution by relying on contractual principles, and by importing the fairness principles specifically intended for such scheme only, into the contract of employment, as had been done in earlier cases.[2071] No implied term of fair treatment or fairness applies to employment contracts generally.[2072] The court also dismissed ***Murray's*** claim that in his case which was not covered by the LRA at all, such an

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2070 In **Maritime** 553, **Cameron JA** explains: *"It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act)'.* The court then pointed out that what had been stated *obiter* in **Gumbi** in relation to these issues cannot be considered to be authoritative – **Maritime** 553 par 55.

2071 ***Boxer, Gumbi*** and ***Murray***. The court provided the following interpretation of these cases: *"In my view the interpretation given to the cases mentioned goes further than the judgments warrant and they provide no obstacle to the correctness of the analysis set out above. That analysis concludes that, insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practice."* – ***SA Maritime*** 553-4 par 56.

2072 Ibid.

implied term existed.[2073] But it seems that such possibility was at least recognized in cases where the employee fall outside the protective umbrella of our labour legislation.

7.16.10 EQUITY AND THE BALANCING OF INTERESTS

Fairness has in jurisprudence always been applied from a practical point of view. One of the practical functions of the adjudicator of labour disputes is always the weighing up and the balancing of the interests of the respective parties.[2074] This stems from the very fact that fairness is a relational concept.[2075] It involves a measure of *proportionalism* or *proportional balancing* in the weighing of interests.[2076] The use of the term proportionalization should not be understood to mean that fair adjudication is a mathematical or mechanical process. We have already demonstrated that fairness involves a value judgment that is applied according to all the relevant circumstances and interests involved in the case under consideration.[2077] In the real physical and practical world, the result may often be a proportional adjudication of physical resources, such as money or property. But the reinstatement of a dismissed employee for instances does not necessarily involve mathematical proportionalism.

In ***Harksen v Lane***[2078] the court emphasised the fact that it is the cumulative effect of factors (interests) – of which there is no closed list – which may constitute fairness or unfairness, and not factors taken individually.[2079] In

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2073 ***SA Maritime*** 554 par 58

2074 ***National Union of Metalworkers of SA v Vetsak Co-Operative Ltd*** 455, 461A.

2075 **Ngwena and Pretorius** ***"Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability: A Commentary on IMATU v City of Cape Town"*** 2007 28 ILJ 747, 766. Here the learned authors point out that a fairness enquiry can by definition, not focus solely or even predominantly on only one of the parties involved and still perform the *'proportionate balancing function'* inherent in a fairness review. This is known as the ***Harksen v Lane*** test.

2076 Ibid. This is in accordance with **Aristotelianism** as discussed in Chapter II, supra. In ***Sidumo*** 2429 par 66, the Constitutional Court emphasised the importance of holding the scales between the competing interests of employers and employees evenly. **Ngcobo J** stated on 2460 par 172: *It is manifest from the very conception of fairness that the commissioner must hold the balance evenly between the worker and the employer. And fairness to both workers and employers means the absence of bias in favour of either."*

2077 ***Nampak*** par 32; ***Sidumo*** par 68.

2078 1998 1 SA 300 324F.

2079 ibid

Loretzen v Sanachem[2080] **Landman J** stated that *'...the test would require one to ask what fairness demands, taking into account the interests of the employee and the employer.'*[2081] It is also important to take a relatively comprehensive view of the interests of the parties involved, and not to limit the concept to that of *right*.[2082] All relevant interests and circumstances of the parties have to be accounted for. This principle has been readily acknowledged and applied by South African labour courts, including the Constitutional Court. In ***National Education Health and Allied Workers Union v University of Cape Town***[2083] the balancing of interests was recognised as one of the key tenets of fairness.[2084] It has also been suggested that in labour disputes, it is not only the interests of employers and employees that should be taken into account, but also wider *societal* interests such as health, safety, the environment, the community and the economy.[2085] This approach may be particularly appropriate in cases where alleged unfair discrimination in contravention of the equality clause of the Constitution, or of the provisions of the EEA is involved. Very often much wider

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2080 1999 20 ILJ 1811 (LC) par 25

2081 This dictum was quoted with approval by **Davis JA** in the LAC case of ***Ellerine Holdings Limited v Commission for Conciliation, Mediation and Arbitration*** 2008 29 ILJ 2899 (LAC) 2902A.

2082 Generally speaking the concept of "interest" is much wider than that of "right". In a dismissal dispute for instance, the job security of an employee may be his "interest" while the employer may have an interest in the sale of his business – see ***Booysen*** 308 par 21; ***National Education Health & Allied Workers Union v UCT*** par 40. In ***Booysen*** 309 par 24, the LC states: *"The provisions erected on the right not to be unfairly dismissed constitute a careful balance between the interests of workers and employers and seek to give expression to the right to fair labour practices – being fair to both employees, namely sufficient protection at minimum costs"*

2083 supra

2084 In ***NEHAWU*** 112 par 38, the court refers back to ***National Union of Metalworkers of SA v Vetsak Co-Operative Ltd*** supra where **Smalberger JA** stated that *"Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment."*

In the same judgment, **Nienaber JA** stated: *"The fairness required in the determination of unfair labour practice must be fairness towards both employer and employee...In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs."*

The idea that fairness applies to both employer and employee was also emphasised in ***NEHAWU*** 113 par 40-41. There the CC commented as follows on s 23(1) of the Constitution: *"...the focus of sect. 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices."*

2085 **Cheadle *"Regulated flexibility..."*** (2006) 672.

interests than those of the disputants are affected in such cases.[2086] However, in most cases these would only be secondary interests which should not be overemphasized at the expense of the personal interests of the parties involved. The ultimate criterion for resolving individual disputes should generally not be direct societal, community, or economic interests, but fairness for the sake of fairness between the parties.[2087] The employment relationship exists directly and immediately between employer and employees, or sometimes indirectly also between employees' and employers' unions. In this respect, the term *'everyone'* in s 23(1) of the Constitution has been interpreted to refer only to these stakeholders.[2088] Tension between various interests is fundamental to the relationship between these parties.

