The Employment Contract and the Changed World of Work

Stella Vettori

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Preface

Introduction

Drastic and fundamental changes in the world of work have occurred in a relatively short space of time since the 1980s. Technology has changed the manner in which the economy works. This in turn has changed the world of work. The phrase 'the changed world of work' in the title of this book refers to the transition from the era of 'Fordism' to the information era. Economies of scale, based on post-war Keynesian mass production fuelled by mass consumption, are a thing of the past. Pressures on national economies and corporations both large and small, to compete in a borderless globalised world have rendered neo-liberal policies advocating the retreat of protective labour legislation and the deregulation of the labour market more popular and prominent. Furthermore, the unprecedented pressure that trade unions were able to exert on employers in the era of 'Fordism', in order to meet employee demands, has largely diminished as a result of the huge change in organisational structures.

As the scale of enterprise diminishes so it becomes more difficult for trade unions to organise. The potential harm or damage that a trade union can wield in a huge organisation, so typical of the era of Fordism, dissipates in a small enterprise. The bargaining power of trade unions has been severely eroded in times of high unemployment, combined with the new structure of organisations and the predominance of small organisations. These factors and others have contributed to a loss of employee protection against possible abuse of power by employers.

The meaning of the phrase 'the contract of employment' in the title of the book has for decades engaged labour lawyers in endless debates as to its exact meaning. In spite of the incoherence concerning the definition of relationships that come within the scope of the 'contract of employment' it is generally accepted that there is a distinction between a person who falls within the scope of the contract of employment, namely an 'employee' and a worker who does not, namely an 'independent contractor'. The changed world of work has resulted in the two concepts becoming even more blurred and intertwined and consequently it is sometimes almost impossible to distinguish the two concepts in a coherent manner. Although the reader will be informed as to the traditional common law tests for distinguishing between these two concepts, I offer no apologies for not indulging in the impossible task of providing more clarity as to the precise meaning of these terms.

Despite the fact that labour legislation is not only a major and direct source of the rights and duties of the respective parties to the employment relationship and that it

can also have a profound effect on the moulding and development of the common law of the contract of employment, discussion of the content of labour legislation is beyond the scope of this book.

What has remained constant in this changed world of work is that a contract has always and still continues to form the foundation of the relationship between an employer and an employee. I undertake an analysis of the potential of the general principles of the common law of the contract as applied and interpreted by judges with speci c reference to the employment relationship in England, South Africa, Australia and the United States of America, to provide a means of protecting legitimate employee interests. Since a contract is also the basis of relationships between providers of work and other types of workers, whether or not they are perceived to be independent contractors or dependent workers, and since it has become more dif cult to distinguish between independent contractors and employees in the changed world of work, the possibility of extending the principles applicable to employees in an employment relationship to workers whose relationship with the provider of work is akin to that of an employee *vis à vis* the employer, is also explored. The ability of the law of contract to be moulded so as to adapt to prevailing socio-economic circumstances is celebrated. In short, the purpose of this book is to demonstrate that, judges willing, the implementation and adaptation of general principles of contract to the employment relationship and possibly in appropriate circumstances to relationships akin to the employment relationship, can contribute meaningfully to attaining a measure of fairness in these relationships, while at the same time not jeopardising economic ef ciency .

Synopsis

Chapter 1

Despite the incoherence and dif culties associated with the traditional common-law tests adopted to de ne and distinguish the concepts employee and independent contractor’, an attempt is made to give some meaning to these concepts.

The brief historical overview of the contract of employment serves two purposes: Firstly it demonstrates the malleability of the law of contract and its consequent ability, with speci c reference to the contract of employment, to adapt to prevailing socio-economic forces. Secondly it demonstrates that, although the in uence that the law of contract has on the employment relationship may vary with changing socio-economic circumstances, a contract between the parties has always been necessary for the creation of the relationship. Consequently general principles of contract have always constituted a source of regulation of the relationship, albeit in varying degrees. Where a general deregulation of labour markets by, amongst other things cutting back on legislative protection of employees occurs, the common law contract of employment as a source of regulation of the rights and duties of the respective parties gains more relevance.

Chapter 2

Having established that the employment relationship is inevitably grounded in contract and that the role of the contract of employment as a means of regulating the relationship between employer and employee in the changed world of work has increased, this chapter demonstrates the importance and applicability of the concept of good faith (albeit in different ways), in all the jurisdictions discussed, not only in contracts generally, but especially in the contract of employment. Consequently, judges should be guided by the concept of good faith when implying terms into contracts of employment.

Chapter 3

Since the implication of terms is one of the most important ways of achieving a measure of fairness between contracting parties, the bases upon which terms can be implied into contracts are explored. Some differences in the laws of the different jurisdictions are highlighted.

Chapter 4

This chapter explores some of the most important sources of the implied terms in contracts of employment. These sources include international law, corporate codes of conduct, employee handbooks and other unilateral employer communications such as policy and mission statements. The different ways in which these terms emanating from different sources are implied into the contract of employment is explored.

Chapter 5

The in uence of the implied term of trust and con dence in England and Australia and, to a lesser degree, in South Africa, the constitutional right to fair labour practices in South Africa, and the implied covenant of good faith and fair dealing in the United States of America, in protecting employee interests, are discussed.

Chapter 6

The possibility of extending the principles applicable to the contract of employment in situations where the relationship is one of atypical employment is explored.

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The idea to write this book was that of Professor David Crowther. He made this project possible by introducing me to Ashgate Publishing, who provided me with the opportunity to write the book. Professor Piet de Kock edited the work and undertook the thankless task of drawing up the Bibliography, Table of Cases and the List of Statutes.

My husband Hendrik, my sons Pier and Luca, and my sister Sandra put up with me and generously supported me with love. My friends Annie Hattingh and Kiewiet de Kock encouraged me and gave me the will to plod on relentlessly. I am deeply grateful to all of you.

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Chapter 1

A New Role for the Contract of Employment

Introduction

The purpose of this chapter is to demonstrate why the changed world of work has resulted in the law of contract having a more active role to play in employment relations. There are two premises upon which this conclusion is based: Firstly, there can be no markets and therefore no economy without contracts. Secondly, the legitimacy or appropriateness of laws is measured with reference to economic ef ciency .[1] This is especially true of labour laws. As Hugh Collins observes, '…the dominant theme of labour law policy has become the enhancement of the competitiveness of business, which at its core, requires the facilitation and stabilisation of exible employment relations'.[2] This is not to suggest that justice should take a back seat in the interests of economic ef ciency . The contract of employment is as much a social relationship as it is an economic relationship.[3] Since 'the only claim of law to authority is its delivery of justice',[4] the ultimate goal should be laws that achieve both justice and economic ef ciency .

Globalisation of the world economy is a consequence of the operation of the universal laws of the market. The law cannot alter these laws. Labour law reacts to the prevalent socio-economic forces that exist at the time. Its function is to formalise market forces that affect the relationship between employers and employees for the bene t of the economy . All employment policies pursued over the past thirty years, whether liberal or interventionist in style, have viewed the market as an overriding given factor whose operation the law is able only to facilitate, or alternatively, restrict.'[5] The role of the law therefore in the words of Davis is: '…that of control and regulation in order to preserve the essential socio-economic structures of society.'[6] This law need not of necessity take the form of legislation. It can just as easily be judge made law or both.

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1 Alain Supiot, 'The Dogmatic Foundations of the Market', *ILJ*, 29/2 (2000): p. 322.

2 'Regulating the Employment Relation for Competitiveness', *ILJ*, 30/1 (2001): p. 17.

3 Supiot, 'The Dogmatic Foundations of the Market', p. 340.

4 Rosemary Owens, 'The Traditional Labour Law Framework: A Critical Evaluation', in Richard Mitchell (ed.), *Redefining Labour Law* (1995): p. 3.

5 Ibid.

6 Dennis Davis, 'The Functions of Labour Law', *CILSA* (1980): p. 214.

A brief summary of the development of the law of contract (and more speci cally contracts regulating employment relationships) demonstrates how the law of contract has been adapted and interpreted by judges and at times supplemented by legislation in line with and in reaction to the changing socio-economic milieu. What has remained constant throughout the centuries, except of course in respect of slavery, is that a contract has always been a necessary foundation for the creation of the employment relationship. At different stages in history legislation has played a major role in regulating the employment relationship. During these times the relationship has been described as a status relationship[7] as opposed to a contractual relationship. Despite the fact that most terms and conditions were regulated by statute, and that the creation of the relationship was often based on a ction of consent, given the inequality of bargaining power between the parties, contract remained the foundation of the relationship. As technology has changed the world of work over the centuries, the adaptation of the laws regulating work relationships have usually served the interests of those in a position to wield economic and social power.[8]

What follows is an assessment of the history of the contract of employment in order to be in a position to properly assess its future. This will assist in the explanation for the broadened scope of the application of the general principles of contract law in order to achieve both exibility and fairness in today s world of work. The role of the law of contract in this regard is even more signi cant in common law jurisdictions such as England, the United States of America and Australia given the recent extensive in uence of neo liberal theories and consequent deregulation of the employment relationship.

Origins of the Law of Contract

Roman law did not originally accept that every agreement created a legally binding obligation. In order for mere consensus between the parties to progress to a legally binding contract there had to be a special reason for the creation of an obligation. This special reason could take the form of the physical act of handing over a thing, or a sworn statement, or a ctitious entry of payment made in the creditor s account book. These requirements differed according to the type of contract at hand.[9] Some contracts, generally referred to as ‘consensual contracts’ (*contractus ex consensu*), were legally binding even in the absence of special formalities. All that was required is that the parties agreed to the essential elements of their agreement. Examples of consensual contracts were contracts of sale, lease and employment.[10] Despite the fact that consent formed the basis of obligation for these contracts, Roman jurists,

7 Richard Rideout, ‘The Contract of Employment’, *CLP*, 19 (1966): p. 111.

8 Martin Brassey, *Employment and Labour Law* (Cape Town, 2000): vol. 1, A: p. ii.

9 Van der Merwe, Van Huyssten, Reinecke and Lubbe, *Contract: General Principles* (2003), pp. 16–17.

10 Ibid.

even under Justinian, never elevated consent to the basis for a binding contract.[11] Natural law and the doctrines of the Catholic Church created the impetus for the acceptance of consent as the basis of a legally binding contract.[12] The moral rule that one is bound by one's promises (*pacta sunt servanda)* became a legal rule in the thirteenth century.[13] Medieval merchants accepted consent as the basis for legally binding obligations for both moral and economic reasons. *Pacta sunt servanda* as the basis for legally binding contracts was thus received into the *lex mercatoria* and the legal systems of Western Europe.[14]

In order for the rule *pacta sunt servanda* to have practical signi cance there must be some guarantor that will give the agreement binding force. God was such a 'guarantor of agreements' in terms of divine law and later the State became the 'guarantor of agreements'.[15] In terms of divine law only contracts that had a just cause could be upheld. Today, in the same vein, contracts that are contrary to public policy or manifestly unfair will not be upheld. The legacy of *pacta sunt servanda* is that consent remains the basis upon which a legally binding contract is founded. Contract in turn, remains the foundation of the employment relationship,[16] and the insistence on fairness in the law of contract forms the foundation of my thesis in this book.

From Contract to Status (The Law of Master and Servant)

Roman law distinguished between a contract for work (*locatio conductio operis*) and a contract of service (*locatio conductio operarum*). In contracts of work the employee undertook to render personal services to an employer. In a contract of service, on the other hand, an independent contractor undertook the performance of certain speci ed work or the production of a certain speci ed result. [17] This distinction is still retained.[18] The law of master and servant regulated contracts of work. It originated in England in the fourteenth century when Parliament began to concern itself with

11 Supiot, 'The Dogmatic Foundations of the Market', p. 333.

12 Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Contract: General Principles*, p. 17.

13 Supiot, 'The Dogmatic Foundations of the Market', p. 333.

14 Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Contract: Gerneral Principles*, p. 17.

15 Supiot, 'The Dogmatic Foundations of the Market', p. 334.

16 Otto Kahn-Freund in 'A Note on Status and Contract in British Law', *MLR*, 30 (1967): p. 635 referred to the contract of employment as the 'cornerstone' of the labour law system. This is because it was the existence of a contract of employment which gave the employee access to statutory rights and protection.

17 *Niselow v Liberty Life Association of Africa Ltd* 1998 (4) SA 163 (SCA); Martin Brassey, 'The Nature of Employment' *ILJ*, 11 (1990): p. 899.

18 See sub-heading, 'The Restrictive Application of the Common Law Contract of Employment', below.

the nation's labour market.[19] The reason for the introduction of the laws of master and servant was to '…compel service by the idle, curb movement by agricultural servants and artisinal and manufacturing workers, suppress their wage demands by xing legal rates and by making annual hiring the norm, and to tie workers to their employers for the duration of their contracts and to their social status for the duration of their lives'.[20] In short the statutes served to maintain the socio-economic *status quo* by regulation of the labour market. Even though the contract of work formed the basis of the relationship between individual employers and employees, terms and conditions were mostly governed by legislation. This is what has prompted the use of the term 'status'.[21] In a status relationship one's rights and duties are not determined by negotiation and subsequent consent between the parties. They are instead determined by one's status in society. In other words a status relationship is a relationship based on agreement but regulated by law.[22] Status is one's identity in society with reference to continuing social relationships. Examples of relationships which create a person's status include the relationship between master and servant or between husband and wife.[23] When an individual had the status of employee, the master and servant laws came into play and automatically provided the terms and conditions governing the relationship between employer and employee. As speci cally stated by Parliament one of the objectives of master and servant laws was to preserve the social status of employees *vis-à-vis* their employers. Breaches on the part of employees resulted in severe sanctions, including imprisonment, forced labour, nes, forfeitures, lashings and other forms of corporeal punishment. [24]

In the 1560s the scattered bundle of fourteenth century statutes were consolidated into one statute: the Elizabethan Statute of Arti cers of 1562. [25] This statute was applied in the British colonies and remained in force in England and the colonies of the British Empire, including South Africa, Australia and the United States of America, for most of the latter part of the last half millennium.[26] The statute upon which the master and servant laws of the colonies were based was repealed in

19 Bruce Smith, 'Imperial Borrowing: The Law of Master and Servant', *Comparative Labour Law and Policy Journal* , 25/3 (2004): pp. 449–209.

20 Douglas Hay, 'England, 1562–1875: The Law and its Uses', in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (2004): p. 62.

21 It was Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861) p. 288, who rst coined the phrase from status to contract'.

22 Otto Kahn-Freund, 'A Note on Status and Contract in British Law', *MLR*, 30 (1967): p. 635.

23 Sanford Jacoby, 'Economic Ideas and the Labour Market: Origins of the Anglo-American Model and Prospects for Global Diffusion', *Comparative Labour Law and Policy Journal* 25/1 (2003): p. 43.

24 Ibid., p. 88.

25 Smith, 'Imperial Borrowing: The Law of Master and Servant', p. 450.

26 Ibid.

England in 1875.[27] In the United States of America, laws of master and servant held sway until the end of the nineteenth century.[28] In Australia these laws were only removed from the statute books in the following century. In New South Wales the laws of master and servant endured on the statute books until 1980, while in Western Australia residual provisions were in force until the mid 1990s.[29] In some Australian jurisdictions 'prosecution under master and servant legislation was commonplace right up to the start of World War II'.[30] In South Africa master and servant legislation was only repealed in 1974.[31] The reason for the endurance of the master and servant laws into the twentieth century in both South Africa[32] and Australia,[33] is that both were pre-industrial societies until late into the nineteenth century or early in the twentieth century. As was the case in pre-industrial Britain,[34] master and servant laws in the pre-industrial British colonies served to maintain the socio-economic status. What is relevant is that although the colonies adapted the British laws of master and servant to suit their particular needs and circumstances, in Australia[35] and South Africa,[36] the fundamental principles embodied in the laws remained the same. Hay and Craven observe that these fundamental principles are embodied in three de ning characteristics : a private contract served to establish the relationship; magistrates enforced the terms of these contracts and; breaches on the part of employees were criminalized and subject to penal sanctions or some kind of speci c performance. [37]

The effect of the master and servant laws was to legitimise an individual employer's control over employees and to provide employers with a 'predictable, tractable, and relatively inexpensive supply of labourers – whether in the potteries of Staffordshire, the sugar plantations of Mauritius, the tea "gardens" of Assam, the mahogany forests of British Honduras, or the diamond mines in the Cape colony'.[38] Although ostensibly based on 'freely' negotiated contracts, the employment relationship was clearly a status relationship as a consequence of the master and

27 The repeal was effected by the Conspiracy and Protection of Property Act of 1875.

28 Jacoby, 'Economic Ideas and the Labour Market: Origins of the Anglo-American Model and Prospects for Global Diffusion', p. 43.

29 Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law', in Lammy Betton (ed.), *The Employment Contract in Transforming Labour Relations* (The Hague 1995), p. 130.

30 Ibid., p. 131.

31 Second General Law Amendment Act 94 of 1974.

32 Martin Brassey, *Employment and Labour Law* (Cape Town, 2000) vol. I, A1: p. 15.

33 Creighton and Mitchell, 'The Contract of Employment in Australian Labour Law', p. 131.

34 Ibid.

35 Ibid.

36 Brassey, *Employment and Labour Law*, A1: p. 14.

37 Hay and Craven, *Masters, Servants, and Magistrates in Britain and the Empire*, p. 1.

38 Ibid., p. 452.

servant laws. Nevertheless the contract of employment remained the 'cornerstone of the edi ce '[39] upon which master and servant laws were built.

From Status to Contract (Classical Theory of Contract)

Laissez faire economic liberalism was supported by economists of the late nineteenth century.[40] These doctrines complemented the classical theory of the law of contract which also has its origins in the eighteenth and nineteenth centuries. The classical law of contract is based on two assumptions: individuals have the freedom to enter into contracts and thereby to regulate their own affairs and secondly, since the intervention of *pacta sunt servanda* principle, they are bound by their promises.[41] These values are premised on the belief that contractants are on an equal footing when they negotiate. The parties' undertakings or promises and consequently their respective intentions are what count. If the outcome of their intention or agreement is unfair, that is of no consequence or concern to the courts.[42] The role of the courts is consequently merely to enforce the terms of the contract as 'voluntarily' agreed to by the parties.

The classical theory of contract emerged as a result of the industrial era. The paternalistic approach associated with the previous agrarian society was replaced by an 'aggressive entrepreneurial industrial society in the nineteenth century'.[43] Judges utilised the classical theory of contract to enforce contracts where there was a huge disparity of bargaining power between the parties. This approach by the courts legitimized the control that employers had over employees without the need for master and servant laws. The asymmetry in the allocation of resources such as wealth and knowledge rendered employees dependent on employers and consequently subject to relations of control and subordination. In the United States of America the privileging of employer interests over those of the employee was taken further than a strict application of the *pacta sunt servanda* principle, despite the presence of manifest unfairness: judges implied terms into contracts of employment that were

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39 Otto Kahn-Freund, 'A Note on Status and Contract in British Law', 30 *MLR* (1967): p. 635.

40 For example John Bates Clark.

41 The famous dictum in the English case of *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 bears this out: 'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice.' It also bears testimony to the sacred origins of the rule that *pacta sunt servanda*. It is to the mediaeval canonists that *pacta sunt servanda* owes its origins. The subsequent in uence of the Roman Catholic Church which taught that a believer must always be true to his word continued this tradition of the sacredness of one's word or promises. This tradition is still prevalent as the above dictum proves.

42 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* (1918) 1 KB 592 (CA) at 605.

43 Linda Hawthorne, 'The Principle of Equality in the Law of Contract', *THRHR* (1995): p. 164.

prejudicial to employees. This judicial activism in introducing judge-made default rules further contributed to the degradation of employee interests. The default rules were:[44]

1. The 'entire contract' rule provided that an employee who only worked for a portion of the term provided for in terms of the contract was not entitled to wages for work actually performed. This created a deterrent to resign for a more favourable offer. Only at the end of the nineteenth century did some judges begin to allow employees to claim payment for time worked on the basis of *quantum meruit*.
2. In terms of the 'enticement' doctrine employers could bring an action for damages against a party who interfered with their employees' performance. Employees on the other hand, had no cause of action against a party who prevented their employer from properly ful lling the obligations provided for in terms of the contract of employment. This rule reduced employees' chances of being offered more favourable terms and conditions of work by other employers.
3. The 'assumption of employer control' rule meant that an employee had to perform duties faithfully in pursuit of lawful and reasonable commands.
4. Judges also implied a rule that denied workers a right to recover damages for injuries sustained in the ordinary course of employment.

Usually employees lacked knowledge of these default rules and therefore did not contract out of them. Secondly, these rules were highly complex and unpredictable. Since employers entered into many contracts of employment they were accustomed to the intricacies of these rules and knew how to phrase their contracts and put their case before the court. [45]

The rigid legal formalism[46] of the nineteenth century was still applied by some judges in South Africa,[47] England[48] and Australia[49] in the late twentieth century.

44 John Fabian Witt, 'Rethinking the Nineteenth Century Employment Contract, Again', *Law and History Review*, Fall (2000): pp. 629–230.

45 Ibid., p. 638.

46 'Legal Formalism' implies that legal rules are applied in a mechanical way and certainty demands that judicial discretion is eliminated. A judges' function is merely to apply these rules in a non-creative manner. The fact that such a strict application of rules might at times result in injustice is according to the adherents of legal formalism a small price to pay for certainty of the law. See Alfred Cockrell, 'Substance and Form in the South African Law of Contract', *SALJ* (1992): p. 55.

47 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 533A-B.

48 Bill Wedderburn (1986): p. 142 states: '…judges have always excluded "commercial pressure" and mere "dominant bargaining power". The likelihood of an English court upsetting an individual contract of employment is low.'

49 See *Commercial bank of Australia v Amadio* (1983) 151 CLR 447. Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law', in Lammy

Late into the twentieth century judges in England[50] and Australia[51] applied the same kind of reasoning when asked to imply terms into the common law contract in the interests of fairness.

Those who adhere to legal formalism justify their preference for certainty over the attainment of an equitable result on the basis of commercial necessity, the freedom to contract and the sanctity of contract.[52] The ostensibly non-committal and neutral stance of legal formalism serves to justify the reaf rmation and reinforcement of the socio-economic status of the contracting parties.[53] Economic ef ciency is used to justify unfairness and the protection of the interests of those in possession of socio-economic power.[54]

The linear progression from status to contract was perceived by Maine as emancipatory. To him it manifested an evolution where individuals were only bound by obligations which they had voluntarily consented to.[55] Such optimism proved unwarranted given the questionable voluntariness[56] in cases of parties having asymmetrical access to resources when entering into contracts of employment. In reality, the employer was usually at liberty to unilaterally impose terms and conditions on the employee. The disappearance of *laissez-faire* and the advent of the welfare state proved Maine's theory of linear progression wrong.[57]

From Contract to Status (The Welfare State)

The height of the industrial era has been referred to as 'Fordism'. Fordism lasted from approximately 1950 to 1980.[58] It is the term used to describe the manufacturing

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Betton (ed.), *The Employment Contract in Transforming Labour Relations* (The Hague, 1995), p. 146 observe: 'Not only does the common law exhibit minimal concern with the fairness of either the substantive content or manner of performance of a contract of employment, it is also entirely indifferent to the circumstances in which the contract is formed (or not formed).'

50 See Wedderburn (footnote 48) where he states: '…judges have always excluded "commercial pressure" and mere "dominant bargaining power". The likelihood of an English court upsetting an individual contract of employment is low.'

51 See *Commercial bank of Australia v Amadio* (1983) 151 CLR 447.

52 See the remarks of Kotze JA in the South African case of *Weinerlein v Goch Buildings Ltd* 1925 (A) 282 at 275.

53 Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment', *ILJ*, 15 (1986): p. 1.

54 John Fabian Witt, 'Rethinking the Nineteenth Century Employment Contract, Again', *Law and History Review* Fall (2000): p. 627.

55 Supiot, 'The Dogmatic Foundations of the Market', p. 326.

56 Creighton and Mitchell, 'The Contract of Employment in Australian labour Law', p. 133.

57 David Campbell, Re exivity and Welfarism in the Modern Law of Contract , *Oxford Journal of Legal Studies*, vol. 20, no 3 (2000): p. 478. Roger Blanpain 'Work in the 21st Century', *ILJ* (1997): p. 189.

58 Roger Blanpain 'Work in the 21st Century', p. 189.

strategy of industrialised countries especially after the Second World War.[59] This strategy relied on the concepts of mass production and mass consumption. Higher paid unskilled workers[60] used their income to sustain high consumption of mass produced products. The economies of scale dictated that, in order for an enterprise to survive, it had to have many employees and production was dictated by post-war Keynesian economic policies. In order to exercise control over a multitude of employees, they had to be arranged into a hierarchy beginning at the bottom with unskilled labourers, up through a number of levels of supervisors and eventually management. Management was also divided into various levels in a hierarchical structure, beginning at lower management, going through to middle management and eventually reaching top management. In this system employees had clear-cut job descriptions. This hierarchical structure resulted in detailed divisions of labour with strict control over employees and centralised management structures.[61] A natural consequence of such large enterprises was that the relationship between the employer (now usually a company and not an individual) and employee was no longer a personal relationship. Fordism created the 'standard' employee. He was typically male, full-time and usually unskilled, his terms and conditions of employment were usually covered by collective agreements and he was usually a trade union member who at times went on strike. The standard employee was normally employed inde nitely (or permanently), and the work was usually done at a workplace controlled by the employer.[62] This stereo-type employee was necessary for the implementation of the socio-economic exchange of the era of Fordism. In exchange for job security (economic and social security) the employee became subject to employer control.[63] This security was achieved principally by a web of social legislation that was attached to this typical 'standard employee'. Hence the term 'welfare state'.

The so-called 'independent contractor' was excluded from this web of protective legislation that was part of the social exchange between standard employees and their employers in the welfare state. According to Deakin the distinction between the

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59 Jacobus Slabbert *et al Mannagement and Employment Relations* (1999): p. 87.

60 Enterprises were protected from competitors operating outside national borders by trade tariffs, and from local competition by collectively bargained wages at central level. This ensured that a relatively well paid unskilled workforce had money at their disposal to further fuel demand for the mass produced products.

61 Slabbert and Villiers, *The South African Organisational Environment* (2002): p. 21.

62 Jan Theron, 'Employment is not What it Used to be', *ILJ* (2004): p. 1249.

63 Supiot, 'The Dogmatic Foundations of the Market', p. 337 explains: 'The invention of employment as a status mandatorily attached to every contract of employment is of German origin. Systemized by German jurists as early as the nineteenth century, it spread in diverse forms into all European countries. It consisted in incorporating into the contract of employment a status which protects the employee against the risks of impairment of his earning capacity. Employment in this sense is the shared baby of labour law and social security.'

'standard employee' and an 'independent contractor'[64] is a 'very *recent* innovation'.[65] In his view this distinction, in English law at least, had its origins in mid-twentieth century English social legislation in the elds of workmen s compensation, social insurance, and employment protection'.[66] Prior to that, workmen's compensation legislation and national insurance legislation had distinguished between unskilled manual labourers or wage earners and salary earners. The reason for this distinction was that the higher status workers were excluded from the purview of this social legislation.[67] Subsequent legislation, from the 1940s onwards,[68] adopted the terminology of 'contract of employment' and 'employee' to describe wage earners, be they unskilled manual workers or of ce workers of a higher status. The inclusion of all wage earners irrespective of whether they were unskilled blue collar workers or white collar workers was in line with the necessary premise of social solidarity of the post-war consensus of the welfare state.[69] Since the bene ts provided for in terms of the web of social legislation were dependent on the presence of a 'standard' employee, the important distinction to be made was whether a person was an 'independent contractor' or an employee.

The distinction between 'independent contractor' and 'employee' has a much longer history in South Africa. This is because of South Africa's Roman law heritage.[70] The basis of this distinction in terms of Roman law was explained by Joubert JA in the South African Appeal Court decision of *Smit v Workmen's Compensation Commissioner*:[71]

1. The object of the contract of service is the rendering of personal services by the employee (*locator operarum*) to the employer (*conductor operarum*). The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certain speci ed work or the production of a certain speci ed result. It is the product or the result of labour which is the object of the contract.

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64 Mark Freedland, 'The Role of the Contract of Employment in Modern Labour Law', in Lammy Betton (ed.), *The Employment Contract in Transforming Labour Relations* (Kluwer, 1995), p. 17 refers to this distinction as the 'binary divide'.

65 Simon Deakin, 'The Many Futures of the Contract of Employment', in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, 2002), p. 178.

66 Ibid., p.181.

67 Mark Freedland, *The Personal Employment Contract* (Oxford 2003), p. 16.

68 Deakin, 'The Many Futures of the Contract of Employment', p. 179.

69 Colin Crouch, *Social Change in Western Europe* (Oxford, 1999), pp. 34–47, describes the employment relationship that embodies the 'standard' employee of the era of Fordism as a 'mid-century social compromise' which prevailed in Western Europe at that time.

70 This Roman Law heritage permeates the legal systems of many Western European countries – see Bruno Veneziani, *The Evolution of the Contract of Employment* (1986), pp. 54–61.

71 1979 (1) SA 51 (A) at 61.

2. According to the contract of service the employee (*locator operarum*) is at the beck and call of the employer (*conductor operarum*) to render his personal services at the behest of the latter. By way of contrast the *conductor operis* stands in a more independent position *vis-à-vis* the *locator operis*. The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof.
3. Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered. The *conductor operis* is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within a reasonable time where no time has been specified.
4. The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The *conductor operis*, however, is on a footing of equality with the *locator operis*. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the *locator operis*. Nor is he under any obligation to obey any orders of the *locator operis* in regard to the manner in which the work is to be performed. The *conductor operis* is his own master, being in a position of independence *vis-à-vis* the *locator operis*. The work has normally to be completed subject to the approval of a third party or the *locator operis*.
5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.
6. A contract of service also terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.

Irrespective of the origins of the concept of ‘employee’ as opposed to ‘independent contractor’, even in the era of Fordism with its huge industrial factories and the consequent prevalence of the standard employee, it always proved to be a thorny issue for the courts everywhere to develop concrete and practical criteria for the differentiation between an ‘employee’ and an ‘independent contractor’. Over the years the courts developed various tests in order to determine whether a person was an employee or not. The first of these tests was the control test in terms of which the worker would qualify as an employee if the employer had the right to exercise control over what work the employee did and the manner in which it was done. In South Africa this test has been applied by the courts in a long line of cases

beginning in 1894[72] until the end of the millennium.[73] Perhaps its endurance is testimony to the fact that control over the employee in the pre-industrial era right up to the modern era of Fordism was a prerequisite for the entrenchment of the socio-economic *status quo*. In England this test has also endured the test of time.[74] Despite the 'control' tests' endurance the courts have at times discovered it to be insuf cient to deal with the particular sets of facts before them. Consequently , the organization test rst propounded by Kahn-Freund [75] was used to supplement the control test when it proved insuf cient on its own. Otto Kahn-Freund criticized the 'control test' as being rooted in social conditions pertaining to an earlier age.[76] In terms of the 'organization test' a person who was integrated into the organization of the employer was an employee. This test was applied in common law jurisdictions including South Africa[77] and England.[78] However, application of the test by the courts was short lived in both England and South Africa.[79] Even in the period from the 1950s to the 1980s when organizations operated predominantly in manufacturing industries and were usually arranged in military-like bureaucracies so typical of the Fordist era, there still were employers or organisations who did not conform to these bureaucratic arrangements. Secondly, it proved dif cult on particular sets of facts that were presented to the courts to decide what criteria to give weight to in deciding whether or not a person formed part of the employer's organisation.[80] The courts then resorted to the use of what Brassey[81] calls 'intuitive tests'. The question asked is whether the person is in business for his or her own account.[82] This test is also referred to as the 'dominant impression' test.[83] The court in terms of this test must take into account all the surrounding circumstances of the

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72 *East London Municipality v Murray* (1894) 9 EDC 55.

73 *Eyssen v Calder & Co* (1903) 20 SC 435; *Townsend v Hankey Municipality* 1920 EDL 226; *R v Caplin* 1931 OPD 172; *Fisk v London & Lancashire Insurance Co Ltd* 1942 WLD 63; *Singh v Provincial Insurance Co Ltd* 1963 (3) SA 712 (N); *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51(A); *Gibbins v Muller, Wright & Mostert Ing en andere* 1987 (2) SA 82 (T); *FPS v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A).

74 This test was applied as recently as 1995 in *Lane v Shire Roofing (Oxford) Ltd* [1995] IRLR 493.

75 Otto Kahn-Freund, 'Servants and Independent Contractors', *MLR*, 14 (1951): 504.

76 See Brassey, *Employment and Labour Law*, vol. 1 B1: p. 24 for a discussion of Kahn-Freund's reasons for rejecting the 'control test' as useful in ascertaining whether or not a person quali es as an employee.

77 *R v AMCA Services Ltd & another* 1959(4) Sa 207 (A).

78 *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] I TLR 101, 111.

79 Brassey, *Employment and Labour Law*, vol. 1, B: p. ii.

80 See *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

81 Brassey, *Employment and Labour Law*, vol. 1, B1: p. 33.

82 Freedland, *The Personal Employment Contract*, p. 20.

83 Paul Benjamin, 'Who Needs Labour Law', in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, 2002), pp. 83–85.

case before it and on this basis come to a conclusion based on common sense. No single factor, for example, whether or not the 'employer' exercises control over the 'employee' is decisive. This test therefore is no test at all. It merely informs the judge to take all relevant circumstances into account, which of course is what a judge must do as a matter of course. The vagueness of such an approach obviously renders the law uncertain. However, it has the advantage of being suf ciently malleable to deal with the plethora of atypical employees that the changed world of work has produced. The results therefore will be dependent on the sensitivities and intuitiveness of the judge. The best test in my view is that derived from the Roman Law as articulated by Joubert JA in the case of *Smit v Workmen's Compensation Commissioner*[84] and quoted above.[85]

This system with its impersonal and bureaucratic hierarchical structures and extensive legislative provisions that regulated the employment relationship prompted the view that the relationship was a status relationship.[86] According to some, the contract of employment is said to have no relevance other than to create the basis for the relationship in such a status relationship.[87] In short the contract of employment merely serves to provide the cornerstone of the edi ce of labour regulation.[88] Legislation, irrespective of the will of the individual parties, regulates terms and conditions of employment. Extensive legislative regulation of the employment relationship and collective agreements between employers and trade unions in the latter part of the industrial era in industrialised economies witnessed the 'burying of the individual contract beneath layers of safeguards for the subordinate employee'.[89]

This stunted further development of common law principles of good faith and equity in the context of the employment contract, leading many to the conclusion that the common law of contract is an inappropriate vehicle for the regulation of employment relationships.[90] Froneman AJA (referring to South African law), has gone so far as to say that, prior to the enactment of the Constitution,[91] unlike the statutory labour law dispensation which has everything to do with fairness, the

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84 1979 (1) SA 51 (A).

85 For a critical and detailed discussion of the various tests see Brassey, '*Employment and Labour Law*, vol. 1, section B1.

86 Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment', *ILJ*, 15 (1986): p. 1.

87 David Freedland, 'The Personal Employment Contract' (Oxford, 2003), p. 2 cites the work of Alan Fox, Otto Kahn-Freund and his own work in this regard. It is not surprising that all these works were published between 1950 and 1980 in the 'golden era' of Fordism.

88 Kahn-Freund, 'A Note on Status and Contract in British Law', p. 635.

89 David Chin, 'Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism', *AJLL*, 10 (1997): pp. 257–259.

90 See the discussion below at the sub-heading 'Perceived Inadequacies of the Common Law of Contract'.

91 Constitution of the Republic of South Africa Act 108 of 1996.

common law contract of employment had nothing to do with fairness.[92] This might have been the case in the era of Fordism with its extensive social regulation of the employment relationship. It is my view that, given the new role that the common law contract of employment has to play in the changed world of work, as discussed below, the common law of contract should have everything to do with fairness. For reasons alluded to below, the common law contract of employment is gaining more and more relevance in today's changed world of work. The common law distinction between an 'independent contractor' and an 'employee' is determinant of an individual's rights: In order to decide what common law contractual rights a person is entitled to, whether they are expressed or implied, the courts will have to establish whether this person, in terms of the common law, is an 'employee' or an 'independent contractor'.

From Status to Contract (The Information or Post-Fordism Era)

Increased international competition, the interdependence of economic and financial markets, cheaper, faster, more varied and an easily accessed means of communication have created a new global economy.[93] This in turn has changed the world of work.[94] The need to remain competitive in the global economy has resulted in a quest for flexibility. The result is flatter management structures,[95] decentralization of collective bargaining,[96] the individualization of the employer employee relationship[97] and a general world wide decline in union membership and influence.[98]

The content and quality of jobs, the skills required, the content and duration of contracts, pay structures and so on have all changed in the information era.[99] Even though South Africa has been described as being simultaneously a first world and a 'third world' country, has also experienced these changes.[100] These changes in the

92 *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ*, 2407 (SCA).

93 Roger Blanpain, 'Work in the 21st Century', *ILJ* (1997): p. 191.

94 Mhone, 'Atypical Forms of Work and Employment and Their Policy Implications', *ILJ* (1998): p. 197; Olivier, 'Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed', *ILJ* (1998): p. 669; Blanpain, 'Work in the 21st Century', p. 189; Clive Thompson, 'The Changing Nature of Employment', *ILJ* (2003): p. 1793; and Jan Theron, 'Employment Is Not What It Used To Be', *ILJ* (2003): p. 1247.

95 Blanpain, 'Work in the 21st Century', p. 185.

96 Mark Anstey, 'National Bargaining in South Africa's Clothing Manufacturing Industry: Problems and Prospects of Multi-Employer Bargaining in an Industry Under Seige', *ILJ* (2004): p. 1829 and pp. 1831–1833.

97 See in general Deery and Mitchell, *Employment Relations: Individualisation and Union Exclusion* (1999).

98 Blanpain, 'Work in the 21st Century', p. 191.

99 See ILO 'The Scope of the Employment Relationship', Report V for International Labour Conference, ILO, Geneva (2003).

100 See Halton Cheadle, Clive Thompson, Peter Le Roux and Andre Van Niekerk, *Current Labour Law* (2004), p. 135.

labour market,[101] have resulted in the emergence of new production methods based on exibility beginning in the late 1970s. Specialisation as opposed to mass production is essential for the survival of companies.[102] Companies have had to restructure and decentralize in order to become more exible. The result is that organisations in the era of post-Fordism have the following characteristics:[103]

(i) smaller enterprises;
(ii) smaller teams of core workers;
(iii) more skilled workers and exible tools;
(iv) outsourcing; and
(v) atter hierarchical structures.

Specialisation results in the necessary exibility to respond to changing consumer demand. Focus and specialisation results in smaller enterprises, that in turn result in smaller teams. A smaller team in turn is conducive to multi-skilling. All these organisational changes are ill suited to hierarchical organisational structures with clear cut job descriptions of the 'Fordist factories'. Since the workers operate in smaller teams the control mechanisms in the form of hierarchical structures made up of managing director and board of directors at the top, descending to top management, middle management, then line management down to blue collar-workers at the bottom, are unsuitable.[104] This bureaucracy of military-like subordination where control was a major function of management cannot operate suitably in today's world of work, which is characterized by atter structures with horizontal lines of communication, self-regulation, and multi-skilling. The atter structures with workers working as equals being rewarded for the value they bring, is conducive to an ethos of teamwork and the individualisation of the employment relationship.

The quest for corporate exibility and hence international competitiveness, has resulted in a plethora of atypical employees who may exhibit some but not all of the characteristics of typical or standard employees. For example, many part time

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101 Creighton and Mitchell, 'The Contract of Employment in Australian Labour Law', p. 158 attribute these changes in labour markets on a world wide scale to factors including: '(i) the ascendancy of free-market ideologies in many parts of the world; (ii) the adoption of "human resource management" techniques in North America and elsewhere, with their emphasis upon the corporate objectives and the role of the individual in achieving those objectives rather than upon the collective interests of the workforce and resolution of disputes; (iii) the proliferation of small business, where the collectivist culture of traditional industrial relations often seems out of place and irrelevant; and (iv) an emerging perception that the "globalization" of the world economy means that developed countries cannot afford the "luxury" of relatively high levels of employment protection in the light of the competition they face from developing economies where workers enjoy much lesser levels of protection.'

102 Blanpain, 'Work in the 21st Century', p. 190 and Slabbert *et al*., *The Management of Employment Relations*, p. 88 where this phenomenon is referred to as exible specialisation'.

103 Blanpain 'Work in the 21st Century', p. 191.

104 Ibid., p. 193.

workers have only one employer, and work on the premises of the employer in terms of a contract of employment.[105] A temporary worker, on the other hand, also works in terms of a contract of employment, but that contract is not for an inde nite period. It is for a xed term. [106] Once that time period has elapsed the contract automatically comes to an end unless there is a legitimate expectation of renewal.

The quest for exibility has also created other forms of atypical employees who in terms of the classi cations of the era of Fordism would be independent contractors . For example, 'outsourcing' refers to a situation where an employer reverts to making use of an outside contractor to provide certain services that were until then provided by employees of the organisation.[107] The employer then 'outsources' services that are peripheral to the 'core' business of the employer to the 'sub-contractor'. The non-core functions include services such as catering, cleaning, security, maintenance and transport.[108] These contractors might not be all that 'independent' in that they are dependent on a single organisation for their livelihood. 'Homework' is a form of sub-contracting.[109] With homework the work is done in someone's home and it is usually women who do the work.[110] In short, with sub-contracting the contract of employment is replaced by a commercial contract.[111] In this way the employer or 'core-enterprise' is relieved of its duties imposed by labour legislation with regard to the workers that perform the non-core functions because they do not qualify as 'employees' of that enterprise. Another means of achieving this result is by making use of a temporary employment service (TES). In terms of these arrangements, workers are employed by an intermediary, and not by the core-enterprise.[112] In this situation the core-enterprise is referred to as the 'client' or 'user' and a 'triangular' employment relationship is created.[113] Outsourcing, sub-contracting, homework and the use of TES's are all forms of 'externalisation'.[114] Externalisation results in a situation where the employment relationship is not regulated. This is termed 'informalisation'.[115] The result is that many atypical employees are excluded from the ambit of legislation aimed at protecting the standard employee.

This huge shift in organizational structure has also resulted in trade unions becoming weaker, not only through loss of trade union members, but also through the dif culty of or ganising and maintaining members. Trade unions are still ghting for stable jobs that no longer exist. As the scale of enterprise diminishes so it

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105 Ibid.

106 Ibid.

107 Theron, 'Employment is Not What it Used to be', p. 52.

108 Halton Cheadle, Clive Thompson, Peter Le Roux and André Van Niekerk, *Current Labour Law* (2004), p. 145.

109 Theron, 'Employment is Not What it Used to be', p. 1253.

110 Ibid.

111 Ibid., p.1254.

112 Ibid., p.1255.

113 Ibid., p.1254.

114 Ibid.

115 Cheadle, Thompson, Le Roux and Van Niekerk, p. 139.

becomes more dif cult for trade unions to or ganise. The potential harm or damage that a trade union can wield in a huge organisation so typical of the era of Fordism, dissipates in smaller enterprises. The bargaining power of trade unions in times of high unemployment, combined with the new structure of organisations and the predominance of small organisations, has been severely eroded.

Smaller enterprises, atter structures in the workplace, decline in trade union presence and in uence, corporate quests for exibility and competitiveness all fuel the trend to individualisation and deregulation of the employment relationship. If the relationship is individualised, the contract of employment, ideally tailored to suit the needs of both parties by means of negotiations prior to entering into the contract, becomes a major source of terms and conditions of the employment relationship. The contract of employment can no longer be perceived as merely a 'port of entry'[116] which forms the basis upon which to attach rules and regulations derived from legislation or collective agreements. The contract of employment has of necessity become an important determinant of the terms and conditions of the employment relationship. This is not a particularly new phenomenon. As Supiot observes:[117]

> One of the features which for the past thirty years has been common to all developed countries is that in labour law the contract has been given precedence over law... This vague concept has made it possible to combine the two political variants of contractualism: the right-wing variant, which places the emphasis on the individual contract of employment, and the left-wing variant, which by contrast places the emphasis on the collective agreement.

Perceived Inadequacies of the Common Law of Contract

The law of contract has been perceived as an inadequate vehicle for the protection of legitimate employee interests for decades.[118] What follows is an identi cation of three of the most pressing objections to the ability of the common law of contract to regulate the employment relationship in a manner that is capable of doing justice between an employer and an employee.

1. Labour Law Should be Regulated by Public Law, not Private Law

Collins equated the exercise of common law and contractual rights to terminate contracts of employment with the 'exercise of a bureaucratic power akin to that enjoyed by the State'. Consequently, in his view, the common law of contract as part of private law is inappropriate and inadequate for the control of the abuse of employer power. The employment relationship accordingly, he argues, should rather

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116 Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment', 15 *ILJ* (1986): p. 1.

117 Supiot, 'The Dogmatic Foundations of the Market', p. 329.

118 See Richard Rideout, 'The Contract of Employment', *CLP*, 19 (1966): p. 111.

be governed by the principles of public law.[119] In the South African case of *Martin v Murray*,[120] Marais J disagreed with the views of Collins. He stated the following with regard to Collins' opinion that employer bureaucratic power over employees is akin to that of the State over employees:[121]

> With respect, I consider the comparison to be neither appropriate nor persuasive. A citizen is in the thrall of his or her state's bureaucracy whether or not he or she chooses to be so. The state does not require a particular individual's consent to exercise its powers over him or her and, absent the protection which administrative law sets out to afford, the citizen would have no protection at all against arbitrary abuse of power. An employee's position in the private sector is in no way comparable. He or she cannot be compelled to enter into an employment contract by any particular employer. Still less can he or she be compelled to bind himself or herself to work for the employer for any particular period. A prospective employee is free to bargain with a prospective employer and, if the employee is not satis ed with a situation in which both parties will be free to terminate the relationship merely by the giving of an agreed or reasonable period of notice, it is open to the employee to stipulate that a hearing should rst be given. Generalizations about inequalities of power are, in my view, no answer…

In this case, an agricultural employee who did not fall within the ambit of the Labour Relations Act[122] was forced to mount his claim for unfair dismissal in the law of contract. Marais J refused to come to the conclusion that it was an implied term of the contract of employment that an employee had the right to a fair hearing before being dismissed. In his judgement Marais J used nineteenth century rhetoric of legal formalism and the philosophy of freedom of contract to justify his conclusion.[123] This is ironic given the fact that in order for the common law contract to be an effective vehicle for the delivery of justice in the employment relationship, judges need to take a more realistic approach and come to terms with socio-economic reality. This formalistic approach of the classical theory of contract with its 'ritualistic incantations about the intentions of the parties and the sanctity of contract'[124] render the common law unable (or more accurately, unwilling) to achieve equity between employer and employee. Nevertheless, as was observed by Marais J , there are fundamental differences between the position of an employee *vis-à-vis* the employer's power of

119 Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment', p. 1 equates the exercise of common law and contractual rights to terminate contracts of employment with the 'exercise of a bureaucratic power akin to that enjoyed by the State'. Consequently, the common law of contract as part of private law, is inappropriate for the control of employer power which is better suited to administrative law.

120 (1995) 16, *ILJ*, 589 (C).

121 At 605–606.

122 28 of 1956.

123 At 606.

124 Creighton and Mitchell, 'The Contract of Employment in Australian Labour Law', p. 159.

control and that of a citizen *vis-à-vis* a state's power of control, which render Collins' analogy defective.

Secondly, as pointed out by Brassey,[125] the hierarchical bureaucracy and control that was typical of enterprises in the heyday of the industrial era (Fordism) does not represent the norm in all workplaces. Even in the era of Fordism, small businesses which lacked this hierarchical structure existed. As already alluded to, globalization has rendered workplaces that are organised in a hierarchical structure of control, with each person allocated a specific and well defined job description, defunct because they are inimical to the flexibility which is essential for enterprises to remain competitive. Therefore, Brassey's conclusion that 'there seems no reason in either principle or policy to make them comply with the exacting and sometimes quite arcane requirements of the administrative law'[126] is even more appropriate in today's world of work.

Collins also expressed the opinion that because the law of contract 'awards an uncertain contractual status to the employer's rule book, it encounters difficulties in explaining the routine application of collective agreements, and it presents obstacles to subsequent variations of duties of employment'.[127] As will be demonstrated in subsequent chapters, these reservations concerning the common law of contract are also unwarranted.

2. The Restrictive Application of the Common Law of Contract

The ability of the common law contract of employment to deliver fairness between employer and employee is limited and results in incoherence because the criteria for qualification as an employee for the purposes of the contract of employment and consequently applicable legislation result in many workers not qualifying as employees for its purposes. The result is that a multitude of atypical[128] employees are excluded from certain contractual or legislative rights that standard employees are entitled to. The usefulness of the common law of contract in terms of this point of view is mostly reduced to determining whether or not a person is an 'employee' and could consequently enjoy the benefits provided for in terms of labour legislation. Mark Freedland[129] suggests the concept of 'the personal employment contract' which is defined as comprising contracts for employment or work to be carried out normally in person and not in the conduct of an independent business

125 *Employment and Labour Law*, vol.1, C1: p. 21.

126 Ibid.

127 Ibid., p. 3.

128 The 'atypical employee' is what a standard employee is not. The standard or 'typical employee' is the employee created by the socio-economic forces of the industrial era. Such an employee is a male, full time, and is usually unskilled, covered by collective agreements, a trade union member, and at times goes on strike. 'Atypical employees' include part-time and temporary employees, sub-contractors, home-workers and so forth.

129 *The Personal Employment Contract* (Oxford, 2003), p. 28.

or professional practice'.[130] Ultimately this extended version of the common law contract of employment is nothing more than the distinction found in Roman law discussed above: Was the person self- employed and the object of his work a product or result? Or was he placing his productive capacity at the disposal of the employer? A decisive factor in deciding whether a person is an employee for the purposes of the common law contract of employment should simply be whether that person is economically dependent on the 'provider of work' in the sense that that work is the person's sole source of income.

