THE IMPACT OF THE TRUST AND CONFIDENCE IMPERATIVE ON THE EMPLOYMENT RELATIONSHIP IN SOUTH AFRICAN LABOUR LAW

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RADLEY HENRICO

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TO WHOM IT MAY CONCERN

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ID number 690626 5221 08 7

Student number 920107680 enrolled student for the

Programme LLM (Labour Law)

Faculty Law

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IN *MEMORIAM* OF

RODNEY HENRICO

MY LOVING BROTHER
WHO PASSED AWAY SUDDENLY ON

02 NOVEMBER 2009

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"In *S v Makwanyana and Another*, the Constitutional Court observed that:

> '. . . respect for the dignity of all human beings is particularly important in South Africa. . .'."[*]

INTRODUCTION

That trust and confidence are indispensible elements of the employment relationship is evidenced in an enquiry germane to most labour disputes. It is especially borne out by the question as to whether the employment relationship between the parties has irretrievably broken down.[1]

The role played by trust and confidence in the employment relationship gives rise to considerations as to how these imperatives have thus far contributed to the development of our labour law jurisprudence and how they can and should be utilised for further development of the common law relationship of employment with particular reference to fair labour practices. The aim is to afford not only the employee, who can rightly be acknowledged as the vulnerable person[2] in the equation of the inherent power imbalance in the employment relationship,[3] but to offer both parties, namely employer and employee

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[*] Per Jajbhay J in *Tshabalala-Msimang v Makhanya & others* 2008 BCLR 338 (W) 351 [29].

[1] *Nedcor Bank Ltd v Frank & others* 2002 7 BLLR 600 (LAC) 603G-I; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (LAC) [113] and [116]; *Kalik v Truworths (Gateway) & others* 2008 1 BLLR 45 (LC) 49C; *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan & others* 2008 2 BLLR 184 (LC) 194G and *Hulett Allumiminium (Pty)Ltd v Bargaining Council for the Metal Industry & others* 2008 3 BLLR 241 (LC) 247H-I.

[2] Per Pillay J in *Tshishonga v Minister of Justice & Constitutional Development & another* 2007 4 BLLR 327 (LC) [153]. See also Ngcukaitobi "Life after Chirwa: is there scope for harmony between the public sector labour law and administrative law?" *ILJ* 841 849 and *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) 1121F.

[3] In this regard see in general Vettori *The Employment Contract and the Changed World of Work* (1st ed) 2; Kahn-Freund *Labour and the Law* (1977) 6; Beatty "Constitutional labour rights: pros and cons" 1993 *ILJ* 1 4; Olivier "The relevance of status and contract for the employment relationship (Part I) Adapted version of an address delivered on 02 September 1992 on the acceptance of a professorate in Mercantile Law at the Rand Afrikaans University (as it was then known) 15 and Macken, McCarry & Sappideen's *The Law of Employment* (1997)73.

greater protection within the framework of the employment relationship. The aforesaid analysis will also take account of the relevant Constitutional, legislative, common law and ILO principles that inform the trust and confidence imperative. An international comparison will be drawn with the common law jurisdictions of Australia and Canada.

THE NATURE OF TRUST AND CONFIDENCE AS RECOGNISED IN A LABOUR LAW FRAMEWORK

STATUTORY RECOGNITION

Trust is a quintessential aspect of the employment relationship. Couched as a noun, it is defined as a: "...firm belief in someone or something...acceptance of the truth of a statement without evidence or investigation." As a verb it means: "believe in the reliability, truth, ability, or strength of."[4] 'Confidence' on the other hand means: "the belief that one can have faith in or rely on someone or something...a feeling of self-assurance arising from an appreciation of one's own abilities".[5]

There can be little doubt that confidence is informed by trust. Put differently, one would venture to argue that trust is a *sine qua non* of confidence. And not unlike the adage which holds that respect is something earned, so too, it is submitted, is confidence achieved by that upon which it is premised, namely trust. One could reasonably be excused for equating the term good faith[6] with trust and confidence.[7]

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[3] To adopt the argument by Professor Ridout as referred to in Elias "The structure of the employment contract" 1982 *CLP 95*. See also Olivier n 2 above; Davies and Freedland *Kahn Freund's Labour and the Law* (1983) 18 25 and Clark "Towards a sociology of labour law: an analysis of the German writings of Otto Kahn-Freund" in Lord Wedderburn of Charlton *et al Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) 82-83 94 and 99.