There has been a tendency amongst some scholars to over-emphasise the *'commercial', 'economic'* or even *'capitalist'* role of fairness in the workplace. Thus *'fairness'* has been described by one of the leading authors on South African labour law as'*...really nothing more than the balance of the respective interests of the employer and the employee in a capitalist society.*'[2089] Another leading author [2090](correctly, we submit) describes the bipolar nature of fairness in reference to the weighing of the respective interests of the parties, but pits the *'employer's commercial interests against the employee's countervailing rights.*'[2091] While the role of capitalist or commercial interests of employers in the employment relationship has to be acknowledged,[2092] one should guard against over-simplification. It is doubtful for instance whether capitalist motives play any

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2086 In ***Harksen v Lane*** 28-9, the court pointed out that in considering the alleged unfairness of discrimination, the position of the complainant in society, the public interests and its protection, particularly in the light of constitutional values, and the effect of the discrimination on the parties, particularly the complainant, have to be taken into account. ***Harksen*** provides an example of a matter in which discrimination was found to have indeed been effected by statute - s. 21 of the Insolvency Act, no. 24 of 1935 -, but where such discrimination was found to have been rationally justified and not unfair..

2087 Cf the words of **Landman J** in **Lorentzen** quoted above.

2088 **Cheadle "*Regulated flexibility*"** (2006) 672

2089 **Cheadle"*The First Unfair Labour Practice Case*"** in 1980 1 ILJ 200, 202. It has to be borne in mind that **Cheadle** was writing here before the adoption of the Constitution or the current LRA.

2090 **Du Toit "*The Evolution of the Concept of Unfair Discrimination in South African Labour Law*"** 2006 27 ILJ 1311et seq, 1315.

2091 Reference is made to the dictum of **Ngcobo J** in ***NEHAWU v UCT***, supra.

2092 s 1(1) of the LRA lays down that the purpose of the Act is to advance economic development, social justice, labour peace and democratization of the workplace.

dominant or direct role in the domestic service market, or in the public service, as compared to the manufacturing industry. Moreover, the constitutional right to fairness comprises interests in the widest legitimate but relevant sense possible. Its purpose is the *fair treatment* of persons in all respects, including, but not limited to the equitable weighing of financial, capitalist or commercial interests. It is suggested that in its deepest and most profound sense, the right relates to the protection of *human dignity, human virtue* and *human goodness*.[2093] That is the prime reason for its constitutionalization.[2094] We have some reservations about the well-known dictum of **Conradie JA** in ***De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration.***[2095] In that case the LAC dismissed an appeal against the dismissal of an employee who had been captured on a video recording contravening store policy on two occasions by eating bread and pap at work, while at the same time trying to conceal his misconduct. **Conradie JA** stated:[2096]

"A dismissal is not an expression of moral outrage; much less is it an act of revenge. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little

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2093 The democratic values of equality, *human dignity*, and freedom have been accorded primacy by s 7(1) of the Constitution. s10 furthermore specifically guarantees to everyone the right to inherent dignity and the right to have such dignity respected and protected. In a sense, even the right to equality and not to be discriminated against is superseded by the right to human dignity. In ***Prinsloo v Van der Linde*** 1998 1 SA 300 (CC) par. 31, the CC decided that human dignity underlies all anti-discrimination provisions contained in the Constitution and the EEA. The same court decided in ***Harksen v Lane*** par. 46 that the prohibited grounds of discrimination listed in s 9(3) of the EEA *'...is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.'*
The constitutional concept of *dignity* is virtually synonymous with that under the common law. It relates to a person's feelings of honour, *dignitas* and human worth. See ***DeLange v Costa*** 1989 2 SA 857 (A) par 29 and ***Dendy v University of the Witwatersrand*** 2007 28 ILJ 2215 (SCA) 2219 par 7 where it was held that the common law needs no adaptation to bring it in line with the Constitution as far as certain aspects of the protection of human dignity is concerned.

2094 The Constitution, with its charter of rights, has been founded on certain foundational principles or values, one of the most important of which is *human dignity.* Economic or financial interest per se, are best addressed through collective bargaining etc. The protection and vindication of human dignity, through inter alia the right to fair labour practices, is more in consonance with the spirit and purport of the Constitution than a direct involvement of economic or financial interests. On the role of dignity as a central constitutional value, see ***Carmichele v Minister of Safety and Security*** 2001 4 SA 938 (CC) par 56; Cf. **Currie & De Waal *Bill of Rights*** (2005) 272.

2095 2000 21 ILJ 1051 (LAC) par 22

2096 ibid

to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise." [2097]

Employees like shelf packers and counter attendants who steal and eat small items more often than not violate the *trust*, and *confidence* that the employer places in them. In ***De Beers*** the employer had adopted a specific rule against such conduct. Such rule had been violated and a deliberate attempt had been made to conceal the misconduct. Such action cries out for moral outrage not only of the employer himself, but also of fellow employees where employment security may be put at risk. Had the same employee carelessly discarded bread or pap of similar value to what he/she had consumed, the odds are that he/she would probably not have been dismissed, even for operational or commercial reasons. Where an item of relatively little value is for instance broken by the employee, chances are that dismissal would not follow. Thus it cannot be pure economic loss or cold operational requirements alone that underpin such dismissal. Ultimately the employee's action indeed involves moral considerations. Operational considerations become a significant factor *because* employers cannot afford to employ morally *untrustworthy* employees who prejudice the smooth operation of the businesses. An employee such as the one in ***De Beers*** will not be dismissed for operational requirements. The dismissal will be for misconduct, and has to be fair in that respect.

It is trite that dismissal for operational requirements amounts to a so-called "no fault" dismissal in the sense that the reason for dismissal is not related to any misconduct on the part of the employee. But since the enactment of the 1995 LRA there has been a rather strict and rigid distinction between dismissals for misconduct on the one hand, and dismissal for operational or commercial reasons on the other – and rightly so, we submit. Not only is the rationale for this distinction justified by the substantive reasons for each category of dismissal, but also by the procedural requirements. These procedural requirements are enshrined in statutory forms. In the case of dismissal for operational reasons,

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2097 Cited with approval by **Davis JA** in ***Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*** 7 BLLR 838 (LAC) par 21.

consultation is required, whereas a *hearing* in some form or other has to be given to the employee where alleged misconduct is involved.[2098]

Moral or equitable considerations have always been a dominant factor in determining the fairness of dismissal, independently of the issues of incapacity or operational requirements.[2099] Where an employee is found guilty of dishonesty – dismissal will probably be a fair sanction, even where he/she has a clean record or where other mitigating circumstances exist.[2100] The record, coupled with remorse,[2101] might be such that from an operational point of view, repeat of the same form of misconduct might seem improbable. Yet, the courts have consistently invoked the imperative of honesty and trust between employer and employee in their refusal to grant relief to such employees.[2102]

Where a dismissal is found to have been substantively unfair, and where none of the impediments to reinstatement enumerated in s 193(2) has been found to

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2098 Procedural requirements for retrenchment, mainly in the form of consultation, are laid down in s 189 of the LRA, whereas requirements relating to misconduct dismissal are to be found in Sch. 8 to the LRA.