Secondly, the common law of contract is still based on the outdated and outmoded classical theory of the law of contract of the late nineteenth and early twentieth centuries. This renders it inappropriate for the regulation of employment relationships of the industrial and post industrial eras. Consequently the general principles of contract and the enforcement of the contracts of employment as a way of securing adjudication of employment disputes are seldom used.[131]

3. The Refeudalisation of the Employment Relationship

This criticism of the contract of employment as an important source of the rights and duties of the parties is related to the previous reservation. The disintegration of the Fordist vertical hierarchical structures and the consequent individualisation of the employment relationship, has not resulted in genuine bargaining between employer and employee. Such individualisation has only served to enable employers to impose terms and conditions of employment on the employees.[132] Deakin's research ndings indicate a tendency to standardize certain terms and conditions since the individualised agreements closely followed the model of the statutory written statement required by legislation'. This fact as well as empirical evidence suggests that the employees are presented with the agreement as a *fait accompli* on a take it or leave it basis without any individual bargaining having taken place.[133] This dictation of terms and conditions and resultant subordination and control by the employer of the employee is not limited to employees in the traditional sense but is often also the fate of so called 'independent contractors' and all sorts of atypical employees in general. The reason for this is the emergence of what Supiot refers to as 'contracts of dependence'.[134] These contracts of dependence 'subject the activity of one person to

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130 This de nition is similar to de nitions in recent English legislation, the purpose of which is to extend the net of protective legislation to otherwise atypical employees who are economically dependent on the employer.

131 Freedland, *The Personal Employment Contract*, p. 2.

132 See Stephen Deery and Richard Mitchell, *Employment Relations – Individualisation and Union Exclusion* (1999) where this seems to be the case in all industrialised countries.

133 Simon Deakin, 'Organisational Change Labour Flexibility and the Contract of Employment', in Deery and Mitchell, *Employment Relations – Individualisation and Union Exclusion*, p. 136 and p. 143.

134 Supiot, 'The Dogmatic Foundations of the Market', p. 343.

the interests of another'.[135] Supiot goes on to explain that organizations that are not organized in the vertical hierarchical structures prevalent in the Fordist era, require individuals to think creatively and make decisions for which they are accountable. In this way standard employees and atypical employees alike are rendered dependent on the employer. Supiot explains:[136]

> Thus, self-employment and employee status are being included within a single new logic of the exercise of economic power. This is because for a network-based organisation neither simple obedience to instructions nor absolute independence is suf cient. It has to harness to its own objectives the capacity of individuals to take the initiative and to assume responsibility in the course of their work. New hybrids are ourishing which or ganise the voluntary allegiance of their members to another's power. These hybrids are already rmly established in economic life (distribution, subcontracting, agricultural integration etc.). They dominate the management culture both public and private. Marrying freedom and servitude, equality and hierarchy they are advancing on labour law and the law of liability from the rear and opening up the way for hitherto unknown forms of power. They are instituting new ways of controlling people which are evocative of feudal vassalage: a relationship of allegiance is formed which does not deprive the vassal of his status as a free man but obliges him to devote that freedom to serving the interests of his superior lord.

The disintegration of the post-war consensus of social citizenship in England and the United States of America has shifted of the risk of economic indigence of individuals from the State and the employer to individuals. The cutting back of social legislation for the protection of individuals against contingencies such as unemployment and old age have contributed to the desperation of individuals who are unable to support themselves. The vulnerability of the unskilled and the unemployed in this environment diminishes their meagre bargaining power even further in the labour market in times of rising unemployment to the extent that they are at the mercy of a prospective employer in the case of a standard employment relationship, or at the mercy of a 'provider of work' in the case of atypical employment. Hence the refeudalisation of society under the guise of a freely entered into contract.

Conclusion

The categorization of the employment relationship as either one of contract or one of status is an over simpli cation. Nevertheless, it is a useful categorization because it illustrates the adaptability of the common law of contract to changing socio-economic circumstances and political imperatives.

The employment relationship can never be governed solely by contract to the exclusion of legislation, or solely by legislation to the exclusion of the common law of contract. This brief overview of the historical development of the law of contract and

135 Ibid.
136 Ibid.

in particular the contract of employment has shown that the contract of employment has always been and remains more than the foundation of work relationships. This fact remains unaltered even if the relationship is heavily regulated either in terms of legislation or collective agreements.[137] In these circumstances the contract of employment remains the 'residual means of regulating the relationship'.[138] Whenever matters are not provided for in terms of legislation or collective agreements, judges have to evoke the general principles of contract in order to ll *lacunae* relating to the terms and conditions governing the relationship between the parties. The more extensive the applicable legislation, the more reduced the role of the common (judge-made, precedent based) law. Conversely, the less regulated the relationship is, the more important general principles of common law of contract become in giving content to the rights and duties of the respective parties.

The capacity of the contract of employment to adapt to changing economic circumstances and political imperatives is manifest.[139] Given the subversion of status and the diversity of different forms of employment that undermine the existing model, the common law of contract has a new role to play as a source of equity. If the classical theory of the law of contract continues to be applied to the employment relationship there is little hope of redressing the imbalance of power inherent in the employment relationship. Such an approach merely further entrenches employer domination. In the last few decades, however, there has been a judicial trend in common law jurisdictions to abandon this formalistic approach and adopt a more realistic approach that gives due regard to fairness.[140] As demonstrated in subsequent chapters, judges willing, there is much scope for the adaptation of the common law to contribute to the attainment of a measure of fairness in work relationships.

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137 Mark Freedland, 'The Role of the Contract of Employment in Modern Labour Law', in Lammy Betton (ed.), *The Employment Contract in Transforming Labour Relations* (The Hague, 1995), p. 18 observes: 'In fact, the law of the contract of employment retained some of its importance as a regulatory system in its own right even in the heyday of statutory regulation of the individual employment relationship; and to the extent that statutory regulation was rolled back, it gave way to the law of the contract of employment… .'

138 Brassey, *Employment and Labour Law*, vol. 1 C1: p. 22.

139 Ibid., C1: pp. 22–29.

140 Ibid., C1: p. 24.

Chapter 2

Good Faith as Underlying Principle of Contract

Introduction

As discussed in chapter one a contract has always formed the basis of the employment relationship in the sense of bringing it into existence. Nevertheless the relationship still exhibits a rather uneasy union between contract and status. This is the case in both typical or standard forms of employment, as well as atypical forms of employment. Judges can and do make law. The adaptation of the common law principles in response to changing socio-economic exigencies is crucial to the development of a framework which is conducive to a measure of fairness. The fact that the basis of the relationship is embedded in contractual form allows the courts latitude in implying terms into the contract if there are matters that have not expressly been agreed upon. In applying social policy in judicial decision-making judges are faced with two major obstacles: rstly , since the basis of any binding contract or term of a contract is consent, in order to imply terms that are not automatically applicable as legal incidents, there has to be consent; secondly, the of cial approach of the legal systems of common law jurisdictions such as England, Australia, South Africa and the United States of America, is the application of the *stare decisis* doctrine or the doctrine of precedent. In terms of this doctrine courts are bound by previous decisions. Decisions that were made a century ago, although no longer appropriate in radically changed social conditions, are still binding or at least in uential in contemporary courts. In addition, the uneasy union between contract and status is reinforced by the implication of terms as legal incidents of the contract of employment. An example of such an implied term is the employee's duty to obey the employer's commands.

The purpose of this chapter is twofold: rstly to demonstrate that in order to achieve a measure of justice in relationships based on contract judges either have to resort to a ction of lack of consent or a defect of will in order to set the contract aside, or a ction of consent in order to imply a term and secondly , that there is a discrepancy between how the doctrine of precedent is applied in practice and the of cial version of the doctrine. The underlying justi cation for these discrepancies and ctions is that the common law of contract is inescapably permeated by the concept of good faith. Given this fact, it is preferable for judges to directly apply a doctrine of good faith in implying terms into a contract in 'hard cases'.

Procedural Fairness (A Fiction of Lack of Consent)

The starting point in the law of contract is that in order for a contract to be valid there must be consent.[1] Where there is no consent there is no contract, that is, the contract is void.[2] In order to achieve procedural fairness there should be no irregularities in the manner in which consent was obtained at the time of entering into the contract.[3] Substantive fairness,[4] on the other hand, refers to the content of the contract as opposed to the means used to acquire consent.[5] Consent obtained through duress, undue in uence and misrepresentation (defects of will) refer to procedural unfairness. At common law, if consent is obtained in an improper manner, for example where the person was coerced by some threat of violence or other detriment (duress) to enter into the contract, or the person gained the wrong impression concerning certain material facts as a result of the other party's misrepresentation, there is said to be a defect of will. Such defect of will justi es the setting aside of the contract. In other words, such a contract is considered to be 'voidable'.[6] What follows is a very brief summary of the circumstances in which the common law allows a party to rescind from a contract on the basis that consent was improperly obtained. The summary is an account of the South African law of contract but virtually the same principles are applicable in the Australian,[7] English[8] and American laws of contract. The inference drawn from this summary of the common law concerning procedural fairness in the common law of contract is that the underlying policy consideration of these rules is the concept of good faith.

1 Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Kontraktereg Algemene Beginsels* (2003), p. 17.

2 Ibid.

3 Lubbe 'Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg', *Stell LR* (1990): pp. 1, 7, 18; Grové, 'Kontraktuele Gebondheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid', *THRHR,* 61 (1998): p. 692; Van der Merwe *et al*., *Contract General Principles*, p. 78.

4 The bases for the implication of terms to achieve *inter alia* substantive fairness is the topic for discussion in chapter three.

5 Grové, 'Kontraktuele Gebondenheid, die Vereistes van die Goie Trou, Redelikheid en Billikheid', *THRHR* (1998), 687 p. 694.

6 Van der Merwe and Van Huyssteen , Reinecke and Lubbe 'The Force of Agreements: Valid, Void, Voidable, Unenforceable?' *THRHR* 58 (1995): p. 565.

7 See *Cheshire & Fifoot's Law of Contract, 8th Australian Edition* (2002), chapters 11, 13 and 14.

8 Sir Guenter Treitel, *The Law of Contract*, eleventh edition, Thomson (2003), chapters 9 and 10; Beatson, *Anson's Law of Contract*, 28th ed. (Oxford, 2002), chapters 6 and 7.

Misrepresentation

Where a party enters into a contract on the basis of a misrepresentation (usually made during the course of negotiations) by the other party, and such misrepresentation results in a material error, there is no consent. Consequently the contract is void.[9]

Duress and Undue Influence

At common law, fraud and duress were accepted as grounds for setting aside a contract.[10] Towards the end of the nineteenth century a third specific ground, namely undue influence,[11] came to be accepted as justifying the setting aside of a contract.[12] The doctrines of duress and undue influence were introduced to invalidate contracts if one of the contracting parties coerced or forced the other party to enter into a contract he or she would otherwise not have entered into. In such cases consent is said to have been improperly obtained in the sense that the contract was not entered into voluntarily.[13] Duress can either be exercised directly by threatening violence, or indirectly by threatening some harm or prejudice, for example the threat of prosecution, or the threat of abandonment by a spouse,[14] or the threat of some kind of economic sanctions,[15] or civil proceedings.[16]

There is no definitive line of distinction between the different grounds for rescission. Duress and undue influence often overlap and certain conduct can fall within the scope of either. What they do have in common is that the means of procuring consent is considered improper in terms of the norms and expectations of society. The terms ‘undue influence’ and ‘duress’ are incapable of precise definition. As judges are faced with new circumstances different examples of means of acquiring consent that the law considers to be improper will come to light. The malleability of an imprecise term allows for judgments that reflect the convictions and needs of society. The content and distinguishing features of the means of procuring consent which are considered improper have and will continue to change over time. For

9 For a detailed discussion on the elements of misrepresentation, the different kinds of misrepresentations, the remedies available to the aggrieved party, in South African law, see Van der Merwe, *Contract General Principles*, pp. 92–103; for English law, see Robert Upex, *Davies on Contract*, 9th edition (2003), pp. 107–122; for Australian law, see J. W. Carter and D. J. Harland, *Contract in Australia* (1992), chapter 11; N. C. Sneddon and M. P. Ellingaus, *Cheshire & Fifoot's Law of Contract* (2002), pp. 467–493.

10 Van der Merwe *et al.*, *Contract General Principles*, p. 95.

11 Undue influence has its origins in English law — Van der Merwe *et al.*, *Contract General Principles*, p. 92.

12 *Preller v Jordaan* 1956 (1) SA 483 (A).

13 Linda Hawthorne, ‘The Principle of Equality in the Law of Contract’, *THRHR* (1995): p. 169.

14 *Savvides v Savvides* 1986 (2) SA 325 (T).

15 *Malilang and others v MV Houda Pearl* 1986 (2) SA 714 (AD).

16 *Slater v Haskins* 1914 TPD 264.

example, in Blackstone's time a contract could only be rescinded on the basis of duress if there was actual physical violence and not merely a threat of physical violence. Blackstone wrote:[17] 'A fear of battery … is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed … because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life or limb. Obviously, such a statement cannot reflect the law of today as this would be anathema to the general sense of justice of modern society.

Improperly Obtained Consent as a General Ground for Invalidation

Another ground, namely improperly obtained consent in a general sense, has also been accepted by the South African courts. In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk*[18] the agent of the other contracting party was bribed into consenting on behalf of his principal. Such consent was said to have been improperly obtained. This ground for setting aside contracts has not been accepted without criticism.[19] Some of the arguments levelled against the inclusion of this ground for the setting aside of contracts are as follows:[20] One strand of criticism is the fact that the notion of improperly obtained consent generally is not part of South African law from a historical perspective. Secondly, duress, undue influence and misrepresentation are sufficient to prevent such improperly obtained consent. Finally, such a notion is incapable of precise and accurate definition resulting in uncertainty of the law. Nevertheless as demonstrated below, improperly obtained consent as a general basis for rescission has been utilized in some South African decisions.

In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*[21] an eighty five year old woman who was almost deaf and blind, ceded her shares to a bank as security for her son's debts. The majority found the contract to be void on the basis that the old lady lacked the capacity to contract. Olivier JA, in his minority judgement held that the contract should be rescinded. He did not resort to the traditional bases for rescission, namely misrepresentation, undue influence and duress to come to his conclusion. Instead, he concluded that the principles of good faith which are based on the legal convictions of the community have a very important role to play in the law of contract[22] and invoked the concept of good faith to justify his conclusion.

Olivier JA is not the first South African judge to emphasize the applicability of the principles of good faith *in contrahendo*. In *Meskin NO v Anglo-American Corporation of SA Ltd & Another*[23] Jansen J put it this way: 'It is now accepted that

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17 As quoted in John Calamari and Joseph Perillo, *The Law of Contracts*, 2nd ed. (1977), p. 261.

18 1986 (1) SA 819 (A).

19 Van der Merwe *et al.*, *Contract General Principles*, pp. 95–98.

20 Ibid.

21 1997 (4) SA 302 (A).

22 At 321J-322A.

23 1968 (4) SA 793 (W) at 320 G-H.

all contracts are bona de (some are even said to be *uberrimae fidei*). This involves good faith (bona de) as a criterion in interpreting a contract and in evaluating the conduct of the parties both in respect of performance and its antecedent negotiation.' The applicability of the concept of good faith in the negotiation process prior to reaching consensus was reiterated by Stegmann J in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd*.[24]

In *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*[25] the South African court of appeal rescinded a contract on the basis of another form of improperly obtained consent. This time it was 'commercial bribery'. This case illustrates 'the fact that the grounds for rescission are not static and may be extended (or limited) in accordance with the needs and convictions of society'.[26] In the employment context it is possible that improperly obtained consent as a general basis for rescission could be extended to situations where as a result of an imbalance of bargaining power the employer extracts an unfair bargain from the employee.

The relationship between employer and employee has often been characterized as one that manifests an inherent imbalance of power between employer and employee.[27] In terms of the classical theory of contract differences in bargaining power do not affect the enforceability of a contract and a judge is not at liberty to disrupt the sanctity of contract even in the face of an unfair bargain. This view was reiterated in the South African case of *Martin v Murray*[28] with reference to a contract of employment. Marais J stated:

> Truisms about the innate dynamic capacity of the common law to accommodate changing societal mores and policy in an evolutionary manner, provide no justi cation for the propounding of an aggressively intrusive philosophy of judicial interventionism in the common law relating to employment…the unequal power relationship is not a legal argument; it is a social comment and not particularly accurate at that. As long as both employer and employee enjoy the same right in law to bring the relationship to an end by the giving of notice, there can be no talk of inequality of power *in law*. If the disparity in power argument rests upon what is said to socio-economic reality, as it obviously does, then one must be sure that it is indeed an abiding reality, and that the employee is, and will continue to be, so consistently in the weaker and more vulnerable position, that the common law should deny the employer the right to do, what the employee has the right to do, namely, to terminate the relationship by simply giving appropriate notice of termination, without the need for any prior consultation with his or her counterpart. To my mind, there is little room in a modern economy for the selective adoption of doctrinaire socio-economic positions of that kind and the manipulation of the common law to accommodate them.

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24 1987 (2) SA 149.

25 1999 (2) SA 719.

26 Van der Merwe *et al.*, *Contract General Principles*, p. 116.

27 The classical reference to this point of view is that of Otto Kahn-Freund: Davies and Friedland, *Kahn-Freund's Labour and the Law*, 3rd ed., p. 18.

28 (1995) 16, *ILJ*, 589 (C).

In a more recent decision,[29] however, the South African Supreme Court of Appeal acknowledged the fact that an imbalance of power between the contracting parties is a factor that should be taken into account in the determination as to whether a contract or a term thereof is contrary to public policy.[30] This approach blurs the distinction between procedural and substantive fairness. The objective, however, namely an outcome which is not contrary to the norms of society, remains the same.

English law has no general doctrine of good faith applicable to the law of contract.[31] However the law of contract is characterized by the underlying principle that contracts should be fair. This truism is aptly expressed in the following *dictum* of Bingham LJ:[32]

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing … English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.

One of the consequences of the principle of 'fair play' is the doctrine of inequality of bargaining power. This doctrine is especially relevant in the context of a contract of employment given the inherent imbalance of power between employer and employee. Thirty years ago in the English case of *Lloyds Bank Ltd v Bundy*[33] Lord Denning formulated a general ground for rescission based on the unequal bargaining power between the parties. In this case an elderly farmer and his son had been customers of the same bank for a number of years. In 1966 the father secured his son's overdraft with the same bank and charged his farm to the bank to secure the sum. Over the next three years or so the overdraft increased from time to time and the father after taking legal advice secured the debt. In December 1969 the bank manager informed the father that his son's overdraft facility would be terminated unless he executed in favour of the bank a further guarantee for £11 000 and a further charge of £3 500.The bank manager did not advise the farmer to take separate advice and the elderly man signed the necessary documents. The Court of

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29 *Afrox Healthcare Bpk v Strydom* 2002 (4) SA (SCA) 125, 130.

30 Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) maintained that the good faith principle forms an element of the concept of public policy.

31 Roger Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', in Roger Brownsword, Norma Hird and Geraint Powell (eds), *Good Faith in Contract: Concept and Context* (Ashgate, Dartmouth, 1998), p. 15.

32 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) 1 QB 433 at 439.

33 [1975] QB 326 at 339.

Appeal held that in the light of the special relationship of con dence between the bank and the elderly man, the contract should be set aside on the basis of undue in uence. Lord Denning preferred to set the contract aside on the more general basis of inequality of bargaining positions. In terms of Lord Denning's judgement a party can resile from a contract if his bargaining power was 'grievously impaired by reason of his own needs and desires'.

However, a general ground for the rescission of contracts based on the inequality of bargaining power between the parties has not been accepted by the English courts. Such a general ground is regarded by many as attracting an unacceptable measure of uncertainty.[34] The use by American courts of the inequality of bargaining power in order to come to the assistance of the weaker party has a long history.[35] Inequality of bargaining power is linked to the principle of uncoscionability[36] and many jurisdictions observe that inequality of bargaining power alone is suf cient for a determination of procedural unconscionability'.[37] However other courts have considered inequality of bargaining power as one of the factors contributing to unconscionablity.[38] Inequality of bargaining power has been established on the following bases: The unavailability of reasonable alternatives for the weaker party; the lack of opportunity to negotiate and; the status[39] of the contracting parties.[40] Hypothetically, it is not dif cult to conceive of an employee having all these disadvantages simultaneously.

The landmark Australian decision concerning procedural fairness is *Commercial Bank of Australia Ltd v Amadio*.[41] In this case Mr and Mrs Amadio signed a mortgage over their immovable property in order to secure a debt their son's company had incurred. The majority of the High Court held that the contract

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34 J. Beatson, *Anson's Law of Contract*, 28th ed. (Oxford, 2002), p. 299 and Daniel Barnhizer, 'Inequality of Bargaining Power', *University of Colorado Law Review*, 76 (2005): p. 139.

35 Barnhizer, 'Inequality of Bargaining Power', *University of Colorado Law Review*, 76 (2005): p. 139, traces this development back to the 1880s: '… bargaining power disparities were rst noticed and given rhetorical and legal import in the labour disputes of the 1880s and 1890s. But beginning in the 1930s, inequality of bargaining power changed from a rhetorical tool of organized labor ... to a legal doctrine applied to contract in general. In the 1940s and 1950s, bargaining power became entrenched in contract law, particularly after the adoption of the Uniform Commercial Code … which expressly authorized the courts to asses the parties' bargaining power under the rubric of unconscionability … .'

36 Ibid.

37 Ibid.

38 Ibid.

39 The courts have found the following status related characteristics to be relevant for the establishment of inequality of bargaining power: gender, poverty, race, employment and consumer status. Barnhizer, 'Inequality of Bargaining Power', p. 216.

40 For a comprehensive discussion and criticism of the application of these bases for the determination of inequality of bargaining power see Barnhizer, 'Inequality of Bargaining Power', pp. 197–223.

41 (1983) 151 CLR 459.

should be set aside on the basis of unconscionability.[42] Unconscionability is difficult to define. However, it seems to require some form of morally reprehensible conduct.[43] Undue influence and unconscionability may at times overlap. However, a convenient way to distinguish between the two is to say: 'Unconscionability steps in when the relationship cannot be said to be one of undue influence, yet one party has taken unconscientious advantage of the other. Attention is not paid to the history of the relationship so much as to the particular transaction.'[44] After stating that the doctrine of unconscionability is not capable of precise definition, Mason J described it as follows: '…whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created … .'[45] Mason J went on to say that it is not in every situation where one party is at a disadvantage that relief on the basis of unconscionability will be granted. He continued:[46]

> I qualify the word disadvantage by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasise that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

The factors that the court considered relevant in arriving at the conclusion that Mr and Mrs Amadio were under a special disability include the following: they had a poor command of written English and consequently a limited understanding of the contents and consequences of the contract; they were both in their seventies and; had not received any legal or other advice concerning the contract. Although this judgment provides some possibility of the extension of the unconscionability principle in order to achieve procedural fairness in circumstances where there is an imbalance of power between the parties there are still some obstacles to a finding of unconscionability. Firstly there is the Court's insistence on something more than inequality of bargaining power in order to grant relief to a victim of an unfair bargain. Usually the courts have required, in addition to unequal bargaining power, some

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42 The requirements of fair dealing that give content to the doctrine of unconscionability 'differ little from the standards of good faith found in other legal systems'. Roger Brownsword, Norma Hird and Geraint Howells, 'Good Faith in Contract: Concept and Context', in Roger Brownsword, Norma Hird and Geraint Powell (eds), *Good Faith in Contract: Concept and Context*, (Ashgate, Dartmouth, 1998), p. 9.

43 *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 at 22.

44 N. C. Sneddon and M. P. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Australian Edition (2002), p. 697; see also French J's Judgment in *ACCC v Berbatis Holdings (Pty) Ltd* [2000] FCA 1376 at 124.

45 At 462.

46 Ibid.

form of ‘unconscionable conduct’ on the part of the dominant party.[47] Secondly, as in the above quote, the courts have required that the party must have been rendered incapable of exercising free will in order for a contract to be vitiated. It seems that the Australian courts are prepared to tolerate a high degree of ‘pressure’ before a contractant s conduct is considered suf cient to set the contract aside on the basis of procedural unfairness. Despite this there is scope for the extension of the doctrine of unconscionability in order to provide employees with some form of redress in cases of unequal bargaining power.[48] Harland is optimistic in this regard and notes an increased willingness on the part of the Australian judiciary to set contracts aside on the basis of unconscionability since the decision in *Amadio*.[49] Harland also points out that in the case of *Geelong Building Society (in liq) v Thomas*[50] the bases of a nding of special disadvantage are not limited to personal circumstances such as illiteracy but can also be based on ‘matters arising … from the context and circumstances surrounding the transaction’.[51] The basis for a nding of special disadvantage can conceivably be the nature of the relationship between an employer and an employee and even between a provider of work and an atypical employee. In *Louth v Diprose*[52] it was held that the relationship between the donor and donee gave rise to the ‘special disadvantage. In this case the donor was infatuated with the donee. It is common, especially in times of high rates of unemployment, and given the retreat of the welfare state that individuals are desperate for jobs in order to secure a livelihood.[53] They become economically dependent on employers. Consequently they suffer from a ‘special disadvantage’ in bargaining power when it comes to negotiating the terms of the employment contract with the employer or provider of work.

Although the emphasis in the *Amadio* case was on procedural fairness, unconscionability may obtain as a result of the unfair contents of the contract,[54]

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47 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 459, *Webb v Australian Agricultural Machinery(Pty)Ltd* (1990) 6 WAR 305 312–13.

48 Breen Creighton and Richard Mitchell ‘The Contract of Employment in Australian Labour Law’, in Lammy Betton (ed.), *The Employment Contract in Transforming Labour Relations* (The Hague, 1995), p. 144.

49 David Harland, ‘Unconscionable and Unfair Contracts: An Australian Perspective’, in Roger Brownsword, Norma Hird and Geraint Powell (eds), *Good Faith in Contract: Concept and Context* (Ashgate, Dartmouth, 1998), p. 248.

50 (1996) V Conv R 54-545 at 66, p. 477.

51 Harland, ‘Unconscionable and Unfair Contracts: An Australian Perspective’, p. 249.

52 (1992) 175 CLR 621.

53 See Simon Deakin, ‘The Many Futures of the Contract of Employment’, in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, 2002), pp. 93–194.

54 N C Sneddon and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract*, 8th Australian Edition, (2002) p.702 refer to ‘substantive unconscionability’. The authors refer to *George T Collings (Aust) Pty Ltd V H F Stevenson (Aust) Pty Ltd* (1991) ATPR 41-104 where it was held that a standard form agency agreement was unconscionable due to the unreasonable content of the agreement which was concealed in the ne print.

or the enforcement of the contract,[55] that is substantive fairness. As is the case in English law, it is generally accepted that Australian law does not impose a general duty of good faith on contracting parties.[56] Harland however, is optimistic with regards to the adoption of an approach in Australian law that embraces a general duty of good faith and fair dealing in the law of contract.[57] This view is justi ed on the basis not only of the willingness of the Australian judiciary to extend the applicability of the principle of unconscionability,[58] but also the introduction or legislation for the control of unconscionability.[59] Since this legislation is not applicable to the employment relationship discussion thereof is beyond the scope of this book.

Unlike the Australian and English law of contract which recognize no general requirement of good faith in contracts, the law of contract in the United States of America does exactly that. Section 205 of the 'Restatement of Contracts Second'[60] of 1979 provides as follows: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' By the 1980s, given the considerable in uence of this Restatement on the courts within the American states, the individual state courts 'had explicitly adopted or acknowledged a general obligation of good faith applicable to contractual relations…'.[61] However, as is clear from the wording of the Restatement, there is no obligation on contractants to act according to the dictates of good faith at the negotiation stage. The Restatement therefore is only of relevance to substantive fairness. An aggrieved party wishing to set a contract aside on the basis of procedural unfairness will therefore have to resort to the common law remedies of misrepresentation, undue in uence and duress. As

55 J. W. Carter and C. J. Harland, *Contract Law in Australia*, 2nd ed. (1992), par. 1501.

56 Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective', p. 262.

57 Ibid.

58 Ibid., pp. 248–250.

59 Discussion of this legislation goes beyond the scope of this book. For details concerning this legislation see Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective', pp. 250–262.

60 A 'Restatement' is a type of law that is peculiar to the United States of America. Robert Summers, 'The Conceptualisation of Good Faith in American Contract Law: A General Account', in Reinhard Zimmermann and Simon Walker (eds), *Good Faith in European Contract Law* (Cambridge, 2000), pp. 119–120 explains: 'The American concept of a "Restatement" is a very special type of "law". It is not statute law adopted by the state legislature or by Congress. Nor is it common law made by the highest court in any given state. It is not even an attempt to restate the actual case law of every state, state by state. Instead a Restatement constitutes an attempt by the American Law Institute, a private organization of scholars, judges and practitioners to formulate with some precision the leading rules and principles in major fields of American law, "in the aggregate", so to speak, as if the United States consisted of only one, rather that fifty state jurisdictions.'

61 Ibid., p. 120.

far as duress is concerned, the long standing general rule is that any threat which undermines the free will of the other party constitutes duress.[62]

The South African Constitution[63] provides for the right to equality.[64] The result of a constitutionally protected right to equality is an increased role played by the concepts of good faith[65] and consequently, fairness and justice in the law of contract.[66] The exact effect of this provision on procedural fairness during the course of negotiations is a matter that to my knowledge has not yet been considered by the courts. Unlike the American Restatement which states speci cally that it is applicable to the performance and enforcement of contracts, the South African Constitutional right to equality is stated in general terms. There is therefore scope for the in uence of this constitutional right to reach beyond substantive fairness aspects of contracts and also exert an in uence on the procedural fairness of contracts. Secondly, section 39(2) of the South African Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. This provision, given the right to equality provided for in terms of the Bill of rights may well provide the impetus for inequality of bargaining power being considered a separate ground for rescission.

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62 *Kaplan v Kaplan*, 25 Ill.2d 181,185,182 N.E.2d 706,709 (1962); *Austin Instrument, Inc. v Loral Ccorp*., 29N. Y.2d 124, 130, 324 N.Y.S. 22, 25, 272 N. E. 2d 533, 535 (1971).

63 Act 108 of 1996.

64 S 9.

65 Values such as equity, fairness and public policy were held to make up the fabric of the concept of good faith in *Tuckers Land Development Corp v Hovis*1980 1 SA 645 (A) at 651E, 652A–D.

66 Linda Hawthorne, 'The Principle of Equality in the Law of Contract', *THRHR* (1995): p. 166, after having discussed the concept of equality and the classical theory of contract, demonstrates that the classical theory of contract, which still forms the basis of our law, is incapable of ensuring equality. This is so because [… classical theory does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract]. After demonstrating that 'mechanisms to guarantee equality' (175) from part of South African law, the submission is made that the constitutional right to equality will have a signi cant impact on the law of contract by increasing the role played by the concepts of fairness and good faith. Neels, 'Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid', *TSAR* (1999): p. 684 opines that the constitutional provisions can have a positive effect on the enforcement of reasonableness and fairness in South African law of contract. Van der Merwe and Van Huyssteen, 'The Force of Agreements: Valid, Void, Voidable, Unenforceable?', *THRHR* (1995): p. 549 at p. 550 express themselves as follows: 'In a system of law within a constitutional state the process of balancing interests must take place within the framework of the constitution and with regard for the principles and values of the broader society which are re ected in the constitution. In the sphere of contract these principles and values may receive effect mainly in so far as they are subsumed in rules and principles of private law, and particularly contract law, such as the concepts of "public policy and public interest" and "reasonableness and good faith".'

Thirdly, the South African Constitution provides for the right to fair labour practices.[67] In *Denel (Pty) Ltd v Vorster*[68] Nugent JA, after noting the contents of section 39(2), stated the following with reference to the constitutional right to fair labour practices: 'If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not deprive a fair contract of its legal effect.' In *Fedlife Assurance Ltd v Wolfaardt*[69] the constitutional right to fair labour practices was read into the contract of employment as providing for an implied right not to be unfairly dismissed. Whether or not procedural unfairness in entering into contracts of employment will be considered an unfair labour practice has not yet been considered by the South African courts.

Conclusion

It is often dif cult to dif ferentiate between undue in uence and duress. One way of differentiating between the two is to say that duress constitutes coercion whereas undue in uence constitutes unfair persuasion. [70] As is the case in the other jurisdictions discussed a misrepresentation or non disclosure of material facts that induces a party to enter into a contract results in a lack of consent and consequently there is no contract.

The common law systems of the jurisdictions discussed all provide for similar forms of procedural fairness. The extent of 'improper conduct' resulting in defects of will that the courts are willing to tolerate may differ from country to country and from judge to judge and from time to time. What all these systems have in common is an underlying classical law theory that the individual's freedom to contract is of paramount importance.[71] Certainty of the law is also a major policy objective.[72] In such a system rules as apposed to standards[73] such as the concept of good faith, form the major component of the system of law. The fact remains, however, that most

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67 S 23(1) of the Constitution provides that everyone has the right to fair labour practices.

68 2004, *ILJ*, 659 (SCA).

69 [2001] 12 *BLLR* 1301 (A).

70 John Calamari and Joseph Perillo, *The Law of Contracts*, 2nd ed. (1977), p. 274.

71 *Bank of Lisbon and South Africa Ltd v De Ornelas & another* 1988 (3) SA580 (A).

72 It will be argued in the section hereunder entitled 'Bona Fides as Underlying Concept' that an application of the concept of good faith is in fact more conducive to certainty of the law.

73 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' *Harvard Law Review*, 89 (1976): p. 1685 made the distinction between rules and standards on the following basis: Rules are applicable to facts in a determinable manner by reference to objective and observable facts. Standards, for example the concept of good faith, require the judge to draw

rules are put in place in order to pursue some kind of policy objective or standard.[74] The value or policy consideration applicable to the rules discussed above is either the sanctity of an individual's free will or alternatively the legitimacy of certain conduct. Alfred Cockrell explains:[75]

> The defences of misrepresentation, duress and undue in uence may be usefully recast in the language of bona des. It is sometimes suggested that the reason why these defences render contracts voidable is because they induce 'defects in the will' (albeit that these defects fall short of nullifying consent). But this explanation looks in the wrong place, for the better view is that the defect resides not in the promisor's will but rather in the improper conduct of the promisee. For one thing the misplaced emphasis on the promisor's will seem to be 'agent neutral' and quite unable to account for the fact that the law requires that the misrepresentation or undue in uence derive from the promisee and not from a third party. These three defences are all concerned with the legitimacy of the promisee's conduct, and one way of linking them is to say that they all amount to instances of bad faith conduct from which the law will not allow the promisee to bene t.[76]

In the nal analysis, the major consideration in instances of rescission is not the integrity of the will of the aggrieved contractant, but the propriety or impropriety of the conduct which causes the defect of will. Determining impropriety requires an evaluation of the conduct by means of objective standards which serve to determine illegality, for example good faith and reasonableness.

Substantive Fairness and Good Faith

Precedent and Implied Terms

In the United States of America, as seen above, there is, with reference to the performance and enforcement of contracts, a direct and legally enforceable duty on contractants to act in good faith. In South Africa it is generally accepted that there is a requirement of good faith 'underlying and informing the law of contract'.[77]

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on norms of behaviour and reasonableness which themselves are concepts which are not static and are incapable of precise de nition.

74 With reference to procedural fairness in English law Kelda Groves, 'The Doctrine of Good Faith in Four Legal Systems', *Const. L. J* (1999) 15(4) 265 at p. 273 concludes: 'When considering the means by which the courts have sought to mitigate the rigours of the principle of *pacta sunt servanda* in the pre-contractual period, the courts have had recourse to a number of different types of reasoning … the underlying motivation or explanation for the reasoning is the same: the wish to prevent parties acting unfairly in quasi-contractual situations … .'

75 'Substance and Form in the South African Law of Contract', *SALJ* (1992): p. 56.

76 A similar view is expressed by Van der Merwe and Van Huyssteen, *Contract General Principles*, p. 566.

77 Dale Hutchison, 'Good Faith in the South African Law of Contract', in Roger Brownsword, Norma Hird and Geraint Powell (eds), *Good Faith in Contract: Concept and*

However, the assertion that all contracts in South Africa are *bona fidei*[78] is a very broad and vague assertion. It is up to the judges, when faced with a particular set of facts to fathom the precise implications of this assertion and give content to the concept by applying it to the facts at hand. This is often done by implying terms into a contract. Since there is no direct legally imposed duty on contractants to act in good faith in the laws of England[79] and Australia, the courts have at times resorted to either an implication of terms into contracts, or the contortion of common law rules in order to achieve more equitable results.[80] This fact was explicitly recognised by Bingham LJ:[81]

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises an overriding principle that in making and carrying out contracts, parties should act in good faith … English law has, characteristically, committed itself to no such overriding principle, but has developed piecemeal solutions in response to demonstrated problems of unfairness.

There are many examples of such piecemeal solutions which take the form of implied terms. In the English case of *Timeload v British Telecommunications plc*[82] British Telecommunications attempted to terminate a contract for provision of a telephone line in terms of the termination clause which provided for termination at one month's notice. British Telecommunications was precluded from terminating the contract on the basis of an implied term that termination could not be effected without reason or cause. On the other hand the duty on contractants to conduct themselves in a fair manner, was applied directly without resort to the implication of terms in the judgment of Winn LJ in *Panchaud Frères S.A v Establissements General Grain Co*.[83] The purchasers of grain were prevented from relying on the fact that the grain was not delivered timeously in order to cancel the contract, even though they were entitled to do so in terms of the agreement. The reason for this is that they had initially attempted to reject the contract on the basis that the amount delivered did not correspond with the amount speci ed in the bill of lading and

Context (Ashgate, Dartmouth, 1998), p. 213.

78 See for example, *Mutual and Federal Insurance Co Ltd v Oudsthoorn Municipality* (1985) 1 SA 419 (A) at 433.

79 There are legislative controls in place in terms of the Unfair Contract Terms Act of 1977. These are mostly for the bene t or protection of consumers. The directive on Unfair Terms in Consumer Contracts 93/13/EEC was implemented in England by regulations. The Directive is only applicable to the control of unfair terms in standard form contracts and not contracts that have been individually negotiated. Discussion of these legislative controls is beyond the scope of this book.

80 The implication of these terms with reference to contracts of employment is discussed in chapter three.

81 *Interfoto Picture Library Limited v Stilletto Visual Programmes Limited* [1989] 1 QB 433 at 439.

82 [1995] E.M.L.R.459.

83 [1970] 1 Loyd's Rep 53.

the objection of late delivery was only resorted to at a much later stage. According to Winn LJ this would amount to unfair conduct.[84] What is interesting is that fair conduct was demanded from the party in attempting to resile from the contract. It has nothing to with the substantive content of the conduct or the procedural fairness in concluding the contract. Nevertheless, it is a judicial acknowledgement of the duty of contractants to act fairly towards each other.

The implementation of social policy considerations in judgments requires a certain amount of creativity on the part of judges. In short, judges make law. This is generally referred to as 'judicial activism'.[85]Any discussion on the in uence of decisions in the moulding of the law of contract must begin with an acknowledgment of the existence of judicial activism as apposed to rigid legal formalism[86] which is embedded in the classical law of contract. The doctrine of precedent or *stare decisis* is part of the law of South Africa,[87] England, Australia and the United States of America. This doctrine might *prima facie* suggest that the common law is static.[88] This is, however, not the case.[89] The common law has changed markedly in the last century or so. As is demonstrated below, the duty of good faith, as well as the concepts of reasonableness, unconscionability and so forth have on many occasions been interpreted and moulded by the courts in common law jurisdictions

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84 He stated at 9: 'What one has here is something perhaps in our law not yet wholly developed as a separate doctrine – which is more in the nature of a requirement of fair conduct – a criterion of what is fair conduct between the parties.'

85 Judicial activism refers to a system where fair outcomes should be reached in decisions. Such justice is achieved by the application of standards to the facts at hand. Each case is decided with reference to public policy considerations and what is best for the community (see Cockrell, 'Substance and Form in the South African Law of Contract', p. 55).

86 'Legal formalism' implies that legal rules are applied in a mechanical way and certainty demands that judicial discretion is eliminated. A judges' function is merely to apply these rules in a non-creative manner. The fact that such a strict application of rules might at times result in injustices is according to the adherents of legal formalism a small price to be paid for certainty of the law.

87 See *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA) par. 26.

88 See Cockrell, 'Substance and Form in the South African Law of Contract', p. 55 where he states: 'Reading the standard South African textbooks on the law of contract, one would be hard pressed to believe that any contentious policy issues existed in this area of the law. In these texts contract law is routinely presented as a seamless web of rules that possesses a determinative rationality of its own, such that answers to any disputes will be thrown up by the inexorable logic that is internal to the system itself. All legal problems are solved by the dextrous manipulation of a few ground rules that are assumed to be beyond controversy; the issues regarding the policy justi cation for those rules are usually brushed aside as "non-legal" or short-circuited by a question-begging appeal to "freedom of contract". In the result we are presented with the curious edi ce of a law of contract that seems to be built around a valuational vacuum – the hard edges of legal policy have been smoothed away by the sandpaper of legal doctrine.'

89 Ibid.

so as to reflect the mores and surrounding socio-economic circumstances of the day.

Many of the *dicta* in support of a formalistic approach are nothing more than a facade to disguise the application of social policy behind the apparent strict application of legal precedent. An example of such a dictum is that of Kotze JA in *Weinerlein v Goch Buildings Ltd*[90] that reads: 'Our common law, based to a great extent on the civil law contains many an equitable principle, but equity, as distinct from and opposed to the law does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of law.'

Despite making use of the doctrine of good faith as the basis for the identification and acceptance of a fictitious fulfilment of a condition in discharge of duties in the facts before the court, Kotze JA nevertheless found it necessary to deny any creative role on the part of judges. As Olivier JA points out in his minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,[91] the problem with this dictum is that it implies a static, closed system, as if the principle of good faith was established in the past and is not capable of different interpretations with reference to new legal norms. 'As pointed out by Olivier JA,[92] a *dictum* such as this, that denies any creativity on the part of judges and perceives the task of a judge as merely to apply the law as opposed to creating law, is out of touch with reality.[93] A preference for standards as opposed to rules has been referred to as 'pragmatism',[94] 'judicial activism' and 'judicial realism'.[95] This approach acknowledges the role of social policy in judicial decision-making. More emphasis is placed on ensuring an equitable, fair and reasonable result than on ensuring certainty of the law. Consequently social policy considerations must play a role in determining the outcome reached by the judge. Since these standards or policy considerations might at times be somewhat vague and abstract, their application could result in a certain amount of uncertainty

90 1925 (A) 282 at 285.

91 1997 (4) SA 302, at 319J – 320A.

92 Ibid.

93 In his minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* at 320B Olivier JA states that such an approach to a judges' role is contrary to the spirit of South African law and cannot cater for the needs of society. See also Grové, 'Kontraktuele Gebondenheid, Die Vereistes van die Goeie Trou, Redelikheid en Billikheid', *THRHR*, 61(1998): 686 p. 696 where he concludes that 'reasonableness' will play a greater role in the law of contract in the future. In the words of Lord Reid as quoted in Stuart Kollmorgen and Julian Riekert, 'Social Policy and Judicial Decision Making in Australian Employment Law' in Richard Mitchell, *Redefining Labour Law* (1995), p. 17: 'There was a time when it was thought almost indecent to suggest judges made law – they only declare it. Those with a taste for fairy tales seem to have though that in some Aladdin's cave there is hidden the common law in all its splendour .... But we do not believe in fairy tales anymore.'

94 Ibid.

95 Kollmorgen and Riekert, 'Social Policy and Judicial Decision Making in Australian Employment Law', p. 172.

in the law. Proponents of such an approach[96] suggest that a little uncertainty in the law is a small price to pay for a fairer, more equitable and just system.[97] The judge has a creative role to play – all facts and circumstances of a case are ascertained on a case-by-case basis and the most appropriate (in the sense of fair) standards are applied.

The values of legal formalism based on the classical law of contract are premised on the belief that contractants are on an equal footing when they negotiate. The role of the courts therefore is to enforce the terms of the contract as voluntarily agreed to by them. It is not for the courts to look into the fairness or otherwise of the bargain. This theory overlooks the inherent inequality that may exist between individuals that arise as a result of wealth, knowledge, positions of power and in uence and so forth. Nevertheless, it appears *prima facie*, that the South African, the English and Australian law of contract still adhere to this formalistic approach.[98] However, Cockrell's opinion is that despite the views expressed in the 'standard South African text books on the law of contract', the South African law of contract is 'shot through with normative commitments and the allegedly 'value neutral veneer' which covers the text book tradition is in truth only obtained by a sub privileging of certain values over others'.[99] The same observation was made with reference to the English law of contract by Friedman more than fty years ago: The dif culty of bridging the gap between the formal and substantive aspects of both freedom and equality is evident in the pathetic contrast between the law of contract as it is taught in most textbooks, and modern contract as it functions in society.'[100] With reference to Australia writers have bemoaned 'the paucity of express judicial acknowledgement of the role of social policy in decision-making'.[101]

Although in applying rules instead of standards judges may deny any creative role on their part and may profess to simply be applying the long established rules of the law of contract, the applied rule is often extended in order to cater for changing exigencies of society. Thus judges make law even when applying rules as opposed to standards. For example, exactly what amounts to undue in uence cannot be de ned with precision. Each case has to be considered with regard to its speci c circumstances. Conduct that was considered legitimate a hundred years

96 See for example Neels, 'Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg', *TSAR* (1999): p. 684.

97 In the next section herein I argue that the application of standards results in more certainty of the law than the application of rules.

98 Hawthorne, 'The Principle of Equality in the Law of Contract', p. 163; De Wet and Yeates *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978); Christie *The Law of Contract in South Africa* (1981); Kerr *The Principles of the Law of Contract* (1989); Joubert *General Principles of the Law of Contract* (1987).

99 Cockrell, 'Substance and Form in the South African Law of Contract', p. 40.

100 W. Friedmann, *Law and Social Change in Contemporary Britain* (1951), pp. 93–94.

101 Kollmorgen and Riekert, 'Social Policy and Judicial Decision Making in Australian Employment Law', p. 168.

ago, constitutes undue influence today. As seen in the Australian law the concept of unconscionability has been extended in the last two to three decades to include conduct that in the not too distant past would not have been considered illegitimate.

There are, however, many more *dicta* that support the approach of judicial activism. As early as 1909 Innes J stated: 'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.'[102] If the purpose of the law is the achievement of justice,[103] social policy considerations upon which the rules and doctrines of common law are based must be applied to the particular facts of each case. Even though it might prove difficult at times for a court to choose between conflicting values and interests this remains part of a judge's function.[104] The judges, by refusing to acknowledge the implementation of judicial activism in their judgments are forced to use the device of a legal fiction. Couching their judgments in the language of legal formalism in order to disguise any creative role on their part, they are forced to stretch, bend and twist the rules of common law so that the facts before the judge can fit into the rule the judge relies on. In this way judges can achieve a fair result. The disadvantages of these judgments are that it is very difficult to rely on precedent that has manipulated common law rules in order to generate a fair result in a specific set of facts and circumstances. The result is incoherence in the law. In fact, these

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102 *Blower v Van Noorden* 1909 TS 890 at 905.

103 See Van der Merwe and Van Huyssteen, 'The Force of Agreements: Valid, Void, Voidable, Unenforceable', p. 549 where it is categorically stated: 'Justice and fairness are universally accepted to be the purpose – or at least a vital part of the purpose – of any system of law. Essential as the commitment to such an ideal may be, the legitimacy of a legal system depends finally on the extent to which it is experienced as just and fair in its particular applications.'

104 Botha J in *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) acknowledged such judges function and stated: 'Counsel for the plaintiff, echoing misgivings expressed in some of the cases referred to earlier, submitted that it must be a matter of extreme difficulty for a Judge to decide whether the enforcement of a right would amount to unconscionable conduct or great inequity. With great respect to others who have expressed such misgivings, I do not share them. A Judge must often, in the exercise of his judicial function, move about in areas of relative uncertainty, where he is called upon to form moral judgments without the assistance of precise guidelines by which to arrive at a conclusion. Examples in the field of contracts are the determination of whether a contract is contrary to public policy or contra bonos mores (see e.g. *Couzyn v Laforce* 1955 (2) SA 289 (T)). The application of broad considerations of fairness and justice is almost an everyday occurrence in a court of law, for instance, in relation to awards of costs. I do not see why a judge should shirk from performing this kind of task, however difficult it may seem to be. Of course, in connection with the *exceptio doli*, difficult questions may and do often arise as to a Court's freedom to depart from the rules and principles of the substantive law, and I certainly do not wish to minimise that kind of difficulty in this field. However, in this particular case with which I am dealing, I do not perceive any difficulty of that kind.

decisions run the risk of later being overturned for being incorrect in law.[105] A direct application of the doctrine of good faith would save judges from resorting to unconvincing contortions of the law.

Good Faith as Underlying Concept

The purpose of this section is to consider some of the reservations and objections to a formal adoption of a duty to act in good faith on the part of contractants.

Economic Efficiency

There are those that are averse to the idea that there should be a duty on contractants during the course of negotiations to conduct themselves according to the dictates of the principle of good faith. In the English case of *Walford v Miles*[106] for example, Lord Ackner said:[107]

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations … A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

This point of view is derived from a belief that all contractants will always engage in adversarial forms of bargaining where each party is out to extract as much as possible from the other party, at that party's expense and for their personal gain. This type of negotiator has complete disregard for the continuation of a relationship with the other party. If there is no applicable underlying concept of good faith, a judge is obliged to resort to implying terms into the contract in order to achieve justice. This is done by speculation concerning what the parties would have agreed to had they considered the eventuality of a speci c outcome during the course of negotiations. Given the premise that all negotiations are by de nition adversarial it is dif cult to imply terms that are co-operative in nature and that serve the interests of justice. Such an implied term would in most cases have to be a term that would render the deal less unfair. Therefore it would have to be bene cial to the party who has suffered a raw deal . In all probability the party who least bene ted from the deal would be the party with the least bargaining power. The lack of bargaining power vis-à-vis the other party at the time of entering into the contract, renders it unlikely that even if the parties had considered the eventuality, a term favouring the

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105 As pointed out by Kollmorgen and Riekert, 'Social Policy and Judicial Decision Making in Australian Employment Law', p. 167 this is exactly what happened in the Australian case of *Gregory v Phillip Morris Limited* (1988) 80 ALR 455.

106 [1992] AC 128; See also the Australian case of *Austotel Property Ltd v Franklins Selfserve Property Ltd* (1989) 16 NSWLR 582 where similar concerns were expressed.

107 At 138.

interests of the party with an inferior bargaining position, would have been agreed to by the stronger party. Judges faced with this dilemma are forced to make use of legal ctions and contortions in order to achieve results that are not repugnant to society.[108] Even though in South Africa, where unlike in England and Australia, it is generally conceded that all contracts are *bonae fidei*, it is unclear what the precise content of good faith is, and what practical application this truism has in the negotiation and implementation of contractual terms.[109] Given this uncertainty judges may prefer to apply the rules that they are familiar with by means of a legal ction rather than to give content to the vague and nebulous principle of good faith. This is what happened in *Richardson v Sylvester*.[110] In order to enable the plaintiff to recover expenses incurred it was held that an invitation to tender must be for the primary purpose of selecting a contractor. Since this was not the case the invitation to tender was held to amount to a false representation. Another example is the South African case of *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman*[111] for example, the majority of the South African Appeal Court preferred to come to the conclusion that one of the parties, an eighty ve year old woman, lacked capacity to contract, rather than to apply the principle of good faith to the facts before them. In the English case of *Lloyds Bank v Bundy*, like the *Eerste Nasionale Bank* case, an elderly person (this time a man), mortgaged his property for his son's debts. Sir Eric Sachs, as was the case in the majority opinion of the South African decision,[112] preferred to apply the rules of contract law rather than appeal to the standard of good faith. He held that the contract should be set aside on the basis that the bank had exercised undue in uence on the old man. [113]

It might be the case that the adversarial style of negotiation that Lord Ackner spoke of is the norm with regard to some kinds of transactions, for example, a one-off purchase.[114] However, in reality the parties to transactions often have long term business relationships, or it would be in their best interests to continue the relationship after performance of the particular agreement or transaction. In such a situation it would be bene cial for all concerned to engage in a more co-operative form of negotiation which would bene t both parties. A contract which is

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108 See for instance the Australian case of *Gregory v Phillip Morris Limited* (1988) 80 ALR 455.

109 Dale Hutchison, 'Good Faith in the South African Law of Contract', in Roger Brownsword, Norma Hird and Geraint Howell (eds), *Good Faith in Contract; Concept and Context* (Ashgate, Dartmouth, 1998), p. 213.

110 [1873] L.R. 9 Q.B. 34.

111 1997 (4) SA 302 (A).

112 Olivier JA was the dissenting judge in this case. He held that the old lady did in fact have capacity to contract, but that on the basis of the implementation of the doctrine of good faith the contract was not enforceable.

113 Lord Denning, as seen above, preferred to achieve the same outcome on the basis of inequality of bargaining power.

114 It is argued below that even in highly competitive contractual contexts, the application of 'contextual good faith' may be appropriate.

manifestly unfair is likely to destroy the likelihood of repeat business transactions with the party who has suffered the consequences of an unfair deal. Co-operative negotiating exposes contractants the possibility of exploitation by the other party. The application of a good faith doctrine in contract law would provide security against this type of opportunism. Contractants would not have to negotiate in the defensive manner so typical of adversarial bargaining. With the knowledge that the legal system will provide protection from exploitative conduct, parties will feel more at ease in exposing themselves to the risks associated with a more open, honest and co-operative style of bargaining. The likelihood of a so called 'win-win' agreement is thereby rendered possible.[115]

Legal Certainty, the Parties' Autonomy and the Sanctity of Contract

Nevertheless it must be conceded that the adversarial form of negotiating is still adopted by some contractants in certain circumstances. In these situations the point of view that the adoption of a doctrine of good faith would be inappropriate for all the reasons articulated by Lord Ackner might hold water. The application of the applicable rules as opposed to standards such as good faith in cases such as these, so the argument goes, will conserve the parties' autonomy, the sanctity of contract and legal certainty which is essential for commercial activity. Wightman however, convincingly turns this argument on its head.[116] Each of the above objections have been rendered toothless by the application of what Wightman terms 'contextual good faith'. Wightman differentiates between 'core good faith, 'contextual good faith' and 'normative good faith'.[117] Core good faith refers to 'the minimum standards of good faith in the formation of contract' and are 'at the heart of all developed systems of contract law'.[118] An example of the core standard brand of good faith is that a contract can be set aside on the basis of duress. As Wightman points out, this type of good faith is not contentious and requires no further discussion. Contextual good faith '… is concerned with making parties live up to the actual standards of the contracting community of which they are members . Wightman identi es three requirements that are necessary for the development of the 'shared understandings' of a contractual community.[119] Firstly the parties should contract enter into contracts on a regular basis so that tacit understandings have time to develop. Secondly, there should not

115 See Simon Deakin and Frank Wilkinson, 'Contracts, Co-operation and Trust; The Role of the Institutional Framework', in David Campbell and Peter Vincent Jones (eds), *Contract and Economic Organisation* (Aldershot, 1996) and; Simon Deakin and Jonathan Michie (eds), *Contracts, Co-operation and Competition* (Oxford, 1977) for an exposition of the view that trust and co-operation are conducive to economic ef ciency .

116 John Wightman, 'Good Faith and Pluralism in the Law of Contract', in Roger Brownsword, Norma Hird and Geraint Howell (eds), *Good Faith in Contract; Concept and Context* (Ashgate, Dartmouth, 1998), pp. 41–52.

117 Ibid., pp. 41–46.

118 Ibid., p. 42.

119 Ibid., pp. 43–44.

be imbalances of power between the parties to the extent that one of the parties is able to dominate the other to the point of dictating the terms of the contracts and the relationship. Finally, at least some members of each of the contracting parties must have experience not only in entering into and performing the terms of the contract, but also in how to handle speci c problems.

Contextual good faith, according to Wightman should apply in 'commercial contracts'.[120] Roger Brownsend, in the same book,[121] describes this type of good faith in terms of protecting the 'reasonable expectations' of contractors. He quotes Steyn[122] to explain:

> I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions. And where in speci c contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties.

Finally, Wightman describes normative good faith as 'a canon of contractual justice which is imposed on the parties'. In his view, normative justice should be applicable to what he terms 'personal contracts' as opposed to 'commercial contracts'.

Wightman demonstrates that 'legal certainty does not always result in commercial calculability'.[123] He demonstrates that contractants may be unaware of applicable laws and consequently conduct their affairs without regard for those laws. It is only when a dispute arises and lawyers become involved that the parties are made aware of the legal rules. The lawyers then alert the parties to the fact that their common understanding of their respective rights does not coincide with the applicable laws

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120 'Commercial contracts' are distinguished from 'non-commercial contracts' or 'personal contracts'. Non commercial contracts include 'all contracts where at least one party is not contracting for exchange purposes'. The contract of employment is considered to be in the class of non-commercial contracts. Ibid., p. 41.

121 Roger Brownsword, Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', in Roger Brownsword, Norma Hird and Geraint Howell (eds), *Good Faith in Contract; Concept and Context* (Ashgate, 1998), p. 30 describes this type of good faith in terms of protecting the 'reasonable expectations' of contractors. He quotes Johan Steyn to explain: 'I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties our contract law can satisfactorily be left to develop on accordance with its own pragmatic traditions. And where in speci c contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.'

122 Johan Steyn, Contract Law: Ful lling the Reasonable Expectations of Honest Men', *LQR*, 113 (1997) p. 433.

123 Wightman, 'Good Faith and Pluralism in the Law of Contract', p. 49.

and that their respective rights are not what they presumed them to be. In other words, their expectations do not accord with the legal rules. He concludes: '… in the nal analysis, calculability will depend on the courts decisions tting with commercial expectations, not those of lawyers.[124] Secondly, Wightman demonstrates that, on occasion, it may be commercial practice or accepted custom not to stick to the letter of the agreement in certain circumstances.[125] In such circumstances an insistence on *pacta sunt servanda* would constitute a deviation from standard practice within a particular trade or industry. The result would run contrary to the expectations of the parties and consequently the certainty required for economic ef ciency would be undermined. Therefore Wightman concludes:[126] '… as long as good faith is based on contextual meaning, it does not disrupt the ultimate consensual basis of commercial contract law, and nor does it risk introducing inappropriate non-commercial conceptions of contractual justice.'[127] In conclusion, a con rmation of the parties' common expectations, with due regard to the context within which the contract was entered into does not disrupt the autonomy of the parties and the sanctity of contract. In fact it upholds the autonomy of the parties and the sanctity of contract. It also does not give the judge unfettered discretion to impose what he or she thinks is reasonable. In addition, in con rming the expectation of the parties, certainty and commercial predictability is ensured.

Conversely, the application of rules which are contrary to the expectations and consequently the intentions of the contracting parties, the free will or autonomy of the parties is undermined. But what would be the situation where there is no trade practice or usage from which to draw the common expectations of the parties? In such a case the judge would have the following choice: the strict application of the existing rule despite possible inequity; a laborious distortion, bending and moulding of the rule to t the facts at hand; the application of Wightman s normative justice or Brownsword's 'good faith regime'[128] or whatever result the judge deems reasonable or fair in the circumstances. The last option simply means that the application of the concept of good faith would amount to the unfettered discretion of the judge charged with deciding the matter. This could easily undermine the autonomy of the parties, the sanctity of contract as well as certainty of the law and consequently commercial predictability. The 'good faith regime' does not allow judges to indulge in unfettered

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124 Ibid.

125 Ibid., p. 51.

126 Ibid.

127 Brownsword , 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' pp. 27–28 reaches a similar conclusion with reference to what he terms 'reasonable expectation'. Brownsword however does not differentiate between 'commercial' and 'non-commercial' contracts. He concludes: 'As a result English law would recover the ability to give effect to the spirit of the deal in a way that prioritised the parties' own expectations.'

128 Brownsword , 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', p. 34 describes this brand of good faith as '… standards of fair dealing that are dictated by a critical morality of co-operation'.

application of their point of view.[129] It '… tries to make the market in the sense of prescribing the co-operative ground rules'.[130] The application of standards that re ect a spirit of co-operation would create an environment conducive to co-operative as opposed to adversarial negotiating styles. As explained previously, co-operative business transactions have proven to be more conducive to economic ef ciency . This is probably the case with regard to the relationship between employer and employee. There are contractual contexts however, which are highly competitive, such as the stock exchange, where traditionally there is a very limited expectation of co-operation. In these contexts opportunism is expected and condoned. Therefore by application of Wightman's 'contextual good faith', or in Brownsword's words, the 'expectations' of the parties, no harm would be done to the autonomy of the parties.[131] Secondly, in such competitive contractual contexts the parties could simply exclude a good faith regime by agreement.[132] In the case of the relationship between employer and employee however, there is an expectation of good faith and co-operation between the parties.[133]

The application of the standard of good faith may at times result in a measure of uncertainty of the law. This is especially likely when no common expectation or trade usage is discernable from the contractual context, and therefore judges are not applying 'contextual good faith'. However, even in instances that a judge applies a rule as opposed to a standard, the need may arise for creativity on the part of the judge. In applying the rules of undue in uence, for example, judges have to decide whether the conduct in the novel facts before them quali es as illegitimate pressure or not. As seen above, the type or forms of undue in uence that were considered acceptable a hundred years ago are now considered illegitimate. The fact that rules have to be applied to different contexts and circumstances makes at least some creativity on the part of judges inevitable.

Conclusion

Terms may be implied in a contract on the basis that they would have been included had the parties thought of it at the time of entering into the contract. In other words,

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129 Brownsword describes this type of application of good faith as follows: 'Here, judges react impressionistically to the merits of a situation and dispose of cases accordingly – all in the name of good faith.' Ibid.

130 Ibid.

131 Wightman, 'Good Faith and Pluralism in the Law of Contract', p. 44 explains: 'The contextual version of good faith does not con ict with freedom of contract because it can be presented as no more than realising the tacit understanding of the parties at the time of entering the contract. Similarly, contextual good faith respects the autonomy of the parties, and so it is possible for them, by agreement, to depart from the usual practice.'

132 Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', p. 36.

133 Martin Brassey, *Employment and Labour Law* (Cape Town, 2000), vol.1, C1: p. 26.

implied terms re ect the tacit consent of the parties. Judges can therefore make use of a ction of consent in order to import a term into a contract. If the concept of good faith underlies the law of contract, it seems natural that the starting point should be that the parties intended to act in good faith, unless they had speci cally agreed otherwise.[134] Whatever is considered by the parties to be conduct in good faith therefore is what can be implied from the intentions of the respective parties. If the judge is faced with a situation where there is no contextual and shared understanding of what the outcome should be, the judge may have to apply what Wightman calls 'normative good faith', or Brownsword's 'good faith regime'.[135] This option faces the risk of criticism for engendering arbitrariness and uncertainty of the law. Nevertheless, this option is preferable to the contortion of applicable rules by judges in hard cases in order to t the facts before them and thereby reach a results judges consider to be fair.

The achievement of justice by the application of a good faith principle will be more consistent and will be more likely to achieve coherence in the law. In Australia, although there is no general good faith principle, the unconscionability doctrine can be utilized to imply terms into contracts that re ect the common good faith intentions of the parties. In South Africa, since all contracts are generally accepted to be in good faith, content can be given to the principle with reference to the implied intention of the parties. Secondly, the provisions of the South African Constitution, as discussed above, provide the judiciary with the necessary licence to import terms into the contract which re ect the spirit and purport of the Constitution. This can only add impetus to the direct importation of terms on the basis of an underlying concept of good faith. In the United States of America, as seen, section 205 of the Restatement (2d) of Contracts provides for an obligation of good faith in the performance and enforcement of contracts. Although such obligation is speci cally applicable to the substantive fairness and not to procedural fairness, the scope for the implication of terms into contracts directly on the basis of good faith is clearly sanctioned. The Comment to the Restatement provides guidance to the judiciary so that the importation of implied terms on the basis of good faith need not be an exercise of the judge's unfettered discretion:

> The phrase 'good faith' is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justi ed expectations of the other party; it excludes a variety of types of conduct characterised as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.

The reference to the common purpose and expectations of the parties limits the discretion of the judge in the same manner that Brownsword and Wightman suggest

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134 This exclusion clause may render the contract void for being contrary to public policy.

135 As discussed above Brownsword's 'good faith regime' does not allow judges unfettered discretion.

should be the case in English law. Despite the absence of an of cially sanctioned underlying doctrine of good faith in English law, an implied duty of mutual trust and con dence in all contracts of employment has recently been accepted. [136] This implied duty will be discussed in a subsequent chapter. For the moment I mention it merely to indicate that the duty provides the judiciary with the necessary licence to imply terms into employment contracts directly on the basis of a concept of good faith.

The systems discussed exhibit differences in their approaches to the concept of good faith. For example Australian law, with its doctrine of unconscionability emphasises the procedural aspects of good faith. The law of the United States of America, on the other hand, only refers to the application of good faith in relation to the substantive fairness of contracts. Nevertheless, there is in conclusion no reason in any of the jurisdictions discussed for judges to have to resort to contortions of rules in order to achieve fairness in contracts of employment.

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136 *Malik v BCCI* [1997] IRLR 462.

Chapter 3

The Bases for the Implication of Terms

1. Introduction

In chapter one it was established that the employment relationship is created in terms of a contract. In chapter two it was demonstrated that there is scope for the acceptance and application of good faith as underlying concept of the law of contract in all the jurisdictions under discussion. In implying terms into contracts judges should therefore be guided by this general concept of good faith. There are various recognised bases for the importation of terms into contracts. These different bases will be distinguished from each other and the requirements for each of them will be discussed. The purpose is to establish how judges can, with reference to the concept of good faith, imply terms into employment contracts in order to help redress the imbalance of power between the contractants and to ensure a measure of fairness in the employment relationship. The application of the general principles of contract to achieve fairness in contracts in general and not necessarily with speci c reference to contracts of employment, will be discussed in this chapter. The ultimate objective, however, is to provide the reader with this general knowledge so that the application of these general principles of the law of contract can be applied to the contract of employment in order to protect employees from employer exploitation. The practical application of these principles by the courts within the employment context will be discussed in chapter ve.

The categorisation of the bases for the implication of terms is not a settled matter.[1] According to Corbett JA '…the expression "implied term" is an ambiguous one in that it is often used without discrimination to denote two, possibly three, distinct concepts'.[2] Corbett JA then identi ed the following meanings of the term: Firstly , it refers to terms that are automatically implied by law to the contract irrespective of the intention of the parties.[3] Secondly, an implied term also refers to unexpressed provisions derived from the common intention of the parties. This includes both the actual or imputed intention of the parties. It is not clear what Corbett JA was referring to when ascribing the third meaning to the term. One possibility is that he

1 See for example the often quoted dictum of Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239 quoted below.

2 In *Alfred McAlpine v TPA* 1974 (3) SA 506 (A) at 531 D.

3 As Corbett JA points out the intention of the parties is not totally excluded in that the parties are at liberty to expressly contract out terms that are implied *ex lege*.

intended terms implied on the basis of actual intention to form a separate category from those implied from an imputed intention.

In *Breen v Williams*[4] Gaudron J and McHugh J distinguished between a term implied from facts and a term implied by law. Evans J in *Australian National Hotels Pty Ltd v Jager*[5] made the same distinction. According to Evans J a term implied from facts is often referred to as implying a term to give business ef cacy to a contract . [6] This is what I categorise as a term implied from the intention of the parties, albeit an imputed or ctitious intention. In *Liverpool City Council v Irwin*,[7] after pointing out that the different categorisations of implied terms are in reality different shades of a continuous spectrum, Lord Wilberforce divided implied terms into the following categories:

> There being nothing in the language [of the offer] itself to lead to this conclusion, it can, as I see it, be reached by one or other of three possible routes. First, it may be said that the transaction is one of such a familiar nature or that the surrounding circumstances (including previous negotiations) are such that no reasonable offeree … could construe the offer made in any other way…Secondly, it may be said that in order to make the transaction work at all it is necessary to imply … a term … Thirdly…it may be said that the transaction in which the parties were engaged is one in which the law requires a term to be implied.[8]

Quoting from an unreported judgment of Young J a categorisation of four different types of implied terms was approved in the Australian case of *Brambles Holdings Limited v Bathurst City Council*:[9] The quote read:

(i) Implications contained in the express words of the contract: see *Marcus Clarke (Vic) Ltd v Brown* (1928) 40 CLR 540 at 553-4.
(ii) Implications from the "nature of the contract itself" as expressed in the words of the contract: see *Liverpool City Council v Irwin* [1977] AC 239.
(iii) Implications from usage (for example, mercantile contracts).
(iv) Implications from considerations of business ef cacy: see *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

In this chapter 'implied terms' will be categorised into two groups: Terms that are implied *ex lege* in the sense that they are consistently taken as a matter of course to form part of the terms of all contracts of a particular type because of the nature

4 (1996) 186 CLR 71 at 102–103.

5 (2000) 9 Tas R par. 10.

6 Ibid.

7 [1977] AC 239 at 253–254.

8 The same distinction was drawn by Viscount Simonds in *Lister v Romford Ice Cold Storage Co Ltd* [1957] AC 555.

9 [2001] NSWCA 61 at par. 28.

of the contract and; terms that are implied on the basis of the common intention of the parties. This second category can be further characterised into two parts: Terms imported into the contract on the basis of the actual intention of the parties and; terms imported into the contract on the basis not of the actual intention of the parties, but on the imputed intention of the parties.[10] The fact that these categorizations, like many other categorizations may at times overlap, with the result that certain sets of facts may t into either of the categorisations, does not detract from the general convenience of the proposed categorization.[11]

2. Ex Lege Implication of Terms

Terms implied in law can be de ned as those terms that are automatically taken to form part of a contract of a particular type. These terms are referred to as *naturalia* or legal incidents. The implication of terms on the basis that they qualify as legal incidents has nothing to do with the intention of the parties.[12] These terms arise automatically from the 'nature, type or class of contract in question'.[13] In fact if the parties want to exclude these terms they have to do so expressly.[14] A term will not be implied in law as being necessary for a class of contract if the parties expressly excluded it[15] or if it is inconsistent with the terms of the particular contract.[16]

The content of legal incidents or *naturalia* is settled. This however, does not mean that the list of terms that are implied *ex lege* into contracts of a particular type is restricted to an exhaustive and circumscribed set of terms. A litigant can attempt to persuade the court that a new term should be implied into a particular type of contract. If the term is accepted by the courts, over time it will evolve into a legal incident that is automatically implied into all contracts that fall within that category

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10 Clearly in this instance, the result is attained by operation of a ction created by the judge.

11 As pointed out by Evans J in *Australian National Hotels Pty Ltd v Jager* (2000) 9 Tas R par. 11: 'Due to the variety of views which have been expressed about the appropriate categorisation of implied terms, any attempt to categorise them may be illusory.'

12 Lord Reid in *Luxor v Cooper* [1941] AC 108 at 137 and *Sterling Engineering v Patchett* [1955] AC 534 at 547 stated: 'The phrase "implied term" can be used to denote a term inherent in the nature of the contract which the law will imply in every case unless the parties agree to vary or exclude it.' Treitel, *Law of Contract*, 4th ed. (1975), pp. 128–132.

13 *Breen v Williams* (1996) 186 CLR 71 at 103.

14 This would not be possible in cases where the contracting out of the terms would be considered contrary to public policy. Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Contract: General Principles* (2003), p. 261, n. 213.

15 In *Exxonmobil Sales and Supply Corporation v Texaco Limited* [2004] 1 All E.R. (Comm) 435 the entire agreement clause which read: 'This instrument contains the entire agreement of the parties…and there is no other promise, representation, warranty, **usage** or course of dealing' (my emphasis), was held to have indicated a clear intention of the parties that terms based on usage or custom were not to be implied into the agreement.

16 *Byrne v Australian Airlines* (1995) 185 CLR 410 at 450.

or type of contract. In order to persuade the court to accept a new implied term as a legal incident, litigants usually put forward public policy arguments. Terms that are implied on the basis of the intention of the parties, actual or imputed, on the other hand, are not settled. They are implied on an ad hoc basis with reference to the parties intentions and other signi cant surrounding circumstances.

Examples of *naturalia* in the contract of employment are the employee's duty to obey the employer's reasonable and lawful commands, the employee's duty to take reasonable care of the employer's property, the employee's duty to account to the employer for any secret commission or remuneration earned while engaged in performing duties in terms of the contract of employment, the employer's duty to provide a safe working environment and, the employer's duty not to require the employee to engage in unlawful conduct.[17] Unlike the civil law jurisdictions the common law systems such as the English law did not inherit legal incidents that are automatically applicable to certain special contracts.[18] These legal incidents[19] were implied on the basis of the parties' common consent so as not to violate the sanctity of contract inherent in the classical law of contract.[20] This development of the English law took place in the eighteenth and nineteenth centuries so that the English law could be in line with the mercantile law of continental Europe.[21] Once so implied they gained the status of legal rules.[22] Drawing on English law[23] McHugh J and Gummow J reach the same conclusion with reference to Australian law:[24]

> There is force in the suggestion that what now would be classi ed as terms implied by law in particular classes of case had their origin as implications based on the intention of the parties, but thereafter became so much part of the common understanding as to be imported into all transactions of the particular description.

South Africa differs in this respect given its Roman law heritage. The legal incidents of many contracts known to South African law originate in Roman law.[25] The

17 Martin Brassey, *Employment and Labour Law* (Cape Town, 2000), vol. 1, sections D and E.

18 The Roman law differentiated the legal regulation of the different types of contract according to the object of that particular type of contract. These contracts were referred to as 'special contracts' or 'nominate contracts'.

19 These are duties imposed *ex lege* on parties to particular types of contracts.

20 See Furmston (1986), p. 15.

21 Holdsworth, in Goodhart and Hanbury, eds, *Essays in Law and History* (1946), p. 189.

22 As will be discussed below, one of the sources of terms that are implied *ex lege* is precedent.

23 *Halsbury's Laws of England*, 4th ed. (1974) vol. 9 par. 354, n. 27.

24 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449–450.

25 Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Contract: General Principles*, (2003), p. 260.

Roman law special contract of *locatio conductio operis* (contract of employment) for example, with its attendant legal consequences, is a case in point.[26]

Sources of Legal Incidents

Legislation

Like all sources of legal rules, legislation should be underpinned by considerations of policy.[27] In contrast, common law is said to be rooted in principle. Principles remain constant while policy considerations, by their nature, must change in order to keep up with the changing exigencies of the times. This differentiation has led some to the conclusion that legislation in common law systems is irrelevant to the development of the common law.[28] To allow legislation to in uence the common law is perceived by some as an undue violation of parliamentary sovereignty. This is the case where the policy of the legislation in uences a decision pertaining to facts where the particular statute is not applicable.[29] Despite these and other reservations[30] concerning the in uence of legislation on the common law , the view that legislation should and does in uence the common law is well supported. [31] In *Stewart v Reavell's Garage*[32] and *G&H Myers & Co v Brent Cross Services Co*[33] the courts implied into contracts for work done, warranties similar to those provided for in terms of legislation applicable to the sale of goods. In *Johnson v Unisys Ltd*[34] Lord Hoffman commented on the effect of legislation on the common law contract of employment in England:

> Over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important

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26 See *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

27 In the Australian case of *Breen v Williams* (1996) 186 CLR 71 at par 105 the court stated: 'Some terms are implied by statutes in contracts of a particular class, for example money lending and home building contracts Such terms give effect to social and economic policies which the legislature thinks are necessary to protect or promote the rights of one party to that class of contract.'

28 See Trevor Allan, *Law Liberty and Justice* (1993), pp. 79–81 who advocates this argument with reference to public law.

29 See J Beatson, 'The Role of Statute in the Development of Common Law Doctrine', *Law Quarterly Review* (2001): 247, p. 250 where the views of other writers in this regard are discussed.

30 See Allan, *Law Liberty and Justice*, pp. 82, 87 and Easterbrook, 'Statutes Domain', *Chicago Law Review*, 50 U (1983): p. 533.

31 See for example, Beatson, 'The Role of Statute in the Development of Common Law Doctrine'.

32 [1952] 2 QB 545.

33 [1934] 1 KB 46.

34 [2001] 2 WLR. 1076 at 1091.

> things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights upon employees. European law has made a substantial contribution. And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.[35]

Another instance of judicial acknowledgement of the in uence of legislation in the development of the common law in the context of the employment relationship is the case of *Malik v Bank of Credit and Commerce International S.A.*[36] In this case, the plaintiff employees were dismissed on the grounds of redundancy following the employer's insolvency. The employees claimed that the bank had breached the implied term of trust and con dence by running its business in a corrupt manner . Consequently, they argued, their long association with the bank had seriously decreased their job prospects due to the stigma, which now attached to the bank and its ex-employees.

The argument that, since the dishonest conduct was aimed at the bank's clients and not the employees, it did not constitute a breach of the implied term of trust and con dence, was rejected. Lord Steyn concluded that in all employment contracts there exists an implied term of trust and con dence. Lord Steyn described the implied term as follows:[37] 'The employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of con dence and trust between employer and employee. He concluded that the bank's dishonest conduct was likely to undermine the trust and con dence required in an employment relationship. He expressed the view that the fact that such losses are recoverable in terms of section 123 of the Employment Rights Act of 1996 reinforced the conclusion that the employees were entitled to recover damages for nancial loss in respect of damage to reputation as a result of a breach of the implied term of mutual trust and con dence. He stated: in the search for the correct common law principle one is not compelled to ignore the analogical force of the statutory dispensation'.[38]

In the South African case of *Key Delta v Mariner*[39] the employee was awarded three months salary after he was summarily and arbitrarily dismissed without a hearing. In terms of the common law the employee would only have been entitled to one month's salary. Nevertheless, the court held that since legislation provided that

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35 For another example of judicial acknowledgement of the in uence of legislation on the common law see *Erven Warnink Besloten Vennootschap v J. Townend & Sons (Hull) Ltd* [1979] A. C. 731 at 743.

36 [1988] AC 20.

37 Par. 8.

38 See also *Wong Mee Wan v Kwan King Travel Service* [1996] 1 IWLR 38 where the Privy Council took into account regulations (secondary legislation) which were not applicable to the facts at hand in order to imply a duty to take reasonable care and skill on the part of the tour operator in rendering services.

39 [1996] 6 BLLR 647 (EC).

arbitrary dismissals amounted to unfair labour practices, it must have been in the contemplation of the parties that the employee would not be arbitrarily dismissed.

As long as policies embodied in statute are not used to denigrate well established principles of the common law, an analogous development of the common law with the in uence of statute helps achieve consistency in the law and is usually in line with the common expectations of the parties.[40]

The in uence of common law on legislation, on the other hand cannot be denied. A clear demonstration of this fact is the use of common law concepts in legislation.[41] As discussed in chapter 1 herein, the employment relationship was generally extensively regulated in the post-war era. Often the statutory provisions were a mere codi cation of the already applicable common law legal incidents. However, legislation usually also expands on those legal incidents as required by prevailing socio-economic conditions.[42] Unless speci cally prohibited in terms of the applicable statute, or in cases where this would be considered contrary to public policy,[43] contractants should be able to contract out of provisions provided for in statute.[44]

In summary, just as the common law is essential for the development and interpretation of legislation, legislation is also important in the development of common law principles.

Custom and Trade Usage

Although custom and trade usage constitute sources of legal incidents, they can eventually progress to the status of legal incidents. This is what Elias J in *Solectron Scotland Ltd v Ms G N Roper & Others*[45] alluded to when he stated:

> A custom or established practice applied with suf cient regularity may eventually become the source of an implied contractual term. That occurs where the point is reached when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystallised into contractual rights.

Before the achievement of such status, in order for courts to acquiesce to their implication certain requirements must be ful lled. In other words it is not an automatic implication that is independent of evidence, the intention of the

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40 For more examples of the in uence of statute on the common law see Beatson, The Role of Statute in the Development of Common Law Doctrine', pp. 253–260.

41 Ibid., p. 248.

42 See for example the provisions of the South African Basic Conditions of Employment Act 75 of 1997.

43 This is trite. See for example, *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1(AD).

44 See *Ashington Piggeries v Christopher Hill* [1972] AC 441 at 501C.

45 [2004] IRLR 4 par. 21.

parties[46] or the terms of the contract. The requirements that need to be satis ed in order to import a trade usage as an implied term of the contract are that the trade usage must be reasonable, certain and notorious.[47] The same requirements of reasonableness, certainty and notoriety were attributed to customs by Pain J in *Bond v CAV Ltd.*[48] In the Australian case of *Nelson v Dahl*[49] which was quoted with approval in *Thornley v Tilley*,[50] Jessel MR stated that the existence of a usage '… is a question of fact, and, like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself'. In this case the terms 'custom' and 'trade usage' are equated. In the English case of *Stirling Park & Co v Digby, Brown & Co*[51] the terms 'custom' and 'commercial usage' are used synonymously: 'In order that a custom, or to use a more exact phrase, a commercial usage, may be binding upon parties to a contract, it is essential that it should be certain, that it should be uniform, that it should be reasonable, that it should be notorious.'

Some cases have mentioned a fourth requirement with reference to customs, namely, that a custom should be long standing. In the Australian case of *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*[52] the requirement that the custom be 'long standing' was alluded to by the High Court of Australia and in the English case of *Eastwood v Ryder*[53] Davies J dismissed the applicant's claim on the basis that there was no 'longstanding custom' which could be implied as a contractual term. The view was expressed in *Solectron Scotland Ltd v Ms G N Roper & Others*[54] that it was not possible for a custom to displace existing contractual rights and that even if it could, it would have to be a 'very long-established practice indeed before it could be inferred that a party had, by implication, accepted the rights conferred by the custom at expense of more favourable rights'. In *Duke v Reliant Systems Ltd*[55] Browne-Wilkinson J said: 'A policy adopted by management unilaterally cannot become a term of the employee's contracts on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without

46 Despite lack of knowledge of the custom or usage by one or both parties to the agreement, and a consequent lack of actual intention, the term can still be implied on the basis of custom or usage, *Cunliffe-Owen v Teather* [1967] 1 WLR 1421 at 1439.

47 Christie (1981), p. 151.

48 [1983] IRLR 360 par 54.

49 (1924) 41 NSWWN 171.

50 (1925) 36 CLR 1.

51 1996 S.L.T. (Sh Ct)17 at par.9.

52 (1973) 129 CLR 48 at 61.

53 [1990] WL (QBD).

54 [2004] IRLR 4 par. 27.

55 [1982] ICR 449 at 452.

exception for a substantial period.'[56] The implication is that a policy will become a term of the contract if the other party either was aware of the policy, or if it was consistently followed for a substantial period . The rst option refers to the notoriety of the 'custom' and the second option to whether it is of long standing. There is no reference to the traditional requirements of reasonableness or certainty. This dictum may be taken to imply that the only requirements for the implication of a term on the basis of custom are notoriety and the fact that the custom is of long standing. Furthermore, by implication, these requirements do not both have to be met, as long as either one of them is met, the term will be implied into the contract. The judgment also provides no indication as to how long a 'substantial period' is. In my view, this dictum does not intend to create an exhaustive list of the factors that need to be met in order for a custom to be implied into a contract. The reason for raising these factors is merely to indicate that, amongst other factors present in all the surrounding circumstances, these are important factors to consider in deciding whether or not a particular policy can be considered to be a custom.[57] This was the approach taken in *Albion Automotive Ltd v Walker & Ors*.[58] Some of the factors that were considered relevant in determining whether a policy unilaterally introduced by management had acquired contractual status were:

(i) whether the policy was drawn to the attention of the employees;
(ii) whether it was consistently followed for a substantial period;
(iii) whether the nature of the communication to the employees concerning the policy could support an inference that it was an implied term of the contracts of employment and;
(iv) the number of occasions that the policy was applied.

This approach of listing factors that need to be met tends to blur the distinction between terms implied by law and terms implied on the basis of the parties' intentions. However, before a custom or trade usage acquires the status of legal incident the factors that are necessary for implication as a term of the contract must be proved by evidence. The parties' respective knowledge and intentions as factors that are taken into account are evidence that can assist in proving the traditional requirements of reasonableness and notoriety.

In South Africa too, a custom must in addition to the requirements of reasonableness, notoriety and certainty also satisfy the additional requirement

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56 This dictum was quoted with approval in *Albion Automotive Ltd v Walker & Ors* [2002] EWCA Civ 946 and *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126 at par 7.

57 This was the approach taken by Lord Couls eld in *Quinn v Calder Industrial Materials Ltd* [1996] IRLR126 at par 7: '… the question is not whether the period for which a policy has been followed is "substantial" in some abstract sense, but whether in relation to the other circumstances, it is suf cient to support the inference that that policy has achieved the status of a contractual term.'

58 [2002] EWCA Civ 946.

of being 'ancient or long-established'.[59] This distinction between custom and trade usage was inherited from English law.[60] Roman-Dutch law, unlike English law, does not distinguish between the concepts of custom and trade usage.[61] The distinction inherited from English law renders it possible to import terms on the basis of trade usage into a contract despite the fact that the rule is of recent origin.[62] In any event, as seen above there is authority to the effect that custom and usage are synonymous. If this is disputed, the solution to ful ll the requirement that the custom is of long standing, is simply to allege that it is a usage. In any event, and certainly in English and Australian case law, the distinction seems to be in the main disregarded and the requirements that are consistently employed for the acquisition of status as custom or usage are notoriety, reasonableness and certainty.[63]

Precedent

As indicated above, most legal incidents in English law have their origin in case law. Legal incidents were originally implied on the basis of the intention of the parties. These precedents were used to create legal incidents so that it was no longer necessary to look to the intention of the parties in order to imply the term. Sometimes it is unclear whether a term can be implied as a legal incident or whether it should be based on the intention of the parties.

Precedent has served to expand and develop the implied duty of trust and con dence in the employment relationship. [64] The obligation of mutual trust and con dence is said to have derived from a general duty of co-operation in the law of contract.[65] This duty however only entails a duty to refrain from frustrating performance on the part of the other contractant.[66] Case law has adopted and extended the mutual obligation of trust and con dence which is derived from the general duty of co-operation to include a duty to take positive action in a number of different circumstances.[67] The content of this duty will be discussed in chapter ve.

59 *Van Breda v Jacobs* 1921 AD 330 at 334.

60 Christie (1981), p. 151 n. 29.

61 Christie, (1981), p. 151.

62 Ibid.

63 See for example *Exxonmobil Sales and Supply Corporation v Texaco Limited* [2004] All E.R. (Comm) 435 at par. 21.

64 See for example *Malik v Bank of Credit and Commerce International SA (in liq)* [1977] 3 All ER 1.

65 Douglas Brodie, 'Legal Coherence and the Employment Revolution', *LQR,* 117 (2001): p. 605.

66 Douglas Brodie, 'Fundamental Obligations', *Emp. LB*, 21 (1997): p. 3.

67 Ibid.

Policy Considerations

Those who adhere to the formalistic classical law of contract would conclude that since *iudicus est ius dicere sed non ius facere,* a judge is not empowered to introduce a legal incident unless it is based on precedent, custom or statute. The case law discussed herein however, will demonstrate that judges do in fact imply terms into contracts as legal incidents on the basis of policy considerations.[68] In South Africa the concept of good faith is imported into all contracts.[69] Consequently, 'the courts have the power to recognise new *naturalia* on the basis of policy considerations'.[70] This fact enables judges to make law. The South African courts have on numerous occasions recognized policy considerations as a justi cation for the implication of legal incidents or *naturalia* of particular types of contracts.[71] As seen in chapter two the concept of good faith is of general application to all contracts in the United States of America. Consequently, as is the case in South Africa, the American courts are at liberty to simply apply and develop the concept of good faith and thereby import new legal incidents into certain types of contracts on the basis of policy considerations.

Since the doctrine of good faith is not of general application in the law of contract in Australia and England, the courts have adopted the criterion of 'necessity'[72] for implying terms as legal incidents on the basis of policy considerations.[73] In *Scally v Southern Health and Social Services Board*[74] the test of necessity for the implication of a term implied in law was also adopted.[75] The distinction between terms implied in law and terms implied in fact according to Lord Bridge involves: 'the search for an implied term necessary to give business ef cacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a de nable category of contractual relationship.'[76] In this case, the employee plaintiffs sued the defendant health boards (employer) for breach of contract, breach of statutory duty and negligence. The plaintiffs claimed that the defendants were obliged

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68 See *inter alia Biddell v Clemens Horst* [1911] 1 KB 934 (CA); *Lister v Romford Ice and Cold Storage* [1957] AC 555 and *John v Rees* [1970] Ch 345.

69 See chapter two.

70 Jacob Vorster, 'The Bases for the Implication of Contractual Terms', *TSAR*, 2 (1988): p. 167.

71 Ibid. for a discussion of the South African case law in this regard.

72 *Liverpool City Council v Irwin* [1977] AC.

73 In England per Lord Wilberforce in *Liverpool City Council v Irwin* at 254 and per Lord Bridge in *Scally v Southern Health Social Services Board* [1992] 1 A.C. 294 at 307; in Australia per Mc Hugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450 and; per Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR. 71 at 103.

74 [1991] 3 WLR. 778.

75 Per Lord Bridge at 787.

76 Ibid.

to bring to their attention their rights to purchase added years of pensionable service at advantageous rates. The House of Lords held that in terms of the contracts of employment, there was an implied duty on the employer to take reasonable steps to bring this to the attention of the employees. This term was implied in law as opposed to in fact. The criterion according to Lord Bridge for the implication of a term in law is 'necessity not reasonableness'.[77] Necessity and not reasonableness, is however also the criterion for the implication of terms in fact.[78] The meaning attributed to 'necessity', however, is used in different senses, depending on the context. The use of the same word to describe differing criteria can only result in confusion. If the term is implied in fact the term is necessary either for:

(i) the business ef cacy of the contract or; [79]
(ii) it may also be necessary to imply a term if the evidence demonstrates that certain unexpressed words must be read into the contract in order to give effect to the intention of the parties.[80]

If the term is implied in law, as was the case in *Malik*, 'necessary' means something akin to 'reasonable'.[81] In fact in the case of *Howman and Son v Blyth*[82] Browne-Wilkinson J directly referred to the criterion of reasonableness and stated that a court can imply a term if it is reasonable.[83] Lord Denning, in *Liverpool City Council v Irwin*[84] in his dissenting judgment, was bolder than his fellow judges and openly admitted that the criterion for implication of the term was merely 'reasonableness' and that necessity was not required.[85]

In the same case Lord Edmund-Davies emphasized the distinction between terms implied in fact on the basis of the *Moorcock* and legal incidents of particular types of contracts. He concluded in agreement with the majority of the Court of Appeal that in the former case the criterion for implication of the term was

77 At 779.

78 The confusion created by Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239 by using the word 'necessary' as the criterion for both terms implied in law and terms implied in fact was perpetuated in this case.

79 *The Moorcock* (1889) 14 PD 64 (CA) 68 is the *casus classicus* in this regard and is discussed below.

80 See *inter alia Hamlyn v Wood* [1891] 2 QB 488 CC at 491 and at 494.

81 Andrew Boon Leong Phang, 'Implied Terms in English Law – Some Recent Developments', *JBL* (1993): 242 p. 245 states: 'Further, terms implied in law are predicated on broader considerations of public policy, thus suggesting that the criterion of reasonableness would be a more appropriate rubric to adopt.'

82 [1983] ICR 416 at 420.

83 J Treitel, *Law of Contract* 10th ed. (1999), p. 193 states that the test for implication of such a term is 'reasonableness'.

84 [1977]AC 239.

85 At 329–330.

necessity and not merely reasonableness.[86] Lord Edmund-Davies held that the term in this case should be implied as a legal incident even if it was unnecessary in the *Moorcock* sense. Lord Cross, in the same case also distinguished between terms implied in law and terms implied in fact. He concluded that since the term did not pass the of cious bystander test   it could not be implied on the basis of the *Moorcock*. Like Lord Edmund-Davies, Lord Cross implied the term in law as a legal incident of the particular type of contract on the basis of precedent.[87] Lords Wilberforce, Edmund-Davies and Cross all observed that terms implied in law as legal incidents are based on 'wider' or 'more general considerations'.[88] Lord Cross asserted that the courts would consider whether it would be 'reasonable' to insert the term and that in doing so a 'common sense' approach would be taken.[89] These are all indications that the implication of terms as legal incidents involve the application of policy considerations and judicial discretion. In effect without openly admitting to it, and still paying lip service to the adoption of the criterion of necessity,[90] these judges adopted a criterion akin to reasonableness for the implication of the term.

Statements to the effect that the requirement of necessity is essential for the implication of terms in law by Lord Wilberforce in the *Liverpool City Council* case and by Lord Bridge in the *Scally* case are unfortunate. As Phang points out, Lord Bridge in *Scally* was 'couching what is essentially policy-balancing in the language of "necessity"'.[91] The same can be said of the speeches of Lords Wilberforce, Cross and Edmund-Davies in the *Liverpool City Council* case.

Nevertheless, the judiciary continues to pay lip service to the criterion of necessity in this context,[92] and is generally very conservative when it comes to implying terms into contracts.[93] There are a number of reasons for this, including the following:

86 This is what Lord Bridge said of the broader category of terms implied in law in *Malik*.

87 *Miller v Hancock* [1893] 2 QB 177.

88 On all occasions *Lister v Romford Ice Cold Storage* [1957] AC 555 was quoted as authority for this proposition.

89 At 259.

90 Lord Wilberforce at 257 stated with reference to Lord Denning's approach: 'My Lords, it will be seen that I have reached exactly the same conclusion of that of Lord Denning MR, with the most of whose thinking I respectfully agree. I must only differ from the passage in which, more adventurously, he suggested the courts had the power to introduce into contracts any terms they thought reasonable or to anticipate legislative recommendations of the Law Commission. A just result can be reached, if I am right, by a less dangerous route.'

91 Phang, 'Implied Terms in English Law – Some Recent Developments', p. 250.

92 Ibid., p. 249 expressed the view that: 'A realistic option would be to retain just one category of terms (implied in fact) premised on an "actual" test of necessity.' Phang proposes this solution in order to avoid the confusion caused by assigning different meanings to the word 'necessity' depending on the context.

93 Elisabeth Peden, 'Policy Concerns Behind Implication of Terms in Law', *LQR* (2001): 459 p. 466 states: 'When taking the question of implication as a whole, it is not an

(i) Firstly, the view that the application of policy considerations is the purview of parliament is widely held.[94] *Reid v Rush &Tompkins Group Plc*[95] serves as an example of judicial reluctance to imply terms where this would entail the application of policy considerations.[96] In this case the employee was working overseas in Ethiopia. He was injured while driving the employer's vehicle there. There was no compulsory third party insurance and the employee could not sue the negligent party who was unknown. Gibson L.J, with whom May and Neill L.JJ concurred, refused to imply a term into the contract requiring the employer to advise employees to take out insurance. While accepting that the policy reasons advanced for implying such a term were 'useful' Gibson L.J. felt that it would be inappropriate to incorporate such a term in all contracts of employment.[97] The contention that the employer should be obliged to insure employees who were working overseas was also rejected. Gibson L.J. expressed the view that this is a matter which would be better suited for incorporation into the law by the legislature.[98]

(ii) Secondly, as Penden points out with reference to English cases: 'It is sometimes thought that courts prefer to dispose of cases by reference to narrow, technical rules'.[99] This is evident in many cases.[100] The enduring in uence of the sanctity of contract and the importance attached to certainty of the law of the classical theory of contract probably contribute to this cautious approach by the courts. Nevertheless, as will be demonstrated in chapter ve, there seems to be an increased willingness to imply terms into contracts of employment on the basis of policy considerations in order to achieve a measure of fairness.

Despite verbal insistence on the criterion of necessity for the implication of terms based on policy considerations,[101] the true criterion for such implication is merely

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exaggeration to say that the tendency is to take a restrictive approach and not to imply terms. This in exibility can be traced back to the necessity test attributed to Irwin.

94 Andrew Boon Leong Phang, 'Implied Terms Again', *JBL* (1994): 255 p. 259 states: 'The task in this broader sphere (pertaining to "terms implied in law") necessarily entails the exercise of legislative power, and is thus best left to parliament.'

95 [1990] 1 WLR. 212.

96 *Smit v Workmens' Compensation Commissioner* 1979 (1) SA 51 (A) is a South African case which also evidences judicial reluctance to imply terms where this involves policy considerations.

97 At 227–228.

98 At 220.

99 Peden, 'Policy Concerns Behind Implication of Terms in Law', p. 466.

100 See for example the South African case of *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA).

101 This is not only true of the British courts, but also of the Australian courts. For example, Chernov JA in *Narni Pty Ltd v National Australia Bank Limited* [2001] VSCA 31 at par 39 stated: 'Even where the terms are applied as a legal incident of certain kinds of contracts such as between landlord and tenant or an employer and an employee, they are

that the term should be reasonable in that it is in line with the standards of society.[102] In the light of the fact that in both England and Australia, in the context of the employment contract, there is an implied duty of mutual trust and con dence, [103] it is not necessary for the courts to indulge in contortions to prove the 'necessity' in order to imply a certain term into a contract of employment. The courts can simply expand and develop this implied duty in order to achieve an equitable result. This should not be dif cult given the fact that the judiciary has perceived the implied term as a material term going to the very root of the contract,[104] as an incident of every contract of employment,[105] and has even described this term as the 'implied obligation of good faith'.[106] Lord Steyn in *Johnson v Unisys Ltd* said: 'It could also be described as an employer's obligation of fair dealing'.[107] The South African and the American courts, similarly, can simply implement the doctrine of good faith in order to imply terms on the basis of policy considerations.[108] The case of *Becker v Becker*[109] is one

implied because it is **necessary** to do so in order to give the contract due operation', my emphasis.

102 Peden, 'Policy Concerns Behind Implication of Terms in Law', p. 459 states: 'Terms implied in law by the courts provide a vital insight into the role of modern contract law. By imposing obligations on contracting parties the courts have to some extent the opportunity to mould agreements. The policy factors in uencing courts reveal a desire to ensure the parties co-operate with each other and with society's standards.'

103 The most exciting common law transformation in Australia, in the context of the contract of employment, as in England, has been the recognition that there is an implied obligation not to damage or destroy the trust and con dence between the parties and thereby undermine the employment relationship, *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR at 144; *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186 at 191.

104 *Courtlands Northern Textiles v Andrew* [1979] IRLR 84 at 86.

105 *Malik v BCCI* [1997] IRLR 462.

106 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* (1991) 1 WLR 589.

107 [2001] 2 All ER 801 at 813.

108 Kerr, *The Principles of the Law of Contract* (Durban, 2002), p. 355 in denying the power of South African courts to imply terms on the basis that they are reasonable in the context of terms implied in fact (ie. based on the intention of the parties) states: 'The question whether there can be implied apparent agreements needs to be distinguished from the question whether a court can declare that a provision which it (the court) thinks would be reasonable but on which the parties did not actually or apparently agree is implied. As the law stands at present the court does not have the last mentioned power. Judicial statements that are sometimes read as indicating support for the proposition that the court has such power are, on examination, concerned with the approach of the court when a residual provision is being laid down or confuse the distinction between implied and residual provisions.'

Kerr uses the term 'residual provisions' to refer to what I have called terms 'implied in law', and he uses the term 'implied provisions' to refer to what I have called terms implied 'in fact'. The obvious implication in this quotation is that when a term is implied in law, it can, according to South African authority be implied on the basis of reasonableness.

109 1981 (3) SA 406 (A).

instance[110] where the South African judiciary applied policy considerations based on the principle of good faith as a source of legal incidents.[111] In this case the Appellate Division implied a term in law into a contract for the sale of goodwill that prevented the seller from soliciting his ex-customers.