2099 The very sources and authorities that the court in **De Beers** refer to, accepted that the fairness of a dismissal always involve moral issues, over and above the economic and operational requirements of the enterprise. In ***Standard Bank SA limited v CCMA*** 1998 6 BLLR 622 par 38-41, **Tip AJ** emphasised the trust factor and honesty, which he said, go to the heart of the employment relationship. Similarly, in ***Metcash Trading Limited t/a Metro Cash and Carry & Another v Fobb*** 1998 19 ILJ 1516 (LAC) par 16-17, it was not the operational requirement issue that was emphasised, but rather the reprehensible act of *"theft is theft and does not become less because of the size of the article stolen or misappropriated."* In ***Leonard Dingler (Pty) Ltd v Ngwenya*** 1999 20 ILJ 1171 (LAC) the triad of *misconduct, incapacity* and *operational necessity* were highlighted by the court. However, considerations such as premeditated, planned *and persistent dishonesty,* which had destroyed the employment relationship, were definitely dominant factors. Moral or equitable considerations also played a significant role in ***Rustenburg Platinum Mines Ltd v National Union of Mine Workers*** , and ***Lahee Park Club v Garratt*** 1997 9 BLLR 1137 (LAC) 1139. Even the single precedent that was distinguished by the LAC in Shoprite from abovementioned cases, namely ***Shoprite Checkers (Pty) Ltd v The Commission for Conciliation, Mediation and Arbitration*** (unreported LAC case no. JA 46/05), was distinguishable on the basis that the conduct of the employee was morally less reprehensible. She had only tasted the food, had eaten her own food on one occasion shown by a video recording, and *'had not gone as far as to produce manufactured evidence that manifestly was concocted in order to support his own mendacious account"* as had been done in the other cases cited above.

2100 ***Toyota SA Motors (Pty) Ltd v Radebe*** 2000 21 ILJ 340 (LAC)

2101 Remorse on the part of the offender may play a crucial role in swaying the court not to impose the capital punishment for misconduct in labour law – see ***Nampak Corrugated Containers (Pty)Ltd v Commission for Conciliation Mediation and Arbitration*** 2009 30 ILJ 647 (LC); ***Timothy v Nampak Corrugated Containers (Pty) Ltd*** 2010 31 ILJ 1844 (LAC)

2102 See the cases in the preceding footnote. See also ***Dipaleseng Municipality v SA Local Government Bargaining Council*** 2008 29 ILJ, 2933 (LC) par 48. In ***Miyambo v Commission for Conciliation, Mediation and Arbitration*** 2010 31 ILJ 2031, the LAC held that even the distinction between theft in the technical sense and mere possession of company property was artificial. It reiterated that a high premium was placed on honesty in the workplace.

exist,[2103] reinstatement or re-employment should as a rule follow. The economic commercial or operational cost to the employer is in principle irrelevant. Interestingly the labour courts have held that the notion of a fair dismissal for operational reasons may include a dismissal for purely economic reasons such as the increase of profits.[2104] But here the traditional requirement of fairness, namely *bona fides* plays an extremely important role, a fact that has been recognised by the labour courts.[2105] Rationality is also decisive,[2106] especially where retrenchment is embarked upon purely to increase profit. Employers are in such cases held to stricter standards of fairness.[2107]

7.16.11 EQUITY AND CONSISTENCY

The Code of Good Practice: Dismissal[2108] introduced a statutory notion of consistency of treatment in dismissal disputes for the first time into South African labour law.[2109] It has to be borne in mind however, that the Code constitutes a guideline only, and should not be rigidly applied. Nevertheless, at least a consideration of the provisions of the code is obligatory to any person considering the fairness of a dismissal.[2110] There is therefore no doubt that the consistency provisions of the Code were adopted for the purpose of promoting the fair adjudication of dismissal disputes, and that it links the notion of consistency to

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2103 In other words, the employee has not opted out of reinstatement or re-employment, continued employment has not become intolerable, and it has not been found that it is not reasonably practicable to reinstate or re-employ the employee.

2104 ***Food & Allied Workers Union & Others v Kellogg SA (Pty) Ltd*** 1993 14 ILJ 406 (IC) 413A; ***NUMSA v Fry's Metals*** 2003 2 BLLR140 (LAC) para 32-3; ***General Food Industries v FAWU*** 2004 25 ILJ 1260 (LAC) par 32; ***FAWU & Others v SA Breweries Ltd*** 2004 25 ILJ 1979 (LC); **Grogan *Workplace Law*** (2007) 224.

2105 ***Morester Bande Pty Ltd v National Union of Metalworkers of SA*** 1990 11 ILJ 687 (LAC) 688J-689B; ***Transport & General Workers Union v City of Durban*** 1991 12 ILJ156 (IC) 159C; ***National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*** 1992 13 ILJ 405 (IC); ***National Union of Textile Workers v Braitext (Pty) Ltd*** 1987 8 ILJ 794 (IC) 799I; 1993 14 ILJ 432 (IC) 435-6; **Grogan *Workplace Law*** (2007) 224-5.

2106 In ***Heigers v UPC Retail Services*** 1998 1 BLLR 45 (LC) a dismissal for operational reasons was declared unfair because it had not been shown that the employer had attempted to avoid the dismissal by finding an alternative position for the employee.

2107 ***NCBAWU & Others v Natural Stone Processors (Pty) Ltd*** 2000 21 ILJ 1405 (LC); **Grogan *Workplace Law*** (2007) 225.

2108 Schedule 8 to the LRA, 1995

2109 Schedule 8 to the 1995 LRA, item 7(b) (iii) reads: *"Any person who determines whether a dismissal for misconduct is unfair, should consider whether or not.....the rule or standard has been consistently applied by the employer..."*

2110 s 203(3) and (4) of the LRA

that of fairness. Consistency has also been regarded as *a basic notion of fairness* by the courts.[2111] It is because of the notion of consistency, that this tenet of fairness is also known as the *parity principle*.[2112]

The Code applies to dismissal disputes only, but one could go much further and safely submit that it is generally unfair to apply rules or standards in the workplace inconsistently.[2113]

The Code provides[2114] that employers should apply the *penalty* of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participated in the misconduct under consideration. This has led to academic writers and the courts distinguishing between *historical* inconsistency, and *contemporaneous* inconsistency.[2115] The requirement of consistency in the treatment of employees is a significant weapon to combat *arbitrary* action on the part of an employer.[2116] And arbitrary action is in compatible with any notion of fairness.

There is both a subjective and an objective element to inconsistent treatment. An employer cannot be said to be inconsistent if he is not subjectively aware of the similar misconduct of the comparator.[2117] The Courts have also emphasised that inconsistency or rather, differentiated treatment, is not per se unfair. In each

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2111 ***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*** 2010 31 ILJ, 452, 457 par 10.

2112 ***SACCAWU v Irvin & Johnson (Pty) Ltd*** 1999 20 ILJ 2302 (LAC). Here the LAC warned against too heavy an emphasis on the *parity principle*, which should in reality not be seen as a separate *principle* of law, as consistency is simply an element of disciplinary fairness.

2113 **Grogan *Dismissal, Discrimination and Unfair Labour Practices*** (2005) 223

2114 Sch.8, Item 3(6).

2115 **Grogan *Dismissal*** (2010) 223. For a case that illustrates the need for contemporaneous consistency, see ***Cape Wrappers (Pty) Ltd v Scheepers*** 2002 8 BLLR 729 (LC) where two employees were involved in a physical altercation in circumstances where it could not be firmly established who had provoked the misconduct, or who was acting in self defense.

2116 Ibid. See also ***SACCAWU v Irvin & Johnson*** 2302. See also the following cases in which inconsistency was found to have been perpetrated: ***Hendred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of SA*** 1992 13 ILJ 593 (LAC); ***National Union of Metalworkers of SA v Hendred Fruehauf Trailers (Pty) Ltd*** 1994 15 ILJ 1257 (A); ***SRV Mills Services (Pty) Ltd v CCMA*** 2004 25 ILJ 135 (LC); ***SACTWU v Novel Spinners (Pty) Ltd*** 1999 11 BLLR 1157 (LC).

2117 ***Gcwensha v CCMA*** 2006 3 BLLR 234 (LAC); ***Southern Sun Hotel Interests*** 457 par 10.

particular case, *bad faith* or *arbitrariness* has to be shown.[2118] Thus it could be said that it is a requirement for unfairness based on inconsistency, that the employer or perpetrator must have acted either consciously wrong, or least arbitrarily. If the adjudicator consciously and honestly, but incorrectly exercises his or her discretion in a particular way, it would not mean that there was unfairness towards the employee, but only that a *wrong* assessment of the nature and gravity of the misconduct had been made.[2119] The objective element of inconsistency would be different or more lenient treatment for similar misconduct, on the part of a comparative employee.[2120]

Consistency in treatment is a somewhat controversial notion in practice, as it competes with two important principles of fairness, namely that each case should be judged according to its own circumstances,[2121] and the need for flexibility[2122] in the workplace. Consistency should never be used by anyone, employers as well as employees, to justify or profit from manifestly wrong conduct.[2123] One of the ways out that is open to an employer is to give fair and timely notice to employees in advance that earlier applied disciplinary measures cannot be expected to be adhered to in future.[2124]

7.16.12 PUBLIC POLICY, THE BONI MORES AND EQUITY

Equity, being primarily a value or moral judgment, has much in common with public policy and the *boni mores.* Much has been written on the role and nature of *public policy* and *boni mores* in the wider context of South African law. Here

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2118 ***SACCAWU v Irvin & Johnson*** 2302; **Grogan *Dismissal*** (2010) 224; ***Mabanina v Baldwins Steel*** 1999 5 BLLR 453 (LAC); ***National Union of Mineworkers v Council for Mineral Technology*** 1998 3 LLD 448 (LAC).

2119 ***SACCAWU v Irvin & Johnson Ltd*** 2302 par 29; ***Southern Sun Hotels*** 458 par 11.

2120 ***Southern Sun Hotels*** 457; ***Shoprite Checkers (Pty) Ltd v CCMA*** 7 BLLR 840 (LC) par 3.

2121 Fair treatment demands that all the circumstances relating to the misconduct as well as the perpetrator be considered, such as personal circumstances, severity of the misconduct- indeed all factors materially relevant to the dispute. See ***Southern Sun Hotels*** (supra), where the following authority is referred to in support of this proposition: ***Early Bird Farms (Pty) Ltd v Mlambo*** 5 BLLR 541 (LAC) 545H-I; ***Num v Council for Mineral Technology*** 1999 3 BLLR 209 (LAC) par 20; ***NUM & Another v Amcoal Colliery t/a Arnot Colliery*** 2000 8 BLLR 869 (LAC) par 6; ***Cape Town City Council v Masitho*** 2000 21 ILJ 1957 (LAC) par 13;**Hahlo and Kahn *The South African Legal System*** (1968) 32

2122 ***SACCAWU v Irvin & Johnson*** 2302.

2123 ***SACCAWU*** 2302; ***Cape Town City Council v Masitho*** 1957 par 14.

2124 ***Cape Town City Council*** 1957 par 14; ***Southern Sun Hotels*** 458 par 12.

we will primarily limit ourselves to employment law and deal with the impact that these two concepts have on the terms of a contract of employment, and on the issue of fairness or fair labour practices in the employment relationship.

Public policy refers to the legal convictions of the community.[2125] Before the adoption the Constitution, the legal convictions of a diverse community such as the South African, may have been more difficult to determine.[2126] However, currently the primary source of the legal convictions of the community is the Constitution.[2127] The *constitutional values* contained in the Constitution are a reflection of the public policy of the community.[2128] For purposes of labour law, the right - and value - enshrined in s 23 (1) of the Constitution reflect the primary public policy in labour relations, namely *fairness*.[2129] But fairness as such is a malleable concept and has to be informed by all the other constitutional values.[2130] The founding provisions of the Constitution refer to human *dignity*, *equality*, *human rights* and *freedoms*, and the rule of law. However, all constitutional values, and especially those contained in the bill of rights are enforceable as public policy.[2131]

It follows from the above that terms of a contract of employment – or even a contract as such - that are in conflict with the Constitution, more especially the Bill of Rights, would be unconstitutional and against public policy or public values.[2132] It would to that extent be unenforceable.[2133] As the LRA constitutes

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2125 ***Barkhuizen v Napier*** 2007 5 SA 323 (CC); 2007 7 BCLR 691 (CC); ***Nape v INTCS Corporate Solutions*** 2129 et seq; **Cohen *"Implying Fairness into the Employment Contract"*** 2009 30 ILJ 2271, 2276-7.