There is a certain degree of overlap between the various sources of *ex lege* implied terms in the sense that, in many situations a term may be implied on the basis of one or more of the sources discussed above. For example, if there is legislation in place that deals with similar circumstances as those the judge is faced with and an analogy is possible, the existence of the legislative rule will reinforce the contention that it is reasonable to imply the term on the basis of policy considerations. Likewise, the existence of a trade usage will also serve to accord credibility to a contention of the reasonableness of the term sought to be implied on the basis of policy considerations. Similarly, there is also an overlap between terms implied in law and terms implied in fact. For example, the existence of a trade usage may provide evidence to the effect that it was the intention of the parties that the term should be included in the contract. Confusion as to whether a term is implied in law or in fact also arises because terms that were originally based on the intention of the parties to speci c types of contract and are therefore implied in fact, in time become implied in law because they 'became so much part of the common understanding as to be imported into all transactions of the particular description'.[112]

3. Terms Implied on the Basis of the Parties' Intentions

In theory, the implication of terms on the basis of the intention of the parties does not violate the sanctity of contract. This, however, is only ostensibly the case. As will be demonstrated, the intention of the parties is often what a judge decides it was in order to achieve what the judge considers to be the most fair result possible in the circumstances. The practical obstacles of ascertaining with certainty what the true intention of the parties at the time of entering into the contract was, are obvious. Consequently, it is often the imputed intention of the parties which determines whether or not a term should be implied into the contract or not. This imputed intention does not necessarily coincide with the true intention of one of the parties to the contract or even both of them. Often the parties did not even consider the term which judges have attributed to their common intentions. So much for the sanctity of contract and certainty of the law.

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110 This is not the only case: see Jacob Vorster, 'The Bases for the Implication of Contractual Terms', *TSAR* 2 (1988): 161 p. 169.

111 Ibid., p. 168.

112 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449.

The Moorcock Doctrine

Bowen LJ became the creator of this widely adopted doctrine[113] when he stated:[114]

> Now an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving ef cacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such ef cacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business ef cacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

The Moorcock doctrine has been utilised on numerous occasions by the South African courts.[115] As noted by Vorster, the South African courts have in general interpreted Bowen LJ's words with reference to the parties' intentions literally and have 'accordingly considered the doctrine to be relevant to the implication of terms *ex consensu*'.[116] The doctrine has been applied in order to determine the actual, subjective intention of the parties as well as their imputed intention in the sense that the parties would have included the term sought to be implied if they had been alerted to the eventuality they face now at the time of entering into the contract.[117] Vorster observes in this regard that as a consequence of the application of the Moorcock doctrine for the implication of terms *ex consensu* 'the meaning of the phrase *ex consensu* had to be extended to embrace not only an actual but also an *imputed* intention'.[118] This insistence on adhering to the subjective intention of the parties is typical of the nineteenth century's classical law of contract and its emphasis on upholding the will of contracting parties.[119]

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113 As will be seen by the case law discussed below, the doctrine has been adopted and extensively applied not only in England where it originated, but also in South Africa, Australia and the United States of America.

114 *The Moorcock* (1889) 14 PD 64 (CA) at 68.

115 See Vorster, 'The Bases for the Implication of Contractual Terms', p. 169.

116 Ibid. and A.J. Kerr, *The Principles of The Law of Contract* (Durban, 2002), pp. 355–357.

117 A.J. Kerr, *The Principles of the Law of Contract* (Durban, 2002), pp. 356–359.

118 'The Bases for the Implication of Contractual Terms', p. 172.

119 As pointed out by Vorster p. 170, the same is true of the English cases of the nineteenth century when he observes: 'It has frequently been pointed out that, under the

The application of the Moorcock doctrine in England and Australia, unlike South Africa, is not applicable in order to ascertain the subjective intention of the parties. The Australian courts openly admit that the doctrine is applicable only once it is found to be impossible to ascertain the true intention of the parties. [120] The same can generally be said with regard to the English case law. It has been held that a term can be implied in order to give effect to the unexpressed but obvious intention of the parties, whether or not the implication of the term is necessary for business ef cacy .[121] In other words, the Moorcock doctrine is not applicable where the real or subjective intention of the parties is capable of being ascertained.[122] Although, there are some English cases that seem to indicate that a term can only be implied if it re ects the subjective intention of the parties, [123] this approach seems rather arti cial given the fact that the Moorcock doctrine is only applicable if it is impossible to ascertain the subjective intention of the parties. Furthermore, there is compelling authority to the effect that terms can be implied on the basis of the Moorcock doctrine where the parties did not even contemplate the possibility of the term at the time of entering into the contract.[124] Generally, reference to the intention of the parties signi es what the parties, hypothetically speaking, would have in all probability agreed to, had someone alerted them to the possibility.[125] Consequently, the Moorcock doctrine is applied in order to impute an intention to the parties and not to ascertain the parties' real intentions. Therefore, terms are only implied on this basis when it is necessary in order to give business ef cacy to the contract.[126]

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in uence of the will theory , English judges of the nineteenth century were wont to justify the application of rules of law by reference to the intention of the contracting parties.'

120 *Breen v Williams* (1996) 186 CLR 71 at 102.

121 *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] QBD IRLR. 521.

122 Vorster, 'The Bases for the Implication of Contractual Terms', p. 170 observes: 'However, there is impressive authority in English law to the effect that the implication of a term as a result of the application of Bowen LJ's test did not necessarily mean that the parties intended that term, nor that they would have assented to it had it been brought to their attention. The parties were *deemed to have intended the term* for the simple reason that the court held the term to be "mercantilely reasonable".'

123 Esher MR in *Hamlyn & Co v Wood & Co* [1891] 2 QB 488 at 491 as quoted by Lord Edmund-Davies in *Liverpool City Council v Irwin* stated: ' …the court has no right to imply in a written contract any such stipulation, *unless*, on considering the terms of the contract in a reasonable and business manner, an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist….'

124 See inter alia in this regard *Trollope & Colls v NWMR Hospital Board* [1973] 1 WLR 601 (HL).

125 See the comments of Scrutton LJ in *Fowler v Commercial Timber* [1930] 2 KB 1 (CA) 5.

126 Per Deane J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 121; See also *Reigate v Union Manufacturing* [1918] 1 KB 592 (CA) at 605 where Scrutton LJ stated: The rst thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have

With regard to the implication of terms on the basis of the imputed intention of the parties the laws of England and Australia are said to be the same.[127] This is so because of the application of the Privy Council's decision in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[128] by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority (NSW).*[129] In the *BP Refinery* case, Lord Simon, delivering the majority judgment of the Privy Council summarized the principles of the Moorcock doctrine by listing the criteria that need to be satis ed for the implication of terms based on the presumed or imputed intention of the parties. These criteria as laid down by the Privy Council 'are frequently called in aid' by the Australian courts.[130] These criteria as quoted in *Byrne v Australian Airlines Ltd* are:[131]

> (1) the implication must be reasonable and equitable; (2) it must be necessary to give business ef cacy to the contract, so that no term will be implied if the contract is ef fective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.[132]

The application of these criteria by the courts in England, Australia, South Africa and the United States of America are discussed hereunder.

The Implication Must be Reasonable and Equitable

In the *BP Refinery* case Lord Simon explained the reason for this requirement as follows:[133]

> It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satis ed that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself.

This explanation implies that the parties to the contract in question will be presumed to be reasonable men. Being reasonable in a hypothetical sense, it could not be their

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been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give ef cacy to the contract .

127 *Laemthong International Lines Co v BPS Shipping Ltd* (1995) 5 NTLR 59; 127 FLR 91 at 102.

128 (1977) 52 ALJR 20 at 26.

129 (1982) 149 CLR 337 at 347.

130 Per Brennan CJ, Dawson and Toohey JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422.

131 Ibid.

132 These criteria were endorsed in inter alia the following Australian cases: *Vita Pacific Ltd v Heather* [2001] TASSC 137; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; *Australian National Hotels Pty Ltd v Jager* (2000) 9 Tas R 153 at 160–161.

133 At 26.

intention to include a term in the contract which would result in unreasonableness or inequity.[134] This consideration is linked to the of cious bystander test [135] and the business ef cacy test. [136] These tests are applied in order to impute an intention to the parties. It has its origins in *Reigate v Union Manufacturing*[137] where Lord Scrutton stated:

> if it is such a term that it can con dently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.[138]

In the light of the fact that the of cious bystander is also presumed to be a reasonable man, if a term which is sought to be implied is perceived by the court as being unreasonable it is also unlikely to pass the of cious bystander test. In applying the of cious bystander test the courts conduct one of two enquiries: In some cases, in an attempt to genuinely ascertain the subjective intentions of the parties, or rather to appear to ascertain the true intentions of the parties in order to uphold the policy of the sanctity of contract, the courts have enquired as to how the parties themselves would have reacted had they been asked the hypothetical question at the time of entering into the contract. This is generally the manner in which the test is applied in England, South Africa, Australia and the United States of America.[139]

A problem may arise in such cases if the following occurs: The party holding the advantage in a bargaining position was not reasonable or honest and had no intention

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134 Although not synonymous, where a term is reasonable it is most likely to be equitable or just.

135 *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701.

136 The often quoted American case of *Fickert v Deiter Bros. Fuel Co. Inc.* A.2d 701 (1975) bore this link out when it stated: 'The law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made….' See for instance the case of *In re Homschek,* 216 B.R. 748 (Bankr. M.D. Pa.1998) at 752 where this dictum was once again quoted with approval.

137 [1918] 1 KB 592 (CA) at 605.

138 This is commonly known as the of cious bystander test.

139 With regard to English cases see inter alia: *Liverpool City Council v Irwin* [1977] AC 239 at 266 *et seq* and ; *Western Electric v Welsh Development Agency* [1983] QB 796. The South African cases seem to favour this test: See inter alia *Sonarep v Motorcraft* 1981 (1) SA 889 (N) at 901E; *Alfred Mc Alpine v TPA* 1977 (4) SA 310 (T) at 331E; *Wedge Transport v Cape Divisional Council* 1981 (4) SA 515 (A) at 535H; *Morin Building Products CO. Inc. v Baystone Construction., Inc.* 717 F 2d 413 (7th Cir. 1983) is an example of this application of the of cious bystander test in the United States. In Australia this test was adopted this way in inter alia *Con-Stan* at 241 where the court stated: 'Unless it can be said that both parties would have consented to its inclusion, a term cannot be implied.'

of acting *bona fide.* Consequently, the party at a disadvantage would have conceded to the term sought to be implied because of an imbalance of bargaining power at the time of entering into the contract. In the light of the fact that in applying the of cious bystander test the parties are presumed to be reasonable and honest, such an unreasonable and dishonest intention will not be imputed to the parties.[140] The enquiry in such a case involves how reasonable men in the position of the parties would have responded to the hypothetical question posed.[141] Since all contracts in the United States of America are considered to be in good faith and contain within them a covenant of fair dealing:[142]

> …the law will imply an agreement to refrain from doing anything that will destroy or injure the other party s right to receive the bene ts or fruits of the agreement, and that the party vested with discretion under the contract must exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.[143]

Irrespective of which of the above ways of applying the test the courts adopt, the benchmark against which the conduct is measured is always that of a reasonable man.

The hypothetical of cious bystander test is the test that is generally applied in South Africa for the implication of terms in fact.[144] Generally, the question asked in the application of this test is what the parties themselves would have agreed to at

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140 *Administrateur (Transvaal) v Industrial & Commercial Timber& Supply Co Ltd* 1932 AD 25.

141 See inter alia *Trollope & Colls v NWMR Hospital Board* [1973] 1 WLR 601 (HL). *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 where the of cious bystander test was applied in this manner. In the South African case of *Administrator (Transvaal) v Industrial Commercial Timber & Supply Co* 1932 AD 25 at 33 Wessels ACJ stated: 'Are we to consider the intention of the particular individual who enters into the contract? Suppose that he asserts: "I thought of this matter but I purposefully made no mention of it, because I thought that by keeping quiet I might avail myself of the fact that the term was not mentioned in the contract"; are we to say that this concludes the matter and that therefore the term cannot be implied? In my opinion the Court is not bound to accept his assertion. The Court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done, not what a crafty person might have done who had an arrière pensée to trick the other party into an omission of the term. The transaction must be regarded as a normal business transaction between two parties both acting as reasonable business men.' This dictum indicates that there may be situations where the application of the two tests may render different results. However, in this case Wessels ACJ stated that the enquiry should be as to the conduct of a reasonable **and** honest business man (my emphasis). Perhaps it would have been preferable to assert that a reasonable man would not be dishonest and on that basis the result would be the same, no matter which test was applied.

142 Contracts par. 346.

143 Ibid.

144 AJ Kerr, *The Principles of the Law of Contract* (Durban, 2002), pp. 355–367.

the time of entering the contract had they envisaged the outcome as a possibility.[145] The arti ciality of reference to the subjective intentions of the parties is often manifest.[146] It cannot for example, have been the intention of the parties to imply a term into the contract if they did not even think of it at the time of entering into the contract. Nevertheless, it is generally accepted that the South African courts have no power to imply terms in fact other than on the basis of the actual intention of the parties.[147] In situations where the parties did not even think of the term sought to be implied, it is at best the hypothetical intention of the parties which must be determined.

The concept of the reasonable man, of course, is beyond precise definition. The concept is also not static because what society considers to be acceptable conduct can differ from one decade to the next. Secondly, what is considered to be reasonable can differ from one individual to the next. Ultimately, what is reasonable is either dependent on the judge's conception thereof, or on the judge's conception of what society in general considers reasonable. [148] Since the presumed intention of the parties is determined with reference to what the judge considers to be reasonable in the circumstances, any attempt to deny the application of policy considerations by the courts when implying terms into contracts is artificial. This is especially true in the light of the fact that a reasonable man is generally considered to be 'fair' and 'honest'.[149] In the South African case of *Wilkins NO v Vogens*[150] in applying the officious bystander test, Nienaber JA said: 'One is certainly entitled to assume, in the absence of indications to the contrary, that the parties to the agreement are typical men of affairs, contracting on an equal and honest footing, without hidden motives and reservations.'[151]

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145 See inter alia in this regard *Simon v DCU Holdings (Pty) Ltd and others* 2000 (3) SA 202 (T); *K & S Dry Cleaning Equipment (Pty) Ltd & another v South African Eagle Insurance Co Ltd and another* 2001 (3) SA 652 (W); *Standard Bank of SA Ltd v Durban Security Glazing (Pty) Ltd and another* 2000 (1) SA 146 (D).

146 See Vorster, 'The Bases for the Implication of Contractual Terms', pp.170–172.

147 Kerr, *The Principles of the Law of Contract*, p. 355.

148 As was correctly observed by Lord Ratcliffe in *Davis Contractors v Fareham UDC* [1956] AC 696 at 728: 'The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself.'

149 The reference to 'fair and reasonable men' by Lord Watson in *Dahl v Nelson* (1881) 6 App Cas 38 at 59 and the reference to 'a reasonable **and honest** business man by Wessels AJA in the South African case of *Industrial Commercial Timber & Supply Co* 1932 AD 25 at 33 (my emphasis) lend support to this proposition.

150 (1994) 3 SA 130 (A) at 141 C-E.

151 See also *Administrateur (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 at 33.

The Term Must be Necessary to Give Business Efficacy to the Contract

The criteria set out by the Privy Council in the *BP Refinery* case[152] and quoted above for the implication of the parties' imputed intention are often referred to as the criteria that are necessary to pass the business ef cacy test. Put dif ferently, business ef cacy is elevated from being simply a criterion that needs to be present in order to imply a term on the basis of the parties' imputed intention, to a test in itself. For example, the Supreme Court of Tasmania in the case of *Vita Pacific Ltd v Heather*[153] stated: 'The criteria for determining whether a term should be implied to give business ef cacy to the contract are the criteria set out by the Privy Council.'

The meaning ascribed to business ef cacy is not always consistent. The older cases, in line with the formalism of the classical theory of contract and the consequent adherence to the freedom of contract, re ect a greater reluctance to imply terms and consequently a term would only be implied if the contract is unworkable without it.[154] Less rigid applications of the business ef cacy test are now common. [155] There are however recent cases that have been more reluctant to imply terms on the basis of business ef cacy .[156] In the case of *Hughes v Greenwich*,[157] for example, the House of Lords held that the court would only imply a term into a contract where there was a compelling reason to do so. In this case the fact that the implication of the term would be 'conducive to enhanced performance' of duties in terms of the contract was held to be insuf cient to imply the term. What was required was that the term should be essential for the performance of the contractual duties. The same approach was taken in *Exxonmobil Sales and Supply Corporation v Texaco Limited* where it was stated:[158] 'However, terms are not implied on the grounds of importance, ease of

152 (1977) 52 ALJR 20.

153 [2001] TASSC 137 at par 14.

154 In *Biddel v Clemens Horst* [1911] KB 934 (CA) at 950 Farewell AJ stated that a term could only be implied if its absence rendered the contract 'impossible of performance'. Similarly in *Re Nott and the Cardiff Corporation* [1918] 2 KB 146 (CA) at 168 Pickford LJ opined that a term could only be implied if this was necessary to carry out the contract.

155 In the not so recent case of *Maredalanto Compania Naviera v Bergbau-Handel (The Mihalis Angelo)* [1970] 3 All ER 125 (CA) at 141 the fact that the term had a 'sensible legal and practical effect was held to be suf cient to imply the term. In the more recent case of *Ali v Christian Salvesen Food Services Ltd* [1995] I.R.L.R. 624 discussed hereunder, a term was implied into a contract of employment where such implication was clearly not necessary to make the contract work.

156 In the United States of America the test with regard to business ef cacy is that the term should be 'necessary to effectuate the full purpose of the contract'. See Don Vaccaro (ed.), *Corpus Juris Secundum A Contemporary Statement of American Law as Derived From Reported Cases and Legislation*, vol. 17A (1999) p. 378 par. 346.

157 [1993] 4 All ER 577 (HL).

158 [2004] 1 All ER (Comm) 435 at par. 19.

proof, convenience or reasonableness but on the grounds that they are necessary to make the contract work.' Similarly, in the South African case of *The MV Prosperous Cobam NV v Agean Petroleum (UK) Ltd and another*[159] Scott AJA said:

> The test to be applied for implication of such a term … can … be summed as follows: (i) it is not suf cient to show that the term sought to be introduced would be reasonable, as it is not for the courts to make a contract for the parties; (ii) the implication must be made as a matter of necessity and be founded on the presumed intention of the parties; and (iii) the term must be obvious and capable of precise formulation.

There is overwhelming authority in South African case law to the effect that reasonableness alone is insuf cient to convince a court to imply a term [160] and 'the fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties is not enough'.[161] The same is true for the United States of America.[162]

The insistence on the 'necessity' of the term when it is sought to be implied on the basis of business ef cacy although common, is not always accorded the same meaning. As discussed above, in some cases 'necessary' means that the term must be 'necessary to make the contract work'.[163] In such instances 'necessary' means 'essential'. In other cases 'necessary' seems to signify something less than 'essential'. For example, in the case of *Byrne v Australian Airlines Ltd*[164] it was held that a term can only be imputed to the intention of the parties if 'it can be seen that the implication of the particular term is necessary for the **reasonable or effective operation of a contract**' (my emphasis).[165] It is not inconceivable that a contract can nevertheless operate even if its operation is ineffective or unreasonable. In the case of *Liverpool City Council v Irwin* Lord Salmon held that a term should be implied into the contract that the City Council should keep the common parts of the building in repair. He stated that in order to imply a term into a contract it is not suf cient that the implication should be reasonable but that something more, for instance that without it the contract would be inef cacious, futile and absurd is required. He expressed the view that to expect a pregnant woman accompanied

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159 (1996) 2 SA 155 (A) at 163 G-H.

160 Kerr, *The Principles of The Law of Contract*, p. 364, n. 195.

161 Ibid., p. 364.

162 *Danby v Osteopathic Hospital Association of Del*., 34 Del. Ch.172, 101 A.2d 308 (1953), aff'd 34 Del. Ch 427, io4 A.2d 903 (1954); *Robinson v Hayes' Estate*, 207 A.D. 718, 202 N.Y.S.732 (3d Dep't 1924) aff'd, 239 N.Y. 512, 147 N.E. 175 (1924); *Percoff v Solomon*, 259 Ala. 482, 67 So. 2d 31, 38 A.L.R.2d 1100 (1953); *Smith v Phlegar*, 73 Ariz. 11, 236 P.2d 749 (1951).

163 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 241.

164 (1995) 185 CLR 410 at 573.

165 This formulation was rst adopted by Deane J in *Hawkins v Clayton* (1988)164 CLR 593 at 573 and approved of in *Australian National Hotels Pty Ltd v Jager* [2000] TASSC 43.

by a small child to walk up nine storeys in the dark to reach her home, would render the transaction inef cacious, futile and absurd . [166] But this contract could conceivably still operate without the implied term, as it had done for years before the case was heard. Therefore Lord Salmon's idea of necessity requires something less than the criterion that the term should be essential for the operation of the contract. What is this something less? Could it be reasonableness? It is dif cult to think of a practical situation where a criterion that falls somewhere between reasonableness on the one hand, and the absolute requirement of indispensability in the sense that the contract would otherwise be unworkable could be applied. Perhaps Lord Salmon should have admitted that his decision was in uenced by his sense of justice instead of resorting to contortions in order demonstrate adherence to a strict test of necessity. The fact that the criterion required for the implication of terms in fact is something less than indispensability in the sense that the contract would be non-operational or unworkable without the term is demonstrated by Phang's suggestion that the category of terms implied in law should be 'abandoned altogether' since 'the same result in any given case could be achieved by way of the narrower (and more established) category of "terms implied in fact" notwithstanding the occasional "**stretching**" of this category' (my emphasis).[167]

In summary, necessary in the interests of business ef cacy has been interpreted to mean different things. The meanings accorded to the term range from reasonableness and usefulness to indispensability in the sense that the contract is effectively unworkable without the term. Generally, however, the courts do insist that the fact that a term is reasonable in the circumstances is not suf cient to imply the term. What is required is that the absence of the term renders the contract unworkable in the sense that its full purpose cannot be achieved.

The Term is so Obvious it Goes Without Saying

It is not dif cult to see why the test that something is so obvious that it goes without saying is linked to both the business ef cacy test and the of cious bystander test: [168] Normally, if the of cious bystander would have included the term without hesitation, the term would in all probability be necessary to render the contract ef cacious. Furthermore, if the term is so obvious that it goes without saying, this might be all the evidence required to ascertain the real intention as opposed to the imputed intention of the parties. The facts of *Ali v Christian Salvesen Food Services Ltd*[169] illustrate this point. This is another case where it was held that it was 'necessary' to

166 [1977] AC 239 at 262.

167 Andrew Boon Leong Phang, 'Implied Terms Again', *JBL* May, (1994): 255 p. 258.

168 The Privy Council itself, in laying down the criteria in the *BP Refinery* case 'recognised that there was a degree of overlap.' (*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422).

169 [1995] IR.LR 624.

imply a term in the interests of business ef cacy where the contract was perfectly workable without the term. In this case the terms of the contracts of employment of Ali and his colleagues were negotiated on their behalf by the trade union. In terms of the contracts Ali and the others were to be paid in terms of an annual hours contract at a standard hourly rate for a notional forty hour week. They were entitled to time and a half for any hours worked in excess of one thousand, eight hundred and twenty four hours per annum. The contract was silent concerning the situation where an average of a forty hour week had been exceeded, but the annual total was not achieved. This is what happened to Ali and the other employees. Since they had been made redundant, prior to the completion of the year, despite having worked an average of more than forty hours a week the employees did not receive any wages at the overtime rate of time and a half. The Employment Tribunal held that no term could be implied into their contracts of employment to the effect that Ali and the others were entitled to be paid at a rate of one and a half for overtime worked. On appeal the Employment Appeal Tribunal overturned the decision and a term to the effect that the employees were entitled to be paid at a rate of one and a half for overtime was implied into the contracts of employment. The Employment Appeal Tribunal citing Liverpool *City Council v Irwin*[170] held that a term could not be implied into a contract merely because it would be reasonable to do so or because it would improve the contract. The Employment Appeal Tribunal considered the failure to include the term an innocent oversight rather than a deliberate omission. The implied term therefore served to ll the gaps of the express terms in the contract in order to ful l the real intention of the parties. Even though the term business necessity as opposed to business ef cacy was used, it amounts to the same thing. Although it was held that it was necessary to imply the term on the basis of business ef cacy on the facts it is clear that the contract was operational without implying the term and it was not necessary to imply the term in order to render the contract workable. Business ef cacy in this case was therefore accorded a less rigid meaning than that given to the term in some of the older cases discussed above. However, the term was implied on the basis of the real and not the imputed intention of the parties: it was held, citing *Mears v Safecore Security Ltd*[171] that where a stipulation is so obvious that the parties must have intended it to form part of the contract in the interests of business necessity, such stipulation can be implied into the contract.

The term that was held to be necessary to imply in order to achieve business ef cacy , could also be said to be reasonable and equitable, so obvious that it goes without saying, capable of precise de nition and, it does not contradict any express terms of the contract.

However, in the Australian case of *Codelfa Construction v State Rail Authority of New South Wales*,[172] it was held that although the term sought to be implied would have passed the business ef cacy test, it did not satisfy the of cious bystander test.

170 [1977] AC 239.
171 [1983] QB 54.
172 (1982) 56 ALJR 459.

In this case Codelfa agreed to complete certain construction work within a speci ed time. Due to excessive noise during the course of construction a third part obtained an injunction against Codelfa preventing Codelfa from carrying on with the construction process during certain times of the day. As a result Codelfa was unable to complete the work on time in terms of the agreement. The High Court refused to imply a term to the effect that in the event of an injunction preventing Codelfa from continuing operations during certain times, the time for completion would be extended so as to allow a reasonable period within which to complete the project. Although the High Court was of the view that such term passed the business ef cacy test, it refused to imply the term on the basis that it did not pass the of cious bystander test. This result implies that it is necessary for a term to pass both the of cious bystander test and the business ef cacy test in order for it to be implied. It also implies that it may be easier to pass the business ef cacy test than to pass the of cious bystander test. If the strict test that the contract must be proven unworkable without the term in order to pass the business ef cacy test is applied, it seems that it will be possible to imply a term in fact only on very rare occasions.

In the United States of America, as is the case in South Africa, the of cious bystander test is applied alone as a test in itself. No other criteria need be satis ed in order to imply a term. This test is also used in conjunction with the criterion that the term was so obviously intended by the parties that it was unnecessary to express it. The business ef cacy test is also elevated to a test in itself, which if satis ed will result in the implication of the term sought to be implied.[173]

On the face of it the cases may seem to be dissimilar and irreconcilable. The reasons are twofold: Firstly it lies in the fact that the business ef cacy test is at times misconstrued as constituting a test in itself, as opposed to being merely one of the criteria that need to be satis ed in order to arrive at the imputed intention of the parties when it is impossible to determine the parties' actual intention. Secondly, even though business ef cacy is one of the criteria that must be satis ed in determining the imputed intention of the parties, it can also serve as evidence to ascertain the **true** intention of the parties. This is why, if a term is so obvious that it goes without saying, it may constitute suf cient evidence to allow a conclusion that the inclusion of the term was in the contemplation of the parties and that it therefore re ects their real intention as opposed to their imputed intention.

In South Africa, the of cious bystander criterion has been applied as the standard test' for determining the intention of the parties.[174] The intention of the parties implied in this manner seems to refer to their real intention, even if they had not foreseen the situation at the time of entering into the contract. The case law referred to in support of this contention indicates that even if the parties had not considered the

173 Don Vaccaro (ed.), *Corpus Juris Secundum A Contemporary Statement of American Law as Derived From Reported Cases and Legislation*, vol. 17A (1999), p. 378 par. 346.

174 Kerr, *The Principles of the Law of Contract,* p. 356 states with regard to South African law: 'The standard test for discovering what was in the minds of the parties is that of the hypothetical bystander, sometimes described as of cious .

situation at the time of entering into the contract, the term can be implied as being their 'common intention' if, had they been alerted to the situation, their response would have been 'prompt and unanimous'.[175] This is similar to saying that the term is so obvious that its inclusion 'goes without saying'.[176]

The criterion of business ef cacy need not necessarily be ful lled in order to imply a term on the basis of the intention of the parties.[177] This conclusion is reached on the basis of the dicta of Bowen LJ in *The Moorcock*[178] and Scrutton LJ in *Reigate v Union Manufacturing Co*[179] quoted above. If the real intention of the parties is ascertainable, in terms of both English and Australian law, the Moorcock doctrine is not applicable.[180] That is why in instances where the real intention of the parties was ascertained, it was not relevant whether or not the term was necessary to accord the contract business ef cacy . This also appears to be the case in South Africa since in *Minister van Landbou-Tegniese Dienste v Scholtz*[181] a term which was not necessary to render the contract ef cacious was implied on the basis of the actual intention of the parties.

However, in order to satisfy the business ef cacy test, the criterion that the term is reasonable and equitable and, the criterion that the term is so obvious that 'it goes without saying' together serve to prove the actual intention of the parties. As discussed above, if the term is proved to be so obvious that it goes without saying, there is no need to prove that the term is necessary to render the contract ef cacious in order to import the term on the basis of the actual intention of the parties. Where the courts however are unable to ascertain the actual intention of the parties, the imputed intention of the parties must be ascertained with reference to the Moorcock doctrine. Furthermore, the requirements stipulated in the *BP Refinery* case must be met in order to imply a term on the basis the imputed intention of the parties.

In South Africa, the Moorcock doctrine is said to be applicable to determine the actual intention of the parties. In reality, the of cious bystander test is the standard test that is applied to ascertain the parties' imputed intention. The actual intention to include the term on the part of the contractants can be proved by reference to the

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175 Ibid., pp. 358–359 quoting from *Techni-Pak Sales (Pty) Ltd v Hall* (1968) 3 SA 231 (W) at 236H-237A.

176 Compare this with the English case of *Ali v Christian Salvesen Food Services Ltd* [1995] IRLR. 624.

177 Kerr, *The Principles of the Law of Contract* p. 368-370; See also the English case of *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521 since the real intention of the parties was ascertained, it was not relevant whether or not the term was necessary to accord the contract business ef cacy .

178 (1889) 14 PD 64 at 68.

179 (1918) 1 KB 592 at 605.

180 In *Aspden v Webbs Poultry Meat Group (Holdings) Ltd* [1996] IRLR. 521 it was held that a term may be implied in order to give effect to the unexpressed but obvious intention of the parties, whether or not it is necessary for business ef cacy .

181 1971 (3) SA 188 (A). See Vorster, 'The Bases for the Implication of Contractual Terms', pp. 170–171.

surrounding circumstances. If however, the court has to impute an intention to the parties because they did not consider the eventuality at hand at the time of entering into the contract, the fact that the term is necessary to render the contract ef cacious will serve as evidence to the effect that if the parties were alerted to the eventuality at the time of entering into the contract, they would have agreed to it. This is the application of the of cious bystander test.

The difference therefore between Australia and England on the one hand, and South Africa on the other is simply that in England and Australia, in order to impute an intention to the parties the criteria listed in the *BP Refinery* case must satis ed. [182] In South Africa, similar, but not precisely the same requirements have been enumerated per Scott AJA for the implication of terms in fact as follows:[183]

> (i) it is not suf cient to show that the term sought to be introduced would be reasonable as it is not for the Court to make a contract for the parties; (ii) the implication must be made as a matter of necessity and be founded on the presumed intention of the parties; and (iii) the term must be obvious and capable of precise formulation.

However, the Australian and English courts have at times elevated the criterion of business ef cacy to a test in itself [184] In addition, the business ef cacy test and the of cious bystander test have been used interchangeably as if they are the same. [185] In South Africa, as discussed above, the of cious bystander test is the standard test. The fact that in most situations a term that is necessary for business ef cacy will also result in the of cious bystander test being satis ed means that in practice the differences have negligible practical effect.

It is unclear whether in Australia and England all the requirements stipulated in the *BP Refinery* case must be met for the implication of terms, or whether just the business ef cacy test or the of cious bystander test will suf ce each on its own. In practice, although it is conceivable that one but d not the other tests is satis ed, [186] generally in circumstances where either one of these tests is met, the other will also be met. In South Africa, it appears that only the of cious bystander test is necessary

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182 *State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd* [2001] NSWACA 47; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Secured Income Real Estate v St Martin's Investments Limited* (1979) 144 CLR 596.

183 In *MV Prosperous Coban NV v Agean Petroleum (UK) Ltd and another* (1966) 2 SA 155 A) at 163 G-H per Scott AJA.

184 For example in the Australian case of *State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd* [2001] NSWACA 47 it was stated that in order to satisfy the business ef cacy test, the *BP Refinery* criteria should be satis ed. See also the unanimous decision of the House of Lords of *Scally and others v Southern Health and Social Services Board* [1991] 3 WLR 778 (HL).

185 *Hughes v Greenwich* L.B.C. [1993] 4 All ER 577 (HL) at 827-829 and the authorities cited there.

186 For example see the facts in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

for the implication of imputed terms, while the of cious bystander test can serve as evidence to prove the real intention of the parties. In the United States of America, it seems that a term can be implied on the basis of any of the following:[187]

(i) The business ef cacy test;
(ii) The of cious bystander test;

The Term Must be Capable of Clear Expression

Given the general reluctance of courts under the in uence of classical law of contract to imply terms,[188] it is no surprise that where a term sought to be implied lacks certainty and precision in formulation it will not easily be implied.[189] This, however does not mean that the term sought to be implied must be ‘capable of exact measurement’.[190] If such a term cannot be de ned with precision, the test of performance is then the exercise of good faith and the expenditure of reasonable effort to the end that the agreement may be fruitful to the contracting parties. A consideration of the circumstances attending the execution of the contract, the custom and usages of trade, and local standards, may make de nite obligations which writing leaves inde nite . [191] If for example, there is no provision concerning the duration of the contract ‘the general rule is that the contract must be performed within a reasonable time’.[192] In deciding what is reasonable the courts have to make value judgments based on policy considerations. This is something that the courts are not unaccustomed to.[193]

A term that is incapable of clear expression is unlikely to pass the of cious bystander test because the question posed would be incapable of eliciting a

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187 Don Vaccaro (ed.), *Corpus Juris Secundum A Contemporary Statement of American Law as Derived From Reported Cases and Legislation*, vol. 17A (1999), par. 346 p. 378: ‘Hence, in order that an unexpressed term may be implied, the implication must arise from the language employed in the instrument or be indispensable to effectuate the intention of the parties, that is, it must appear that the implied obligation was so clearly within the contemplation of the parties that they deemed it unnecessary to expressly stipulate with reference thereto, or it must appear that it is necessary to infer such obligation to effectuate the full purpose of the contract and a promise or term can be implied only where it can be rightfully assumed that it would have been added if the attention of the parties had been directed to it or that it was deemed unnecessary to expressly state it.’

188 See for example *Scot Properties, Ltd v Wal-Mart Stores, Inc.* 138 F. 3d 571 (5th Cir. 1998).

189 *R v Paddington and St Marylebone Rent Tribunal Ex p. Bedrock Investments* [1947] 2 All ER 15.

190 *Crossland v Kentucky Blue Grass Seed Growers’ Co-op Association* (1939) 103 F.2d 565 at 567.

191 Ibid.

192 Ibid.

193 See Patrick Atiyah, ‘Judges and Policy’, *Israel Law Review* 15 (1980): p. 346.

'prompt and unanimous' answer.[194] This sequiter is evidenced in Scott AJA's statement that **one** (my emphasis) of the requirements for implying a term is that 'the term must be obvious and capable of precise formulation'.[195] Although stated as one requirement, there are two requirements: that it must be obvious,[196] and that it should be capable of precise formulation. The overlap with this and the other requirements is obvious.

The Term must not Contradict any Express Term in the Contract

The general rule is that an implied term cannot take precedence over an expressed term.[197] As discussed above, terms that are implied in law as legal incidents can expressly be excluded by the parties. Consequently, on this basis, it seems logical that an expressed term will take precedence over an implied term irrespective of whether the term is implied in law or in fact. However, in *Johnstone v Bloomsbury*[198] where the court was faced with a term implied in law which con icted with an expressed term, the court gave precedence to the implied term.

The facts of this case are as follows: Dr Johnstone was employed by Bloomsbury Health Authority as a senior house of cer in the obstetric department of University College Hospital in London. In terms of clause 4(b) of the contract of employment Dr Johnstone was required to work a forty hour week. In addition to those forty hours he was obliged to be available on call for up to an average of an additional forty eight hours per week over a speci ed period. The pay for this overtime was 'somewhat unusually not at a higher rate than the basic pay, but at one-third of this rate'.[199] Dr Johnstone worked for more than eighty eight hours a week for some weeks. As a result of the consequent sleep deprivation he became ill. Dr Johnstone alleged inter alia that the Health Authority was in breach of an implied duty to take reasonable care of his safety as an employee.

In response to counsel's assertion that an expressed term must prevail over an implied term, Stuart-Smith LJ stated:[200] 'But this is not an implication that arises because it is necessary to give business ef cacy to the contract as in the Moorcock … ; it arises by implication of law.' Perhaps the motivation for this view that a term implied in law as opposed to a term implied in fact (on the basis of the Moorcock), can prevail over an expressed term is founded on the fact that one of the criteria listed in the *BP Refinery* case for the implication of terms in fact is that the term sought to

194 Ibid., 358–359 quoting from *Techni-Pak Sales (Pty) Ltd v Hall* (1968) 3 SA 231 (W) at 236H-237A.

195 In *MV Prosperous Cobam NV v Aegean Petroleum (UK) Ltd and another* 1966 (2) SA 155 (A) at 163 G-H per Scott AJA.

196 In other words it would pass the of cious bystander test.

197 *Lynch v Thorne* [1956] 1 WLR. 303 at 306; *Stevens v National Broadcasting Co.* 270 Cal. 2d 886, 76 Cal. Rptr. 106 (2d Dist. 1969).

198 [1992] QB 333.

199 Per Stuart-Smith LJ at 340.

200 At 343.

be implied does not con ict with an expressed term. As far as terms implied in law are concerned the courts have not (to my knowledge)[201] expressed the view that in order to be implied the term should not con ict with an expressed term. It is likely that this has not been done for the simple reason that it goes without saying that an express term takes precedence over an implied term. Although conceding that 'an express clause in a contract of employment could be so framed as to limit or exclude'[202] the implied term, Stuart-Smith LJ was of the view that this was not the case in the circumstances before the court and that the express and implied terms could co-exist. Nevertheless, although not spelled out in so many words by Stuart-Smith LJ, it is clear that the co-existence is only possible if the employer's rights in terms of the express term are exercised with due regard to the employer's duties in terms of the implied term. In short, the implied term was given precedence over the expressed term.

Stuart-Smith LJ took the view that the alleged breach of the implied term that the employer is obliged to take reasonable care of the safety of its employees was not incompatible with the express term contained in clause 4(b) of the contract of employment. He reasoned that the employer's right to expect Dr Johnstone to work those overtime hours was to be exercised having due regard to its (the employer's) implied duty to take reasonable care of the safety of its employees. In other words the employer's right as per expressed term, although not declared invalid, could only be exercised provided such exercise did not encroach on Dr Johnson's rights as per the implied term. Since there was no obligation on the employer to make Dr Johnstone work eighty eight hours per week, Stuart-Smith LJ reasoned, the expressed term was not incompatible with the implied term. The following analogy was made:[203] 'If these were the hours of a contract of a heavy goods driver, and he fell asleep at the wheel through exhaustion and suffered injury … the employee would have a good claim against his employer for operating an unsafe system of work.'

Sir Nicolas Browne-Wilkinson concurred with Stuart-Smith LJ. In his view, if the contract had imposed an 'absolute obligation'[204] on Dr Johnstone to work an additional forty eight hours on average per week, there could be no breach of the implied term on the part of the employer. However, since the employer has a discretion as to how many hours overtime, if any, Dr Johnstone should work, the implied term is not incompatible with the expressed term.

Leggatt LJ delivered a dissenting judgment. Although he expressed the view that 'it may indeed be scandalous that junior doctors should not now be offered more

201 Although the Moorcock doctrine is now generally taken to apply to terms implied in fact, it was held in some of the older cases that the citation of Bowen LJ is also applicable to terms implied in law as legal incidents. See in this regard inter alia *Young v Hoffman Manufacturing* [1907] 2 KB 646 (CA) at 652–653.

202 [1992] QB 333 at 343.

203 At 434.

204 At 350.

civilised terms of service in our hospitals',[205] he concluded simply that 'as a matter of law, reliance on an express term cannot involve breach of an implied term'.[206]

All three judges however, were of the view that it would be inappropriate to base their decisions on public policy and expressed the view that the courts should exercise restraint in basing decisions on public policy.[207] One cannot help but wonder whether the majority judgments were not in reality motivated by the judges' sense of justice since the practical outcome of the decision was that the implied term prevailed over the expressed term.

Other Bases for the Implication of Terms

According to Vorster there are ve dif ferent bases for the implication of terms in South African law:[208]

- (i) in order to give effect to the actual subjective intention or consensus of the parties;
- (ii) in order to give effect to the reasonable expectation of one of the parties that the other had accepted a certain obligation;
- (iii) in order to interpret the contract in a rational manner;
- (iv) in order to give effect to the Moorcock doctrine and;
- (v) the implication of legal incidents.

Usually, the application of the Moorcock doctrine can give effect to all these bases for the implication of terms in fact. However, as pointed out by Vorster, it is possible that where a term does not satisfy the requirements of the of cious bystander test, which is the standard test for the implication of terms in fact in South Africa, it can still be implied on the basis that one of the parties had a reasonable expectation that the other party was under a certain obligation.[209] In other words where no intention can be imputed to a party, it may still be possible to successfully argue that the party by its conduct, created a reasonable expectation that it intended to be bound by the term sought to be implied. If the party seeking to imply the term can demonstrate a subjective belief (although objectively determined) that the other party intended to be bound by the term sought to be implied, the other party will be precluded from denying such intention.[210] In *Coop & others v SA Broadcasting Corp & others*[211] this rule was referred to as the 'doctrine of quasi-mutual assent'. In this case the medical scheme rules entitled retired employees to continue as members of the scheme inde nitely if they so wished. The employer subsidized this bene t at the same rate

205 At 348.
206 At 349.
207 At 346–347, 348, 349.
208 Vorster, 'The Bases for the Implication of Contractual Terms', p. 161.
209 Ibid., pp. 163–164.
210 Ibid.
211 (2004) 25 *ILJ* 1933 (W).

as for all other employees, namely 60%. When the employer unilaterally withdrew these subsidies, the retirees brought an application to the High Court for relief. The employer contended that the subsidy was a gratuity and not a term of the contract of employment. The court held that in the absence of evidence as to whether this was a condition of service, the doctrine of quasi-mutual assent was applicable and that a clear and implied term had been established by the plaintiffs. Consequently the court held that the plaintiffs were entitled to continue as members of the medical aid scheme post retirement as a condition of service on the same basis as other employees. The employer took this decision on appeal to the Supreme Court of Appeal.[212] The appeal court upheld the nding of the court a quo on the basis of the doctrine of estoppel or ostensible authority. In terms of this doctrine,

> a person who has not authorized another to conclude a juristic act on his or her behalf may in appropriate circumstances be estopped from denying that he or she had authorized the other so to act. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he or she had authorized the other to act.[213]

The court held that even though the employer had not given its senior of cers or management employees actual authority to implement this scheme, the employer had created a façade of regularity and approval of the scheme. Furthermore, the court found that the essentials of esoppel, namely, that the person relying on estoppel was misled by the person sought to be held liable that the person who acted on his or her behalf was authorized to do so, that such belief was reasonable, and that the representee acted on this belief to his or her detriment or prejudice, had all been met.[214]

Similarly, in the United States of America the doctrine of promissory estoppel, is comparable to the basis of implication that gives effect to a reasonable expectation of one of the parties. In terms of this doctrine, promises that induce reasonable detrimental reliance are enforced. These promises are usually not embodied in the contract itself. They can be oral or written representations. In the employment context these promises may simply be statements by the employer that the employee's job is secure,[215] or they can be statements in the employee handbook.[216] This doctrine has been accorded formal recognition in terms of section 90 of the rst Restatement which provides:

> A promise which the promisor should reasonably expect to induce action or forbearance of a de nite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

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212 *SA Broadcasting Corp v Coop and others* (2006) 27 *ILJ* 502 (SCA).

213 At 517.

214 Ibid.

215 See inter alia *Demczyk v Innkeepers & Equip. Corp.*, No. 65953, 1994 WL 449719.

216 See inter alia *Booth v Caldwell*, No. 95 APE 101367, 1996 WL 221142.

Despite the of cial recognition, the courts have shown reluctance to allow a party success when relying on this doctrine.[217] Generally the courts have applied stringent tests in that 'promissory estoppel does not protect the promisee's reliance on promises'. Instead, it 'aims to enforce seriously considered promises and hold promisor's to their voluntarily-made promises'.[218] This is very different from focusing on the reasonable expectation of the parties. It is typical of the classical law of contract's obsession with the will of the parties. However, the classical approach of focusing on the will of the promissory rather than the reasonable expectations of the promise is not always adopted. For example, the court in *Darner Motor Sales, Inc. v Universal Underwriters*[219] held that customers who signed standard form contracts were not bound by 'unknown terms which are beyond the range of reasonable expectation'.[220]

The effect of the doctrine of promissory estoppel in the context of the employment relationship is discussed in chapter four.

The fact that there are so many different tests causes confusion. In reality, all the tests would usually yield the same result if applied to the same set of circumstances. In fact Vorster suggests that the Moorcock doctrine should be scrapped since inter alia, terms implied under the Moorcock doctrine could easily be implied on the basis of one or more of the bases he identi es and quoted above. [221] As pointed out by Vorster the of cious bystander test is manipulated by the presumption that the parties to the contract are reasonable men. In this way 'the court gives itself freedom to disregard objections which the party who would be disadvantaged by the term, might very well have made'.[222] In fact application of the criterion of reasonableness serves to give a rational interpretation to the contract, to give effect to reasonable expectations and so on.[223]

Conclusion

In the same way as there is overlapping between all the tests adopted for the implication of terms in fact, so too is there overlapping between the tests adopted for implication of terms in fact and the implication of terms in law. So much so, that writers have suggested doing away with the Moorcock doctrine and the retention

217 See Robert A. Hillman, 'Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study', *Columbia Law Review*, 98 (1998): 580.

218 Phuoung N. Pham, 'The Waning of Promissory Estoppel', *Cornell Law Review*, 79 (1994): 1263 p. 1269.

219 682 P.2d 388 (Ariz. 1984).

220 Ibid., at 396.

221 Vorster, 'The Bases for the Implication of Contractual Terms,' p. 177.

222 Ibid., p. 176.

223 See inter alia the case of *Van den Berg v Tenner* (1975) 2 SA 268 (A) where the application of the Moorcock doctrine rendered the same result as the process of giving a rational construction to the contract.

of the implication of terms in law,[224] and the opposite, namely doing away the implication of terms in law and retaining only implication of terms in fact.[225]

Phang suggests the abandonment of terms implied in law because 'the same result in any given case could be achieved by way of the narrower (and more established) category of "terms implied in fact," notwithstanding the occasional stretching of this category'.[226] It is unclear what the justi cation is for the observation that the category of terms implied in fact is 'more established' than the category of terms implied in law. Phang's reasons for preferring terms implied in fact to terms implied in law are: Firstly, the implication of terms in law entails the application of policy considerations and this is tantamount to the undemocratic exercise of legislative power by the courts and this is best left to Parliament.[227] Secondly, since the implication of terms in law entails the application of policy considerations, it introduces uncertainty 'which far outweighs any other practical bene t which would, in the main, centre on the attainment of justice in "hard cases"'.[228] Vorster's solution to the allegation that the application of policy considerations is undemocratic, is to imply terms in law and not in fact. He argues that even if this allegation is accepted, the legislature can control judge-made rules by legislation that overturns or alters them. Decisions that are fact speci c on the other hand are not susceptible to legislative control as one can hardly imagine a statute overturning a case'.[229]

There are however, two conclusions that Phang draws that are dif cult to reconcile with the reasons he puts forward for his view that 'terms implied in law ought to be abandoned altogether'.[230] If as he avers the same result is achieved irrespective of whether terms are implied in law or in fact, then surely the same criteria are utilized to arrive at a decision? In fact Phang bemoans the use of the term 'necessary' for the implication of terms implied both in law and in fact.[231] Secondly if 'stretching' is allowed, it means that courts can go beyond narrower criteria and implement the dreaded public policy and reasonableness considerations. On what basis will a judge determine whether to 'stretch' the doctrine? How will the 'the possible undesirable psychological effects (premised on the well-worn but no less signi cant concept of oodgates) be halted, if the judiciary stretches the category of implied terms in fact too far and too often?

The truth is that whether the term is implied in law or in fact, the courts actually implement the criterion of reasonableness and label it 'necessity'. Despite judicial

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224 Vorster, 'The Bases for the Implication of Contractual Terms', pp. 177–183.

225 Andrew Boon Leong Phang, 'Implied Terms Again', *Journal of Business Law,* (1994): pp. 255–259.

226 Ibid.

227 Andrew Boon Leong Pang, 'Implied Terms in English Law-Some Recent Developments', *Journal of Business Law* (1993): 242 p. 249.

228 Ibid., p. 249.

229 Vorster, 'The Bases for the Implication of Contractual Terms', p. 182.

230 Phang, 'Implied Terms Again', p. 258.

231 Pang, 'Implied Terms in English Law – Some Recent Developments', pp. 245–246.

contortions and negations concerning the adoption of principles of public policy and reasonableness, it cannot be denied that whether one is implying a term in fact or in law, the criterion of reasonableness is the determining factor.[232] This is true of all the jurisdictions under consideration.[233] It has been referred to as 'the revolutionary movement from the subjective theory to the objective theory of contracts'.[234]

Since the concept of the reasonable man is the vehicle whereby an intention is imputed to the parties in implying terms in fact, it is obvious that the criterion of reasonableness is adopted. Clearly what a reasonable man will do, in a hypothetical situation in the opinion of a judge, will be in uenced by considerations of public policy. The result that whatever the judge considers reasonable in the circumstances will apply, despite rhetoric to the contrary, is inevitable. A logical consideration of the reasons for and of the practical implementation of the reasonable man standard will bear out this inevitable conclusion:

The insurmountable evidentiary obstacles in ascertaining the real subjective intentions of the parties[235] resulted in the adoption of the concept of the reasonable man standard in order to impute an intention to the parties.[236] This resulted in 'a shift from the is of contract to the ought'[237] of contract. The ction of presumed intent often masks a judicial attempt at creating 'socially reasonable contracts'.[238] When actual intent is missing, 'the courts impose external standards of behaviour and fair outcomes on the parties'.[239] In order to achieve such 'socially responsible contracts' by the implication of terms, the ction of ascertaining the real or subjective intention of the parties is abandoned. The reasonable man standard also serves the purpose of creating a semblance of objectivity on the part of the judge because the judge is seen to adopt the community values of the objective and impartial reasonable person and

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232 See Andrew Robertson, 'The Limits of Voluntariness in Contract', *Melbourne University Law Review,* 29 (2005): 179 pp. 208–209 and Andrew Robertson (ed.), *The law of Obligations: Connections and Boundaries* (2004), pp. 97–101 where it is argued that the implication of terms (whether implied in law or in fact) are dependent on considerations of public policy such as reasonableness and fairness.