2126 ***Barkhuizen v Napier*** 691 par 28.

2127 Ibid; ***Nape v INTCS*** 2130

2128 Ibid. In ***Barkhuizen v Napier*** 691 par 28 the CC stated: *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulty. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it."*

2129 **Cohen *"Implying Fairness into the Employment Contract"*** 2009 30 ILJ 2277.

2130 In ***Nape v INTCS*** 2130 par 53, the learned **Boda AJ** pointed this out.

2131 In ***Barkhuizen*** 691 par 48, the CC made it clear that the Bill of Rights is the cornerstone of the SA democracy and that it enshrines these values.

2132 ***Eagleton & others v You Asked Services (Pty) Ltd*** 2009 30 ILJ 320 (LC).

2133 In ***Barkhuizen*** 691 par. 29, the CC stated *"What public policy is, and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional*

effectuation of the constitutional value of fair labour practices, contractual terms that are in conflict with the provisions of the LRA would have to suffer the same fate. Such contractual terms would not only be void for conflicting with these legislative instruments, but also on the basis of repugnance to public policy.[2134] And although the LRA, unlike the Constitution,[2135] knows no general and comprehensive right to fairness, the Labour Courts would on the basis of public policy not easily countenance unfair terms in an employment contract.[2136]

In ***Nape v INTCS***[2137] the learned **Boda AJ** pointed out that public policy imports the notion of *fairness, justice* and *reasonableness.* It would preclude the enforcement of contractual terms, if its enforcement would be *unjust* or *unfair.* Public policy is a manifestation of the *'general sense of justice'*, of the *'boni mores'* of the community.[2138] Public policy allows for both the principle of *pacta sunt servanda* on the one hand and simple justice and fairness between employer and employee on the other.[2139]

On the basis of the principles expounded above, the court in ***Nape v INTCS*** – rightly so, we submit – declared a clause in a contract between a labour broker and its client that entitled the latter to insist on the dismissal of the labour

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democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."
See also ***Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff*** 2009 3 SA, 78 (C); 2009 30 ILJ 1750 (C), where the court warned against the unconstitutional abuse of private power, which includes contractual power by private individuals. In ***SA Post Office v Mampeule*** 2009 30 ILJ 664, the Labour Court also held that it was impermissible for private parties to undermine the fundamental protections afforded to persons by the equity provisions of the LRA. It should in this regard be kept in mind that the LRA is a reflection or concretization of s 23(1) of the Constitution, and that such conduct would be unconstitutional, and therefore also against public policy and the constitutional value of fairness.

2134 ***NAPE*** 2130 par 53.

2135 s 23(1)

2136 In ***NAPE*** 2130 par 53, **Boda**, AJ stated: *"Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair."*

2137 2130 par 53.

2138 ***NAPE*** 2130A-B; ***Barkhuizen*** par 28.

2139 ***Barkhuizen*** par 30; ***Nape*** 2130 par 54. On the tempering of the effects of pacta sunt servanda in Dutch law, see **Van der Ven *"Arbeidsrecht/Sociaal recht"*** (1985) 344: *"Door rechterlijke tussenkomst kan dus de gestrengheid van het 'pacta sunt servanda' (overeenkomsten moeten worden nagekomen) en de hardheid van 'dura lex sed lex (de wet is hard, maar ze is nu eenmaal wet) aanzienlijk worden afgezwakt."*

broker's employee placed with the client, against public policy and unenforceable, and the dismissal of the employee unfair.[2140]

There can be little doubt that in ***Nape***, the court, in applying the constitutional right and value of fairness in labour practices in the comprehensive manner that it did, subjected every employment contract and all employment relations to a general regime of constitutional fairness.[2141]

In a considerable line of decisions, the Labour Court maintained that public policy and the public interest lay at the heart of the constitutional dispensation concreticised by the LRA and other labour legislation. Employers and employees are for that reason not allowed to contract out of the security of employment and protection of employees afforded by the labour legislation, as often happens where the contract of employment provides for dismissal of the employee in the event of the employer's (labour broker's) client indicating that the services are no longer needed.[2142]

7.16.13 EQUITY, LEGAL CERTAINTY AND JUDICIAL PRECEDENT

We have already pointed out the significance of the role that legal certainty plays in Western legal systems generally.[2143] Here we consider its relation to the system of judicial precedent, and how that relates to equity.

The doctrine of *stare decisis*[2144] is one of the cornerstones on which South African law, and especially its jurisprudence or case law rests. It entails that a court of

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2140 The learned **Boda AJ** pointed out (loc. cit): "*To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view, the hands of justice can never be tied under our constitutional order.*"

2141 Referring to ILO Private Employment Agency Convention, cited by the Namibian Supreme Court in ***Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA*** 51/2008 (unreported), the court emphasised that human labour is not a commodity but part of the character of the employee. Generally, employees would therefore have to be treated fairly. - 2130 par 53

2142 See ***SA Post Office Ltd v Mampuele*** 2009 30 ILJ 664 (LC); ***Mahlamu v Commission for Conciliation, Mediation Arbitration*** 2011 32 ILJ 1122. Reference was made to the English cases of ***Igbo v Johnson Matthey Chemicals*** 1986 IRLR 215 (CA), and ***British Leyland (UK) Ltd v Ashraf*** [1978] IRLR (EAT); ***Sindane v Prestige Cleaning Services*** 2010 31 ILJ 733 (LC) was distinguished.

2143 See for instance the emphasis that the LAC placed on legal certainty as compared to legal confusion in ***Modise v Steve's Spar Blackheath*** par 77 1.

2144 *Stare decisis et quieta non movere (standing by previous decisions and not to disturb settled matters).*

law will generally observe and not deviate from the legal principle or *ratio decidendi* that informed a prior decision of a higher court, or even of that court itself. This applies to employment or labour law with the same force as it does to any other area of law.