233 See Arthur T. Van Mehren, 'Substantive Contractual Justice', 7 *International Encyclopedia of Comparative Law*, 42 (1992): p. 51 and Vorster, 'The Bases for the Implication of Contractual Terms'.

234 Larry A. Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', *SCLR*, 48 (1997): 293, pp. 296–297.

235 See Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (New York, 1992), p. 35.

236 Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', p. 31 and; Robertson, 'The Limits of Voluntariness in Contract', p. 203.

237 Ibid., p. 312.

238 Larry A. Dimatteo, Equity s Modi cation of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law', *New Eng. L. Rev*, 33 (1999): 265 p. 281.

239 Robertson, 'The Limits of Voluntariness in Contract', p. 210.

not his own. In this way the judge is perceived as playing a limited role in policy making. In keeping with a semblance or discovering the real or subjective intentions of the parties, the reasonable man of the law of contract is personalized and endowed with the 'idiosyncratic features of the contracting parties viewed within the context of their interaction'.[240] Consideration of other evidence about the circumstances surrounding the transaction and applicable customs and usages also personalize the outcome.[241] This serves to perpetuate the ction that the judge is discovering the actual intention of the parties and not imposing his own subjective sense of justice on the parties. At the same time, it is not inconceivable that the intention imputed to the parties coincides with their real subjective intention. According to some, this is usually the case.[242] This is not surprising given the extensive personalization and the ad hoc application of the reasonable man test. But perhaps this view is a little optimistic. There is no denying that the intention imputed to the parties is not always a re ection of their real intention. [243]

In fact there are situations where it is clear that the outcome re ects neither of the parties' intentions.[244] This happens because of the application of the criteria of reasonableness and fairness by judges.

The reasonable man test has elements of both objectivity and subjectivity. The objectivity is evidenced by the fact that decisions re ect collective societal values and norms.[245] Intentions are imputed from how the impartial and objective reasonable man endowed with a sense of community values would interpret the parties' conduct. But just how objective can the reasonable man be, given the inevitable practical consideration that the reasonable man is a fabrication of the judge and that it is the judge who decides what the reasonable man would make of the circumstances? Judicial discretion is inevitable because 'a judge sweeping the landscapes of facts, custom, usage and practice has much to choose from in developing a concept of the reasonable person'.[246] The exercise of this discretion is in uenced by many factors including the judge's personal preferences and prejudices (even though they may be on a subconscious level), personal experiences and dogmas and so on.[247]

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240 Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', p. 317.

241 In the words of Dimatteo, ibid., p. 14: 'The reasonable person is cut from the fabric of facts and is thus intimately connected with the totality of the circumstances.'

242 Robertson, 'The Limits of Voluntariness in Contract', p. 204. Perhaps this statement should be quali ed to the extent that this is usually the case in matters that don not reach the courts.

243 Dimatteo, Equity s Modi cation of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law', p. 265.

244 Ibid., p. 206.

245 See ibid., p. 281 where Dimatteo states: 'The preservation of the illusion of contractual consent and freedom of contract by the use of the ction of presumed consent is offset by the courts' preference to create socially reasonable contracts.'

246 Ibid., p. 345.

247 Ibid.

Although judges are constrained by precedent,[248] custom,[249] public opinion and the general morality of the community,[250] ultimately the outcome in any given case is dependent on the judge's interpretation of what is fair and reasonable.[251] Judges have been known to apply patently arti cial techniques of construction in order to arrive at a result that they consider fair or to avoid an outcome that they consider to be unfair.[252]

The open admission that judges can and do make law because it is inevitable that their decisions are tainted by subjectivity is anathema to those who still adhere strictly to the principles of the classical theory of contract of the nineteenth century. One of the main criticisms leveled against the application of vague and abstract notions such as reasonableness and fairness by judges is that it introduces unacceptable levels of uncertainty and unpredictability in the law. Since the viable participation in commercial activities is to some extent dependent on certainty and predictability of the law, a system that allows judicial discretion is unacceptable. The simple answer to this objection is rstly that subjectivity is inevitable, but it is constrained by precedent, custom and the general sense of morality of the community.[253] Secondly, 'a law based on the objective interpretation of external manifestations is likely to promote predictability, certainty, generality and ultimately, fairness in the rule of law'.[254] Court decisions are most likely to be predictable and uniform because it is these characteristics, inter alia, which render judgments acceptable and justi able.

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248 See ibid., p. 314 where Dimatteo observes: 'The fabrication of a reasonable person is supposed to be performed on an ad hoc basis. Once constructed, however, the reasonable person continues as an afterimage in the judicial mind. A reasonable person thus becomes a culmination of previous fabrications. The earlier fabrications provide the basis for mutation by the idiosyncrasies of the pending case. Once brought to the conscious mind, the ghost of the past reasonable person triggers a preconceived bundle of beliefs and rationales.'

249 As discussed above, custom is a source of implied terms as legal incidents. Trade usages and customs are relevant to the outcome of the conclusion the reasonable man will arrive at.

250 Judges have to provide coherent reasons that appear to be logical and principled to justify their decisions.

251 See Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', pp. 343–353 for a comprehensive explanation of the reasons for the inevitability of the fact that the subjective opinions of the judiciary have a role to play in the implementation of the reasonable man test.

252 Robertson, 'The Limits of Voluntariness in Contract', pp. 205–206.

253 Vorster, 'The Bases for the Implication of Contractual Terms', p. 181 advocates the abandonment of the Moorcock doctrine. He is of the view that if terms are implied in law, the application of considerations of reasonableness and public policy is likely to be constrained: He argues: 'A judge who knows that he is creating a precedent is more likely to proceed with caution than one who thinks he will avoid the tentacles of the doctrine of precedent by purporting to base his decision on factors uniquely relevant to the case before him.'

254 Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', p. 343

Since judges have to justify their decisions, they are likely to endow their decisions with these characteristics.

The illusion of contractual consent and the ction of the imputed intention should be abandoned. The courts should openly admit to the application of considerations of fairness and reasonableness as is the case in civil jurisdictions. This will prevent the contortions that judges indulge in to camou age the real impetus for their decisions. If judges hide behind these ctions the law is prevented from developing new principles because these ‘principles remain obscured and unarticulated’.[255]

255 Vorster, ‘The Bases for the Implication of Contractual Terms’, pp. 177–178.

Chapter 4

Sources of Implied Terms

Introduction

I demonstrated in the previous chapter that irrespective of whether terms are implied in law or in fact, the criterion necessary for implication is reasonableness. Generally, what renders a term reasonable is that it is in line with the norms and moral standards accepted by the community, or it is accepted trade usage or custom (which also indicates acceptability within the norms and standards of the community). Alternatively, it is possible to imply a term on the basis that the promisor, by his conduct, created a reasonable expectation in the mind of the promisee that he was obliged to ful l certain obligations. The reason for implying terms on this basis is that intentions are imputed to parties on the basis of their conduct.

In this chapter I will discuss international law, corporate codes of conduct, employee handbooks and other unilateral employer communications such as policy and mission statements as sources of implied terms. The potential in uence of international labour and employment standards, the general principles of international human rights law as implied terms will also be considered. International labour standards and general human rights principles have the potential to be implied into individual contracts of employment on the basis that these laws and principles re ect the norms and moral standards accepted by the community, and therefore qualify as accepted trade usage or custom.

Codes of conduct may take the form of multilateral government initiated codes formulated by organisations such as the United Nations or the International Labour Organisation (ILO), or they may be codes that are initiated by private business, or by national governments. Whether these codes are self imposed individual company codes, or international or national guidelines, they have the potential to be implied into the individual contract of employment on one or both of the following bases:

(i) The codes qualify as customs or trade usage or;
(ii) The employer has indicated by unilateral communication or other conduct that it intends to be bound by the terms of the code.

Other unilateral employer communications, for example policy statements can also be implied into contracts of employment on the basis that a legitimate expectation on the part of the employee was created by employer conduct and consequently the employee's reliance on the employer's conduct is worthy of protection.

The employment relationship in the United States of America differs from the other jurisdictions under discussion in that it is based on the employment at will doctrine. This essentially means that both the employer and the employee are free to terminate the contract at any time and for whatever reason. This doctrine obviously places employees in a very precarious position with virtually no job security. Given the harshness of this rule implied terms have played a very important role in providing a measure of job security for some American employees. The extensive and universal use of employee handbooks in the United States of America has led to these handbooks becoming an important source of implied terms for the bene t of otherwise unprotected employees. Given these facts and the uniqueness of the employment relationship in the United States of America, I will analyse the case law pertaining to the implication of terms contained in employee hand books.

The possibility of implying terms for the bene t of employees into contracts of employment in South Africa is far from remote. The reasons for this are inter alia the in uence of the South African Constitution on the interpretation of contracts and, the fact that as seen in chapter two all contracts in South African law are premised on the principles of good faith. In addition to this there is a very comprehensive and enlightened national corporate governance code. Once again, given the uniqueness of the South African situation it is also worthy of discussion. Since the South African national corporate governance code is exemplary, I will discuss the sections pertaining to employee rights.

Employer Promises

In order to enhance their corporate image amongst suppliers, clients and employees, to attract new employees, or to elicit loyalty from existing employees, employers make promises. These promises can take various forms: They may simply be oral statements made to individual employees, or as is often the case in the United States of America they can be statements that appear in the employee handbook. Alternatively, companies may pledge adherence to corporate codes in various advertising media including print advertising and websites or the company may issue policy or mission statements wherein it adheres to certain standards and principles.

It could be argued that these promises constitute suf cient evidence to impute an intention to be bound on the part of the company. The counter argument to this is that such policy documents, mission statements, advertisements and the like, are merely an indication of what the company is striving for, and not an intention by the company to be bound by the principles embodied in the codes of conduct.[1]

1 See for example, the observation made in *Soderlun v Public Serv. Co.*, 944 P.2d 616 at 620 that a statement only has contractual force if it evidences ‘a promissory intent or is one that the employee could reasonably conclude constituted a commitment by the employer. If the statement is merely a description of the employer’s present policies … it is neither a promise nor a statement that could reasonably be relied upon as a commitment’. This dictum

Ultimately, whether such an intention can be imputed on the part of the employer depends on the wording of these statements. For example, in the case of *Johnson v McDonnell Douglas Corporation*[2] Billings CJ held that the company's unilateral act of publishing its handbook was not a contractual offer to its employees. He concluded that the handbook was 'merely an informational statement of McDonnel's self-imposed policies'[3] The basis for this conclusion is that:

> Several of the rules and regulations in the handbook were couched in general terms and were open to broad discretion and interpretation … Given the general language of the handbook and the employer's reservation of power to alter the handbook, a reasonable at will employee could not interpret its distribution as an offer to modify his at will status.[4]

In situations where it is not possible to impute an intention to the company, it is still possible to imply these promises as terms of the contract of employment, and thereby bind the employer on a basis other than the intention of the employer: The alternative is that the company can be said to have created a reasonable expectation on the part of the employee that the company intended to be bound by those mission or policy statements.[5] It has to be conceded that the distinction between these two bases for binding an employer to certain terms is extremely narrow since the chances of overlap are very high.[6] In all probability where it is possible to impute an intention to the employer it can be said that the employer created a reasonable expectation on the part of the employee that it intended to be bound.[7] The absence of a clear and distinct promise as pointed out by the courts, means that there can be no reasonable reliance on the part of the employee.[8] Nevertheless, it is conceivable that there may be situations where there is no overlap.[9]

In terms of South African case law the employee will be said to have a legitimate expectation if the employee can demonstrate a subjective belief (but objectively determined) that the company intended to be bound by such statements or advertisements. The company is consequently precluded from denying such intention.[10] In the South African case *Coop & others v SA Broadcasting Corp*

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has subsequently been followed inter alia in *Demasse v ITT Corporation*, 194 Ariz. 500, 984 P2d 138.

2 745 S.W.2d 661.

3 At 662.

4 Ibid.

5 *Volkskas v Van Aswegen* 1961 (1) SA 493 (A) at 496 G.

6 As will become apparent in the discussion concerning the implication of terms in handbooks, the requirements that the American courts have insisted on in order to impute terms on this basis demonstrate the overlap between this doctrine and general contract theory.

7 Robert A. Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting', *Rutgers Law Journal*, 31 (1999): 1 pp. 17–18.

8 Ibid.

9 See Jacob Vorster, 'The Bases for the Implication of Contractual Terms', *TSAR*, 2 (1988): pp. 161–163.

10 Ibid.

& others[11] this rule was referred to as the 'doctrine of quasi-mutual assent'.[12] In this case the provisions of the medical scheme rules were implied as terms of the contract of employment. Similarly a company's mission or policy statements could be imported into the contract of employment. As discussed,[13] the appeal court[14] on the basis of the doctrine of ostensible authority or estoppel held the employer liable. The court found that even though the employer may not have intended to be bound by the scheme that had been implemented, it had conducted itself in a manner that caused the employees to be misled into believing that the management employees acting on the employer's behalf in implementing the scheme were authorized to do so. Furthermore, the coort found such belief to be reasonable, and that the employees had acted to their detriment in relying on this belief. Thus all the requirements of the doctrine of estoppel were met.

The right to bene ts such as employee bonuses, [15] pension bene ts [16] and severance payments have been implied into employment contracts on the basis of the employee's 'legitimate expectation' in the United States of America.[17] In the case of *Cain v Allen Electric & Equipment Company*,[18] for example, the Supreme Court of Michigan held that the personnel policy adopted by the employer's board of directors relating to severance pay was binding on the employer. Smith J stated:[19]

> We cannot agree that all we have here is a mere gratuity, to be given, or to be withheld, as a whim or caprice might move the employer. An offer was made, not merely a hope or intention expressed. The words on their face looked to an agreement, an assent…Did the offer consist of a promise? "A promise is an expression of intention that the promisor will conduct himself in a speci ed way or bring about a speci ed result in the future, communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon." (Corbin on Contracts, 13).

Similarly in *Toussaint v Blue Cross & Blue Shield*,[20] the court explained that in terms of the legitimate expectation rule the employer will be bound when an 'employee believes that, whatever the personnel policies and practices, they are established and of cial at any given time, purport to be fair and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation"'.

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11 (2004) 25 *ILJ* 1933 (W).

12 The facts of this case are set out in chapter three.

13 See chapter three.

14 SA Broadcasting Corp v Coop and others (2006) 27 ILJ 502 SCA.

15 *Roberts v Mays Mills*, 184 N.C. 406, 410 114 S.E. 530, 28 A.L.R. 338.

16 *Schofield v Zion's Co-op. Mercantile Institution*, 85 Utah 281, 39 P. 2d 342, 96 A.L.R. 1083.

17 *Toussaint v Blue Cross & Blue Shield*, 292 N.W. 2d 880 (Mich. 1980).

18 346 Mich.568 78 N.W.2d 296.

19 At 301.

20 292 N.W. 2d 880 (Mich. 1980) at 894.

As discussed,[21] in the United States of America there is a similar doctrine to that of legitimate expectation which is known as 'promissory estoppel'. This is a manifestation of the fact that in determining the validity of contracts or clauses contained therein, it is not the actual subjective intention of the promisor that is relevant, but what interpretation the objective reasonable man would have attached to the promisor's words and conduct. Even if the promisor had no intention to be bound and can demonstrate this fact, he can still be liable on the basis of the doctrine of 'promissory estoppel'. Secondly, the doctrine 'does not impose the requirement that the promise … must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee'.[22] This is what allows this doctrine the status of an independent theory of obligation, which is distinct from a breach of contract action.[23] However, it must be borne in mind that this court case requiring something less than is required for an offer was decided in 1965, and empirical studies of more recent cases evidence an insistence by the courts on clear and de nite promises more in line with the requirements for a valid offer in terms of the general principles of contract.[24]

The reasonable man, in interpreting the words and conduct of the promisor, must determine rstly whether the promisee s reliance was reasonable and, secondly whether a reasonable person in the position of the promisor would have foreseen the reliance on the part of the promisee.[25] In addition, many cases indicate that the promisee has to demonstrate a detrimental reliance on the assurances or promises in order to successfully claim damages.[26] Some empirical studies of case law conducted in the mid 1980s concluded that it was unnecessary to demonstrate a reliance on the promise to one's detriment in order to be successful in a claim based on promissory estoppel.[27] However, other extensive case law studies conducted in the mid nineties have put these ndings into question. [28] As

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21 See chapter three under the sub heading 'Other Bases for the Implication of Terms'.

22 *Hoffman v Red Owl Stores, Inc.* 133 N.W.2d 267 (Wis. 1965) at 275. In this case the Wisconsin Supreme Court awarded relief on the basis of promissory estoppel to the plaintiff who had to his detriment, relied on the repeated assurances of the defendant that it would grant the plaintiff a grocery store franchise.

23 Despite this distinction, as will be discussed herein under the hereunder where the implication of terms in handbooks is discussed, many of the decisions require nothing less than what is required for a valid contract in terms of the general principles of contract.

24 See Phuong N. Pham, 'The Waning of Promissory Estoppel', *Cornell Law Review*, 79 (1994): 1263 pp. 1287–1288.

25 Larry A. Dimatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', *South Carolina Law Review*, 48 (1997): 294 p. 302.

26 Robert A. Hillman, 'Questioning the New "Consensus" on Promissory Estoppel: An Empirical and Theoretical Study', *Columbia Law Review*, 98 (1998): p. 580.

27 Ibid., p. 588.

28 Ibid. and Pham, 'The Waning of Promissory Estoppel', p. 1263.

pointed out by the authors, the reason in some cases where reliance or detrimental reliance was not even mentioned by the courts, was that it was not necessary to establish detrimental reliance in order for the claim to fail because the claim had already failed on other grounds. These grounds for failure include the nding that the promise was ambiguous, or that reliance on the promise was unreasonable.[29] In other words, the enquiry into whether there was detrimental reliance only becomes necessary if the prerequisites that the reliance was reasonable and that the promisor should have foreseen such reliance have been met. In other cases the claim failed because detrimental reliance could not be proved. An example of this situation is the case of *Norland v Mahlum*.[30] The buyer of a bank's stock promised the bank's employees that they would not lose their jobs as a result of the transfer. On transfer the bank's employees lost their jobs. One of them sued the buyer on the basis of promissory estoppel. The claim was unsuccessful because there was no detrimental reliance since the employee did not turn down job offers made to him prior to the transfer. There is no clear consensus amongst the different jurisdictions in the United States as to the 'extent to which detrimental reliance … is a necessary element'.[31]

Despite this uncertainty, case studies have demonstrated that the difference between the doctrine of 'promissory estoppel' and that of 'legitimate expectation' is that the latter protects the promisee's reliance on the promise, while the former, despite references to detrimental reliance, 'aims to enforce seriously considered promises and hold promisors to their voluntarily-made promises'.[32] The requirement that the promisee relied on the promise or representation to his detriment, renders a successful claim based on promissory estoppel even more burdomesome than one based on the general principles of contract.

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29 See Hillman, 'Questioning the New "Consensus" on Promissory Estoppel: An Empirical and Theoretical Study'; Pham, 'The Waning of Promissory Estoppel', pp. 1286–1288 and; Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting'.

30 No. C2-94-561, 1994 WL 510142 (Minn. Ct. App. Sept. 20,1994).

31 *Bankey v Storer Broadcasting Company*, 432 Mich. 438, 443 N.W. 2d 112 at 117.

32 Phuong N. Pham, 'The Waning of Promissory Estoppel', *Cornell Law Review*, 79 (1994): p. 1269. As explained by the Supreme Court of Michigan in *Toussant v Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 at 892: 'While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to the employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place, and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies or practices.' Therefore it was held unnecessary that the employee prove reliance on the policies set forth in the manual to succeed in his claim.

Empirical studies of claims based on promissory estoppel generally[33] and in the employment context speci cally [34] have indicated that usually the claimant is unsuccessful. Several reasons for the failure of the courts to allow recovery in terms of promissory estoppel have been suggested:

(i) The existence of the alternative basis of breach of contract based on traditional general principles of contract. This alternative possibility is available in most circumstances given the huge overlap between the two bases of claim.[35]
(ii) Even where the alternative ground of breach of contract is rejected or not even considered, the courts 'nonetheless employ in their promissory estoppel analysis the traditional contract method of implying a contract term…'.[36]
(iii) With regard to oral representations in the employment context, Hillman concludes, on the basis of an empirical study of case law of the 1990s, that there was a judicial preference for enforcing written promises as opposed to oral promises.[37]
(iv) With regard to claims based on promissory estoppell in the employment setting, a judicial 'veneration' or 'allegiance' to the employment-at-will rule has been observed.[38]

Nevertheless, such claims are still possible. In summary to empirical case law studies highlighting the reasons for the low success rate of claims based on promissory estoppel, Hillman suggests the following 'recipe for success of a claim':[39]

> An employee could hope to succeed only if the employee could demonstrate that the authorized person made a distinct promise of concrete bene ts or of a particular duration

33 Ibid.

34 Hillman, 'Questioning the New "Consensus" on Promissory Estoppel: An Empirical and Theoretical Study'.

35 Pham, 'The Waning of Promissory Estoppel', p. 1263. He concludes at 1274: 'Courts are likely to allow recovery under estoppel where they also actually found or could have found a breach of contract.'

36 Ibid.

37 Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting', explains the reasons for this judicial preference his case studies revealed: 'The reasons for this trend are complex, but they surely relate to the change in public opinion during the 1980s and early 1990s concerning the appropriateness of judicial intervention in private transactions, the merits of the welfare state, and the importance of free markets.'

38 Ibid., p. 25. Hillman explains: 'Perhaps the most important reason for judicial adherence to employment at will, at least in the cases studied, however, may be the rule's long history and judicial acceptance. The absence in most judicial opinions of substantive discussion of the reasons for employment at will and the rule's place in the modern setting, despite serious criticism of employment at will in the secondary literature, demonstrates the judiciary's high regard for the rule.'

39 Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting', pp.19–20.

of employment directly to her; and as a result, she forewent a distinct and foreseeable opportunity and sustained provable damages. Employer promises and representations of job security and employee failures to look for other jobs would not alone sustain a promissory estoppel claim.

Case Law

Faced with the decision as to whether employer statements should be implied into the contract of employment, some courts have decided the matter with reference to the employee's reliance on the statements, while the majority of the courts have employed unilateral contract theory to determine the matter.[40] A brief discussion of some cases in the employment context will provide a sense of the type of circumstances that will render it possible to bind an employer to its promises.

The discussion that follows will demonstrate that since the courts have generally applied unilateral contract theory to claims that could be based on promissory estoppel, the promisor's intention or imputed intention to be bound is of paramount importance. An insistence by the courts on a clear and de nite promise and the consequent presence of intent serves to reinforce the application of traditional contract theory.

Given the extensive use of handbooks in the employment situation in the United States of America there are a multitude of cases dealing with the implication of terms from such handbooks. Statements in handbooks dealing with certain employee bene ts such as termination pay ,[41] death bene ts, [42] severance pay[43] and pro t sharing bene ts [44] have been implied into the contract of employment.[45] This does not mean that terms can only be implied from employee handbooks. Terms emanating from employment policies, manuals and other offers can also be implied into the contract of employment.[46] Most cases concerning the implication of terms, however, deal with terms emanating from employee handbooks. Most of these cases in turn, deal with terms that limit the application of the at-will doctrine. Unless otherwise provided for in terms of an agreement, at-will employment is the bedrock model of

40 *Bankey v Storer Broadcasting Company*, 432 Mich. 438, 443 N.W. 2d 112 at 117.

41 *Cain v Allen Electric & Equipment Co., 346 Mich.* 568, 78 N.W. 2d.296 (1956).

42 *Psutka v Michigan Alkali Co.*, 274 Mich. 318, 264 N.W.385 (1936).

43 *Gaydos v White Motor Corp.*, 54 Mich.App 143, 220 N.W.2d 697 (1974); *Clarke v Brunswick Corp.*, 48 Mich.App. 667, 211 N.W.2d 101 (1973).

44 *Couch v Administrative Committee of the Difco Laboratories, Inc., Salaried Employees Profit Sharing Trust*, 444 Mich.App. 44, 205 N.W.2d 24 (1974).

45 These employer promises are usually not found in employee handbooks. They usually appear in employer policy statements. (See *Cain v Allen Electric & Equipment Co*., 346 Mich. 568, 78 N.W. 2d.296 (1956) at 296.)

46 *Scott v Pacific Gas & Electric Co.* (1995) 11 Cal 4th, 454, 46 CalRptr.2d 427, 904 P2d 834 and; *Foley v Interactive Data Corp.* (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373.

American employment law.[47] In terms of this model an employee may be dismissed for any reason, good or bad, or no reason at all. Provisions or statements in employee handbooks have on occasion been recognized by the courts in the different states as providing limitations to the at-will principle in the form of implied terms to the contract of employment. Although there is no clear consensus as to the legal theory to be adopted for the implication of terms from employee handbooks,[48] the basis of these implications in most jurisdictions is unilateral contract theory.[49] In a unilateral contract the offeror's promise is accepted by performance, and mutuality of obligation is not required.[50] Stated differently: 'In a unilateral contract, there is only one promisor, who is under an enforceable legal duty … The promise is given in consideration of the promisee's act or forebearance. As to the promise, in general, any act or forebearance, including continuing to work in response to the unilateral promise, may constitute consideration for the promise.'[51] A discussion of some of the cases where unilateral contract theory was adopted in deciding whether or not a provision in the employee handbook was to be implied into the contract of employment, will provide an indication of what the courts in the different jurisdictions have required the claimant to prove in order to succeed in his claim. The mere existence of statements or provisions in handbooks does not automatically render them terms of the contract. The courts have held that these employer communications can only be implied terms if they meet 'the traditional requirements for the formation of a unilateral contract – an offer, communication, acceptance and consideration'.[52]

One of the rst cases to recognize that a provision in a handbook can become an implied term of the contract of employment is *Pine River State Bank v Mettille*.[53] In this case the Minnesota Supreme Court described the requirements that have to be met in order for a handbook policy to be implied into the contract of employment:[54]

> The offer must be de nite in form and must be communicated to the of feree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions … An employer's general statements of policy are no more than that and do not meet the contractual requirements of an offer. Thus in *Degen v Investors Diversified Services, Inc.*, 260 Minn. 424, 110 N.W.2d 863 (1961), where the employee was told he had a great future with the company and to consider his job as a "career situation," we said that these statements did not constitute an

47 See Stephen Carey Sullivan, Unilateral Modi cation of Employee Handbooks: A Contractual Analysis', *Regent U. L. Review*, 5 (1995): 261, p. 263.

48 *Bankey v Storer Broadcasting Company*, 432 Mich. 438, 443 N.W.2d 112.

49 Jason A. Waters, 'The Brooklyn Bridge is Falling Down Unilateral Contract Modi cation and the Sole Requirement of the Of feree s Assent , *Cumberland Law Review*, 32 (2001–2002): 375, pp. 382–383.

50 *Wilder v Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo.1994).

51 *Asmus v Pacific Bell*, 23 Cal.4th 1, 1999 P.2d 71, 96 Cal.Rptr.2d 179 at184.

52 *Amoco Fabrics and Fibers Company*, 729 So.2d 336.

53 333 N.W.2d 622.

54 At 626–627.

> offer for a lifetime employment contract … If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner an original employment contract may be modi ed or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.[55]

There have been some variations in emphasis in cases with reference to what constitutes a valid offer. Some cases have emphasized the promisee's reasonable reliance on the promise[56] combined with the intention of the promisor,[57] or the fact that the statements created an expectation on the part of the employee,[58] while others refer to the actual wording of the statements and the conduct of the promisor[59] and, some cases consider a combination of these factors.[60] The facts of *Ex parte Amoco Fabrics and Fibers Company (In re Danny Stokes and Phillip Williams v Amoco Fabrics and Fibers Company Inc.)*[61] are illustrative:

Amoco employed Stokes and Williams to work in the Andalusia Mills facility in 1985 and 1987 respectively. Throughout their employment Amoco had implemented a 'general seniority policy'. The gist of the policy was that when the employer had to reduce its workforce those who had worked for the employer for the longest time would be the last to be terminated. This policy appeared in the employer's policy and procedure manual which was made available to the supervisors and not the other employees. The employee handbooks, which were distributed to all the employees also referred to the policy. However, it did not speci cally refer to the procedure to be adopted when reducing the workforce

55 This approach was followed inter alia in *Hoffman-LaRoche, Inc. v Campbell*, 512 So.2d 725 (Ala. 1987) and *Ex parte Amoco Fabrics and Fibers Company (In re Danny Stokes and Phillip Williams v Amoco Fabrics and Fibers Company Inc.)* 729 So.2d 336.

56 In *Foley v Interactive Data Corp.* (1988) 47 Cal.3d 654, Cal.Rptr. 211, 765 P.2d 373 the court held that a term can be implied on the basis of the employee's reasonable reliance on company policy manuals.

57 In *Demasse v ITT Corporation*, 194 Ariz 500, 984 P.2 d 1138 at 1143 the court quoted *Soderlun v Public Serv. Co.*, 944 P2d 616, 620 (Colo.App.1997) and stated: 'A statement is contractual only if it discloses a "promissory intent, or is one that the employee could reasonably conclude constituted a commitment by the employer. If the statement is merely a description of the employer's present policies … it is neither a promise nor a statement that could reasonably be relied upon as a commitment".'

58 *Brodie v General Chemical Corporation*, 934 P.2d 1263.

59 Ibid.

60 *Ex parte Amoco Fabrics and Fibers Company (In re Danny Stokes and Phillip Williams v Amoco Fabrics and Fibers Company Inc.)* 729 So.2d 336.

61 Ibid.

as did the policy manual. The handbook merely provided that company seniority referred to the length of service of the employee and that such seniority would determine what bene ts including vacation pay , service awards, retirement bene ts the employee would be entitled to. It further provided that promotions and transfers would not interrupt an employee's level of seniority. The procedure to be followed when reducing staff however, was in the policy manual and not the employee handbook. The employees were informed of the employer's policies and practices and that they were entitled access to the policy manual. Stokes and Williams both testi ed that their supervisors explained to them how the seniority policy and the lay off/reduction-in-workforce policy worked. In1992 Amoco sold its Andalusia facility to Shaw Industries. Stokes and Williams formed part of a group of seven industrial mechanics terminated in order to reduce the industrial-mechanic department in line with Shaw's requirements. This termination did not consider the length of service of the employees who were being retrenched. Stokes and Williams sued Amoco on the basis inter alia of breach of contract in that the lay off /reduction- in-workforce policy was not implemented and it was an implied term of their employment contracts. The court held that the language in the handbook and policy and procedure manual was speci c enough to constitute an of fer since it speci cally states that Whenever it is necessary to reduce the number of employees within a job classi cation the employee within that classi cation with the least job seniority will be reduced from that job"'.[62] Secondly, the court held that the fact that Amoco communicated the policy to Stokes and Williams as a bene t, and that it applied it consistently throughout their tenure constituted suf cient evidence that Amoco intended to be bound by the terms of the policy. In conclusion, the court held that the claimants 'presented substantial evidence indicating that Amoco's manifestations created an offer'.[63]

Once it is established that the words constitute an offer, it must be proved that the offeree was aware of the offer, since 'it is axiomatic that an offer must be communicated before it can be accepted'.[64] Generally, the fact that the provisions are contained in employee handbooks constitutes communication. However, other forms of communication may under certain circumstances be considered adequate to constitute proper communication of the offer.[65] In the case of *Ebling v Masco Corporation*[66] for example, where the entire contract was oral, an oral undertaking was considered to be a valid and enforceable term of the contract. During the course of negotiations an of cial of the employer agreed that he would personally review Ebling's job performance, and if he was 'doing his job' he would not be discharged. The court found this undertaking to constitute a valid term of the employment contract.

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62 At 339–340.

63 Ibid.

64 *Hoffman-LaRoche, Inc. v Campbell,* 512 So.2d 725 (Ala. 1987) at 734.

65 Ibid.

66 408 Mich, 579, 292 N.W.2d 880.

Once it has been established that the words (be they written or oral), or possibly even the conduct of the employer constitute an offer, and that offer has been properly communicated to the employee, all that is required to create a valid and binding unilateral contract is that the employee accept the offer and exchanged consideration.[67] Generally continued employment after communication of the offer constitutes both acceptance and consideration.[68] As observed by a Court of Appeal[69] more than fty years ago:

> Of late years the attitude of the courts (as well as of employers in general) is to consider employment security arrangements which offer additional advantages to employees as being in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment, and not as being mere offers of gifts. They make the employees more content and happier in their jobs, cause the employees to forego their rights to seek other employment, assist in avoiding labor turnover, and are considered of advantage both to employer and the employees.

The implication is that the exchange is a fair one with both parties bene ting, the employer bene ts because its staf f is loyal and the employee bene ts by the additional job security.[70]

There are however, still some judges who are loath to imply a term that varies the at-will doctrine. One reason given for a refusal to imply terms which constitute deviations from the at-will doctrine is that such terms undermine a principle of contract law that is based on settled precedent.[71] This principle is the freedom of contract in terms of which an employer should be free to hire and re, and employees to resign as they please.[72] Another reason for allegiance to the at-will doctrine is based on the policy consideration that technology has rendered

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67 *Hoffman-LaRoche, Inc. v Campbell,* 512 So.2d 725 (Ala. 1987) at 734 and *Brodie v General Chemical Corporation*, 934 P.2d 1263 at 1266.

68 Ibid.

69 *Chinn v China Nat. Aviation Corp*., (1955) 138 Cal.App.2d 98, 99–100, 291 P.2d 91.

70 *Asmus v Pacific Bell*, 23 Cal.4th 1, 999 P.2d 71, 96 Cal. Rptr.2d 179, 184. See also *Cain v Allen Electric & Equipment Co.,* 346 Mich. 568, 78 N.W. 2d.296 (1956).

71 See dissenting judgment of Hooper C.J. in *Amoco Fabrics and Fibers Company*, 729 So.2d 336, at 342–343.

72 In *Duldulao v Saint Mary of Nazareth Hosp.* 115 Ill.2d 482, 106 Ill.Dec. 8, 505 N.E. 2d 314 (1987), the Illinois Supreme Court, following *Pine River State Bank v Mettille*, 333 N.W.2d 622 (Minn 1983) explained: 'Nearly all courts agree on the general rule, that an employment relationship without a xed duration is terminable at will by either party . Those courts which hold that an employee handbook can never create enforceable job security rights appear to apply this general rule as a limit on the parties' freedom of contract. The majority of courts, however, interpret the general 'employment-at-will rules a rule of construction, mandating only a presumption that a hiring without a xed term is at will, a presumption which can be overcome by demonstrating that the parties contracted otherwise. We agree with the latter interpretation.'

employer exibility indispensable in order to enable the employer to compete and survive in the new global economy.[73] Despite these arguments, the majority of the decisions have held that provided the unilateral contract theory criteria are met, it is possible for a term that provides the employee with a measure of job security and which is at variance with the employment-at-will rule, to be implied into the contract of employment.

In summary, in many cases, the application of unilateral contract theory for the implication of terms based on promissory estoppel has meant that the employee need not prove detrimental reliance to succeed in his claim. All that is required is that the statement made by the employer constitutes an offer, that the offer was communicated to the employee and that the employee accepted the offer and furnished consideration. Continued employment after communication of the offer has generally been held to constitute acceptance of the offer, and 'by continuing to stay on the job although free to leave, the employee supplies the necessary consideration for the offer'.[74]

Nevertheless there are many cases where claims based on promissory estoppel have failed because the employee was unable to prove detrimental reliance.[75] Furthermore, the courts generally found that a failure to look for another job, or that they continued their job in reliance on the promise was insuf cient to prove detrimental reliance. The courts require actual detriment in the sense that the employee had to prove that they had rejected actual offers or opportunities.[76]

The English case law dealing with whether policies or practices unilaterally introduced by the employer, usually for the bene t of the employee, is also not settled.[77] Sometimes the handbooks are interpreted as an exercise in management prerogative in the issuing of instructions, and at times the handbooks are seen to create binding obligations on the employer that can be enforced on the basis of protecting legitimate employee expectations.[78] However, the courts are not generally averse to perceiving handbook policies (or rulebook policies to use the English terminology), as part of the contract of employment. In *Briscoe v Lubrizol Ltd*[79] terms of the income protection scheme were contained in the staff handbook. The court noted the frequent use of employee handbooks and stated: 'It is of course frequently the case that details of an employee s contract and the bene t to which he is entitled by virtue

73 See Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting', p. 26 where the various arguments for holding that it is not possible to contract out of employment-at-will are discussed.

74 *Pine River State Bank v Mettille*, 333 N.W.2d 622 (Minn 1983) which decision was subsequently followed in inter alia *Hoffmann-La Roche, Inc. v Campbell*, 512 So.2d 725.

75 Hillmann, The Unful lled Promise of Promissory Estoppel in the Employment Setting', pp. 15–16.

76 Ibid.

77 See Douglas Brodie, Re ecting the Dynamics of Employment Relations: Terms Implied From Custom or Practice and the Albion Case', *ILJ*, 33 (2004): p. 159.

78 Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment', *ILJ*, 15 (1986) 1 p. 4.

79 [2002] EWCA Civ 508 (CA).

of his employment are largely to be found in a handbook of the kind supplied to the claimant in this case.' Given the frequent use of handbooks the court concluded that despite the fact that the clauses in the handbook were of an explanatory nature the purpose of which was to provide information, these terms gave rise to binding legal obligations. Despite this willingness to accept handbook terms as forming part of the contract of employment, it is still unclear what is required in order for such policies or practices to be implied as terms of the contract of employment. In *Lee v GEC Plessey Communication*[80] it was accepted that 'where an improvement in the employees' terms and conditions is announced by the employer, the employee gives consideration by continuing to work on the basis of the improved terms and without seeking a larger or more signi cant improvement . [81] The application of unilateral contract theory in order to ascertain whether or not employer policies or practices form part of the contract of employment by way of implication is in line with the approach taken in many cases in the United States of America as discussed above. The employer's conduct, as in the United States of America is of prime importance in determining the intention of the employer and consequently whether the policy or practice constituted an offer.[82] What remains uncertain is precisely what conduct will result in the making of an offer. As pointed out by Brodie,[83] in *Duke v Reliance Systems*[84] it was held that in order for an employer policy to become a term of the contract, the policy had to be drawn to the attention of the employee, or, the policy must have been consistently adopted by the employer for a 'substantial' period of time. The latter option is very broadly stated and clearly does not provide suf cient clarity to be able to predict with certainty under what circumstances this requirement would be satis ed. Secondly , in other cases the mere fact that the employer had always or for a long period of time adopted a particular policy or conducted itself in a particular manner was held to be insuf cient in itself to conclude that the policy or conduct could be implied as a term of the contract.[85] In *Albion Automotive Ltd v Walker*[86] the tests in *Duke* were taken not to be tests in themselves, but merely possible indications, given all the other surrounding circumstances, that the employer intended to make an offer or to be bound by the terms of the policy. Such intention to be bound is therefore ascertained with reference to the overall interaction between employee and employer. If the employer conducts itself in such a manner that an intention to be bound can be ascertained, such conduct will result in legitimate expectations on the part of the employee which should be upheld.[87]

80 [1993] IRLR 383.

81 At 389.

82 Brodie, Re ecting the Dynamics of Employment Relations: Terms Implied From Custom or Practice and the Albion Case', p. 161.

83 Ibid.

84 [1982] ICR 449 at 452.

85 See Brodie, Re ecting the Dynamics of Employment Relations: Terms Implied From Custom or Practice and the Albion Case', p. 161.

86 [2002] EWCA Civ 946.

87 *Albion Automotive Ltd v Walker*[2002] EWCA Civ 946 par 16.

Once it can be concluded that the employer intended to make an offer, application of bilateral contract theory would require acceptance by the employee. In all probability such acceptance would have to be gleaned with reference to the employee's conduct. As Brodie points out this may be 'problematic'.[88] Therefore adherence to unilateral contract theory in terms of which continued employment by the employee is suf cient to constitute acceptance is suggested. [89]

Modification of Handbook Policies

Given the fact that most jurisdictions accept that terms in handbooks can provide employees with additional rights or advantages such as job security by providing for an exception to the at-will rule,[90] the question whether these terms can be modi ed by statements in subsequent handbooks has arisen. Employer quests for exibility have led some employers to issue new handbooks wherein the job security provisions are amended or even retracted. A number of cases have had to determine the validity of these retractions.

Some cases have held that an employer is entitled to unilaterally alter and modify terms in the handbook, provided reasonable notice is given to the employee. One such instance is in the case of *Toussaint v Blue Cross and Blue Shield of Michigan*.[91] In this case the Supreme Court of Michigan held that since statements of policy can give rise to contractual obligations without evidence that the parties agreed that these policy statements would create contractual rights, the employer can 'unilaterally amend these policies without notice to the employee'.[92] This decision was followed in the case of *Bankey v Storer Broadcasting Company.*[93] The plaintiff employee asserted that the employer could not unilaterally alter the existing discharge-for-cause policy because this would amount to no more than a proposal for which mutual assent is required. This argument was rejected. The court reasoned that on the basis of the *Toussaint* decision, that 'employer statements of policy …can give rise to contractual rights … without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee …',[94] such rights could similarly be retracted without mutual assent. The court thus concluded: 'Under circumstances where "contractual rights" have arisen outside the operation of normal

88 See Brodie, Re ecting the Dynamics of Employment Relations: Terms Implied From Custom or Practice and the Albion Case', p. 162.

89 Ibid.

90 Jason A. Waters, 'The Brooklyn Bridge is Falling Down Unilateral Contract Modi cation and the Sole Requirement of the Of feree s Assent , *Cumberland Law Review*, 32 (2001–2002): p. 375 at note 28 observes that his research revealed that Missouri was the only state that rejected handbook exceptions to employment-at-will.

91 408 Mich. 579, 292 N.W.2d 880 at 892.

92 Ibid at 614–615.

93 432 Mich. 438, 443 N.W.2d 112. See also *Grovier v North Sound Bank*, 957 P.2d 811 (Wash. Ct. App.1998).

94 Ibid., quoting *Toussaint* at 447.

contract principles, the application of strict rules of contractual modi cation may not be appropriate.'[95] Grif n J with whom the other judges concurred, observed that in some states the courts, on the basis of unilateral contract theory, considered the continuation of work adequate consideration and acceptance of the modi ed term in the handbook.[96] On the other hand, he noted that there were cases that held that acceptance could not be inferred merely on the basis that the employee continued to work.[97] Grif n J concluded that unilateral contract theory was inadequate as a basis to decide whether an employer may unilaterally change a written discharge-for-cause policy to an employment-at-will policy, though the right to make such alteration was not expressly reserved at the outset.[98] He preferred to adopt the 'analysis employed in *Toussaint* which focused upon the bene t that accrues to an employer when it establishes desirable personnel policies'.[99] These policies are enforceable, so Grif n reasoned, not because they have been offered and accepted in terms of traditional contract theory, but because the employer derives a bene t from them. In return for job security and 'a conviction that he will be treated fairly', the employer gains a co-operative, loyal and productive employee. Mutual assent is not required. Therefore Grif n concluded: [100]

> Under the Toussaint analysis, an employer who chooses to establish desirable personnel policies, such as discharge-for-cause employment policy, is not seeking to induce each individual employee to show up for work day after day, but rather is seeking to promote an environment conducive to collective productivity. The bene t to the employer of promoting such an environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, gives rise to a situation 'instinct with an obligation'. When, as in the question before us, the employer changes its discharge-for-cause policy to one of employment-at-will, the employer s bene t is correspondingly extinguished, as is the rationale for the court's enforcement of the discharge-for-cause policy.

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95 Ibid., p. 447–448.

96 The Supreme Court of Arizona, in *Chambers v Valley National Bank*, 3 IER Cases 1476 (Ariz 1988), characterized the bank's subsequent revision of the manual in terms of which it disclaimed any obligation to discharge only for cause, as an offer of modi cation of a unilateral contract. It opined that the employee had accepted the offer by continuing to work for the employer.

97 This is what the Virginia Supreme Court held in *Thompson v King's Entertainment Co*, 653 F. Supp. 871 (E.D.Va.1987). The United States Court of Appeal for the Tenth Circuit, applying Oklahoma law in *Vinyard v King*, 728 F.2d 428, 432 (CA 10, 1984) came to a similar conclusion. The Minnesota Supreme Court in *Pine River State Bank v Mettille*, 333 N.W. 2d 622, 627 (Minn.1983), held that 'in the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner an original employment contract may be modi ed or replaced by a subsequent unilateral contract .

98 At 453.

99 Ibid.

100 At 454.

In response to the allegation that the revocability of a policy renders it of no value to employees, Grif n J justi ed his decision as follows:

Firstly the very de nition of policy negates a legitimate expectation of permanence'.[101] Since a policy is commonly understood to be a exible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of business enterprise must be adaptable and responsive to change'.[102] Secondly, if the employer had amended its handbook from time to time, it could face a situation where it was obligated to different employees in different ways, depending on when the employees had commenced work with the employer. Thirdly, an employer who had not reserved the right to modify the terms in the handbook could nd itself bound to anachronistic policies in perpetuity'.[103]

Finally, the court held that the fact that the employer could modify its policies did not signify that the employer could act in bad faith by announcing fair policies to attract the best employees only to revoke them later. The court held therefore that in order for revocation of a discharge-for-cause policy to be legally effective, 'reasonable notice of change must be uniformly given to affected employees'.[104] The court also added in a footnote that there was precedent to support the courts further addendum that if the employer sought to revoke bene ts that had already accrued to the employee such as entitlements to a pension, death bene ts or severance pay , the employee would be able to rely on his legitimate expectation that these accrued or vested rights could not be retracted. The decisions in *Toussaint* and *Bankey* have been described as being based on 'public policy considerations' as opposed to unilateral contract theory.[105]

In other decisions it was held that an employer may unilaterally modify terms in the handbook on the basis of unilateral contract theory. In terms of some of these decisions continued employment by the employee with knowledge of the alterations was all that was required for a valid alteration of the terms of the contract of employment.[106] In *Asmus v Pacific Bell*,[107] the Supreme Court of California held that an employer may unilaterally terminate a policy that contains a speci ed condition, if the condition is one of inde nite duration, and the employer ef fects the change after a reasonable time, and without interfering with the employee s vested bene ts . In these cases as in the cases based on public policy, the employer may unilaterally amend provisions in the handbook provided the employee is given reasonable notice of the change.

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101 At 455.

102 Ibid.

103 At 456.

104 At 458.

105 *Brodie v General Chemical Corporation*, 934 P.2d 1263 at 1268.

106 *Sadler v Basin Elec. Power Coop.*, 431 N.W. 2d 296 (N.D. 1988), *Ryan v Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998); *Progress Printing Co. v Nichols*, 421 S.E.2d 428 (Va. 1992).

107 23 Cal, 4th 1, 999 P.2d 71, at 79.

Other jurisdictions, unlike California require mutual assent and additional consideration, aside from continued employment in order for modi cations that reduce employee rights or bene ts to be legally valid. [108] In terms of these decisions in order for there to be adequate consideration when an employer wants to modify or terminate a discharge-for-cause term, there must be some additional bene t to the employee, or some detriment to the employer, or alternatively, there must have been a bargained for exchange.[109] The argument that continued employment constitutes consideration was found to be unacceptable because the only way an employee could prevent the modi cation of a dischar ge-for-cause term to an employment-at-will term from being implemented is to stop working. This does not make sense because the employee has to stop working in order to retain the required job security. As stated in *Doyle v Holy Cross Hospital*:[110] 'Any other result brings us to an absurdity: the employer's threat to breach its promise of job security provides consideration for its rescission of that promise. Unilateral modi cation by the employer is considered in terms of these decisions as being not only manifestly unfair, but also contrary to the general principles of contract.[111]

Although continued employment was held not to constitute adequate consideration for a modi cation that reduced an employee s rights, continued employment was held to constitute adequate consideration for modi cations that are bene cial to the employee.[112] However, if the employer had reserved the right to unilaterally modify terms in the handbook the employer would be able to amend an employee handbook that provided for job security.[113]

In summary provisions in handbooks can play an important role in providing job security and other bene ts to the employee. The courts are very divided as to whether and under what circumstances an employer can retract from these provisions. However, despite the fact that some decisions have allowed the employer to unilaterally alter handbook provisions, generally this cannot be done in a capricious manner and merely to satisfy a whim of the employer. Generally good faith and must accompany the retraction. Policy considerations also play a part in justifying such retractions.

In England a unilateral modi cation of the terms of a contract can amount to a breach of the implied duty of trust and con dence. [114] This was what the Court of

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108 See inter alia, *Stokes Amoco Fabrics and Fibers Company, Inc*., 729 So.2d 336; *Brodie v General Chemical Corporation*, 934 P.2d 1263; *Robinson v Ada S. McKinley Community Services, Inc*.,19 F.3d 359 (7th Cir. 1994); *Doyle v Holy Cross Hospital*, 708 N.E.2d 1140 (Ill.1999); *Demasse v ITT Corp*., 984 P.2d 1138 (Ariz. 1999).

109 Ibid.

110 708 N.E.2d 1140 (Ill.1999) at 1147.

111 *Robinson v Ada S. McKinley Community Services, Inc*.,19 F.3d 359 (7th Cir. 1994) at 363.

112 *Doyle v Holy Cross Hospital*, 708 N.E.2d 1140 (Ill.1999) at 1142.

113 *Brodie v General Chemical Corporation*, 934 P.2d 1263 at 1266.

114 The implied duty of mutual trust and con dence will be discussed in chapter ve.

Appeal held in the case of *French v Barclays Bank*.[115] The employer's attempt to change a policy which would result in an alteration to the terms on which loans were made to employees who were requested to relocate. The policy had been consistently applied to other employees for many years and it appeared in the employee manual. The Court of Appeal held that the fact that this would amount to a change in policy was irrelevant. The alteration, the court held, would amount to a breach of trust and con dence between the bank and the employees and the obligation of mutual trust and con dence would ensure that an employee s legitimate expectations were upheld.

The court in the case of *Briscoe v Lubrizol Ltd*[116] dealt with the situation where the terms of a disability scheme, which were set out in detail in another document were inaccurately summarized in the employee handbook. The court opined that such inaccuracies should be determined in favour of the employee: If the adoption of the error would be to the advantage of the employee, the employer would be prevented from implementing the erroneous version which was caused by the representations of the employer. If on the other hand, the erroneous version was to the advantage of the employee, the employer, having created legitimate expectations on the part of the employee would be bound to that version on the basis of estoppel.

International Labour Standards[117]

The globalization of markets, an increasingly integrated world economy, the relative ease with which corporations can relocate to other countries, the growth in numbers and stature of multinational corporations have all contributed to a changed world of work where workers are more easily exposed to exploitation. Attempts to redress concerns about the exploitation of workers has led to the promulgation of a number of international and transnational labour standards that ideally all employers across the globe should be legally obliged to adopt. This is not a new phenomenon. The 1919 Treaty of Versailles required the various countries to protect workers' freedom of association, to insist on equal rights for migrant workers, to institute equal remuneration for men and women, as well as having reasonable working hours, fair and reasonable remuneration, holidays with pay, reasonable standards of living, equal pay for equal work and the prohibition of slavery and child labour.[118]

The International Labour Organisation (ILO) was established in terms of the Treaty of Versailles and it became a specialised agency of the United Nations in 1946. Its function it is to promote social justice and internationally recognized

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115 [1998] IRLR 646.

116 [2002] EWCA Civ 508 (CA).

117 It is not my intention to discuss the content of labour standards adopted by international bodies. That is beyond the scope of this book. I merely want to demonstrate the possibility of implying labour standards and laws that are generally accepted by the international community into individual contracts of employment.

118 Treaty of Versailles (1919): part XIII.

human and labour rights. The ILO establishes international labour standards by means of conventions, resolutions and recommendations. Resolutions and recommendations are not binding, but merely ideals against which countries should benchmark their domestic labour laws and practices. Conventions, on the other hand, are binding on states that have rati ed them. The obvious aw in this system is that independent countries cannot be obliged to abide by recommendations or resolutions, or to ratify and consequently be bound by the terms of conventions. Secondly, even if a country has rati ed certain conventions, despite the fact that the ILO imposes detailed reporting requirements on individual countries, the ILO literally has no powers of enforcement.[119] Having reviewed these reports the ILO can only make use of the mechanisms of diplomacy and international public opinion as enforcement tools. Recently the ILO has advocated adherence to minimum core standards by all countries irrespective of rati cation. These are the freedom of association and the right to bargain collectively; the prohibition of forced labour; the abolition of child labour and the elimination of discrimination in respect of employment or occupation.[120] The ILO has adopted over 180 conventions, over 190 recommendations and many resolutions that provide for minimum labour standards.[121] What is of relevance for the purposes of this book is that the ILO has been a very important source of international law. As a source of international law, with international legal authority, these standards can be implied into an individual contract of employment as a custom or trade usage. The more countries that have rati ed a convention, the more likely it is that it can be implied into a contract of employment on the basis that it forms part of customary international law. Alternatively, international law can be implied into a contract of employment on the basis that it is so well known and generally accepted by the world community that the intention to include the term can be imputed to the reasonable employer.

There are many other international instruments that provide for employee protection. These include the Universal Declaration of Human Rights which provides inter alia for the right to work, fair and favourable conditions of work, fair wages, equal pay for equal work, reasonable hours and holidays with pay, reasonable living standards and the prohibition of slavery and forced labour.[122] The International Covenant on Economic, Social, and Cultural Rights also provides for a whole range of labour standards. These include equal pay for equal work,

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119 Lance Compa & Tashia Hinchliffe-Darricarrere, 'Enforcing Labor Rights Through Corporate Codes of Conduct', *Columbia Journal of Transnational Law,* 33 (1995) 663 p. 665.

120 Freedom of Association and Protection of the Right to Collective Bargaining Convention (No. 98); Equal Remuneration Convention (No. 100); Abolition of Forced Labour Convention (No. 105); Forced Labour Convention (No. 29), Discrimination (Employment and Occupation) Convention (No 111); Minimum Age Convention (No. 138).

121 Patrick Macklem, 'Labour Law Beyond Borders', *Journal of International Economic Law,* 5 (2002): 605 p. 615.

122 G.A. Res. 217A, U.N. Doc. A/810 (1948).

fair wages, the right to work, safe and healthy working conditions, the freedom of association, the right to bargain collectively and the right to strike.[123] The International Covenant on civil and political rights provides for the freedom of association, the right to form and join a trade union and prohibits discrimination and slavery.[124] These instruments and others, like ILO conventions and possibly even recommendations, can also be implied into contracts of employment. Unfortunately, all these instruments, although internationally recognized, at most are aspirational as they all lack adequate enforcement mechanisms.[125]

Given the unenforceability of these and other international instruments, another means of redressing international concerns about the exploitation of workers is to link the adoption of certain labour standards to trade liberalization initiatives. These initiatives have been taken by states, international institutions and non-state actors. The World Trade Organization is an international, multi-lateral institution that seeks to promote the adoption of reasonable labour standards by linking trade initiatives thereto. It is the largest organisation in the world for the regulation of international trade, including trade liberalization. In short, these initiatives rely on trade sanctions and trade barriers to enforce international labour standards. The advantage of these initiatives is that unlike ILO and other conventions and declarations, 'linking trade liberalization initiatives with international labour rights supplies a robust enforcement mechanism'.[126] However, the problem with these mechanisms is that they are limited to preventing the violation of labour rights in the context of the production of goods destined for export markets.[127]

The proposition that the combination of labour standards adopted by international instruments, international trade law and codes of conduct[128] that transnational corporations adopt 'provide international legal authority for innovative domestic regulation of transnational activity'[129] is convincing. The substantive content of these standards often coincides.[130] The relevance of this fact is that these standards provide benchmark standards against which domestic legislation of individual countries can be measured. Even if domestic legislatures do not adopt legislation that is backed up by these international standards, given the general acceptance of certain labour law standards by the international community, these standards can be said to form part of

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123 G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/ 6316 (1966).

124 G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/ 6316 (1966).

125 Elisa West eld, Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century', *Virginia Journal of International Law*, 42 (2002): 1075 pp. 1084–1085.

126 Macklem, 'Labour Law Beyond Borders', p. 638.

127 Ibid.

128 Corporate codes of conduct will be discussed under the next heading.

129 Macklem, 'Labour Law Beyond Borders', p. 605.

130 Ibid.

customary international law.[131] As such, they can be implied into individual contracts of employment on the basis of custom or trade usage.

Corporate Codes of Conduct

Corporate codes of conduct are behavioural guidelines for business. The inability of governments worldwide to protect individuals from economic insecurity has led to a renewed interest and public expectation that corporations have public responsibilities in furthering the interests of the public or the public good. David Crowther explains:[132]

> …it might be argued that the focus of war has shifted from imperialistic or ideological reasons to economic reasons – at least as far as governments and countries are concerned. But governments, as the epitome of the nation state, are becoming less important because what is becoming more important than governments and nation states is the multinational companies operating in a global environment. Some of these multinationals are very large indeed – larger than many nation states and a good deal more powerful. Arguably it is here that the economic war for the global village is taking place.

Other factors contributing to this renewed interest in corporate social responsibility have been an increased awareness of impending ecological crises as well as changes in the structure of the economy. The political climate in the 1980s and 1990s has led to a move towards ideological preference for private sector solutions to socio-economic ills. Conservative and social democratic governments in Europe and Australasia have generated a non-interventionist trend and a move to privatisation.[133]

The view that in this global economy no corporation can afford to run its business without due consideration of the interests of all the stakeholders is commonly referred to as 'stakeholder theory'. In terms of this theory a company should be run in the interests of all its stakeholders rather than just the shareholders.[134] These stakeholders include the community in which the company operates, its customers, employees and suppliers. It could conceivably also include the company's so called 'atypical employees'. Since business is dependent on society and does not work in isolation of it, it follows that corporate decisions and actions that have a negative impact on stakeholders can in turn impact negatively on the corporation.[135]

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131 Ibid., pp. 639–640.

132 *International Dimensions of Corporate Social Responsibility* (2005), pp. v–vi.

133 Stephen Deery and Richard Mitchell, 'The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy' in Stephen Deery and Richard Mitchell *Employment Relations* (1999), p. 3.

134 Vinten, 'Shareholder Versus Stakeholder – Is There a Governance Dilemma?', *Corporate Governance*, Vol. 9 January (2001): p. 37.

135 An extreme example of such lack of ethics on the part of a corporation is the lack of safety controls that caused a gas leakage at Union Carbide Limited (Bhopal, India) which led to thousands of deaths and led to another 200 000 to 300 000 suffering minor injuries,

A company's long term viability is dependent on its reputation.[136] Relationships with all stakeholders, including employees must be actively managed in a manner that re ects integrity , trust and transparency, so that the company will gain the support and backing of its stakeholders which becomes even more important if things go wrong.[137] Companies should create a climate which not only attracts talented employees but which also motivates and is able to retain these employees. Employees have been described as forming part of a company's assets and competitive edge.[138] The ability of an enterprise or company to remain productive in an increasingly competitive global economy is dependent inter alia on its ability to develop and retain human talent.[139] In order to do this a company must conduct itself in an ethical manner towards its employees because if a company treats individual employees with dignity and respect, the human potential necessary for competitive advantage and productivity in a global economy will be unleashed.[140]

In terms of the Commonwealth Business Council Working Group[141] the de ning characteristics of good corporate citizenship for the attainment of sustainability with reference to employee relations are:

❑ Respect for the well-being of employees;
❑ fair treatment of employees having due regard to cultural sensitivities;
❑ development of employees' potential through skill and technology transfer;
❑ sharing of the company's success with the employees;
❑ recognition of international agreements with reference to the freedom of association and collective bargaining; and
❑ elimination of all forms of forced labour.

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loss of employment, or found themselves destitute due to the loss of the only bread-winner in the family. The outcome was that the company lost the support of society, it had to pay heavy compensation and was forced to close down. See Ryan, 'Social Conscience Comes with a Price Tag', *Without Prejudice*, vol. 4 issue 4 (2004): pp. 7–8.

136 See Hyman and Blum, 'Just Companies Don't Fail: The Making of the Ethical Corporation', *Business and Society Review*, (1995): pp. 48–50.

137 De Jongh, 'Know Your Stakeholders', *Finance Week* 30 June (2004): p. 34.

138 Rossouw, 'Unlocking Human Potential with Ethics', *Management Today* February (2005): p. 28 states: 'The way that companies think about their people and what they choose to do (or not to do) in unlocking their human potential determines their future sustainability.'

139 See ibid. where the author identi es the results of various surveys that demonstrate that 'companies that invest in their human capital, develop it and reward people for performance, make more money than those who place less emphasis on human capital'.

140 Ibid.

141 'CBC Draft Principles for Best Practice on the Relationship Between International Enterprises and Countries to Encourage Foreign Direct Investment'; 'CBC survey A Good Environment for Business Development and Investment'; 'CAGC Guidelines on Corporate Governance'; 'The UN Global Compact, the Work of Prince of Wales Business Leaders' Forum'; and the 'World Business Council for Sustainable Development'. See King Report p. 92 n. 22.

Corporate codes are sometimes the result of international co-operation between various countries (multilateral government-initiated codes). Examples of multilateral government initiated corporate codes are the United Nations code,[142] the guidelines drawn up by the Organization for Economic Cooperation and Development and, the ILO Codes of Conduct for Multinationals.[143] Alternatively, corporate codes can be self-imposed internal codes drawn up by the corporation itself,[144] or they may be drawn up by individual governments and take the form of quasi-legislation,[145] and finally they can be developed by non-government or ganizations. Examples of such codes are the MacBride Code, the Sullivan Code and the Slepak and Miller Codes.[146] Normally with this type of code, corporations operating in a certain country or industry make a pledge to adopt certain principles and standards.

Irrespective of the source of the code, these codes contribute to the creation of a type of international customary law. This is especially the case where the standards adopted by the various codes coincide with each other and with the standards adopted by international instruments as well as trade liberalization incentives imposed by the likes of the World Trade Organization, the World Bank and the International Monetary Fund. Multinational enterprises, given their prominence and influence, ‘possess the potential to produce a new mode of international labour regulation by their capacity to articulate and enforce labour standards through corporate codes of conduct that govern employment relations in the firm regardless of geographical location’.[147] Secondly, as a result of the enormous political and economic power that multinational corporations wield they can influence government policies on issues including labour rights and standards.[148] The relevance of this is that once a standard has progressed to the status of a custom or trade usage, it can be implied into the contract of employment. This is so even when the employer has not specifically adopted or agreed to abide by the terms of a particular code

142 This code however refers to the fair treatment of workers in a very general manner and has never been formally adopted and consequently it is nothing more than a statement of principles that should ideally be adopted. See Compa and Hinchliffe-Darricarrere, ‘Enforcing Labor Rights Through Corporate Codes of Conduct’, p. 670.

143 See http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/main.htm last visited on 2006/02/19.

144 See Elisa Westfield, Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century’, *Virginia Journal of International Law*, 42 (2002): 1075, pp. 1098–1011 and Compa and Hinchliffe-Darricarrere, ‘Enforcing Labor Rights Through Corporate Codes of Conduct’, pp. 674-683 where inter alia the Levi-Strauss terms of Engagement and Guidelines and the Reebok’s Human Rights Production Standards are discussed.

145 See for example the South African King Commission Report (2002).

146 Compa & Hinchliffe-Darricarrere, ‘Enforcing Labor Rights Through Corporate Codes of Conduct’, pp. 671–673.

147 Macklem, ‘Labour Law Beyond Borders’, p. 632.

148 Westfield, Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century’, p. 1083.

or the national government has not put legislation in place that is in line with the codes. In this way other corporations can be held bound by standards adopted by multinationals. If, on the other hand the employer in order to enhance its corporate image has advertised adherence to a particular corporate code in various advertising media including print advertising and websites, it can be held bound on the basis of an imputed intention to be so bound. If a company has drawn up its own code, an intention to be bound to its terms can be imputed to the company on the basis of these statements and advertisements. In this way the sections in the code dealing with employee rights are taken to be implied terms of the individual contract of employment. Alternatively, where no such intention can be imputed to the company, the company can be said to have created a reasonable expectation that the company intended to be bound by those mission or policy statements.[149] This will be the case if the employee can demonstrate a subjective belief (but objectively determined) that the company intended to be bound by such statements or advertisements. The company is consequently precluded from denying such intention.

Although the South African government is not the only one to have produced guidelines for companies wishing to adopt corporate codes, the progressive and exemplary nature of this effort renders a short discussion of its content interesting. The King Report on Corporate Governance for South Africa 2002 (The King Report) is the result of an enlightened and progressive initiative on the part of the South African government. It provides guidelines for South African companies wishing to implement good corporate governance practices.[150] It encourages the adoption of certain ethical principles with reference to employer treatment of employees. Adoption is voluntary and does not have the force of law. The King Commission subscribed to the view that in this global economy no corporation can afford to run its business without due consideration of the interests of all the stakeholders.[151] These stakeholders have been de ned as those whose relations to the enterprise cannot be completely contracted for, but upon whose co-operation and creativity it depends for its survival and prosperity'.[152] This includes the community in which the company operates, its customers, employees and suppliers.[153] The King Report states: [154]

The 19th century saw the foundations being laid for modern corporations:

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149 As discussed above in the previous section.

150 Corporate governance is de ned as the system by which companies are directed and controlled' by the Cadbury Report on Corporate Governance (UK). This is the meaning that is ascribed to the term in this book.

151 King Report II , par. 14 reads: 'In the global economy there are many jurisdictions to which a company can run to avoid regulation and taxes or to reduce labour costs. But, there are few places where a company can hide its activities from sceptical consumers, shareowners or protestors. In short, in the age of electronic information and activism, no company can escape the adverse consequences of poor governance.'

152 King Report II p. 98 par. 1.4.

153 King Report II p. 8 par. 5.3.

154 Pg 15 par. 24.

> this was the century of the entrepreneur. The 20th century became the century of management: the phenomenal growth of management theories, management consultants and management teaching (and management gurus) all re ected this pre-occupation. As the focus swings to the legitimacy and the effectiveness of the wielding of power over corporate entities worldwide, the 21st century promises to be the century of governance.

In terms of the King Report, nurturing, protecting, capturing, retaining and developing human capital is a vital ingredient for the sustainable economic performance of any company. The necessity for corporate ethics has been expanded upon in the King Report by the introduction of seven characteristics or principles that must be adhered to for good corporate governance.[155] These principles serve to guide and govern the moral conduct of individuals in carrying on the business activities of the company. They are: discipline, transparency, independence, accountability, responsibility, social responsibility and fairness. The King Report suggests that the concept of *ubuntu* should be used as a guideline by companies for the application of these ethical principles. *Ubuntu* is an African value system which signi es a commitment to co-existence, consensus and consultation'.[156] It is encompassed in the phrase '*umuntu nguumuntu ngabantu*' which means: 'I am because you are, you are because we are'. The interdependence of humanity and community of society is the basis of this principle. Khoza has identi ed the following characteristics of African values and hence *ubuntu*:[157]

- ❑ humility;
- ❑ respect (social obligation, personal dignity, ancestral value and essence of a person);
- ❑ community and sense of belonging;
- ❑ responsibility and concern for others;
- ❑ generational responsibilities; respect for the social obligation/contract;
- ❑ respect for personal dignity;
- ❑ neighbourliness;
- ❑ spirit of inclusion and general consensus.

In terms of the King Report '*Ubuntu* has formed the basis of relationships in the past and there is no reason why it could not be extended to the corporate world. International experience, which reveals a growing tendency towards an emphasis on non- nancial issues, is a wake-up call to all Africans not to abandon their cultures when they become part of the business sector, but to import and infuse these practices into the corporate world.'[158]

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155 See King Report II par. 18.

156 Roussouw, 'Business Ethics and Corporate Governance in the Second King Report-Farsighted or Futile?', *Koers* (2002): p. 413.

157 'Corporate Governance: Integrated Sustainability Reporting', *Management Today* (2002): p. 18.

158 P. 94 par. 7.

Honest application of these values by companies is a guarantee that the inherent imbalance of power between employers and employees will not be exploited by employers. Since investors are increasingly placing more importance on a company's ethical conduct[159] in their evaluation of companies, the corporate application of the concept of *ubuntu* can go a long way to achieve the primary objective of the implementation of a system of good corporate governance, namely, the attraction of foreign investment.[160] Even though the adoption of the King Report guidelines is not legally mandatory, public companies are obliged to report in their annual financial statements as to the extent of compliance with the King Report, the extent of non-compliance and explain the reasons for such non-compliance.[161] This form of negative enforcement could easily contribute to the terms of the King Report acquiring the status of trade usage or custom. Consequently these terms could be implied into individual contracts of employment.

In the light of worldwide trends towards individualisation, decollectivisation and deregulation in the quest for flexibility ,[162] alternative means of attaining more equitable bargains between employers and employees should be explored. The individualisation of the employment relationship has resulted in the individual contract of employment forming not only the basis but also the main source of the employee's rights. The resurgence of the individual contract of employment calls for an adaptation of the common law to accommodate these changes that have come about as a result of new world socio-economic circumstances.

Judges have in the past, and still continue to 'socialise' the general law of contract in order to avoid harsh outcomes that result from differences in power between contracting parties.[163] Corporate codes of conduct, (irrespective of their origin), and other potential sources of internationally recognized norms such as declarations and covenants have created 'a core set of labour rights that seem to be gaining general recognition and acceptance throughout the world'.[164] This fact provides judges with the ideal opportunity to imply these terms into the contract as employment and thereby redress the imbalance of power between employer and employee inherent in the employment relationship. Furthermore, the fact that most corporate codes of conduct (irrespective of origin) go beyond core labour rights as defined by the ILO in 1998,[165] can lend authority to the argument that at least these core standards, if not

159 According to a survey of opinions undertaken by McKinsey (see Armstrong, 'Corporate Governance: The Way to Govern Now', *Management Today* (May 2003): p. 10, a premium of 22% would be paid for a well governed South African company).

160 Roussouw, 'Business Ethics and Corporate Governance in the Second King Report: Farsighted or Futile?', p. 406.

161 Johannesburg Stock Exchange Listing Requirements (2003) par. 8.63.

162 As discussed in chapter one.

163 *Sasfin (Pty) Ltd v Beukes* (1989) 1 SA 1 (A).

164 Jane C. Hong, 'Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations', *Wisconsin International Law Journal*, 19 (2000): 41 p. 67.

165 Macklem, 'Labour Law Beyond Borders', p. 635.

all those included in certain corporate codes,[166] have gained the status of customary international law. On this basis a judge can imply these core standards as a term of the individual contract of employment even if the employer has not subscribed to any code of conduct. The possibility of class actions against an employer who does not respect core rights and possibly other rights can provide a robust enforcement mechanism. The basis upon which enforcement of these rights is claimed need not be legislative,[167] it can also be an application of the general principles of contract by the implication of terms.

The major setback of internationally accepted norms is their unenforceability. The same is true with regard to corporate codes of conduct. As pointed out by one author: 'Despite the fact that the publicized codes of conduct impress consumers and the media, they have been largely ineffective at realizing the goals they purport to represent. Much of this ineffectiveness is due to the lack of legal enforcement mechanisms in the code.'[168] The increasing number of corporate enterprises that are adopting codes of conduct can provide the necessary authority for the conclusion that certain standards are part of trade practice or custom. The possibility of enforcing certain standards on the basis that they form part of custom or trade usage can become a signi cant means of enforcing and enhancing employee rights.

166 Including a right to fair wages, health and safety, severance pay, a prohibition on forced overtime and disability pay, ibid.

167 See Hong, 'Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations', where three cases in which class suits against eighteen prominent clothing manufactures operating in Saipan were led are discussed. Although the claims were based on legislation, as opposed to the common law of contract, the effect would be the same: Many of the employers settled and the threat of class action has proved to be a robust mechanism for the enforcement of labour rights and standards.

168 Ibid., 48.

Chapter 5

Fairness in the Contract of Employment

Introduction

From 1981 to 2001, the coverage of collectively bargained agreements in England declined from 83% of the workforce to 35% of the workforce.[1] This has resulted in an increase in the use of individual employment contracts for setting terms and conditions of employment. The renewed importance of the role of the common law for the protection of employees has been acknowledged by the judiciary. In the case of *Johnson v Unisys Ltd*[2] Lord Steyn made the remark that as a result of the decreasing coverage of collective bargaining: '… individual legal rights have now become the main source of protection of employees.' The inherent imbalance of power in the employment relationship and the general decline of trade union power on a worldwide scale has resulted in a situation where management often imposes its own terms and conditions on the employee in a standardised contract on a take it or leave it basis.[3] This is not peculiar to England but is a worldwide phenomenon.[4]

Another factor that has contributed to a renewed importance of the common law in the contract of employment is judicial acknowledgement of the relational nature of the employment relationship. This acknowledgement was succinctly articulated by McLachlin J in *Wallace v United Grain Growers*.[5] In this case the contract of employment was differentiated from 'a simple commercial exchange in the marketplace of goods or services' as follows: 'A contract of employment is typically of a longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater

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1 Bob Hepple and Gillian Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights', *Industrial Law Journal* (UK) (2002): 245, p. 247.

2 (2001) 2 All ER 801 at 811.

3 Simon Deakin, 'Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain', in Stephen Deery and Richard Mitchell *Employment Relations – Individualisation and Union Exclusion* (1999): pp. 30–131.

4 See Stephen Deery and Richard Mitchell *Employment Relations – Individualisation and Union Exclusion* (1999).

5 (1997) 152 DLR (4th) 1 at 46.

opportunity for harm or abuse.'[6] In similar vein in *Johnson v Unisys*[7] Lord Hoffmann observed:[8]

> Over the last 30 years or so the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament … And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.

As a result of this transformation of the contract of employment there has been an 'increasing acceptance of the view that an employer's powers under the employment contract cannot be allowed to operate unfettered by the common law'.[9]

In the Australian case of *Gambotto v John Fairfax Publications Pty Ltd*[10] Peterson J stated the following with regard to the development of employment law in the twentieth century:

> The notion of 'master and servant' relationship became obsolete. Lord Slynn of Hadley recently noted 'the changes which have taken place in the employer-employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, nancial and even psychological welfare of the employee: *Spring v Guardian Assurance Plc.* [1995] 2 A.C. 296, 335B.

As far as the American judiciary is concerned one author has reached the following conclusion: 'In the past 30 or 40 years we have seen the judiciary attempt to fashion ways of tempering the injustices and economic inef ciencies of the at-will doctrine.'[11] In South Africa it is trite that the employment relationship is considered to be a relationship of the utmost good faith.[12]

The need to strengthen, ameliorate and enforce individual rights has come to the fore. Recent court decisions in England and Australia (which are discussed below) have developed the common law by the use of implied terms, most notably the duty

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6 Other English cases where the 'relational' nature of the employment relationship is judicially recognised are *Spring v Guardian Assurance Plc* [1995] 2 AC 296; *Crossley v Faithful & Gould Holdings Limited* [2004] IRLR 377 (CA).

7 [2003] 1 AC 519.

8 At 1091.

9 Douglas Brodie, 'Legal Coherence and the Employment Revolution', *Law Quarterly Review*, 117 (2001): 604, p. 608.

10 [2001] NSWIRComm 87.

11 David Cabrelli, 'Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts', *International Journal of Comparative Labour Law and Industrial Relations*, 21 (2005): p. 445.

12 See *Carter v Value Truck Rental (Pty) Ltd* (2005) 26 *ILJ* 711 (SE) at 724; *Council for Scientific& Industrial Research v Fijen* (1996) 17 *ILJ* 18(A) at 26B-F; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC) at par. 7.

to maintain trust and confidence, in order to address the *lacunae* created by the de-collectivisation of employment relations.

Although there has been no recognition of an implied term of trust and confidence in the employment relationship in the United States of America, the implied covenant of good faith and fair dealing is a concept that is implied into all contracts including the contract of employment. The South African judiciary, on the other hand, has explicitly recognised the implied duty of trust and confidence in the contract of employment.[13] However, it is generally not specifically mentioned or applied in case law. The reason for this is probably that like the United States of America, this has been unnecessary, due to the fact that in South Africa all contracts are *bona fide*. Furthermore, since the promulgation of South Africa's present Constitution, everyone has the constitutional right to fair labour practices.[14]

The Implied Term of Trust and Confidence

There is no general adoption of the principle of good faith in the English law of contract.[15] As discussed, in order to achieve a measure of fairness the judiciary has resorted to a piecemeal case by case approach of implying terms into contracts.[16] The contract of employment is no exception. This piecemeal implication of implied terms is rendered possible by the fact that the English law of contract is characterized by the underlying principle that contracts should be fair. This truism is aptly expressed in the following *dictum* of Bingham LJ:[17]

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing …. English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.

The implied term of trust and confidence is the most influential of these implied terms in the context of the contract of employment. The acceptance of the term of mutual trust and confidence as a legal incident of the contract of employment has been described as forming the 'cornerstone of the legal construction of the contract

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13 *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A); [1996] BLLR 685 (A).

14 Act 108 of 1996.

15 See chapter two.

16 Chapter four.

17 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) 1 QB 433 at 439.

of employment' and, being 'undoubtedly the most powerful engine of movement in the modern law of employment contracts'.[18] In similar vein Lord Hoffmann observed that: 'The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far-reaching is the implied term of trust and con dence . [19]

According to Brodie this term was derived from the general obligation of co-operation.[20] This obligation, unlike the implied term of mutual trust and con dence does not require any positive action on the part of the contracting parties. It merely requires the parties to refrain from conduct which would prevent the other party from ful lling their side of the bar gain.[21] The duty of mutual trust and con dence, on the other hand, requires positive action. In *Scally v Southern Health and Social Services Board*[22] for example, on the basis of the implied term of mutual trust and con dence, the employer was held to have been under the duty to take positive steps to inform employees of certain bene ts in terms of a pension scheme.

Malik v Bank of Credit and Commerce International[23] is the *locus classicus*[24] for authority that in all employment contracts there exists an implied term of trust and con dence. [25] Lord Steyn, in this case described the implied term as follows:[26] 'The employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of con dence and trust between employer and employee.' In this case, the plaintiff employees were dismissed on redundancy grounds. They claimed that the bank had breached the implied term of trust and con dence by running its business in a corrupt manner . Consequently, they argued, their long association with the bank had seriously decreased their job prospects due to the stigma, which now attached to the bank and its ex-employees. The argument that, since the dishonest conduct was aimed

18 See Cabrelli, 'Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts , p. 451.

19 *Johnson v Unisys* (2001) 2 All ER 801 at 1091.

20 Brodie, 'Legal Coherence and the Employment Revolution', p. 605.

21 Douglas Brodie, 'Fundamental Obligations', Employment Law Bulletin, 21 (1997): p. 3.

22 [1992] 1 AC 294.

23 1997 IRLR 462.

24 The notion of this implied term however did not make its rst appearance in the *Malik* case. See The Honourable Mr Justice Lindsay, 'The Implied Term of Trust and Con dence , *ILJ*, (2001): pp. 2–3 and Douglas Brodie, 'Beyond Exchange: The New Contract of Employment', *ILJ* (1998): 79 pp. 81–84 for a discussion of previous cases where this implied term of trust and con dence was considered.

25 In *Imperial Group Pension Trust v Imperial Tobacco Ltd* 1991 IRLR 66 at 70, Browne-Wilkinson J said: 'In every contract of employment there is an implied term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of con dence and trust between employer and employee.'

26 Par. 8.

at the bank's clients and not the employees it did not constitute a breach of the implied term of trust and con dence, was rejected. It was held that this dishonest conduct was nevertheless likely to undermine the trust and con dence required in an employment relationship.

In *Bank of Credit and Commerce International SA (in liq.) v Ali*[27] on the basis of *Malik*, a 'stigma' claim was brought against an employer for conduct that took place before the *Malik* decision even though stigma claims were in existence until that decision in 1997. The employees had received an additional redundancy payment 'in full and nal settlement of all or any claims   which they might have against the bank. The employees argued that at the time they signed the release they had no idea of the corrupt manner in which the bank had conducted its business and that they could therefore not be held bound by the release. On the basis of *Malik*, the employees argued that the bank had breached the implied term of trust and con dence by not disclosing its fraudulent conduct to them. Lightman J referred to the case of *Bell v Lever Brothers Ltd*[28] where there was found to be no duty of disclosure in an employment contract since the contract of employment is not a contract *uberrimae fidei*, and concluded that the bank had not breached its obligation of trust and con dence by not disclosing its fraudulent conduct to the employees.

In the second case involving the same parties, *Bank of Credit and Commerce International SA (in liq) v Ali (No 2)*[29] Lightman J considered the decision of the House of Lords in *Malik* and concluded that the bank's fraudulent conduct was suf ciently serious to constitute a breach of the trust and con dence term. In other words, even though failure to disclose the fraudulent conduct did not constitute a breach of the implied term of trust and con dence, the conduct itself did constitute such a breach. However, the former employees of Bank of Credit and Commerce International had signed form COT3 of the Advisory, Conciliation and Arbitration Service to settle 'all and any claims whether under statute, common law , or in equity' arising from their employment with the Bank of Credit and Commerce International in return for payment. On the basis of this document Lightman J held that the claim should fail because the wording of the release was suf ciently broad to include this claim.

The Court of Appeal[30] reversed Lightman J's decision. Even though a majority of the Court of Appeal was in agreement with Lightman J that the language of the release was suf ciently comprehensive to embrace the claim, they found it to be unconscionable to allow the bank to rely on the release in order to bar the claim. In the view of the majority of the Court, to hold otherwise would allow the Bank of Credit and Commerce International to obtain an unconscionable advantage from the employees' ignorance of the facts concerning the fraudulent and dishonest manner that the Bank conducted its business.

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27 (1999) 2 All ER 1005.

28 (1932) AC 1 (1931) All ER Rep 1.

29 (1999) 4 All ER 83.

30 (2000) 3 All ER 51, (2000) ICR 1068.

In *Bank of Credit and Commerce (in liq) v Ali* and others,[31] the bank's liquidators appealed to the House of Lords. The appeal was dismissed (Lord Hoffman dissenting), on the basis that the release could not be construed as including claims which at the time of entering into the contract, the parties could not possibly have contemplated. What is of relevance is that it seems to have been accepted by the courts that fraudulent or dishonest means of conducting business can be construed as a breach of the implied term of trust and con dence rendering the employer vulnerable to a claim for damages because of such breach.

This obligation is mutual and the trust and con dence required in the employment relationship could also be undermined by an employee.[32] However, the fact remains that the most important effect of the term is its impact on employer duties.[33]

The Australian judiciary, following English case law, has recognised the implied term of mutual trust and con dence as legal incident of the contract of employment.[34] For example in *Perkins v Grace Worldwide (Aust) Pty Ltd*[35] the Court stated: Trust and con dence is a necessary ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and con dence between the parties

The recognition of this term as a legal incident of all contracts of employment[36] has been attributed to 'an emerging communitarian view that workers' interests range beyond merely nancial concerns and that deference to management is no longer the status quo'.[37] As pointed out,[38] this communitarian view has challenged some of the assumptions of the classical law of contract, such as the notion of 'freedom of contract' and the assumption that parties to a contract have equal bargaining power and; that each one is capable of looking after his or her own interests. Furthermore the 'historical deference to management power' and the notion that employees' only interest in the employment relationship is of a pecuniary nature have both been eroded.[39]

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31 (2001) 1 All ER 961 (HL).

32 Ibid., par. 14.

33 Douglas Brodie, 'Recent Cases, Commentary, the Heart of the Matter: Mutual Trust and Con dence , *ILJ*, 25 (1996): 121.

34 See Kelly Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Con dence , *Australian Law Journal*, 77 (2003): pp. 764–77.

35 (1997) 72 IR 186 at 191.

36 In *Scally v Southern Health and Social Services Board* [1991] IRLR (HL) 522 at 525, Lord Bridge described the implied term of trust and con dence as that which the law will imply as a necessary incident of a de nable category of contractual relationship.

37 Harry Hutchison, 'Evolution, Consistency, and Community: The Political, Social, and Economic Assumptions That Govern the Incorporation of Terms in British Employment Contracts', *North Carolina Journal of International Law and Commercial Regulation*, Reg. 355 (2000): 335 p. 339.

38 Ibid., 353.

39 Ibid.

The Scope and Content of the Implied Term of Trust and Confidence

The precise content of this implied term however, like the concept of good faith, is almost impossible to de ne. The implied term of trust and con dence has been likened to the concept of good faith. Lord Nicholls in *Eastwood v Magnox Plc*[40] stated: The trust and con dence implied term means, in short, that an employer must treat his employees fairly. In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith.' In *Imperial Group Pension Trust v Imperial Tobacco Ltd*[41] Browne-Wilkinson J referred to the implied term of trust and con dence as the implied obligation of good faith . In the Australian case of *Brackenridge v Toyota Motor Corporation Australia Ltd*[42] the Industrial Relations Court, in similar vein held that there was an implied term that an 'employer would act fairly and in good faith'. Similarly the term has been described as requiring the employer to treat its employees in a 'fair and even-handed manner'.[43]

The notion of good faith has also contributed to the development of the scope of the implied term of mutual trust and con dence. Brodie points out that: The obligation of mutual trust and con dence has evolved and ourished in an environment where there have been both moves towards good faith playing a greater role in contract law and where employer prerogative has been constrained by employment protection legislation.'[44] Nevertheless, Brodie suggests that the term does not require that the relationship be considered to be one of *uberrimae fides*.[45] The reason for this is that although the parties to an employment relationship should have regard for one another's interests, they are not required to subjugate their interests in order to give priority to the interests of the other party. In his view a preferable interpretation of the term would be one that strikes a balance between the employer's interest in being allowed the necessary management prerogative to run an ef cient enterprise and, the employee's interest in not being treated unfairly.[46] This formulation renders the term capable of covering great diversity of situations.

The content and scope of this implied obligation of mutual trust and con dence has been examined in a number of cases. The facts of the following few cases illustrate the wide diversity of circumstances that could give rise to the breach of the implied term of trust and con dence. The case of *University of Nottingham v Eyett*,[47] for example, dealt with a possible duty on the part of the employer to take positive action to inform its employees about certain matters. It was held that the

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40 [2004] IRLR 733 at 736.

41 [1991] IRLR 66 at 70.

42 (1996) 142 ALR 99.

43 *BG Plc v O'Brien* [2001] IRLR 496 at 500–501.

44 'Legal Coherence and the Employment Revolution', pp. 613–614.

45 See Brodie, 'Recent Cases, Commentary, the Heart of the Matter: Mutual Trust and Con dence , p. 121.

46 Ibid.

47 (1999) 2 All ER 437.

university did not breach the implied term of trust and con dence by a failure to inform the employee that he would have received a higher pension if he had worked for an extra month. The court however did not reject the possibility of failure to provide information constituting a breach of the term of trust and con dence. The circumstances of the case however, rendered the employer's failure excusable: The employee 'undoubtedly knew of the existence of his early retirement rights. He was able 'to have worked out for himself how best to avail himself of those rights by carefully studying the information set out in the explanatory booklet'.[48] In the case of *Scally v Southern Health Board*,[49] on the other hand, without referring to an implied obligation of trust and con dence, it was held that the employer owed the employee a duty of disclosure with reference to employees rights to purchase added years of pensionable service. The most important fact that convinced the court in concluding that the employer had breached the implied duty of trust and con dence in this case, was the fact that the information was not accessible to the employees and they could not reasonably be expected to be aware of the terms giving rise to their rights. Another case that considered whether or not the employer had breached the implied duty of trust and con dence because it did not warn the employee of the implications that resignation would have on his entitlements to certain bene ts is *Crossley v Faithful & Gould Holdings Ltd*.[50] Once again the employer was found not to be in breach because not only did the employee have access to the information, but he was also knowledgeable, experienced, he possessed status and also had access to expert advice. These cases demonstrate that whether or not there has been a breach of the term of mutual trust and con dence is dependent on the unique surrounding circumstances of each case that courts are faced with. Ultimately, the result is dependent on considerations of reasonableness and fairness in balancing the competing interests of employer and employee.[51]

The case of *Lewis Motorworld Garages*[52] concerned the unilateral alteration of terms and conditions of employment by the employer. The employee had tacitly accepted the change. The employer was prevented from relying on the employee's tacit acceptance on the basis that its conduct amounted to a breach of the implied term of trust and con dence. The signi cance of this case lies in the fact that the employer's ability to rely successfully upon the general principles of contract law may be contingent on his having acted in a manner consonant with mutual trust and con dence . [53]

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48 Ibid., 728.

49 [1991] IRLR (HL) 522.

50 [2004] IRLR 377 (CA).

51 Michael Jefferson, 'Stigma Damages Against Corrupt Companies', *Company Lawyer*, 19(1) (1998): 21, p. 22 states: 'Unreasonable conduct nowadays is likely to be a breach of the implied duty of mutual trust and con dence. This term, which is inserted into all contracts of employment, can cover unreasonable behaviour by the employer.'

52 (1985) IRLR 445.

53 Douglas Brodie, 'Beyond Exchange: The New Contract of Employment', *ILJ*, 27 (1998): 79, p. 83.

In *O'Brien v Transco plc (formerly BG plc)*,[54] O'Brien, who was initially employed by BG through an agency in 1995, was not offered the same enhanced redundancy terms as the other 'permanent employees' on the basis that BG did not consider him to be a 'permanent employee'. O'Brien brought a claim against BG on the basis of a breach of the implied term of trust and con dence. The employment tribunal found, as a preliminary issue, that O'Brien did qualify as a permanent employee and that by not offering him the same redundancy terms as the other employees BG had breached its duty of trust and con dence. This nding was upheld by both the Employment Appeal Tribunal (EAT)[55] and the Court of Appeal. What is of great signi cance in this case is the application of a two–stage enquiry in the determination of whether or not there has been a breach of the implied term of trust and con dence. The Court of Appeal held that if the effect of the conduct, or its likely effect, were to destroy or seriously damage trust and con dence, then there would be a *prima facie* breach of the implied term of trust and con dence. Once a *prima facie* breach is identi ed, the second stage of the enquiry involves the determination of whether the employer acted without 'reasonable or proper cause'.

The consequence of this two-stage enquiry is that: 'whether or not the employer had reasonable or proper cause to act as it did will inevitably impact on the effect the conduct had on trust and con dence. In other words, if the employer can show that it had reasonable and proper cause to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and con dence there will no breach of the implied term.[56]

Similarly, the question of whether the employer had reasonable and proper cause for certain conduct must be considered in the light of the impact that that conduct had on the employee.[57] As stated by Lord Steyn in *Malik*: In ascertaining whether or not the employer's conduct constituted a breach of the implied term of trust and con dence it seems clear that what is signi cant is the impact of the employer's behaviour on the employee rather that what the employer intended. Moreover the impact will be assessed objectively'.[58] This objective test, as opposed to a consideration of the employer's subjective intentions or motivations has been commended as being in line with 'contractual orthodoxy'.[59] Furthermore, recourse to an employer's subjective intentions and motivations would 'introduce a great deal of uncertainty into employment law'.[60] Despite the adoption of an objective test in

54 (2002) All ER (D).

55 (2001) All ER (D) 169.

56 *Billington v Michael Hunter & Sons Ltd* (2003 WL) 22769575 (EAT).

57 Jon Fisher and Pinsent Curtis Biddle, 'Is There an Obligation of Fair Dealing to Employees?', *All England Legal Opinion*,18 (2002): 9.

58 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 47; see also *Gulf Offshore Guernsey Ltd v Struth* (2004) WL 3265212 (EAT) and *Omilaju v Waltham Forest LBC (No.2)* [2005] IRLR 35.

59 Brodie, 'Legal Coherence and the Employment Revolution', p. 608.

60 Ibid.

the determination of whether or not there has been a breach of the implied term of trust and con dence, this does not derogate from the fact that the concept embraces within it duties such as good faith, honesty, loyalty, delity and con dentiality .[61] As Kirby J con rmed in *Concut Pty Ltd v Worrel*:[62] 'The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, con dentiality and mutual trust.

Various cases have found the duty to endure after the contract had been terminated. This is despite what Lord Millet said in regard to the implied duty of mutual trust and con dence in *Johnson v Unisys*:[63] 'But this is an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship. The implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration.' In the Australian case of *Gambotto v John Fairfax Publications Pty Ltd*[64] Peterson J awarded damages to an ex-employee of the employer for consequences of conduct by the employer that took place after the termination of the employment relationship. The breach of the implied term of trust and con dence was ef fected by certain actions of the employer which occurred between eight and twenty six months after the contract of employment had been terminated. Peterson J stated:[65]

> Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formally, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and con dence is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and con dence term to be liable if he hereby causes continuing nancial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and con dence term. [66]

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61 Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Con dence , p. 768.

62 [2000] HCA 64 at 52.

63 Ibid at par 78.

64 [2001] NSWIRComm 87.

65 At par. 26.

66 In *Spring v Guardian Assurance Plc* [1995] 2 AC 296 the House of Lords held that that the employer had breached an implied duty of care in drafting and supplying an unfavourable reference concerning the employee to a prospective employer.

Another case con rming that the implied duty of trust and con dence endures after the employment relationship has terminated is *Wade v State of Victoria and Amor*.[67] In this case the police department of Victoria provided false and misleading information about a former employee of the Victoria Police force to Queensland Criminal Justice Commission. This resulted in the former employee losing employment with a manufacturer of gaming machines. Harper J awarded damages to the former employee for the nancial loss suf fered as a result of the negligent dissemination of inaccurate information by the former employer.[68]

In his dissenting judgment in *Johnson v Unisys Ltd* Lord Steyn stated that the purpose of the implied obligation of mutual trust and con dence is 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'.[69]

In contrast to these cases the court in *Lloyd v RJ Gilbertson (Qld) Pty Ltd*[70] held that the manner of dismissal did not constitute a breach of the implied term of mutual trust and con dence. Madgwick J, while accepting that the implied term of trust and con dence was implied into every contract of employment, [71] he went on to conclude that in this case the term had not been breached. These were his reasons:

> But here, the relationship of employer-employee was ex-hypothesi to be forthwith discontinued, in any event. One of the bases, in my opinion, for the implication of such a term is the obligation on the parties so to conduct themselves that ful lment of the contract will not be rendered impossible, practically speaking. That justi cation no longer exists when the performance of the contract is, for other reasons, forthwith coming to an end. Thus it is not clear to me that an implied term so formulated was breached.

This dictum implies that since the purpose of the implied term of trust and con dence is to render the ful lment of the contract of employment possible, it is not applicable during the time the contract is being terminated.[72]

As will be discussed below, it remains uncertain to what extent the obligation is applicable to dismissals.

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67 [1999] 1 VR 121.

68 The court in this case referred to the cases of *Spring v Guardian Assurance Plc* [1995] 2 A.C 296 and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 47 in support of its decision.

69 (2001) All ER (HL) 801 at 813.

70 (1996) 68 IR 277 at 283–284.

71 On the basis of *Burazin v Blacktown City Guardia*n (1996) 142 ALR 144 at 151.

72 Compare *Irving, Williamson and the State of New South Wales v Kleinman* [2005] NSWCA where the Court of Appeal of the Supreme Court of New South Wales held that the implied term of mutual trust and con dence is applicable to disciplinary proceedings. See also *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99.

Dismissals and Disciplinary Action

In *Johnson v Unisys Ltd*[73] the employee claimed that the manner in which he was dismissed caused him to suffer a nervous breakdown thus impairing his ability to nd work. He relied on the implied term of trust and con dence contending that the employer had breached that term by not giving him a fair hearing and by breaching its disciplinary procedure. The House of Lords dismissed the claim on the basis that since statute provided a remedy for unfair dismissal and Johnson had already been compensated in terms thereof, a common law right to recover nancial loss resulting from the manner of dismissal would be inconsistent with the statutory regime of unfair dismissal. Lord Nicholls said:

> … a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would y in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the bene t of the statutory right, the amount of compensation payable and the short time limits for making claims of this nature should be decided by specialist tribunals, not the ordinary courts of law.[74]

In similar vein Lord Hoffman commented:

> …judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balance of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord.

The reasoning of the majority is dif cult to follow: After having commented on the changed nature of the employment contract and the manner in which Parliament has attempted to re ect this in legislation, [75] and after having stated that the courts should work in harmony with Parliament,[76] Lord Hoffman and Lord Millet with whom Lord Bingham of Cornhill and Lord Nicholls of Birkenhead concurred, make a ruling to the effect that an employee is precluded from claiming damages arising

73 [2001] ICR 480.

74 At 483.

75 Lord Hoffman stated at 496: 'But over the last 30 years or so the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament.'

76 See quotation in the text.

from the manner the relationship was terminated. This reasoning begs the question: If the contract of employment has changed to such an extent that it can adequately be described as a ‘relational contract’, and that termination thereof can have a devastating effect on the individual employee,[77] how can a decision that prevents an employee whose employment has been terminated from claiming damages arising from the manner of dismissal be in harmony with Parliament’s recognition of the transformation that the contract of employment has undergone? Hence the criticism that this decision has prevented the common law from developing so as to reflect modern perceptions of how employees should be treated fairly and with dignity’.[78] Ironically the outcome of this decision is that employees might be better protected in circumstances where there is no applicable legislation.[79] If, as both Lord Hoffman[80] and Lord Millet[81] aver, Parliament has enacted legislation to give effect to the changed perception concerning the contract of employment, then the consequence of their decisions clearly does not reflect this changed perception and, nor does it work in harmony with the intention of Parliament. As has been pointed out:[82]

> The argument that Parliament had intended to freeze out the development of the common law by creating a statutory remedy for unfair dismissal is contentious: the absence of any reference to the common law in the legislation may have occurred because Parliament was content to let the courts develop it in the usual way. Indeed it would be open to the courts to reason by analogy that a requirement by employers to follow a fair procedure is not regarded by Parliament as unduly onerous.

The South African courts, on the other hand, have not perceived the creation of statutory rights in the form of legislation as a bar to the development of, or the application of the common law. *Buthelezi v Municipal Demarcation Board*[83] is a case in point. The appellant was appointed as deputy manager for the respondent’s financial operations in terms of a fixed term contract of five years running from 24 January 2000 to 23 January 2005.The appellant was dismissed with effect from February 2001 on the basis of the employer’s operational requirements. The Labour

77 Lord Millet who at 503,stated that he was ‘in full agreement’ with Lord Hoffman said the following, at 506, about the extent to which the contract of employment had evolved: ‘Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents . It is generally recognised today that “work is one of the defining features of people s lives ; and that loss of one s job is always a traumatic event ; and that it can be “especially devastating” when dismissal is accompanied by bad faith.’

78 Hugh Collins, *ILJ*, 30 (2001): 305.

79 See Bob Hepple and Gillian Morris, ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’, *ILJ* (2002): 245, p. 247.

80 At 496.

81 At 506.

82 Hepple and Morris, ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’, p. 254.

83 (2004) 25, *ILJ*, 2317 (LAC).

Appeal Court held that although legislation had amended the common law in certain respects, it had not amended the common law principle that a unilateral cancellation of a xed-term contract constitutes a material breach of contract. Jafta AJA, with whom Zondo JP and Davies AJA concurred, stated: 'Generally, our courts have declined to interpret a statute as taking away existing rights unless that was the purpose intended by the legislature and that is expressed in clear unambiguous terms in the statute itself.'[84] Most signi cantly , Jafta AJA pointed out that the reason that the legislature in its provisions concerning xed term contracts did not include the premature termination thereof, although this would be unfair is 'plain'. He quoted the explanation of Nugent AJA (with whom Howie JA, Marais JA and Mpati JA concurred) in *Fedlife Assurance Ltd v Wolfaardt*:[85]

> The common law right to enforce such a term remained intact and it was not necessary to declare a premature termination to be an unfair dismissal. The very reference to xed term contracts makes it clear that the legislature recognised their continued enforceability and any other construction would render the de nition absurd. [86]

If the House of Lords in *Johnson* had applied the above reasoning to the facts before it, the absurd result that 'employees may be better protected by implied terms in areas in which Parliament has failed or chosen not to legislate than in those in which it has'[87] would have been avoided.