The Constitutional Court recently re-emphasised the importance of this doctrine in the field of labour law. That was in the context of resolving the perceived tensions between the decisions of ***Fredericks*** and ***Chirwa*** discussed earlier. In ***Gcaba***[2145] it held that this doctrine, also referred to as the doctrine of judicial precedent, should be observed, subject only to the recognised exceptions allowed, as it operates in the interest of *legal certainty, equality before the law*, and the satisfaction of *legitimate expectations.*[2146] Recognised exceptional situations justifying deviation from the doctrine, are when a court is faced with an *erroneous* precedent[2147] which it had previously set, where, in the precedent that the court encounters, the principle involved had not been *argued*, or where the precedent is *distinguishable*.[2148] The wider significance of the doctrine of precedent is that it is essential to the *rule of law.*[2149]

We wish to advise one caveat in regard to the ambit of the decision of ***Gcaba*** with particular reference to labour law. It is that ***Gcaba*** was dealing with the doctrine of judicial precedent as applied to legal principles, i.e. law in the strict sense, as we called it throughout this work. The ratio of ***Gcaba*** was not intended for application to equity as such. The perceived tension between ***Fredericks*** and ***Chirwa*** related to jurisdictional issues, forum shopping and related matters, which are all *legal* issues and not *equity issues.*[2150] This particular dictum of ***Gcaba*** is therefore no authority for the view that where an unfettered, purely

2145 ***Gcaba v Minister for Safety & Security*** 2637.
2146 The court made reference to, and applied the doctrine as laid down in its own previous decisions of ***Certification of the Amended Text of the Constitution*** 1997 2 SA 97 (CC), ***Van der Walt v Metcash Trading Ltd*** 2002 4 SA 317 (CC), and ***Daniels v Campbell*** 2004 5 SA, 331 (CC), and also ***Robin Consolidated Industries Ltd v Commissioner for Inland Revenue*** 1997 3 SA 654 (SCA
2147 This refers to a clearly wrong decision that mars the precedent.
2148 ***Gcaba*** 2637 par 61.
2149 In ***Gcaba***, the court stated per **Van der Westhuizen J**, 2637 par 62: *"Therefore, precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot 'rule' unless it is reasonably predictable."*
2150 See the discussion in ***Gcaba*** 2636 par 52 – 2638 par 62.

equitable discretion has to be exercised, the decision maker is strictly bound by precedent.[2151] We have shown earlier in this work that equitable decisions are made on the basis of the unique individuality of cases, the circumstances of which may vary infinitely.[2152] We submit that within the realm of pure equity, 'precedent' should at most have *persuasive* value.[2153] The furthest that the courts seem to have gone, was to regard its decisions on equity as mere guidelines in the building of an equity jurisprudence.[2154]

CONCLUSION

Our investigation has shown that the notion of equity and its close relation to law was recognised from the very dawn of Western civilization. The earliest and most enduring attempt at developing a coherent and comprehensive *theory of equity* dates back to Aristotle's Nicomachean Ethics. [2155]

To this very day, the Aristotelian theory of equity constitutes the most widely accepted equity paradigm amongst Western jurists. It holds that equity is an indispensable, integrated and organic part of justice, and therefore of law. Law as we know it cannot exist in isolation from equity. Still less can law ignore equity.

2151 See the determination of **De Kock** SM in ***Jonker v Amalgamated Beverage Industries*** 1993 14 ILJ 199, 214-5, where the industrial Court recognised that it was subject to the doctrine of judicial precedent, but declined to follow the interpretation by the LAC of ss 46 and 49(3) (b) of the 1956 LRA, on the basis that it was clearly wrong. The court furthermore pointed out that *value judgments*, such as the determination of an unfair labour practice, are not subject to judicial precedent.

2152 The doctrine of judicial precedent has much greater significance in so-called Common Law jurisdictions, such as the English and the American, than under the Civil Law jurisdictions, such as the legal systems on the Continent of Europe. Judge-made law has always played a major role in Common Law systems, in contrast with Continental systems where the principled law of the Romans had a major influence. For useful discussion see **Knottenbelt & Torringa** ***Inleiding in het Nederlandse recht*** (1979) 94-5; **Koschaker** ***Europa en het Romeinse recht*** (2000) 201. **Knottenbelt** & **Torringa** compare the precedent system of judicial precedent in different jurisdictions and point out that the differences are not as stark as they are sometimes made out to be. They also refer to a decision of the Judicial Council of the English House of Lords on 26 July 1966, which recognised that *'too rigid adherence to precedent may lead to injustice',* and may also *'unduly restrict the proper development of the law.'* The decision went further :*"They propose therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it is right to do so."* This principle was adopted specifically for the House of Lords , and applied to it only. It did not affect the doctrine of judicial precedent as it applied to other courts.

2153 **Brassey**: ***"Fairness"*** (1987) 70 and authority there cited. **Hahlo and Kahn** ***The South African Legal System*** (1968) refer to the fettering effect that judicial precedent had on the equitable discretion of the Scottish Court of Session.

2154 See ***United African Motor & Allied Workers Union v President of the Industrial Court*** 1987 8 ILJ 224G.

2155 Bk 6

Aristotle himself, as well as the adherents of his theory throughout the ages, acknowledged the fact however, that the notion and role of equity in jurisprudence is fraught with difficulty. Aristotle did not venture much further than a *descriptive* exposition in this regard. He never made any attempt at a comprehensive definition of equity. To Aristotle it sufficed to state that equity was an inherent part of the *virtue* of justice, to be applied where strict law failed, such application always to be according to the circumstances of each case.

Roman Stoic philosophy and jurisprudence eagerly embraced Aristotelian doctrine, similarly regarding equity as a *virtus* or virtue, an integral part of the virtue of justice. With *justitia, aequitas* was the virtue of *living honestly*, *giving everyone his due*, and *causing injury to nobody*. [2156]

The Greco-Roman virtue theory of fairness was based on the ideal of human perfection. As such, fairness did not simply relate to the performance of objectively existing and predetermined demands of obligation. A much more subjective and personal human attribute, namely *virtue* informed and infused the notion of equity: An equitable act had to be intended by its agent to be fair, and could not coincidentally be fair, even when experienced to be *'fair'* by its recipient. More apodictic or duty based theories of fairness only gained popularity in the 19th century, mainly due to the influence of **Kant**.