The nding in *Johnson* is in line with the old fashioned perception that the contract of employment is an ordinary commercial contract. This perception, which is no longer supported,[88] is grounded in nineteenth century individualism and the law of master and servant and is not in harmony with the intention of Parliament in drafting legislation that protects employees against unfair dismissals.

The majority in *Johnson* inter alia, justi ed their conclusion by reasoning that since the implied obligation of mutual trust and con dence is concerned with 'preserving the continuing relationship which should subsist between employer and employee…it does not seem altogether appropriate for use in connection with the way that relationship is terminated'.[89] As Lord Steyn correctly pointed out, this

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84 At 2322. In support of this conclusion Jafta AJA quoted the following dictum of Smalberger JA in *SA Breweries Ltd v Food & Allied Workers' Union & others* 1990 (1) SA 92(A); (1989) 10 *ILJ* 844 (A) at 99F: 'There is an assumption against the deprivation of, or interference with, common law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured.'

85 2002 (1) SA 49 (SCA); (2001) 22 *ILJ* 2407 (SCA) at par. 18.

86 See also *Denel (Pty) Ltd v Vorster* (2004) 25 *ILJ* 659 (SCA) where the court held that despite the fact that the employer had abided by statutory procedural requirements, its failure to abide by the procedural requirements provided for in terms of the contract constituted a breach of contract.

87 Hepple and Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights', p. 255.

88 See Lord Steyn's speech at 488–489.

89 Per Lord Hoffman at 498.

is to misconstrue the scope of the obligation. He explained: ‘It is noteworthy that the implied obligation of mutual trust and con dence was developed in a series of constructive dismissal cases   It cannot therefore be con ned to breaches during the subsistence of the contract.’[90] As seen, there are cases where the obligation was found to have been breached after the contract was terminated.[91] The decision in *Johnson* and in other cases relying on *Johnson*[92] have prevented employees from claiming damages for the manner of dismissal on the basis of the implied term of trust and con dence. This has led some to conclude that the implied term is not applicable to the manner of dismissal and the act of dismissal itself.[93] This conclusion may no longer be entirely accurate. The House of Lords has since had to reconsider the situation.[94]

The anomalous result of the *Johnson* decision that the duty of mutual trust and con dence is not applicable to dismissals or the manner of dismissal, is, as pointed out by Lady Smith in *King v University of St Andrews'*: if in the circumstances there was no dismissal then:[95]

> the implied duty of trust and con dence would obviously apply to the continuation of the ongoing working relationship between employer and employee. It is hard then to see how and why, bearing in mind the purpose of the implication of the duty, it should be regarded as suspended whilst the employer carries out the critically important t ask of assessing whether good cause for dismissal has been shown. For an employer to act in breach of that duty during an assessment which has the potential either to reinforce or to terminate the contract of employment would clearly be highly destructive of and damaging to the relationship between them.

The following cases illustrate this point. In *Gogay v Hertfordshire CC*[96] the claimant was suspended from her post while the employer undertook an investigation concerning allegations that the claimant had sexually abused a child in the care of her employer. The investigation concluded that the allegations were false. The claimant however suffered psychiatric illness and loss of earnings as a result of the suspension. The Court of Appeal held that the employer had breached its obligation of mutual trust and con dence by not conducting a proper investigation prior to suspending the claimant. If the employer in this case had dismissed the claimant, and the reasoning in *Johnson* were to be followed, the claimant would not have

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90 At 490.

91 See for example *Gambotto v John Fairfax Publications Pty Ltd* [2001] NSWIRComm 87; and in *Spring v Guardian AssurancePlc* [1995] 2 AC 296 where the House of Lords held that that the employer had breached an implied duty of care in drafting and supplying an unfavourable reference concerning the employee to a prospective employer.

92 *Eastwood v Magnox Electric Plc* [2002] EWCA Civ 463.

93 Cabrelli, ‘Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts .

94 See discussion below.

95 [2002] IRLR 252 at 255.

96 [2000] IRLR 703 (CA).

succeeded in a claim based on breach of the duty of mutual trust and con dence. In other words, the employer would have been better off if it had dismissed the claimant.

The facts in *McCabe v Cornwell CC*[97] are similar, the major difference being that the plaintiff was dismissed and not suspended. The plaintiff sought damages for psychiatric injury resulting from his suspension and the manner of investigation prior to his dismissal. The plaintiff worked for the respondents as a teacher from September 1991. In early May 1993 a number of girls complained that he had indulged in inappropriate sexual conduct. Five days later he was suspended. Nearly four months elapsed before he was made aware of the allegations against him. He was required to attend a disciplinary enquiry. Over the following three years there were three disciplinary enquiries. The result of the rst one was that McCabe was issued a nal written warning. The second and third enquiries were appeals. Despite the fact that the alleged conduct was described as 'a relatively trivial affair' at the second enquiry, the penalty of dismissal was imposed at both the second and third enquiries. McCabe lodged a complaint with an industrial tribunal. The industrial tribunal found the dismissal to have been unfair but found that McCabe was 20% at fault since the conduct had merited reproof and warning. On appeal, the Employment Appeal Tribunal upheld the Industrial Tribunal s nding that the dismissal was unfair , but overturned the nding of 20% contributory fault.

In the meantime, McCabe instituted proceedings in the High Court. He claimed that as a result of the employer's failure to conduct a proper investigation into the allegations, its failure to conduct a proper disciplinary enquiry and, the dismissal, he had suffered special damages as a result of his psychiatric illness. Later, as a result of the decision in *Johnson*, McCabe sought to amend his statement of claim by limiting the focus to the period prior to dismissal. The High Court refused to allow the amendments to the statement of claim and held that the conduct which McCabe complained about was part of the events leading up to the dismissal and therefore in terms of *Johnson* McCabe had no claim.[98]

McCabe appealed to the Court of Appeal. The appeal was allowed.[99] The court unanimously held that if prior to dismissal the employee has a claim for breach of contract or otherwise, this claim remains unimpaired by a subsequent dismissal and the statutory rights attached thereto. In order to reach this probably more equitable result the court had to adopt a rather legalistic and arti cial approach that is riddled with dif cult practical obstacles of application. Clearly , this is not a straight forward exercise in practice. How and on what basis does one draw the line? The court nevertheless held that the events leading up to the dismissal including the procedure followed can be distinguished or demarcated from the dismissal itself. The court held that it is a question of fact to be determined on a case by case basis whether the manner of dismissal and the dismissal itself can be severed from each other and

97 [2002] EWCA Civ 1887.
98 [2002] EWHC 3055 (QB).
99 [2003] ICR 501.

at what point the events preceding and resulting in dismissal end and the dismissal itself begins. Lord Justice Auld explained that these questions must be answered by considering the following:[100]

> The question is not just one of the length of the disciplinary process eventually giving rise to dismissal. There may be other relevant factors. For example, an employer may not embark on disciplinary proceedings with dismissal in mind and may only come to it late in the day when he discovers that the complaint is much more serious than he at rst thought. So, the consistency of conduct and intention of the employer at different stages of the process may be relevant, as also may be: the nature and pattern of any warnings; whether there is a natural break in the process before dismissal becomes a practical position…

With respect, this line of reasoning is dif cult to follow . If I have understood correctly, the implication is that if the disciplinary process is a short one, it will be less likely that the events leading to the dismissal and the dismissal itself can be severed from each other. In other words, if no procedure is followed at all or the procedure that is followed is a sham, the employee will be limited to damages provided for in terms of legislation and will be barred from claiming common law damages on the basis of breach of the implied term of trust and con dence. If the employer, on the other hand at least attempts to follow a fair disciplinary procedure, the employee has a better chance of claiming common law damages in addition to statutory damages. Secondly, if I have read the dictum correctly, it implies that if the employer intends dismissing the employee from the outset, it is less likely that the events leading to dismissal and the dismissal itself will be capable of being severed the one from the other. This reasoning has absurd results: If the employer intended dismissing the employee before the employee was even given a chance to state his or her case, or worse still, the employer intended dismissing the employee knowing that the employee is innocent and the accusations and allegations are fabrications made by the employer in order to dismiss the employee,[101] the employee is less likely to succeed in a claim based on common law and will be limited to a statutory claim for unfair dismissal. If the employer on the other hand, affords the employee a fair opportunity to state his or her case before deciding to dismiss the employee, the chances of severing the actions leading to dismissal from the dismissal itself are improved, thus allowing the employee both a statutory and a common law claim. In short, the more unfair the conduct of the employer, the less likely the employee's chances of success in claim for damages based on the common law.[102]

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100 At par. 27.

101 This is what happened in *Eastwood & Williams v Magnox Electric Plc* [2002] EWCA Civ. 463.

102 It is not surprising that in this case, at par 33, while allowing the appeal Lord Justice Brooke expressed reservations about the present state of the law in this regard. He stated that re-examination of the law by the House of Lords, or by Parliament was warranted. After identifying inter alia, the anomaly that a claim will be disallowed if the employer intended dismissing the employee throughout the disciplinary process he stated at par 46: 'As the law now stands (or appears to stand) I am very uneasy about the long-term social consequences of

In the case of *Eastwood, Williams v Magnox Electric Plc*[103] the employer had maliciously fabricated allegations against the employees in order to dismiss them. The disciplinary process was a sham with the employer's objective being to dismiss the employees knowing that they had not committed the misconduct that they were accused of. Both employees were dismissed. They pursued claims for unfair dismissal in terms of legislation at the employment tribunal. Both men received financial payments in settlement. The agreement reserved their right to pursue a claim at common law for damages in respect of personal injuries arising out of their employment. The two men then proceeded in the county court with a claim for damages based on the breach of the implied term of mutual trust and confidence. Their claims on the basis of the decision in *Johnson* were dismissed. Subsequently the Court of Appeal held that the employer's malicious and devious plan to dismiss the employees by creating false evidence and coaxing witnesses to lie constituted part of the dismissal. Consequently based on *Johnson*, their claim for damages for psychiatric injury failed.[104] The two men appealed to the Appeal Court and their claim was once again dismissed. A differently constituted Court of Appeal in McCabe[105] (as discussed above) however, allowed a common law claim for damages in similar circumstances. The employer in McCabe's case took this decision on appeal to the House of Lords, and Eastwood and Williams also took the decision of the Court of Appeal on appeal to the House of Lords. The cases were decided together by the House of Lords.[106] Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffman, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood unanimously held that if before his dismissal, whether actual or constructive, an employee had acquired a cause of action at law for breach of contract or otherwise, that cause of action remained unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. Nevertheless, in terms of the *Johnson* decision, the House of Lords held that a breach of the common law implied term of trust and confidence could not be relied upon as a basis upon which to claim for unfair dismissal (whether actual or constructive) because Parliament had established a statutory code for unfair dismissal. Usually, aside from instances where an employee is suspended, the dismissal itself, and not the events leading up to the dismissal would be the cause of pecuniary loss to the dismissed employee. In such cases the dismissed employee's claim would be limited to the statutory claim. In exceptional cases, so the House of Lords held, a dismissed employee could suffer financial loss as a direct result of the employer's failure to act in a fair manner when taking steps leading to dismissal.

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a law which may permit an employee who is known to be psychologically vulnerable damages of nearly £200,000 if his or her employer's breach of duty … triggers off a foreseeable psychiatric injury, while an employee who is perceived to be more robust can recover nothing at all when treated in the same way.'

103 [2002] EWCA Civ 463; [2003] ICR 520;[2003] CLY 1332.

104 Ibid.

105 [2003] ICR 501.

106 *Eastwood and another v Magnox Electric Plc McCabe v Cornwall County Council and another* [2004] UKHL 35.

An example of such exceptional circumstances in the opinion of the House of Lords would be where the employee suffered financial loss from psychiatric or other illness caused by pre-dismissal unfair treatment. In such cases, the dismissed employee would have an independent cause of action based on the common law implied duty of trust and confidence for the unfair pre-dismissal treatment. The separate cause of action based on the statutory right not to be unfairly dismissed would not effect the common law action. However, a dismissed employee who brought actions based on both the statutory and the common law rights, he could not recover overlapping damages twice.

Lord Nicholls of Birkenhead gave reasons for his decision and Lord Hoffman, Lord Rodger and Lord Brown concurred with Lord Nicholls. Both Lord Nicholls and Lord Steyn, however, expressed reservations concerning the practical implications of having to designate a clear boundary between events leading up to the dismissal and the dismissal itself. Lord Nicholls stated:[107]

> As was to be expected, the decision in *Johnson v Unisys Ltd* [2001] ICR 480 has given rise to demarcation and other problems. These were bound to arise. Dismissal is normally the culmination of a process. Events leading up to a dismissal decision take place during the subsistence of an employment relationship. If an implied term not to dismissal itself unsatisfactory results become inevitable.

After having referred to some of the anomalies resulting from the *Johnson* decision identified by the Court of Appeal,[108] Lord Nicholls identified some of the drawbacks of this 'unusual boundary'.[109] Firstly, there is the possibility of 'duplication of proceedings' where 'the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs'.[110] Secondly, Lord Nicholls identified the artificiality of severing a continuing process into two parts. This would be most likely to 'give rise to difficult questions of causation where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. In such instances judges and tribunals, Lord Nicholls pointed out, faced with conflicting medical evidence will be in the unenviable predicament of having to decide whether it was the dismissal itself, or the actions leading up to the dismissal that caused the illness.[111] Finally, Lord Nicholls pointed out the anomaly that an employee against whom disciplinary action short of dismissal is taken would not be subject to the statutory cap on the amount of compensation, whereas a person who is dismissed would not be able to claim amounts in excess of the statutory cap.[112]

107 At 1068.
108 They are discussed above.
109 At 1072.
110 Ibid.
111 At 1073.
112 Ibid.

Lord Steyn, who was the only one who dissented in the *Johnson* case observed that 'Johnson has left employment law in an unsatisfactory state.'[113] Like Lord Nicholls, Lord Steyn inter alia was concerned with the practical obstacles and inconsistencies that would naturally arise from the courts having to draw a legalistic and arti cial boundary between the events leading up to the dismissal and the dismissal itself. He stated:[114]

> This dichotomy will often give rise to questions whether earlier events do or do not form part of the dismissal process. After all, such problems in relationships between an employer and an employee will often arise because of a continuing course of conduct. In practice this will inevitably lead to curious distinctions and arti cial results. It will involve case by case decision-making rather than principled adjudication. The outcome of litigation will be very unpredictable.

Lord Steyn, also re-iterated the anomalous result of *Johnson* that 'although the exercise of the power to suspend must be exercised with due regard to trust and con dence (or fairness), the more drastic power of dismissal may be exercised free of any equivalent constraint'.[115] In short, 'the more outrageous the breach, the less likely it is that the employee can af rm the contract .[116]

Lord Steyn, unlike Lord Nicholls, was not too concerned about the prospect of a claimant being allowed to make a double recovery. He pointed out that 'this will pose no more serious problems than in other areas where possible double recovery problems occur and are dealt with by judges on the facts of each case'.[117]

After having discussed with approval the criticisms levelled against the decision in *Johnson* by various academic writers,[118] Lord Nicholls concluded that the Johnson decision 'prevents and will continue to prevent, the natural and sensible evolution of our employment law in a critical area'.[119] Like Lady Smith[120] and Brooke LJ,[121] Lord Steyn and Lord Nicholls expressed the view that the law should be re-examined by Parliament.

The Interaction Between the Implied Terms and Express Terms

1. Contracting Out

In this section contracting out refers to an express term in a contract which directly excludes or modi es the operation of an implied term. It does not refer to an express

113 At 1074.
114 At 1075.
115 At 1076.
116 Ibid.
117 At 1079.
118 These are discussed above.
119 At 1079–1081.
120 *King v University of St Andrews* [2002] IRLR 252.
121 *McCabe v Cornwell CC* [2003] ICR 501.

term which will have the effect of indirectly limiting, contradicting or otherwise in uencing the operation of an implied term. [122] In other words[123] contracting out in this context refers to a term in a contract that simply states that the implied term of trust and con dence is not applicable to the contract, or a statement that the term is not applicable to certain clauses in the contract, or a modi cation of the term in the form of an explanation of what the term will signify in that particular contract.

The traditional or ‘orthodox view is that this implied obligation may be displaced or quali ed by express agreement or necessary implication . [124] However, whether or not, this is true with regard to the implied term of term of trust and con dence remains to be seen. The various arguments for the view that it is not, or rather should not be possible to contract out of this term, are discussed below.

In *Courtlands v Northern Textiles v Andrew*,[125] the tribunal concluded that the mutual obligation of trust and con dence should be implied into the contract of employment on the basis that it is ‘necessary to give it commercial and industrial validity’.[126] This is not the same as implying a term on the basis that the implied term of trust and con dence is an incident of that particular type of contract. [127] Since this term is necessary to give business ef cacy or commercial and industrial validity to the contract, its absence would render the contract incapable of ful lling its function. In other words, the implied obligation of trust and con dence is a material or fundamental term.[128] As such it is an essential term which goes to the very root of the contract. In consequence, it should not be possible to contract out of the term.[129]

In similar vein, Hepple points out that since rights such as dignity, respect and equality, (which would come within the realm of protection of the implied term of

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122 The effect of these terms is discussed in the text following.

123 Using Brodie’s categorisation in his article, ‘Beyond Exchange: The New Contract of Employment’, *ILJ*, 27 (1988): p. 82.

124 Per Lord Steyn in *Johnson v Unisys Ltd* [2002]2 All ER 801 at 809 and Van der Merwe, Van Huyssteen, Reinecke and Lubbe, Contract: General Principles, 2nd ed. (2003): p. 260.

125 [1979] IRLR 84 (EAT).

126 Similarly in the Australian case of *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 190 the full court of the Industrial Relations Court stated: Trust and con dence is a *necessary* ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and con dence between the parties without reasonable cause (my emphasis).

127 See chapter three.

128 *Morrow v Safeway Stores Plc* [2002] IRLR 9.

129 In the Australian case of *Lloyd v RJ Gilbertson (Qld) Pty Ltd* (1996) 68 IR 277 at 284 Madgwick J expressed the view that one of the most important reasons for importing the implied term of mutual trust and con dence into contracts of employment was to render the ful lment of the contract possible. By implication, absence of the term renders ful lment of the contract impossible and therefore its implication is necessary. *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 also referred to the implied term of mutual trust and con dence as a necessary incident.

trust and con dence), [130] are considered to be fundamental rights, it should not be possible to exclude them by express terms.[131]

On the other hand, if the implied term of mutual trust and con dence is a *naturalia* of all contracts of employment[132] the parties would be free to exclude or modify the term.[133] However, Lindsay is of the view that if a term is an incident of all contracts, it is possible to contact out of such a term.[134] This view however is contrary to orthodox contract principles.[135]

Another way of preventing the contracting out of the implied term of trust and con dence would be to ar gue as Brodie does,[136] that such prevention is based on public policy considerations. He believes that in situations where there is a greater equality of bargaining power 'it is appropriate that implied terms, of fact or law, operate as default rules'.[137] However, Brodie maintains that if there is an inequality of power, as is generally the case between employer and employee, based on considerations of public policy, implied terms which are considered to be incidents or standard terms of that particular type of contract, should not be capable of being excluded by express provisions.[138] In support of his argument Brodie points out that the judiciary has been a most willing partner in supporting the renewed relevance of insisting on the implied term of trust and con dence in order to protect the employee. For example Lord Steyn in *Johnson v Unisys Ltd*, stated:[139]

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130 In the South African case of *Tek Corporation Provident Fund & others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235 the implied term of trust and con dence was said to provide authority for the existence of an employer's duty to conduct itself in 'good faith'.

131 This point of view is put forward in Bob Hepple, 'The Common Law and Statutory Rights', Hamlyn Lectures (2005): ch 3.

132 In the South African case of Council for Scienti c & Industrial Research v Fijen (1996) 17 ILJ 18 (A) at 20 Harms JA said of the implied term of trust and con dence: 'However, in our law it is not necessary to work with the concept of an implied term. The duties referred to simply ow from *naturalia contractus*.'

133 Van der Merwe, van Huyssteen, Reinecke and Lubbe, *Contract: General Principles*, 2nd Ed (2003): pp. 260–261 distinguish *essentialia* and *naturalia* as follows: *Essentialia* are terms which are essential for the classi cation of a particular type of contract. The absence or presence of the *essentialia* does not effect the validity of the contract. However, absence of a particular *essentialia* disquali es the contract from falling within a particular class of contract. *Naturalia* occur *ex lege* as legal incidents of particular types of contracts. They are based on 'notions of what is both economically and generally viable, fair and reasonable'. As a general rule *naturalia* can be contracted out of.

134 The Honourable Mr justice Lindsay, The Implied Term of Trust and Con dence , *ILJ*, 30 (2001): 1 p. 10.

135 See Andrew Boon Leong Pang, 'Implied Terms in English Law – Some Recent Developments', *Jounnal of Business Law*, May (1993): 242 p. 252 and Brodie, 'Beyond Exchange: The New Contract of Employment', p. 84.

136 'Beyond Exchange: The New Contract of Employment', pp. 83–85.

137 Ibid., 85.

138 Ibid.

139 2001 (2) All ER 801 at 809.

> These considerations are testimony to the need for implied terms in contracts of employment protecting employees from harsh and unacceptable employment practices. This is particularly important in the light of the greater pressure on employees due to the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and nancial markets.

Secondly, Brodie points out, there is no bar on the courts to render an implied term mandatory on grounds of policy. Brodie cited *Lee v Showmen's Guild*[140] as authority for this.[141] In this case Denning LJ stated:[142] 'Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice.' Finally, Brodie argues that in the light of the fact the implied term of mutual trust and con dence is considered to be in Lord Steyn s words 'essential in providing a reasonable and fair framework for contracting', and an 'incident of all contracts of employment', lends support for the argument that it should be considered to be a mandatory term that cannot be contracted out of.[143] Brodie concludes:[144] 'Statute ensures that the implied obligation to take reasonable care for the employee's safety is rendered mandatory. Endowing the obligation of mutual trust and con dence with the same status would promote the protection of employees' general well-being.'

2. Good Faith, Reasonableness and Fairness

As discussed, the judiciary has perceived the implied term as material term going to the very root of the contract,[145] as an incident of every contract of employment,[146] and has even described this term as the 'implied obligation of good faith'.[147] Lord Steyn said in *Johnson v Unisys Ltd*: 'It could also be described as an employer's obligation of fair dealing'.[148] Similarly, in the Australian case of *Concut Pty Ltd v Worrel*[149] Kirby J observed: 'The ordinary relationship of an employer and an employee at common law is one importing implied duties of loyalty, honesty, con dentiality and mutual trust.'

The fact that the employer was precluded from relying on general principles of contract law because it had breached the implied term of trust and con dence

140 [1952] 2 QB 329.

141 Douglas Brodie, 'Fundamental Obligations', *Employment Law Bulletin*, 21, (1997): 3, p. 4.

142 At 342.

143 Brodie, 'Beyond Exchange: The New Contract of Employment', p. 85.

144 Ibid., p. 86.

145 *Courtlands Northern Textiles v Andrew* [1979] IRLR 84 (EAT) at 86.

146 *Malik v BCCI* [1997] 3 All ER 1 at 15.

147 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* (1991) 1 WLR 589.

148 Ibid., at 813.

149 [2000] HCA 64 at par. 52.

in *Lewis v Motorworld Garages*[150] is most signi cant in the introduction of an element of good faith in the contract of employment. In this case the employer had unilaterally changed the terms and conditions of employment. The employee had tacitly accepted the change. The employer was prevented from relying on the employee's tacit acceptance on the basis that its conduct amounted to a breach of the implied term of trust and con dence. The signi cance of this case lies in the fact that 'the employer's ability to rely successfully upon the general principles of contract law may be contingent on his having acted in a manner consonant with mutual trust and con dence .[151] Also of signi cance is the fact that the implied term was allowed to 'trump' the term that was actually agreed to, albeit tacitly.[152]

Similarly, as discussed above, the Court of Appeal[153] in an appeal from *Bank of Credit and Commerce International SA (in liq) v Ali (No 2)*[154] reversed Lightman J's decision dismissing a claim on the basis of a settlement agreement releasing the employer from liability for any claims. Even though a majority of the Court of Appeal was in agreement with Lightman J that the language of the release was suf ciently comprehensive to embrace the claim, they found it to be unconscionable to allow the bank to rely on the release in order to bar the claim. In short, the Appeal court, on the basis of its sense of justice, good values, public policy, good faith or a combination of these factors, (which are dif cult to de ne), refused to uphold an agreement that was voluntarily entered into by the parties.

Oddly enough, even though the South African law considers all contracts to be in good faith,[155] the South African judiciary has on occasion criticised this approach on the basis that even though principles such as good faith, reasonableness and fairness are basic to the South African law of contract, it is not a judge's place to impose his or her sense of morality on the parties. If the judiciary is allowed to act on these principles directly the result, so they argue, will be legal and commercial uncertainty.[156] This argument is dif cult to follow . If the principle of good faith is an underlying and basic principle of the law of contract, what function does it serve if judges are not to apply the principle

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150 Ibid.

151 Douglas Brodie, 'Beyond Exchange: The New Contract of Employment', *ILJ* 27 (1998): 79 p. 83.

152 In *Bainbridge v Circuit Foil* [1997] ICR 541, the Court of Appeal held that despite an express term in the contract to the effect that the employer could 'at any time without prior notice' terminate a sick pay scheme, held that the employer was obliged to inform employees of a decision to terminate the scheme.

153 (2000) 3 All ER 51, (2000) ICR 1068.

154 (1999) 4 All ER 83.

155 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15.

156 See discussion in Craig Bosch, The Implied Term of Trust and Con dence in South African Law', *ILJ*, 27 (2006): 28 pp. 47–50. See also *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA).

'directly' to the facts before them? It is the courts' prerogative to develop the law[157] and in applying the principles of good faith judges are required to exercise their discretion.[158] In developing the law judges must have recourse to vague principles of fairness, justice, the public good, public policy[159] and the principles embodied in the Bill of Rights in the Constitution.[160] These include the right to dignity and equality.

In *Grobler v Naspers Bpk en ander*,[161] the court extended the common law rule of vicarious liability to include an employer's liability for sexual harassment by its employees. The court held that in its duty to develop and adapt the common law it must keep abreast with changing socio-economic circumstances and should extend the common law on the basis of policy considerations where the law is not suf ciently exible to cater for altered social and economic circumstances. This decision was upheld on appeal where Farlam JA reiterated that 'the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so'.[162] In the case of *N K v Minister of Safety & Security*[163] three policemen took turns to rape a twenty-year-old woman. The Constitutional Court, on the basis of the principles embodied in the Constitution, found the employer vicariously liable for the criminal acts of its employees despite the fact that their actions constituted a clear deviation from their duties.

Admittedly, concepts such as good faith, reasonableness and the like are dif cult to de ne and give precise content to, but this should not bar the judiciary from applying these principles on a case by case basis. After all, as seen,[164] the courts have had to determine what 'a reasonable person' would do and think in certain circumstances. Furthermore in the context of the employment relationship there is an implied duty on the employee to act in good faith. The courts have had to give

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157 *Afrox Healthcare Bpk v Strydom* at 135.

158 Ibid., at 318–320.

159 Neels, 'Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid', *TSAR* (1999): 684 p. 696. Changing socio-economic circumstances such as amended trade practices are relevant in this regard. See *Afrox Healthcare Bpk v Strydom* (2002) 4 All SA 125 (SCA) at 131 where Brand JA cites *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 A at 804C-806D and *Durban's Water Wonderland (Pty) Ltd v Botha & another* 1999 (1) SA 982 (SCA) at 989 as authority for this view.

160 Grové, 'Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid', *THRHR* , (1998): 687, p. 694.

161 (2004) 25, *ILJ*, 439 (C).

162 *Media Ltd 24 & another v Grobler* (2005) 26, *ILJ*, 007 (SCA) at par. 68.

163 (2005) 26, *ILJ*, 1205 (CC).

164 Chapter three.

content to this term and they have succeeded in doing so.[165] It has been described in the following terms:[166]

> There can be no doubt that during the currency of his contract of employment the servant owes a duciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self evident proposition which applies even though there is not an express term in the contract of employment to that effect.

The application of the judges personal sense of what is right is inevitable. If this were not so judges would be mere administrators. Furthermore, especially in the context of the employment relationships, South African courts have had to decide what is fair in the circumstances they are faced with. The concept of unfair labour practices was introduced into the South African labour law dispensation as a result of recommendations of the Wiehahn Commission.[167] The rst de nition of unfair labour practice to be found in legislation was a very open-ended and non-speci c de nition. An unfair labour practice was de ned as any labour practice that in the opinion of the Industrial Court is an unfair labour practice'.[168] This obviously gave the Industrial Court enormous leeway and 'amounted to a licence to legislate'.[169] In 1980 the legislature intervened and a new de nition of unfair labour practice was introduced. It was more speci c and the de nition referred to four consequences that might arise as a result of an act or omission.[170] Nevertheless, this was still a general and open-ended de nition requiring the Industrial Court to use its discretion in interpreting it.[171] In 1988 the de nition was once again

165 See *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 (1) SA 686 (W); *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers , a member of INVESTEC* 1994 *ILJ* 1140 (IC); *Maduna v Brollo Africa (Pty) Ltd* 1995 *ILJ* 1589 (IC); *Council for Scientific & Industrial Research v Fijen* 1996 *ILJ* 18 (A); *Standard Bank of SA Ltd v CCMA* [1998] 6 BLLR 622 (LC); *De Beers Consolidated Mines Ltd v CCMA* 2000 *ILJ* 1051 (LAC); *Daewoo Heavy Industries(SA) (Pty) Ltd v Banks & others* 2004 ILJ 1391 (C). This is also true of English law. For example in *Robb v Green* (1895) 2 QB 1 Hawkins J said: ' … in the absence of any stipulation to the contrary, there is involved in any contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall act honestly and faithfully serve his master; that he shall not abuse his con dence in matters appertaining to his service, and that he shall by all reasonable means in his power, protect his master s interests in respect to matters con ded to him in the course of his service.'

166 *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) at 867.

167 Commission of Enquiry into Labour Legislation appointed under GN 445 GG 5651 of 8 July 1977.

168 S 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

169 Clive Thompson and Paul Benjamin, *South African Labour Law* (1997) A1–60.

170 S 1(g) of the Industrial Conciliation S 1(h) of the LRA Amendment Act 95 of 1980.

171 Thompson and Benjamin, *South African Labour Law* A1–60.

amended.[172] This time it contained a list of speci c unfair labour practices with an omnibus clause that corresponded with the 1980 de nition. Thus it was still open ended and open to interpretation. Again in 1991 a new de nition was enacted.

The 1991 de nition reads as follows: [173]

An unfair labour practice is de ned as any act or omission, other than a strike or lock-out, which has or may have the effect that:

(a) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
(b) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
(c) labour unrest is or may be created or promoted thereby; or
(d) the labour relationship between employer and employee is or may be detrimentally affected thereby.

Presently, section 23(1) of the Constitution provides simply that everyone has the right to fair labour practices. It will be for the courts to decide what is fair and what is unfair. Consequently the old Industrial Court's interpretation of the concept of 'fairness' in the context of unfair labour practices becomes relevant again.

The result of a constitutionally protected right to equality[174] is an increased role played by the concepts of good faith and consequently, fairness and justice in the law of contract.[175] Secondly, section 39(2) of the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. Finally, the fact that the Appellate Division[176] acknowledged that the implied term of trust and con dence is an implied term of all contracts of employment in terms of South African law.[177] Harms JA with whom Van Heerden JA, Van Den Heever JA and Olivier JA concurred stated:[178]

> It is well established that the relationship between employer and employee is in essence one of trust and con dence and that, at common law , conduct clearly inconsistent therewith

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172 S 1(h) of the LRA Amendment Act 83 of 1988.

173 S 1 of the LRA Amendment Act 9 of 1991.

174 S 9.

175 Van der Merwe and Van Huyssteen, 'The Force of Agreements: Valid, Void, Voidable, Unenforceable?', *THRHR* (1995): 549 p. 550 state: 'In a system of law within a constitutional state the process of balancing interests must take place within the framework of the Constitution and with regard for the principles and values of the broader society which are re ected in the Constitution. In the sphere of contract these principles and values may receive effect mainly in so far as they are subsumed in rules and principles of private law, and particularly contract law, such as the concepts of "public policy and public interest" and 'reasonableness and good faith.'

176 Now referred to as the 'Supreme Court of Appeal'.

177 *Council for Scientific and Industrial Research v Fijen* (1996) 17, *ILJ*, 18 (A).

178 At 26.

> entitles the 'innocent party' to cancel the agreement … On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee … It does seem to me that in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply ow from naturalia contractus. [179]

In the light of these facts, especially in the context of the employment relationship, judges will not be able to hide behind incantations of the sanctity of contract and that it is not a judge's place to legislate. Judges will be obliged to make value judgments whether they are giving content to the implied duty of trust and con dence, the principle of good faith or the right to fair labour practices.

In some instances, the application of values such as good faith and fairness have resulted in express terms having been quali ed by an implied obligation to exercise the powers conferred by the express terms in a reasonable manner. One such instance is the case of *United Bank v Akhtar.*[180] One of the terms of the contract of employment provided: 'The bank may from time to time require an employee to be transferred temporarily or permanently to any place of business which the bank may have in the UK for which a relocation or other allowance is payable at the discretion of the bank.'

Mr Akhtar was informed on 5 June that he should commence work at another bank on 8 June. Since Mrs Akhtar was ill and they were in the process of selling their house, Mr Akhtar requested that his transfer be postponed. The bank refused and subsequently ignored a request for leave. The bank stopped remunerating Mr Akhtar and merely offered to pay him 24 days' leave. Mr Akhtar resigned and claimed constructive dismissal. The EAT held that the bank's prerogative in this regard was curtailed by an implied term that the bank would give reasonable notice of relocation and that it would exercise its discretion with regard to the provision of allowances reasonably. In short the bank was not permitted to contract out of an implied term by means of an express term. This is contrary to contractual orthodoxy. Similarly in *White v Reflecting Roadstuds Ltd*[181] it was held that there had to be 'reasonable or suf cient grounds in order for the employer to exercise its rights in terms of a exibility clause. [182]

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179 The implied term was taken from English law. However, the exact words describing the content of the implied term were not taken over. The term in this case (at 26) is de ned as: 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 con dence and trust between the parties. It is most likely that the word probable in this de nition of the term is unintended and a result of a transcription error.

180 [1989] IRLR 261.

181 [1991] ICR 733.

182 See also *Clark v BET* [1997] IRLR 348 where it was held that an employer was not entitled to exercise an express discretion in a capricious manner or in bad faith.

In the recent South African case of *Erasmus & others v Senwes Ltd & others*[183] the court held that employer prerogative provided for in terms of an express term in the contract could not be exercised unfettered, but that the power to amend the contract was subject to the standard of reasonableness. The applicants in this case were all former employees of Senwes. On retirement they continued to be members of a medical scheme towards which Senwes made contributions on behalf of the retirees. During the last few years Senwes has made a number of unilateral changes to the structure and amounts of the subsidies which it contributed. On 1 November 2004 Senwes decided to reduce the amount of subsidies payable to the applicants. The applicants sought as a matter of urgency orders restraining Senwes from implementing its decision. The court found that Senwes was contractually bound, in terms of the contracts of employment between itself and the applicants to make contributions on their behalf towards the medical scheme. Furthermore, on retirement Senwes gave each applicant a letter wherein it unequivocally stated that it would continue to pay the subsidy. In fact Senwes continued to pay these subsidies even when it faced dif cult nancial times.

The contract, however, provided that Senwes's board of directors and management could amend any of the terms of the employment contract without notice to or the consent of the applicants. Regarding this term Du Plessis J held that Senwes's power to amend its own obligations to subsidise medical schemes would only be objectionable if such power renders the obligation uncertain and therefore unenforceable. He concluded that it was not objectionable because the power was not unfettered and it was subject to an objective standard. He explained that since all contracts 'are subject to the principle of good faith, and that parties should as far as possible be held to their contracts',[184] the rule that discretion must be exercised *arbitrio bono veri*[185] should apply whether the power vests in the promisor or the promisee. Applied to this case, Du Plessis J concluded that it meant that Senwes was obliged to exercise its discretion reasonably. After having referred to relevant precedent Du Plessis found that '…the concept of reasonableness is so settled in our law that it can readily be used, and is used as an objective standard that is justiciable by a court. It follows that Senwes's power to amend the contract is subject to the standard of reasonableness and not unfettered'.[186] Du Plessis J held that reasonable exercise of a power or discretion to amend a contract signi es that the party vested with such power must take into account the rights and interests of all the parties to the contract 'bearing in mind the nature and content of the original contractual obligation'.[187] Senwes

183 (2006) 27 *ILJ* 259 (T).

184 At 266 (footnotes omitted).

185 Du Plessis J (ibid.) referred to the Claassen *Dictionary of Legal Terms and Phrases* which translates the term as 'the decision of a good man' and explains it as a 'reasonable decision'.

186 Ibid.

187 At 267.

was found not to have done this and consequently to have breached the contract between itself and the applicants.

Finally, of signi cance is the reference by Du Plessis J to the constitutional right to fair labour practices.[188] He commented that this right ‘adds impetus to the general rule that a court should endeavour to enforce rather than to invalidate a contract’.[189] What is signi cant about this dictum is that it implies that an employee s right to fair labour practices (or the employer’s duty to enforce them) endures beyond the duration of the employment contract.[190]

In the Australian case of *Dare v Patrick Hurley trading as PGH Environmental Planning*[191] the contract of employment provided that the employer had ‘absolute discretion to use any of the disciplinary steps’ provided for in terms of the contract. The employer in this case did not, in terms of the disciplinary procedures set out in the contract, inform the employee of the allegations against her, nor did it allow her an opportunity to answer to these allegations. In its defence the employer sought to rely on the express term in the contract quoted above. The court held that the implied term of trust and con dence obliges an employer to exercise powers or discretions that are expressly provided for in a reasonable manner.[192]

In *Johnstone v Bloomsbury Health Authorities*[193] the Court of Appeal had to consider the effect of an implied term on an express term. Johnstone, a medical doctor entered into a contract of employment with the Bloomsbury Health Authorities in terms of which he could be required to work up to eighty eight hours per week. Paragraph 4b of the contract provided that Johnstone had to work forty hours basic per week, and in addition to those 40 hours he was required to be available for work for a further forty eight hours in that week should the Bloomsbury Health Authorities require him to do so. The Court of Appeal considered the effects of an implied term imposing a duty on the employer not to harm the employee by requiring him to work excessive hours on the express term contained in paragraph 4b of the employment contract. The Court of Appeal held that even though the contract entitled the employer to require Johnstone to work up to eighty eight hours per week, this prerogative had to be placed in the context of the contract as a whole and the employer’s implied duty to be responsible for the safety of its employees. It was further held that it was reasonably foreseeable that those excessive working hours could be detrimental to Johnstone’s health and that the employer was obliged to take

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188 S 23(1).

189 At 266.

190 See the Australian case of *Gambotto v John Fairfax Publications Pty Ltd* [1999] 1 VR 121; the English case of *Spring v Guardian Assurance Plc* [1995] 2 A C 296 and other cases discussed *supra* under the sub-heading ‘The Scope and Content of the Implied Term of Trust and Con dence .

191 [2005] FMCA 844.

192 In support of this conclusion the court quoted the Australian case of *Burazin v Blacktown City Guardian* (1996) 142 ALR 144 at 151 and *Johnstone v Bloomsbury Health Authorities* [1991] 2 WLR 1368.

193 [1991] 2 WLR 1368.

into account the physical condition of employees. Sir Nicolas Browne Wilkinson V-C and Stuart-Smith LJ held that the implied term should prevail over the express term. However, they came to this conclusion for different reasons. Stuart-Smith was of the view that precedence should be given to the term which, based on considerations of policy, is correct on 'principle'. However, in response to counsel's contention that in terms of orthodox principles of the law of contract an implied term is cannot take precedence over an express term, he responded: 'But this is not an implication that arises because it is necessary to give business ef cacy to the contract (i.e. a term implied in fact) …; it arises by implication of the law.'[194] However he then went on to say that it is possible for a contracting party to speci cally waive or limit his or her rights in terms of an implied term of the contract.[195] These two statements seem to be contradictory leading some to describe the judgment of Stuart-Smith LJ as ambiguous.[196] But a distinction needs to be made between expressly contracting out of an implied term, or expressly modifying the scope and ambit of the term on the one hand, and situations on the other hand, where there are no such express terms in the contract. In *Johnstone*, there were no express terms that referred directly to the application of the implied term. The express term only indirectly gave rise to an interplay between itself and possible implied terms. Perhaps what Stuart-Smith LJ was alluding to was that if in this case Johnstone had expressly waived his rights in terms of the implied duties of the employer, that express term would take precedence over the implied term obliging the employer to take care of the safety of its employees. If there are no such express terms excluding or modifying implied terms, then the implied terms are free to co-exist with the express terms. If the implied term arises as a legal incident it may take precedence over the express term in the sense that it may temper its operation. The way these express and implied terms interact may be determined by concepts such as reasonableness and fairness. In other words if there was a term in the contract in terms of which Johnstone waived his right that the employer would take care of his safety, this term would then oust the implied term that the employer must take care of its employees' safety. Lord Steyn also seems to take the view that express and implied terms can coexist, but that it is possible for the parties by express stipulation to render the implied term inapplicable or to reduce or modify its scope or application. In *Johnson v Unisys Ltd* [197] Lord Steyn stated: 'The interaction of the implied obligation of trust and con dence and express terms of the contract can be compared with the relationship between duties of good faith or fair dealing with the express terms of notice in a contract. They can live together … There is no con ict between express and implied terms. [198] This statement does not

194 At 1368.

195 Ibid.

196 Andrew Boon Leong Pang, 'Implied Terms in English Law – Some Recent Developments', *Journal of Business Law*, May (1993): 242, p. 252.

197 [2001] ICR 480 at 493.

198 This seems to be the approach taken in the South African case of *Erasmus & others v Senwes Ltd & others* (2006) 27, *ILJ*, 259 (T).

contradict Lord Steyn's obiter statement in *Malik v BCCI*[199] that the implied term of mutual trust and con dence operates as a default rule and can therefore be expressly excluded or modi ed.

Sir Nicholas Browne-Wilkinson V-C was of the view that the express term that Johnstone could be required to work for up to 88 hours per week could co-exist with the employer's implied obligation to take care of its employees' safety. His argument was that since the extra hours were within the discretion of the employer, the employer should exercise the discretion with due regard to its implied duty to care for the safety of its employees. He stated:[200]

> There is no incompatibility between the plaintiff being under a duty to be available for 48 hours overtime and the defendant's having the right, subject to their ordinary duty not to injure the plaintiff, to call on him to work up to 48 hours overtime on the average. There is … no incompatibility between the plaintiff's duty on the one hand and the defendants' right, subject to the implied duty as to health, on the other. The implied term does not contradict the express term of the contract.

Legatt LJ dissented and gave primacy to the express term even though there was no express provision in the contract contracting out of or modifying the implied term. He stated:[201]

> Although it is a canon of construction that the terms of a contract will be construed, as far a possible so as to be compatible with each other, it is axiomatic that the scope of an express term cannot be cut down by an implied term; and that is as true of terms implied by law as it is of terms which depend on the intention of the parties (i.e. terms implied in fact).

As seen from this dictum, the implication of an element of reasonableness or even good faith via implied terms in order to temper or qualify the exercise of an express discretion or power as occurred in the cases discussed has been perceived as being contrary to orthodox principles of contract.[202] Nevertheless, as has been pointed out, the South African, Australian[203] and English judiciaries have found it possible to allow seemingly contradictory terms to co-exist and interact with each other in

199 [1997] IRLR 462 at 468.

200 At 1375.

201 At 1372.

202 Brodie, 'Legal Coherence and the Employment Revolution', p. 609 states that these cases constitute a modi cation of the traditional approach to the relationship between express and implied terms.' See also Legatt LJ's dissenting judgment in J*ohnstone v Bloomsbury Health Authorities* [1991] 2 WLR 1368 and Pang, 'Implied Terms in English Law – Some Recent Developments', p. 254.

203 Kelly Godfrey, 'Contracts of Employment: Renaissance of the Implied Term of Trust and Con dence , *Australian Law Journal*, 77 (2003): 764, p. 771 expresses the view that '… the Australian courts are likely to require as they do in New Zealand 'very clear … language' to do so' (footnote omitted).

the interests of fairness. However, in the light of the importance the common law of contract accords to the sanctity of contract it is unlikely that an express term that directly and specifically excludes or alters an implied term can be found to be subject to the operation of that term. However, if there is no express exclusion or modification of the implied term, it will still be allowed to affect the operation of an express term. Referring to the obligation of mutual trust and confidence Lord Steyn observed:[204]

> It is an overarching obligation implied by law as an incident of the contract of employment … It requires at least express words or a necessary implication to displace it or to cut down its scope. Prima facie it must be read consistently with the express terms of the contract … The interaction of the implied obligation of trust and confidence and express terms of the contract can be compared with the relationship between duties of good faith or fair dealing with the express terms of notice in a contract. They can live together.

Conclusion

The introduction of an element of good faith by the judiciary in interpreting contracts where express employer prerogatives clash with implied duties is evident from the cases. Also evident from the cases is the fact that the obligation of mutual trust and confidence has been likened and even equated to a duty of good faith. Nevertheless, in ascertaining whether or not there has been a breach of the term, the enquiry remains objective. It is not the intention of the employer which is of relevance. What is relevant is the effect of the employer's conduct on the employee.[205] Similarly, the application of standards of reasonableness and the principle of good faith are also judged from an objective standard.[206] In short what the obligation of mutual trust and confidence and the obligation to act in good faith in the context of the employment relationship both entail is that 'each party must have regard to the interests of the other'.[207]

Implied Covenant of Good Faith and Fair Dealing

The American courts have developed three broad categories of exception to the 'at will' theory in order to attain some kind of fairness. These exceptions take the form

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204 *Johnson v Unisys* [2001] ICR 480 at 493.

205 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 47.

206 *Erasmus & others v Senwes Ltd & others* (2006) 27, *ILJ*, 259 at 266.

207 *University of Nottingham v Fishel* [2000] ICR 1462 at 1493. Similarly, Halton Cheadle, 'The First Unfair Labour Practice Case', *ILJ*, 1 (1980): p. 200 describes 'fairness' in the context of the employment relationship as: ' …a policy decision … It is not a sociological investigation, verifiable by empirical evidence, that the court has to conduct. It is really no more than the balance of the respective interests of the employer and the employee in a capitalist society.'

of public policy, breach of implied term, and the implied covenant of good faith and fair dealing.

Implied in Fact Terms[208]

In order to show that the dismissal was unfair the employee must prove that the employer had at some stage (during the job interview or during the course of employment) implied orally, tacitly or in writing that he/she would only be dismissed for 'just cause'.[209] 'At will' employees cannot establish causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.[210]

Public Policy

Some examples of employees having been protected from unfair dismissal on the basis of public policy is if they were dismissed for refusing to commit a crime,[211] whistle blowing on the employers' illegal activities,[212] for serving on a jury against the employer's wishes,[213] or for exercising a legal right.[214] Discharge in violation of public policy may be perceived as constituting a breach of the covenant of good faith and fair dealing.[215]

Implied Covenant of Good Faith and Fair Dealing

This principle is derived from commercial law. Section 205 of the Restatement (Second) of Contracts provides: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' The commentary to section 205 states:[216]

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justi ed. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

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208 Implied in fact terms were discussed in detail in chapter four with particular reference to employee handbooks.

209 *Foley v Interactive Data Corporation* 765 P 2d 373 (1988).

210 *Egerer v Computer Parts Unlimited, Inc.* (2002) WL 31648790, *Schlichtig v Inacom Corp* (2003) US District Court New Jersey (2003) civil action No 99–1208 (SSB), *Horton v Darby Electric Co Inc* (2004) IER 1058 SC.

211 *Nees v Hocks* 272 Or. 210 (1975).

212 *Tameny v Atlantic Richfield Co* 27 Cal. 3d 167 (1980).

213 *Palmateer v International Harvester Co* 85 111 2d 124 (1981).

214 *Sheets v Knight*, 308 Or 220, 779 P2d 1000 (1989).

215 *Metcalf v Inter mountain Gas Co*, 116 Idaho 622, 778 P2d 744 (1989).

216 Restatement (Second) of Contracts § 205 comment d (1981).

Basically the parties are required to conduct themselves in an honest manner and not to take unconscionable advantage of the other party in executing and in entering into the contract. It has been suggested that although the meanings of 'fair dealing' and 'good faith' overlap and coincide, the duty of fair dealing might be broader in that this duty can be breached even in the absence of any subjective intent or culpable mental state.[217] Since the duty of good faith and fair dealing is read into all commercial contracts one might expect the contract of employment to be no exception. However, because of the vague and nebulous nature of this principle,[218] and because most contracts of employment are 'at will' the courts seldom apply it.[219] The at-will-doctrine generally is given precedence over the duty of good faith and fair dealing.[220] Consequently, generally the implied covenant of good faith is not breached by the mere absence of good cause for discharge, unless motivated by a speci c intention to harm the employee. [221] For example, in the case of *Life Care Centers of America, Inc v Dexter*[222] the court held that in order for a duty to arise under the implied covenant of good faith and fair dealing in an employment contract there must be a showing of a special relationship of trust and reliance between the employee and the employer. In this case the fact that the employee had worked for the employer for a period of six years was insuf cient to establish the required special relationship. The court held that long term employment will be suf cient to support a cause of action for breach of the implied covenant of good faith and fair dealing only if it is coupled with a discharge calculated to avoid employer responsibilities to the employee, such as the payment of bene ts. [223] If the employer discharges an at-will employee in order to deny particular bene ts in terms of the contract of employment, the covenant of good faith and fair dealing may be breached.[224]

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217 See Robert M. Phillips, 'Good Faith and Fair Dealing Under the Revised Uniform Partnership Act', *University of Colorado Law Review*, (1993): 1179 p. 1192; see also *Gram v Liberty Mutual Insurance Co*, 384 Mass 659, 429 NE2d 21 (1981); 391 Mass 333, 461 NE2d 796 (1984).

218 See ibid. at 1190–1194 for a discussion of the meaning of the terms 'good faith' and 'fair dealing' in terms of the Restatement.

219 David Cabrelli, 'Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts', *International Journal of Comparative Labour and Industrial Relations*, 21 (2005): p. 445 points out that according to empirical studies only 11 states, have recognised the existence of the implied duty of good faith and fair dealing in the employment context.

220 Ibid.

221 *Corpus Juris Secundum* – Employer § 44.

222 (2003) 19 IER WY 38.

223 In both this case and in the case of *Horton v Darby Electric Co Inc* (2004) IER 1058 SC, it was held that failure to follow a procedure of progressive discipline as provided for in the employee handbook did not constitute a breach of the implied covenant of good faith and fair dealing because in both cases the contracts were 'at will'.

224 *Mitford v De Lasala*, 666 P2d 1000 (Alaska1983); *Fortune v National Cash Register Co*, 373 Mass 96, 364 NE2d 1252 (1977); *Wagensellerv Scottsdale Memorial Hospital*, 147 370, 710 P2d 1025 (1985).

On the other hand, some states do allow claims for wrongful discharge based on breach of the implied covenant of good faith.[225]

Where the duty of good faith and fair dealing has been upheld however, it has been limited to the discharge of an employee and not the employment relationship as a whole.[226] This is the opposite to the application of the implied term of mutual trust and con dence in England and Australia, which as discussed is applicable to the employment relationship and possibly not to dismissals. Given the fact that, even in the few states that the implied term of trust and con dence has been found to be applicable to contracts of employment, its application has been limited to the context of dismissal. The judiciary, however has made use of common law principles of contract in order to offer the employee some form of protection during the course of the employment relationship. Finkin has identi ed and examined six areas that supply a kind of legal framework of the common law of contract; (1) offer and acceptance; (2) requirement of a writing; (3) consideration; (4) de niteness of terms; (5) illusory promises; and, (6) unilateral modi cation . [227] The way the courts have interpreted these rules provides insight as to how the courts have made use of the common law of contract in order to protect the interests of the employee against employer abuse of power. What follows is a short summary of Finkin's overview.

Offer and Acceptance

A requirement for the creation and validity of a private contract is the existence of mutual assent.[228] The courts, in determining the existence of consensus, or the existence of an offer and an acceptance (mutual assent), have adopted a rather exible approach. As Finkin states: There is no doubt, however, that a manager s statements made with actual or even only "apparent authority" on the part of the employer and conveying a commitment of suf cient de niteness — most often a concomitant on compensation or, less often, to job security – can supply a term of the employment which, if accepted by the applicant or employee, rises to a contractual commitment.'[229] In most jurisdictions the terms of a written contract may be altered orally. Consequently, where companies have attempted to exclude contractual liability for such statements by requiring all agreements to be in writing and signed by a designated company of cer , it is likely that this limitation will be of no force and effect.[230]

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225 See *Berube v Fashion Centre, Ltd.,* 771 P.2d 1033 (Utah 1989).

226 Phillips, Good Faith and Fair Dealing Under the Revised Uniform Partnership Act', 1195.

227 Matthew W. Finkin, 'Regulation of the Individual Employment Contract in the United States', in Lammy Betten, *The Employment Contract in Transforming Labour Relations* (1995): pp.172–177.

228 Arnow-Richman *Texas Wesleyan Law Review* 2 (2003): 1.

229 Finkin, 'Regulation of the Individual Employment Contract in the United States', pp. 172–173.

230 Ibid.

Contracts can also be created tacitly. Foe example, an employer's well established practice with reference to severance pay, leave pay and bonuses has been taken to be suf cient to establish a mutual assent and consequently a contractually binding term.[231]

Requirement that the contract be in writing

Most states have legislation to the effect that in order for a contract that is to last for longer than a year to be enforceable it must be in writing.[232] As far as the applicability of this rule to contracts of employment is concerned the courts have applied a very open ended interpretation: Generally speaking, therefore, an oral commitment to the effect that a contract of inde nite duration which can only be terminated for cause or other good reason would be enforceable years after the commitment had been made.[233]

Consideration

In order to render the agreement enforceable there must be an exchange of promises or the doing of an act.[234] At its simplest, this means that in exchange for remuneration in the form of a salary an employer will offer his/her services to the employer. The problem arises when the contracts in question concern so-called 'permanent' employment. In such cases the courts have taken the view that something in addition to the offering of services by the employee is necessary to ful l the requirement of consideration.[235] The reasoning behind this was that 'the commitment was thought accordingly, to be so "highly improbable", especially where oral and uncorroborated, that the courts were reluctant to enforce it absent some additional circumstance to indicate that such a commitment had indeed been made'.[236] However, where the employee has been able to demonstrate detrimental reliance on the employer's act or representation, some courts have come to the rescue of the employee by making use of a doctrine of 'promissory estoppel' in order to render the representation enforceable.[237]

Definiteness of Terms

In order to render an obligation enforceable its terms must be suf ciently certain. For example, the courts have refused to enforce general undertakings such as generalized assurances of good or fair treatment or con dent expectations of long duration'.[238] However, where a certain amount of certainty or de niteness

231 Ibid.

232 Ibid.

233 Ibid., p. 174.

234 Ibid.

235 Ibid., p. 175.

236 Ibid.

237 *Grouse v Group Health Plan* (1981) 306 N.W. 2d 114 (Minn.). See chapter four.

238 Finkin, 'Regulation of the Individual Employment Contract in the United States', p. 176.

is ascertainable by looking beyond the terms of the contract, and the courts were of the opinion that fairness demanded that such term be enforced, the courts have read certainty into the term. An example of such a situation is where "reasonable" compensation has been held to be suf ciently de nite or certain by having reference to the surrounding circumstances such as the going rate for that particular job in the industry, the type of work to be performed, and the employer's custom, usage or practice.[239]

Illusory Promises

This occurs when the employer reserves for itself the right to decide the extent or application of a particular obligation.[240] Although some courts have held such obligations to be unenforceable, other courts have held that 'an employer cannot reserve to itself the power to declare its underlying obligation an illusion'. Therefore for example, an employer cannot reserve for itself the right to terminate a xed term contract before the expiry date for no good reason,[241] or promise bene ts without an obligation to pay.[242] Thus, in the same way as the concept of good faith or even mutual trust and con dence in the other jurisdictions discussed has served to temper or limit employer prerogative, so too has the implied obligation of mutual trust and fair dealing been used to limit employers' discretionary powers. In particular, the reasonable expectations of the parties coupled with a reasonable interpretation of the contract terms may require employer discretionary powers to be exercised in good faith.[243]

Unilateral Modification

Since employment contracts are held at will, either party can terminate the contract at any point in time for whatever reason, even no good reason at all.[244] Given this fact, many consider the contract of employment to be a unilateral agreement.[245] Since contracts of employment are terminable at will, obligations endure so long as the employer desires them to. If an employer wants to alter the terms and conditions of employment, it can threaten termination if these new terms and conditions are not accepted. As discussed in chapter 5 continuance of service by the employee may

239 Ibid.

240 Ibid.

241 *Rothenberg v Lincln Farm Camp, Inc* (1985) 755 F. 2d 1017 (2d Cir.).

242 *Mabley and Carew Co. v Borden* (1935) N.E 697.

243 In *Martin v Prier Brass Manufacturing Co*, 710 SW2d 466 (Mo App 1986), for example, it was held that despite the fact that the employer had complete discretion to modify or terminate bene ts in terms of the contract of employment, the employer was required to give the employees notice prior to terminating the bene ts. The basis of this conclusion is that the exercise of discretion is subject to the duty of good faith.

244 Every jurisdiction except for Montana adopts the employment at will doctrine. See Rothstein *Employment Law* (1999): pp. 1–4.

245 Arnow-Richman, 'The Role of Contract in the Modern Employment Relationship', p. 2.

constitute an acceptance and payment for those services constitutes consideration.[246] In this regard Finkin points out:[247]

> More recently, however, at least some courts have been troubled by that approach, especially where the employment is conditioned upon the relinquishment of a previously earned bene t or job right, and have required a showing of actual consent, or additional consideration other than retention in employment or have applied notions of fraud or duress to limit the employer's power in that regard.

In *Robinson v Ada S. McKinley Community Services*[248] the court required that actual consent by the employee be proved, and in *Goodwyn v Sencore, Inc*,[249] the court disallowed the employer's threat to terminate if the employee did not abide by renewed terms on the basis of duress. Consequently the employee was not obliged to accept the new terms of the contract. According to Arnow-Richman it is not surprising that the courts should come to the rescue of employees in these circumstances. She states:[250]

> ... courts often resist the conclusion that a disputed employment contract is gratuitous, particularly in cases involving employers reneging to the detriment of employees. And no wonder. Given the economic signi cance of work to the individual, as well as the centrality of work in our society, the promises and commitments of those we work for play a crucial role in shaping our lives. For many people, personal happiness, sense of purpose, and sense of success, in addition to nancial security , all depend signi cantly on their experiences in their jobs.[251]

Conclusion

Despite these judicial attempts to provide some protection for the employee, they can never be as effective as an outright recognition and acceptance of an implied term of good faith that acts as a mandatory rule applicable during the course of the employment relationship[252] and at dismissal, that cannot be contracted out of. Unfortunately this is not the case and as seen the duty of good faith and fair dealing gives way to the at-will-rule. As Cabrelli with good reason observes:[253]

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246 Finkin, 'The Individual Employment Contract in the United States', p. 177.

247 Ibid.

248 (1994) 19 F. 3d 359 (7th Cir.).

249 (1975) 389 F. Supp. 824 (D.S.D.).

250 Arnow-Richman, 'The Role of Contract in the Modern Employment Relationship', p. 4.

251 See chapter four for a discussion of unilateral changes of contractual terms by the employer.

252 There seems to be no reason why this duty should not be applicable during the course of the employment relationship and not only at dismissal.

253 Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts , p. 452.

> This begs the question as to how this position (which is prevalent in most US states) can be explained. After all, if the implied covenant of good faith and fair dealing ought to be a primary default rule (which its statutory status suggests), then why does it not trump the 'at-will' rule which bears the hallmark of a secondary default implied standardized term?

The application of the duty of good faith and fair dealing with reference to contracts of employment is fraught with uncertainty and contradiction with reference to both the scope of the duty as well as whether it is applicable at all.[254] Perhaps the best explanation for this is simply the entrenched commitment to individualism so prevalent in American culture.[255]

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254 In some cases the duty has been held to be inherent in all contracts of employment (*Gianaculas v Trans World Airlines, Inc.*, C.A. 9 (Cal.), 761 F2d 1391; *Williams v Maremont Corp.*, App., 776 S.W.2d 78), while in other cases it has been held not to be. (*Moore v McGraw Edison Co.*, C.A.8(Minn), 804 F.2d 1026; *Satterfield v Lockheed Missiles and Space Co., Inc.*, D.C.S.C., 617 F.Supp.1359.)

255 Harry Hutchison, 'Evolution, Consistency, and Community: The Political, Social, and Economic Assumptions That Govern the Incorporation of Terms in British Employment Contracts', *North Carolina Journal of International Law and Commercial Regulation*, 25, (2000): 335, p. 358.

Chapter 6

Atypical Employees

Introduction

Most analysts generally agree that the increase in ‘atypical’[1] forms of employment is a global phenomenon which began in the late 1970s and early 1980s. This is often attributed to different factors such as those linked to ‘globalization, technological change and transformation in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment’.[2] Although most agree that the occurrence of atypical forms of employment has increased substantially since the 1980s,[3] there is less coherence and agreement on how this term ‘atypical employment’ should be described and exactly what it entails. The reason for this is that the term is impossible to de ne with accuracy . An explanation of what is meant by the terms used to describe different forms of atypical work is useful. The meanings that are ascribed to the different forms are those given by Theron.[4] As a starting point, it makes sense to de ne what the standard employment relationship (SER) or ‘typical employment’ entails because this is what ‘atypical’ employment is not. The ‘typical employee’ or SER is the employee created by the socio-economic forces of the industrial era. Such an employee is a male, full time, and is usually unskilled, covered by collective agreements, a trade union member, and at times goes on strike. The SER refers to employment that is inde nite (or permanent) and full-time, and the work is usually done at a workplace controlled by the employer.[5] ‘Casualisation’ refers to the use of part-time and temporary workers.[6] ‘Part-time work’ refers to work that is not full-time. However many part-time workers ‘have

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1 Other names used to describe this phenomenon are inter alia ‘non-standard forms of work , exible work and marginal work .

2 ILO, ‘The Scope of the Employment Relationship’ Report V for International Labour Conference, ILO (2003): Geneva.

3 Atypical forms of work, although on the increase, are not a new phenomenon. Even at the height of the industrial era when the stereotype ‘typical’ employee was considered the norm and to whom protective labour legislation was applicable and social security entitlements were directed, there existed a plethora of atypical employees. These included agricultural and domestic workers, self employed entrepreneurs who owned small businesses and many more. See Mark Jeffery, ‘Not Really Going to Work? Of the Directive on Part-time Work, “Atypical Work” and Attempts to Regulate It’, *ILJ*, 27, (1998): 193, p. 207.

4 Jan Theron, ‘Employment is Not What it Used to Be’, *ILJ* (2003): 1247.

5 Ibid., p. 1249.

6 Ibid., p. 1250.

only one employer, and work on the premises of the employer in terms of an employment contract'.[7] A temporary worker, on the other hand, also works in terms of a contract of employment, but that contract is not for an inde nite period. It is for a xed term. [8] Once that time period has elapsed the contract automatically comes to an end unless there is a legitimate expectation of renewal.[9] 'Outsourcing' refers to a situation where an employer reverts to making use of an outside contractor to provide certain services that were until then provided by employees of the organisation.[10] The employer then 'outsources' services that are peripheral to the 'core' business of the employer to the 'sub-contractor'. Such non–core functions include services such as catering, cleaning, security, maintenance and transport.[11] 'Homework' is a form of sub-contracting.[12] With homework the work is done in someone's home and it is usually women who do the work.[13] In short, with sub-contracting the contract of employment is replaced by a commercial contract.[14] In this way the employer or 'core-enterprise' is relieved of its duties imposed by labour legislation with regard to the workers that perform the non-core functions because they do not qualify as 'employees' of that enterprise. Another means of escaping statutory obligations is by making use of a temporary employment service (hereinafter TES). In other words, workers are employed by an intermediary, and not by the core-enterprise.[15] In this situation the core–enterprise is referred to as the 'client' or 'user' and a 'triangular' employment relationship is created.[16] Outsourcing, sub-contracting, homework and the use of TESs are all forms of 'externalisation'.[17] Externalisation results in a situation where the employment relationship is not regulated. This is termed 'informalisation'.[18]

What is common to all forms of atypical work relationships is that the provider of work is able to escape duties in terms of collective agreements and legislation. The atypical employee is therefore vulnerable, and has access to less entitlements, if any, than an ordinary or typical employee who is employed in terms of the traditional employment contract.[19] Usually, it is the ' ... workers who have spent many years with their employer in constant, full-time employment, and who work on the premises of

7 Ibid.

8 Ibid.

9 See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2001), pars 1100–1102.

10 Theron, 'Employment is Not What it Used to Be', p. 1252.

11 Halton Cheadle, Clive Thompson, Peter Le Roux and André Van Niekerk, *Current Labour Law* (2004): p. 145.

12 Theron, 'Employment is Not What it Used to Be', p. 1253.

13 Ibid.

14 Ibid., p. 1254.

15 Ibid., p. 1255.

16 Ibid., p. 1254.

17 Ibid.

18 Cheadle, Thompson, Le Roux and Van Niekerk, *Current Labour Law*, p. 139.

19 Ibid., p. 205.

large-scale enterprise in which there is active trade unionism'[20] who are entitled to the rights in terms of labour legislation and collective agreements. In short, only the so called 'typical' or 'standard' employee is entitled to these rights. The number of atypical employees has increased to such an extent on a worldwide basis, as to render the term 'atypical' a misnomer. The result is that there are a huge proportion of 'employees' or 'dependent workers' with very little, if any, protection of their legitimate interests. Part-time workers constitute more that 25% of the workforce in England.[21] This gure excludes the other types of atypical employees, such as xed term employees and agency employees. More statistics are not necessary to prove the prevalence of the atypical employee. Much research to establish the extent of atypical employment in South Africa has been undertaken.[22] Various categories of such atypical employees have been identi ed including part-time work, temporary work, day work, outsourcing, sub-contracting, homework, self-employment and so forth. After collecting all the available data in South Africa, Theron concludes:[23]

> The extent and effects of the processes of casualisation, externalisation and informalisation cannot be measured quantitatively at this stage, nor is it realistic to expect to be able to do so. Yet the quantitative indicators are consistent with what is described in qualitative studies and trends that are well established in both developed and developing countries. It does not seem that there is any basis to argue that South Africa is an exception to these trends.

The English legislature has attempted to provide some sort of protection for the atypical employee by extending the ambit and application of certain protective labour legislation to workers who would not necessarily qualify as 'employees'. This has been done by making some legislative provisions applicable to 'workers'.[24] The concept 'worker' in this context and its potential to extend the net of protection to atypical employees will be discussed hereunder.

The South African Department of Labour and the legislature have also been aware of the fact that numerous atypical employees are excluded from the ambit of protection provided by legislation.[25] Such knowledge is what prompted the 2002

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20 Ibid., p. 206.

21 Claire Kilpatrick, Has New Labour Recon gured Employment Legislation? , *ILJ*, 32 (2003): 135 p. 143.

22 See Theron, 'Employment is Not What it Used to Be', p. 1247 where a summary of all the available studies and surveys undertaken in South Africa is undertaken.

23 Ibid., p. 1278.

24 See Guy Davidov, 'Who is a Worker?', *ILJ*, 34 (2005): p. 57.

25 In the Department of Labour's Green Paper: Policy Proposals for a New Employment Statute (GG 23 Feb 1996) the legislature expressed itself as follows:

'The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are

amendments to the Labour Relations Act[26] (hereinafter the LRA), which provide that a person will be presumed to be an employee if one of the following conditions are met:[27]

- there is control or direction in the manner the person works;
- there is control or direction in the person's hours of work;
- the person forms part of the organisation;
- an average of 40 hours per month has been worked for the last 3 months;
- the person is economically dependent on the provider of work;
- the person is provided with tools or equipment;
- the person only works for one person.

This amendment is also found in the Basic Conditions of Employment Act[28] (hereinafter the BCEA). Obviously, the legislature hoped to extend the net of protection to workers who may otherwise have been considered atypical employees as opposed to employees in terms of the legislation and would therefore not have been covered by the protective legislation. The Minister of Labour has also been given the power to extend the provisions of BCEA to persons who do not qualify as employees in terms of the legislation.[29]

However, the legislature's attempt to extend the net of protection to atypical employees has not been altogether successful. The fact that the administrative power of extension of the Minister of Labour provided for in terms of the BCEA has never been utilised has been attributed to 'a lack of capacity within the Department of Labour'.[30] The courts traditional approach to de ning an employee has also been described as 'unimaginative' with the result that there is a certain amount of lack of protection for a signi cant proportion of the workforce . [31] The criteria that are relied upon for the operation of the presumption of being an employee are based

unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion is women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive social wage bene ts such as medical and or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely dif cult.

26 66 of 1995.

27 S 200A. This presumption will only be operative where an employee earns less than a prescribed amount per annum.

28 S 83(A) of Act 75 of 1997.

29 S 83(1).

30 Paul Benjamin , Who Needs Labour Law? De ning the Scope of Labour Protection in Joanne Conaghan, Richard Michael Fishl and Karl Klare (eds), *Labour Law in an Era of Globalization* (2002), p. 91.

31 Ibid., n. 76.

on the 'traditional tests' as applied by the courts. As such the criticisms[32] levelled against the courts approach to determining who quali es as an employee are also applicable to the 2002 Amendments of the LRA.[33] In short therefore, some 'atypical employees' are not in a position to enjoy the protection granted in terms of the LRA, BCEA and other labour legislation.

The Constitution of the Republic of South Africa[34] provides that everyone has the right to fair labour practices.[35] The possibility of this constitutional right providing some protection for the legitimate interests of atypical employees will be discussed hereunder.

The Constitutional Right to Fair Labour Practices

Although many 'atypical employees' enjoy protection in terms of labour legislation[36] some of these 'atypical employees' may still not qualify as employees in terms of the legislation. Consequently they do not enjoy protection in terms of these Acts. These 'atypical employees' can conceivably turn to section 23(1) of the Constitution[37] which provides that everyone has the right to fair labour practices for protection against employer abuse. Those who are speci cally excluded from the legislation[38] may also conceivably turn to section 23(1) of the Constitution for relief. Finally, section 23(1) may possibly also be utilised for relief where the alleged unfair labour practice does not fall within the scope of the de nition of an unfair labour practice in terms of section 186(2) of the LRA. This constitutional provision will also have an in uence on how individual contracts of employment are interpreted by our courts. Contracts or terms of contracts that are contrary to the spirit of the Constitution or that prevent or limit fundamental rights guaranteed in the Constitution may be set aside.[39] In the light of the worldwide trend towards individualisation of employment contracts, this provision can also play a very useful role in redressing the imbalance of power between employers and employees.

Having established that there may be 'atypical employees' that have slipped through the net of legislative protection and that spies and soldiers are excluded from the ambit of the LRA,[40] it is necessary to discuss what is intended by the word 'everyone' in section 23(1) of the Constitution.

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32 Ibid., pp. 82–85; Martin Brassey, 'The Nature of Employment', *ILJ* (1990): p. 528.

33 S 200A.

34 Act 108 of 1996.

35 S 23(1).

36 See s 200A of LRA and s 83(A) of Basic Conditions of Employment Act 75 of 1997.

37 Act 108 of 1996.

38 S 2 of the LRA provides that it is not applicable to members of the National DefenceForce, the National Intelligence Agency and the South African Secret Service.

39 See Basson, 'Labour Law and the Constitution', *THRHR,* (1994): 498 p. 502.

40 S 2.

The broad terms used in section 23(1) of the Constitution in describing not only the rights accorded but also the bene ciaries of the right to fair labour practices (namely everyone, all workers) have prompted the suggestion that an extensive interpretation of the de nition of an employee would be possible, and that if such an extensive interpretation of employee were to be accepted, it would lay the foundation for the possibility of the Constitutional Court nding the exclusion of some workers from other labour legislation to be unconstitutional.[41]

According to Cheadle,[42] the subject of the sentence in section 23(1), namely 'everyone' should be interpreted with reference to the object of the sentence, namely 'labour practices'. Since 'labour practices are the practices that arise from the relationship between workers, employers and their respective organisations'[43] the term should be understood in this sense and should only include the persons and organisations speci cally named in section 23, namely workers, employers, trade unions and employers' organisations. This interpretation would be in line with an approach that looks to the section as a whole in ascertaining the true intention of the legislature.

This approach renders it essential to ascertain who quali es as a worker and who does not. In *SA National Defence Union v Minister of Defence & Another*,[44] in considering the meaning of 'worker' the Constitutional Court stressed the importance of its duty in terms of section 39 of the Constitution to consider international law. The Court in applying the approach of the ILO concluded that even though members of the armed forces did not have an employment relationship with the defence force *strictu sensu*, they nevertheless quali ed as workers for purposes of the Constitution.[45] Cheadle also argues for a less restrictive meaning than that ascribed to 'employee'.[46] The policy consideration put forward in support of this argument is the growth in number and forms of atypical employees who remain vulnerable to employer exploitation.[47] Such broader interpretation is supported by international practice.[48] The crux of the enquiry as to whether a person quali es as a worker for purposes of section 23 of the Constitution is that the relationship must be 'akin' to the relationship resulting from a contract of employment. What renders

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41 Paul Benjamin, Who Needs Labour Law? De ning the Scope of Labour Protection , in Conaghan, Fischl and Klare, *Labour Law in an Era of Globalization*, pp. 79–80.

42 Halton Cheadle, Dennis Davis, Nicholas Haysom, *South African Constitutional Law: The Bill of Rights* (2002) pp. 364–365.

43 Ibid.

44 1999 (4) SA 469 (CC); 1999 *ILJ* 2265 (CC).

45 Pars 25–27.

46 S 213 of the LRA de nes an employee as follows: (a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

47 *South African Constitutional Law: The Bill of Rights*, pp. 365–366.

48 Ibid.

such relationship 'akin' to the relationship in terms of the common law contract of service is the presence of an element of dependency on the provider of work.[49]

The Constitution does not de ne fair labour practice . The courts have on occasion been called upon to decide whether certain conduct was in breach of section 23(1) of the Constitution. The following cases shed some light on what conduct may Ibe considered to be in breach of section 23(1) of the Constitution: In *Fedlife Assurance Ltd v Wolfaardt*,[50] the respondent claimed damages for a breach of contract. The respondent claimed that the contract of employment was for a xed term of ve years and that after only two years the employer had repudiated the contract by terminating it. The reason given for such termination was that the respondent's position had become redundant. The Supreme Court of Appeal concluded that implicit in the constitutional right to fair labour practices is the right not to be unfairly dismissed. This right, on the basis of the Constitution was read into the contract of employment.[51]

In *Ndara v the Administrator, University of Transkei*[52] the court held that the plaintiff had been unfairly dismissed in violation of his constitutional right to *inter alia* fair labour practices. Again in *Gotso v Afrox Oxygen Ltd*[53] the High Court found that an unfair dismissal constituted an unfair labour practice. The reason the dismissal was found to be unfair in this case was that the principle that no one may be a judge in his own case was not adhered to.

In *Van Dyk v Maithufi NO & Andere*[54] the court found that it would amount to an unfair labour practice if an employer were to condone conduct which was in contravention of a statutory provision and subsequently without warning prosecute the employee for the contravention.

In *Nelson & Others v MEC Responsible for Education in the Eastern Cape and Another*,[55] the High Court expressed the view (albeit obiter) that the transfer of the applicants amounted to 'the antithesis of fair treatment'[56] and that if it had jurisdiction it would have set aside the redeployment directives. In the recent case of *Govender and Dennis Port (Pty) Ltd*[57] the unilateral implementation of short-time was held to be considered an unfair labour practice if imposed without a fair reason and without following a fair procedure.

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49 Dependency in this context refers to a situation where the worker is nancially dependent on the provider of work in the sense that the worker has no other means of earning a living.

50 [2001] 12 *BLLR* 1301 (A).

51 S 39(2) of the Constitution provides: 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and object of the Bill of Rights.'

52 Case no 48/2001 (Tk) (unreported).

53 [2003] 6 BLLR 605 (Tk).

54 2004 *ILJ* 220 (T).

55 [2002] 3 BLLR 259 (Tk).

56 At 272.

57 (2005) 26 *ILJ* 2239 (CCMA).

In *National Union of Health and Allied Workers Union v University of Cape Town and Others*[58] the Constitutional Court held that the word 'everyone' in section 23(1) of the Constitution is broad enough to include employers and juristic persons. As such it is possible for an employee to commit an unfair labour practice. The court expressed the view that the focus of section 23(1) of the Constitution is the relationship between the employer and the worker and its continuation, so as to achieve fairness for both parties. In order to achieve balance between the con icting interests of the parties these interests should be accommodated. With regard to giving content to the constitutional right to fair labour practices the court stated:[59]

> … the relevant Constitutional provision is s 23(1) which provides that: 'everyone has the right to fair labour practices'. Our Constitution is unique in constitutionalising the right to fair labour practices. But the concept is not de ned in the Constitution. The concept of fair labour practice is incapable of precise de nition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to de ne this concept In giving content to this concept the courts and tribunals will have to seek guidance from international experience. Domestic experience is re ected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codi cation of unfair labour practice in the LRA ...

In *Denel (Pty) Ltd v Vorster*[60] the employer (appellant) submitted that since the procedure adopted by it in dismissing the respondent was one that respected respondent's constitutional right to fair labour practices, it would constitute an infringement on the appellant's (employer's) right to fair labour practices if the dismissal were to be regarded as unlawful. In accepting this submission the court stated that the constitutional dispensation introduced into the employment relationship 'a reciprocal duty to act fairly'.[61]

Although these cases may shed some light on the meaning to be attributed to the right to fair labour practices, the concept, like that of *bona fides* remains incapable of precise de nition. For example in the case of *National Entitled Workers Union and CCMA, Nana Keisho NO and George Laleta Manganyi*[62] the Labour Court like the Constitutional Court in *National Union of Health and Allied Workers Union v University of Cape Town*[63] expressed the view that what constitutes an unfair labour practice for purposes of section 23(1) is not capable of precise de nition and that much depends on what is fair in the circumstances and that this concept is exible. Landman J found that the concept as provided for in the Constitution was broad

58 (2003) 24, *ILJ*, 95 (CC).

59 Par. 33.

60 2004, *ILJ*, 659 (SCA).

61 At 667.

62 Case JR 685/02 (unreported).

63 2003, *ILJ*, 95 (CC).

enough (unlike the concept in the LRA) to include employee conduct vis-à-vis an employer that might be unfair. The crux, therefore, turns on what would be fair or unfair in the circumstances.

As seen, the concept of an unfair labour practice can be extended to include unfair employee conduct vis-à-vis the employer. It may also include dismissals[64] and redeployment or transfer of employees.[65] Fairness as opposed to lawfulness will be the determining factor. Ultimately, what the judge considers to be fair or unfair in the circumstances will prevail. What is certain, as Landman J concludes is that:

> The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission.[66]

Implied Term of Mutual Trust and Confidence

The question whether the implied term of trust and con dence should also apply to contracts entered into by atypical employees is not certain. The rising number of atypical employees has led academics[67] as well as the judiciary[68] to conclude,

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64 *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (A).

65 *Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another*[2002] 3 BLLR 259 (Tk).

66 'Fair Labour Practices – The Wiehahn Legacy', *ILJ* (2004): 805, p. 812.

67 The Honourable Mr justice Lindsay, The Implied Term of Trust and Con dence , *ILJ*, 30 (2001): 1, p. 11 where he states: 'There are plenty of agencies willing to supply companies with workers There are plenty of workers who nd that form of self-employment the best or the only course open to them. There are plenty of companies who nd it cheaper and easier to pay the Agency (which of course, adds its own costs and pro ts to the costs it incurs in paying the worker) rather than bearing the pension NIC, holiday pay, sickness and other expenses that it incurs in relation to its employees. The employer also hopes to gain the convenience of the ability to procure the equivalent of an instant dismissal and the avoidance of redundancy money. The growth in this form of employment has been remarkable. There is an irony that almost any new enhancements of employees' terms of employment, which almost invariably add to the cost of employing someone, risk driving more people into this particular form of self- employment A perpetuated exclusion of all the self-employed from the bene ts of the implied term would leave a huge number unprotected and could even, of itself drive more into this form of self-employment… .' See also Mark Freedland, 'The Role of the Contract of Employment in Modern Labour Law, in Lammy Betten *The Employment Contract in Transforming Labour Relations* (1995), p. 21 where it is suggested that 'the law of the contract of employment ought to cover the territory of work relationships more broadly…'.

68 In *Spring v Guardian Assurance plc* (1994) *ICR*, 596 (House of Lords), even though the judges were uncertain and even at variance with each other as to whether a contract of employment existed between the parties, held that the company was bound by the standard of obligation present in contracts of employment. See also *O'Brien v Transco Plc (formerly BG plc)* (2002), All ER (D) 80.

on public policy grounds, that the term of trust and con dence should also be implied in contracts involving atypical employees. The English legislature has also recognized the fact that the dichotomous division in the law of work relationships into independent contractors on the one hand and standard or typical employees on the other hand is unsuitable in today's changed world of work. This legislative recognition is found principally in the creation of the so-called 'statutory worker'.[69] The legislature has chosen to use the term 'worker' to denote not only a standard or typical employee, but also a work relationship that falls somewhere between an independent contractor and a standard employee. Worker has been de ned in the various pieces of legislation[70] as:

> … an individual who has entered into or works under (or, where the employment has ceased, worked under) -
> (a) a contract of employment; or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

The rights which this legislation has extended to 'workers include the right to receive remuneration which is above a certain minimum threshold, the right not to suffer unauthorized deductions from one's salary, the right to be accompanied at grievance and disciplinary procedures, the right to annual leave and rest periods, the right not to work more than a certain amount of hours and, for part-time workers, the right not to be treated less favorably than comparable full-time workers, who also do not qualify as employees'.[71]

The policy consideration behind the extension of certain rights to statutory workers seems to be a desire to extend protection to vulnerable workers who would not normally be considered standard employees and who therefore are excluded from the net of protection provided for in terms of labour legislation.[72] It seems however, that for similar reasons, both the South African and the English legislatures' attempts to spread the net of protection provided by legislation

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69 This is the term used by Douglas Brodie, 'Employees, Workers and the Self-employed', *Industrial Law Journal*, 34 (2005): 253.

70 The term originated in section 8(2) of the Wages Act 1986 (now section 230(3) of the Employment Rights Act 1996), and it now also appears in section 54(3) of the National Minimum Wage Act 1988 and section 13 of the Employment Relations Act 1999.

71 Guy Davidov, 'Who is a Worker?', *ILJ*, 34 (2005): 57, p. 66.

72 Ibid. at 57; *Roberts and others v Redrow Homes (North West) Ltd* [2004] *ICR*, 1126 at par. 17. In *Byrne Brothers (Formwork) Ltd v Baird* [2002] *ICR*, 667, [2002] IRLR 96 (EAT) at par. 2(4), the Tribunal stated: 'The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically in the same position.'

further have not met with a great measure of success. As pointed out above the main reason for these short-comings in the South African situation has been the adoption of the same criteria that are required in terms of the 'traditional tests' applied by the courts to qualify as an employee in the extension of protection. It appears that the English legislature and judiciary has fallen into the same trap.[73] The fact that in terms of the statutory de nition of worker the worker is required to 'personally' do or perform the work or services is the same requirement for a traditional, standard contract of employment. Unfortunately, despite older cases that have held that a limited power to appoint substitutes is not inconsistent with a contract of employment,[74] more recent decisions have taken a more rigid approach to this requirement. One such case is *Express and Echo Publications Ltd v Tanton.*[75] In this case the putative employee was a driver. In terms of the contract he was empowered to appoint a substitute if he was 'unwilling or unable' to perform the services himself. The Court of Appeal found that this term of the contract inconsistent with a contract of employment.[76] However, in *Byrne Brothers (Formwork) Ltd v Baird and others*[77] where delegation was only permissible in circumstances where the individual was unable to do the work himself, and the employer's permission was required for such delegation, the EAT held that a limited power to delegate was not inconsistent with a contract of employment. In the recent case of *Redrow Homes (Yorkshire) v Wright*[78] the contract provided terms to the effect that the contractor must at all times provide suf cient labour to maintain the rate of progress laid down from time to time by the company ... On each site where the work is in progress the contractor must maintain a competent

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73 In *Byrne Brothers v Baird* [2002] IRLR 96 at 101 it was stated: '…drawing the distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour.'

74 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515.

75 [1999] *ICR*, 693.

76 Contrast this decision with *MacFarlane v Glasgow City Council* [2001] IRLR 7. In this case two gymnastic coaches were entitled to make arrangement for substitute coaches to take their classes when they were unable to do so themselves. These substitute coaches, however, had to be one of the coaches on a list compiled and maintained by the Council. Finding that this was not incompatible with the contract of employment Lindsay J distinguished the facts before him from the facts in the *Tanton* case. He stated at 10–11: 'The Tanton case is in our judgment distinguishable from that at hand for at least the following cumulative reasons. Firstly, the appellants in our case could not simply choose not to attend or not to work in person. Only if an appellant was unable to attend could she arrange for another to take her class. Secondly, she could not provide anyone who was suitable as a replacement for her but only someone from the council's own register. To that extent the council could veto a replacement … Thirdly, the council itself sometimes organised the replacement … Fourthly, the council … paid the substitute direct… .'

77 [2002] *ICR*, 667 at 675.

78 [2004] IRLR 720.

foreman who has complete control of all labour engaged on the work'. Despite these provisions the Court of Appeal upheld a decision of the EAT, that it was the intention of the parties at the time of entering into the contract, the contractors would personally perform the work. This conclusion was reached by consideration of inter alia the basis of the 'scheme of payments' and the terms of the contract as a whole. Although upholding the decision of the EAT, the Court of Appeal criticized the EAT's reliance on the what actually happened after the contract was entered into instead of only considering what the parties actually intended at the time of entering into the contract. In *Byrne Brothers (Formwork) Ltd v Baird and others*[79] reference was had to the general practices within the particular industry concerned in order to ascertain whether the parties intended the individual to perform the work personally.

The requirement of mutuality of obligation[80] can result in an insurmountable obstacle to qualifying as a 'statutory worker'. This is especially true of part-time and casual employees since mutuality of obligation in the employment context 'requires a commitment to on-going relations'.[81] The case of *O'Kelly and others v Trusthouse Forte Plc*[82] illustrates this fact. The banqueting department of a hotel company kept a list of about 100 people who were known as 'regulars'. These 'regulars' could be relied upon by the company to offer their services on a regular basis. In exchange the company gave them preference in the allocation of available work. Three of these 'regulars' who had no other source of income complained to an industrial tribunal that they had been unfairly dismissed. The industrial tribunal dismissed their claim on the basis that even though the facts demonstrated that the arrangement between the 'regulars' and the company had many of the characteristics of a contract of employment, the absence of mutuality of obligation barred the 'regulars' from qualifying as employees. Consequently, they could not be unfairly dismissed. The Court of Appeal, upholding the industrial tribunal s nding, held that the absence of an undertaking on the part of the company to offer work, and the lack of an undertaking on the part of the 'regulars' to accept' work meant that there existed no mutuality of obligation and therefore there was no contract of employment.[83] By contrast, in *Nethermere (St Neots) Ltd v Taverna and Gardiner*[84] the Court of Appeal,

79 [2002] IRLR 96.

80 See *Byrne Brothers v Baird* [2002] IRLR 96; *Firthglow v Descombes* [2004] UKEAT 916 and *Mingeley v Pennock* [2003] UKEAT 1170.

81 Brodie, 'Employees, Workers and the Self-employed', p. 254.

82 [1983] IRLR 369.

83 Similarly, in *Clark v Oxfordshire HA* [1998] IRLR 125, despite some considerations pointing to a contract of employment, the absence of mutuality of obligation since there was no obligation on Oxfordshire HA to offer Clark work and there was no corresponding obligation on Clark to accept such work, barred Clark from qualifying as an employee. See also *Carmichael v National Power Plc* [2000] IRLR 43 where an absence of an obligation to provide and accept work resulted in no mutuality of obligation and hence no contract of employment.

84 [1984] IRLR 240.

relying on the fact that the relationship between the parties had endured for a number of years, was able to conclude that this gave rise to an expectation on the part of the applicants that the company would continue to provide work and a corresponding expectation on the part of the company that the applicants would continue to do the work. Consequently there was found to be mutuality of obligation. On this basis the Appeal Court found that the applicants were employees. This is despite the fact there were many facts that pointed to a situation of atypical employment: Gardiner and others worked from home sewing pockets onto trousers manufactured by the company. They were not paid by hour, but rather according to the amount of work they did. There were no xed hours of work and they were not obliged to accept any particular quantity of work. The Appeal Court held that the mere fact that the home worker could arrange his own hours of work, the amount of work he did, and his holidays did not detract from the fact that as a result of the fact that a mutuality of obligations could be implied into the relationship, there was in fact a contract of employment.

The ease with which employers can insert clauses that negate mutuality of obligation and thereby avoid statutory obligations renders the position of atypical employees precarious and limits the effects of the legislature's attempts to spread the net of statutory protection to the 'statutory worker'.

Brodie suggests that perhaps this requirement should be done away with on the basis of policy considerations with reference to both employees and 'statutory workers'.[85] He points out:[86]

> The absence of mutuality of obligations in any given set of working relations is consistent with a lack of integration in the employer's enterprise. Such a state of affairs is also often associated with the hiring of economically vulnerable workers. It is therefore somewhat ironic that the EAT in Byrne Brothers, whilst otherwise anxious to take a purposive approach to protect economically dependent labour, regarded themselves as obliged to impose an element of contractual doctrine which might be said not to be part of the general law of contract but, at most the contract of employment.

Davidov[87] suggests that instead of being a 'prohibitive threshold requirement' the presence of mutuality of obligations should merely be one of the factors taken into consideration in determining the degree of the worker's dependence on the working relationship.

A third obstacle to the net of protection being extended to atypical employees is the ability of employers to construct contracts in such a manner so as to escape statutory provisions. The wording of the contract does not re ect the reality of the situation but is a mere sham. Unfortunately, despite the fact that some decisions have given precedence to the reality of the relationship as opposed to a formal reading

85 Ibid., p. 258.
86 Ibid., p. 255.
87 Davidov, 'Who is a Worker?', p. 65.

of the terms of the contract,[88] some decisions have preferred to uphold the formal wording. of the contract.[89] Obviously this has resulted in ridiculous outcomes and this approach has been severely criticized.[90]

In short, the creation of the 'statutory worker' has not been of much assistance in spreading the protective net of labour legislation wider. The main reason for this is that the criteria for quali cation as a statutory worker are similar, if not the same as those for quali cation as an employee.

The signi cance of the creation of the statutory worker for the purposes of this book, is its impact on the scope of application of common law terms that are normally implied into contracts of employment. The lack of success of the 'statutory worker' in extending the net of legislative protection to atypical employees renders the possibility of developing the common law so that the scope of application of implied terms that are applicable to the employment relationship may be extended to work relationships involving vulnerable atypical employees even more important. Does a statutory recognition of the provision of statutory labour rights to atypical employees justify an extension of common law rights of employees to atypical employees? Brodie has suggested that the fact that both mutuality of obligation[91] and that the work be performed personally are normally required in order for an individual to qualify as not only an employee but also as a 'statutory worker', renders the 'statutory worker' analogous to an employee. Consequently, the implied term of mutual trust and con dence should also be applicable to 'statutory workers'.[92]

In developing the common law the courts have recourse to legislation as well as the policy considerations underlying the legislation in order to ensure consistency.[93] This lends support to the proposition that the creation of the 'statutory worker' grants the courts license to imply terms that are implied into contracts of employment into at least some forms of atypical employment.[94] Lord Hoffman in *Johnson v Unisys Ltd*,[95] after

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88 With reference to whether the individual quali ed as an employee, see *Ferguson v John Dawson* [1976] 3 All ER 817 at 824.

89 See *Dacas v Brook Street Bureau (UK) Ltd* [2004] *ICR*, 1437.

90 Davidov, 'Who is a Worker?', pp. 63–64.

91 As pointed out by Brodie, ibid., not all the cases have insisted on mutuality of obligation. See *Allonby v Accrington and Rossendale College* [2004] IRLR 224 and *Voteforce Associates v Quinn* [2001] UKEAT 1186.

92 Brodie, 'Employees, Workers and the Self-employed', p. 259.

93 J Beatson, 'The Role of Statute in the Development of Common Law Doctrine', *Law Quarterley Review*, 117, (2001): 247, p. 251.

94 Lord Diplock in *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743 stated: '…where over a period of years there can be discerned a steady trend in legislation which re ects the view of successive Parliaments as to what the public interest demands in a particular eld of law , development of the common law in that part of the same eld which has been left to it ought to proceed upon a parallel rather than a diverging course.'

95 [2001] 2 WLR 1076 at 1091.

having noted the extensive legislative changes to the law of employment in recognition of the relational nature of the relationship between employer and employee stated: 'And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.'[96]

Considerations of policy alone, without necessarily having recourse to analogous statutory developments have led the courts to impose duties on certain parties which may not otherwise have existed. In *Lane v Shire Roofing Company (Oxford) Limited*[97] the Court of Appeal held that the defendant owed the appellant duties which employers owe employees. This is despite the fact that the appellant was trading as a one-man firm, that he was considered to be self-employed for tax purposes, that the defendant had purposefully not entered into a contract of employment with the appellant, and that the appellant was being paid for the completion of a task, (all factors that indicate that the appellant was an independent contractor). Consequently the appellant was allowed to claim damages for injuries sustained while performing work for the defendant. This conclusion was based on policy considerations. Henry LJ (with whom the rest of the court concurred) stated:[98] 'When it comes to the question of safety at work, there is a real public interest in recognizing the employer/employee relationship when it exists, because of the responsibilities that the common law and statutes such as the Employer's Liability (Compulsory Insurance) Act 1969 places on the employer.' Henry LJ said that the appellant in this case fell somewhere between an independent contractor and an employee. Although not explicitly stating that the appellant qualified as an employee, he said that he was closer to being an employee than an independent contractor.[99]

In *Lennon v Commissioner of Police of the Metropolis*[100] the Court of Appeal held the commissioner liable for pure economic loss caused to Lennon as a result of inaccurate information given to him by an employee of the employer. This is despite the fact that Lennon was not an employee of the commissioner. There was however, a relationship akin to employment between the commissioner and Lennon. Lennon was a police officer serving in the defendant's police force. Lennon was to be transferred to another station. An executive personnel officer of the defendant, whose duties included inter alia making arrangements for such transfers, assured Lennon that if he took time off prior to the transfer it would not affect his entitlement to certain housing subsidies. This interruption of service however, resulted in his loss of the housing subsidy. The basis of the vicarious liability of the commissioner was that its employee, who had misinformed Lennon, had voluntarily assumed responsibility for this matter and Lennon had relied on the information she had

96 See also the Australian case of *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 60—63 for a discussion confirming that the common law may develop by analogy to the enacted law.

97 [1995] PIQR 417.

98 At 421.

99 At 423.

100 [2004] EWCA Civ 130.

provided him to his detriment. It did not matter whether Lennon was an employee or not, since the liability was not based on any contractual relationship between Lennon and the commissioner. Nevertheless, if Lennon was not in a relationship akin to employment with the commissioner, he would never have requested the information from the commissioner s employee in the rst place.

In *Spring v Guardian Assurance Plc*[101] Spring was employed as a sales director and of ce manager by a rm of estate agents. At the same time, he sold insurance policies for Guardian Assurance on a commission basis. Guardian Assurance took over the rm of estate agents where Spring worked. Spring applied for a post as a company representative at another insurance company. Guardian Assurance wrote a job reference for Spring with respect to his work selling policies for Guardian Assurance. Despite the fact that the judges of the House of Lords were uncertain as to whether Spring was an employee of Guardian Assurance, they held that Guardian Assurance owed Spring a duty of care in providing a reference so as not to negligently cause damage by diminishing his chances of obtaining employment. This duty of care is an implied duty applicable to contracts of employment. The House of Lords held that this duty could either arise from the law of delict, or alternatively it could arise as a duty implied into the contract between the parties. The signi cance of this decision lies in the fact that the House of Lords imposed an obligation owed by an employer to an employee on Guardian Assurance, despite being unable to categorically classify the relationship at hand as one between an employer and an employee. Whether Mr Spring was an employee or not was irrelevant in the imposition of the duty of care.[102]

These cases provide some cause for optimism about the ability of the judiciary to extend the implied duties applicable to contracts of employment to contracts involving atypical employees. If one accepts that the judicial license to so extend the application of these implied terms, the question as to the circumstances when such extension is applicable arises. Davidov is of the view that the criterion of economic dependency should be the main determinative factor of whether a person quali es as a 'statutory worker'. He states:[103]

> Rather than relying on the traditional, restrictive tests, it is suggested that the main focus should fall on the degree of dependence of the putative worker, in the sense of inability to spread risks. The additional requirements of the legislated de nition — personal service and mutuality of obligation – can also be useful in identifying dependence, provided that they are not seen as dichotomous.

Davidov does not commit himself to a numerical percentage threshold required with reference to the amount of income derived from a particular provider of work in order to establish economic dependency.[104] The point is, where the extent of

101 (1994) *ICR*, 596.
102 Per Lord Goff of Chieveley at 614.
103 Davidov, 'Who is a Worker?', p. 58.
104 Ibid., p. 60.

economic dependence renders an individual as vulnerable as an employee vis-à-vis an employer in circumstances where that individual does not qualify as an employee, on the basis of policy considerations, the individual should qualify as a 'statutory worker'. By analogy, terms that are implied into contracts of employment should also be implied into contracts representing atypical forms of employment where the worker is in a similarly vulnerable position vis-à-vis the provider of work.[105]

The Implied Covenant of Good Faith and Fair Dealing

As seen in the previous chapter legislation in the United States of America requires that the covenant of good faith and fair dealing be implied into every contract. Oddly, in most states the courts have singled out the contract of employment for exclusion of this implied term and held that the covenant is not applicable to contract of employment.[106] The way that the courts have achieved this result is by according primacy to the at-will-doctrine. This is odd. As Cabrelli explains:[107] '… if the implied covenant of good faith and fair dealing ought to be a primary default rule (which its statutory status suggests), then why does it not trump the "at-will" rule which bears the hallmark of a secondary default implied standardized term?'

This interpretation can lead to the anomalous result that since the duty of good faith is normally read into commercial contracts, atypical employees will enjoy more protection than, at times more vulnerable or at least equally vulnerable employees. Indications are that this is the case. For example, as pointed out by Cabrelli,[108] the covenant of good faith has been implied into franchisor/franchisee and principal/distributor contracts so as to negate or restrict the franchisor's or the principal's ability to terminate the contract at will. Generally distributors and franchisees are conducting businesses for their own account and could be (depending on the circumstances) considered to be independent contractors.

Conclusion

The English case law provides some cause for optimism concerning the possible extension of the application of implied terms, including the implied term of trust and con dence to contracts with atypical employees. The cases that have extended the application of certain implied terms have generally done so without justifying themselves by analogy to statutory developments. It is hoped that the recent creation of the 'statutory worker' will provide the judiciary with the necessary support and

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105 Freedland, 'The Role of the Contract of Employment in Modern Labour Law', p. 23.

106 As pointed out by David Cabrelli, 'Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Con dence in the US and UK Employment Contexts', *International Journal of Comparative Labour Law & Industrial Relations*, 21, (2005): 445 p. 456: 'According to empirical research … the courts in only 11 states have accepted the existence, let alone the pre-eminence, of the good faith covenant.'

107 Ibid.

108 Ibid.

license to further extend the application of these common law implied terms to atypical employees.

The scope of the broadly worded right to fair labour practices in terms of the South African Constitution has the potential to be of great relevance not only in the development of rights for employers and employees, but also for the development of rights applicable to certain atypical employees.

The statutorily imposed duty of good faith and fair dealing in the United States of America, ironically, has the potential to place atypical employees in a better position vis-à-vis their provider or providers of work, than an employee vis-à-vis his employer.

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