The great Roman Dutch jurists remained faithful to the doctrine of Aristotle and the Roman jurists. **Johannes Voet** reiterated the subjective as well as objective elements of equity in further detail. His father, **Paulus Voet** had emphasised the fact that fairness is part of the unwritten law – a matter best left to the discretion of the judge. It is not a matter for (pre-) determination by statutory instruments. The legislature cannot by means of antecedent statute of general application provide equitable solutions to the infinite variety of individual cases which present themselves to the judge on a daily basis. Statutes are like garments in which the law is dressed, wrote **Johannes Voet**. Like garments they are

[2156] Inst 1 1 3; D 1 1 10

regularly changed. Equitable judgment involves a consideration of all relevant facts and circumstances of a particular, concrete case.

The Roman Dutch jurists often referred to the Ciceronian adage of ***summum ius summa iniuria*** – *the highest or best law often allows for the worst form of injustice or unfairness.* They made their preference for *equity* above strict law quite clear. Equity was likened to the highest summit of a lofty mountain, while law was compared to the rest.[2157]

Hugo Grotius[2158] highlighted the *conscienability* aspect of equity. The judge takes an oath of office to the effect that he would act in accordance with the dictates of conscience – the conscience of a virtuous judge.

Both in Roman and Roman Dutch law *rationality* or *reason* infused equity. Despite the recognised subjective element that was involved in equity, equity could not be *arbitrary* or *capricious. Reason* had to be applied to the circumstances of each individual case. An equitable or conscionable judgment was a *reasoned* judgment. **Aquinas**, who served as an inspiration to **Grotius** in this regard, had written in the 13th century already that *conscience* is a judgment of reason.

The Roman Dutch jurists, mainly adherents of the Christian faith, recognised the fact that, because of the biblical Fall of Man, his reason was at times a sullied or muddled reason. For that reason they required the exercise of *recta ratio* or right reason by the judge. Often they expressed *recta ratio* as *sana ratio*, literally translated as *sane* or *sound reason.* This required judicial *impartiality, personal disinterestedness* in the case before him, and all other factors which modern labour law would require from a good judge or adjudicator.[2159]

For various reasons, mainly historical, we have a paucity of textual authority on the subject of labour law as such handed down to us from Roman and Roman Dutch law. The result is that a complete picture of that law is unavailable. By

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[2157] **P Voet *De Statutis***

[2158] Due to the influence of Canon Law.

[2159] See 7 16 4 above.

means of a process of reconstruction however, making use of a few extant texts relating to general fairness in Roman and Roman Dutch law, to which a few available texts on labour law in particular were added, we managed to demonstrate that both in Roman and Roman Dutch law, a general regime of fairness in labour disputes obtained.

The general principles of fairness in Roman law were proclaimed by jurists such as **Cicero, Ulpian, Marcellus, Modestinus** and **Celsus** alike. Roman law also established the unique office of *praetor,* a magistrate specifically and constitutionally charged with the duty of ensuring fairness in daily legal practice such as the enforcement of contractual obligations, including those relating to the contract of the letting and hiring of service or the employment contract.

The praetor did not simply apply existing law. He creatively innovated and granted *actiones* and *exceptiones* to litigants to a lawsuit in order to ensure fairness. These actions and exceptions were ***in bonum et aequum conceptae*** or conceived in fairness and goodness. Already in Roman law frequent use of the expression ***bonum et aequum*** indicated that to the juristic mind the two concepts were virtually synonymous: what is fair must be good, and what is good must be fair.[2160]

Closely related to this was the concept of good faith which was vigorously enforced in all matters relating to consensual contracts such as the employment contract. The praetor's formula instructed the judge to condemn a party to a lawsuit involving the employment contract[2161] to perform whatever the dictates of good faith required. The Digest makes it clear that *bona fides* demanded the application of ***aequitatem summam*** – the highest degree of equity. Even imperial rescripts meticulously observed the yardstick of equity in labour disputes.[2162]

[2160] Inst 322 pr
[2161] ***actio locati conducti***
[2162] D 19 2 19 8-10; C 4 65 22

The Roman Dutch jurists did not discard the wealth of Roman law textual authority on equity, but used it as a foundation for further building. And although the sources are for historical reasons not always as copious and clear as it could have been, there can be little doubt that *fairness* and *reasonableness* were regarded by the most authoritative jurists as indispensable to labour law.

So for instance, in contrast with English and American common law of dismissal which embraced the principle of employment at will, classical Roman Dutch law required lawful and even *fair reason* for dismissal. Whereas in English and American common law a judge was incompetent to enquire into the reasons for a dismissal, such reasons being legally irrelevant, the very essence of the judicial function in Roman and Roman Dutch law was to investigate the reasonableness and fairness of such reasons.[2163]

Unlike English and American common law where a dismissed employee could at most be awarded token damages in the form of the equivalent of the wage he would have earned had the notice period been complied with by the employer, the relief for unreasonable or unfair dismissal in Roman and Roman Dutch law was a substantial relief in the form of damages representing the wage that would have been earned during the remaining period of service.

As far as the contract of employment and its terms as such are concerned, same was voidable in Roman Dutch law if it violated *fairness, good faith* or *morality.*[2164]

Modern Dutch law accepted the cornerstones of Roman and Roman Dutch employment law, namely *reasonableness*, *fairness* and *goodness* (the ***bonum et aequum***) and developed from it their most comprehensive principle of employment law, namely the *good employer – good employee* imperative.

The conclusion is therefore unavoidable: The blind criticism sometimes leveled at the 'common law' i.e. that it knew no equity in the labour or employment relationship, is without substance. On the contrary, the very bedrock of all

[2163] See Chapt III
[2164] ibid

consensual contractual relations in the common law was *reasonableness* and *fairness*.

Unsavory doctrines such as employment and dismissal at will, forfeiture of wages already earned by some categories of dismissed workers, indivisibility of labour and token or notice damages where the required notice of dismissal had not been given, incrementally infiltrated early South African labour law through erroneous judicial recognition and application. But it was not these doctrines as they appeared in some old Dutch urban placaats and by-laws that served as the sources of judicial inspiration in this regard. These were specifically disavowed in cases like ***Spencer***. At the early stages of the development of a unique South African system of labour law proper, it was rather English common law that served as judicial precedent. Equity played no role in such precedent.[2165]

Even today, the application of equity in employment related issues is foreign to English law. The prime English statute governing dismissal disputes, namely the Employment Rights Act of 1996, is the only English piece of legislation making provision for the application of fairness, but its field of application is limited to *unfair dismissal* disputes. The concept of unfair labour practice remains foreign to English law.

Equity also remains virtually unknown to American employment law. The National Labor Relations Act of 1935 introduced the concept of unfair labour practice, but its area of application is largely limited to collective labour law, namely the relationship between employers and representative trade unions, union membership and the like. The employment and dismissal at will principle is still in full force in America. Only in 11 States has judicial creativity introduced implied contractual terms to the effect that good faith and fair dealing should govern the employment relationship. Even this move is relatively feeble, isolated and quite casuistic, and has made little inroad on employment and dismissal at will.

[2165] See Chapters V and VII

As indicated earlier, unsavory doctrines such as employment and dismissal at will, forfeiture of wages earned, token damages in respect of the notice period of dismissal and the like, were nor derived from Roman Dutch Law, but rather from English law as described above.

Such was the position when the Industrial Conciliation Act, 1956 was amended in 1979, directly as a result of the Report of the Wiehahn Commission, which first identified the need for a comprehensive equitable regime in South African labour law.

As a direct result of the recommendations of the Wiehahn Report, the erstwhile Industrial Court was also introduced by the 1979 Amendments. There seems to be a general consensus amongst labour lawyers today that the Industrial Court performed pioneering work and that it left a rich jurisprudential heritage of equity in labour matters. The drafters of the 1995 Labour Relations Act made ample use of this heritage, and rightly so, we submit. But the drafters also consulted foreign legislation. This was a prudent thing to do, even though it seems that some of the textual deficiencies in the 1996 LRA[2166] could be traced back to such legislation. It also appears as though the political and constitutional junctures which obtained at the time that the 1995 LRA was drafted, left their mark on the text of the LRA. It is not an indelible mark however. Although the eventual LRA text was a political and ideological compromise somewhat hurriedly constructed, it is still an impressive document.

Such deficiencies that still do occur in the text, need to be addressed by legislative intervention. The problem in this regard seems to exist mainly in the form of shortcomings in the definitions of unfair labour practices, and to a lessor extent, unfair dismissal, resulting in the LRA text not giving adequate expression to the more general right to fair labour practices as enshrined in s 23 of the Constitution.

[2166] See 7 10 above

The jurisdictional conundrum often resulting in forum shopping amongst litigants has been largely addressed by the Constitutional Court in cases like **Gcaba**. The same applies to the traditional differentiation or discrepancy between the status and rights of public sector as opposed to private sector employees. However, it is still desirable that the legislature address these issues again and harmonise them as much as possible with the tenets of s 23 of the Constitution and the guidance given by the Constitutional Court in this regard.

Both legs of South African labour law, namely the common law of employment and the statutory scheme enshrined in s 23 (1) of the Constitution, as given effect to by the LRA, 1995, give recognition to and a role for equity to fulfill.

The common law of employment assigns a supplementary, tempering, moderating and correctional role to equity, whereas the statutory scheme raises equity to the sublime status of ultimate yardstick for the resolution of labour disputes.

In this statutory scheme, fairness and fairness alone serves as the final determinant of the fairness of labour practices, including dismissal.

The common law has virtually reached a ceiling of development as far as employment fairness is concerned. S 23 (1) of the Constitution as given effect to by the LRA, 1995, constitutes that ceiling.

In ***SA Maritime*** the SCA held that the common law cannot be developed to the extent where it recognizes an implied term of fairness in contracts of employment. The rationale for this decision was that such development would intrude onto the terrain of the statutory scheme, and was therefore not intended by the legislator. A development of this nature should best be left to the legislature, the courts argued since ***SA Maritime***. English persuasive jurisprudence such as ***Johnson v Unisys*** played a pivotal role in this regard, as it will without doubt do in the foreseeable future.

The obvious vehicle to be used by the Legislature for this purpose is appropriate amendment of the LRA. We have noted that although a progressive piece of

legislation, the LRA suffers from many deficiencies in its quest to give effect to the imperative contained in s 23 (1) of Constitution, namely the right of everyone to fair labour practices.

Hopefully the legislature will take note of ***SA Maritime*** and cases in similar vein, and come forward with the necessary and desired amendments to the LRA so as to take it to its next level of alignment with s 23 (1) of the Constitution.

In conclusion, a brief outline of the insights we have gained since the inception of the Industrial Court, and even prior to that auspicious event, into the nature and role of equity in South African labour law.

We subscribe to the view espoused by virtually all labour courts, but especially the Constitutional Court, that it seems to be undesirable to provide a definition of *equity* or *fairness*. The nature and role of *fairness* are dichotomous: on the one hand is *fairness* a relatively familiar concept in daily use, not only in the labour courts as such, but in virtually all courts of law. At times, the concept is consciously and deliberately applied during the course of judicial activity, while it sometimes fulfills its role quietly, unobserved and without any recognition. Fairness is sometimes derisen by sceptics – mostly ignorant – while it is more often eagerly embraced by realists, i.e. those who have come to the realization that strict legal principle is sometimes hopelessly insufficient for the resolution of legal disputes, and that equity has an inherently supplementary role to fulfill in all legal practice. Moreover, in labour law such role is not merely supplementary, but pivotal. Unfair labour practice and unfair dismissal disputes are ultimately resolved by application of the criterion of equity alone, and nothing else.

But despite the healthy disinclination of the courts to provide an attempted definition of equity, some *theory of equity* seems to be steadily developing. This fledgling theory is torn between the opposites of strict law and the traditional need for legal certainty on the one hand, and the inherent flexibility which is the hallmark of equity on the other. A theory of equity should not be confused with a definition of equity. In fact the very theory is predicated on the versatility,

flexibility and adaptiveness of the notion of equity – attributes not readily accommodated by definition.

It is for this reason that we have entitled the section of this study dealing with this theory merely as "factors informing equity".[2167] This is to emphasise that no attempt is made at all to provide a *numerus clausus* or closed list of factors to be taken into account by the presiding official applying equity. In fact such a closed list will probably never be developed. The labour courts appear to be alive to the unique opportunity that the open-ended, flexible and indeterminate concept of equity provides them for the fulfillment of the ideal enshrined in s 23 (1) of the South African Constitutional, namely *fair labour practices.*

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[2167] See 7 16 infra

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