[4] Concise Oxford Dictionary (10th ed) 1540.

[5] *Ibid* 299.

[6] For a discussion on what constitutes good faith, reasonableness and fairness see Grove "Kontraktuele gebondenheid, die vereistes van die

It is submitted that trust and confidence are vital integers of our human make-up: qualities that identify us as individuals to participate in a civil society for advancement and furtherance of human development. It is also that which qualifies us individually and collectively to aspire to values we call morality, honour, goodness, fairness[8], integrity, honesty, morality, righteousness and decency. These are, after all, the things that conduce to human dignity[9], equality[10] and freedom in a democratic society.[11]In brief: it is about acting in good faith and being dealt with fairly.

It comes as no co-incidence that the legislature has seen fit to enshrine human dignity, equality, [12] human rights and freedoms as constitutionally protected rights and to give effect thereto through statutory mechanisms.

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goie trou, redelikheid en billikheid – Eerste Nationale Bank van Suidelike Afrika Beperk v Saayman 1997 4 SA 302 (A)" 1998 *THRHR* 687.

[7] See Bosch "The implied term of trust and confidence" 2006 *ILJ* 28 47. The notion of good faith is a term more commonly utilised in commercial as opposed to employment related matters as borne out by the case authority referred to below. If ultimately one is referring to conduct alternatively, a state of affairs, the nature of which adversely impacts upon the employment relationship to render the ongoing nature thereof intolerable then the conclusion may be inescapable that there is an irretrievable breakdown in trust and confidence. To suggest that a lack of good faith automatically arises has the potential danger of being equated with notions of *male fide* which may then be required to be visited with criminal consequences.

[8] See Neels "Regsekerheid en korrigerende werking van redelikheid en billikheid (deel 3)" 1999 *TSAR* 477 478-480.

[9] Wood "Human dignity, right and the realm of ends" 2008 *Acta Juridica* 47 48-52. Also see *"Kylie" v CCMA & others* 2008 BLLR 870 (LC) 886A-E.

[10] In this regard, see comments by Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157 162 *et seq*; Epstein n 50 below 954; Brassey "The contractual right to work' 1982 *ILJ* 247 and Rycroft n 64 below 272. See also the dictum by van der Westhuizen J in *Gcaba v Minister of Safety and Security & others* 2009 ZACC 26 (CC).

[11] See *Minister of Finance & another v Van Heerden* 2004 12 BLLR 1181 (LC) [22].

[12] Albeit qualified in the form of "achievement of equality". For general discussion in this regard see Cooper "The boundaries of employment equity" 2003 *ILJ* 1307; Hepple "Equality laws and economic efficiency" 1997 *ILJ* 598 and Dupper "Proving indirect discrimination in employment: a South African view" 2000 *ILJ* 747.

The founding provisions of our Constitution[13] state that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) ..."

As its purpose, the Labour Relations Act ("LRA")[14] aims:

> "[...] to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of [the LRA], which are –
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;[15]
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) ..."

The primordial purpose of the LRA[16], as referred to in *NUMSA & others v Bader Bop (Pty) Ltd*,[17] is to give effect to section 23 of the Constitution.[18] O'Regan J stated that: "If it

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[13] of 1996.
[14] 66 of 1995.
[15] The reference to section 27 is to the Interim Constitution. It should now be read in its modified form as it appears in section 23 of the final Constitution. See *Business SA v COSATU & another* 1997 5 BLLR 511 LAC 517A-B).
[16] Apart from it serving as the cornerstone to protect employees as vulnerable people per Pillay J in *Tshishonga v Minister of Justice & Constitutional Development & another* 2007 BLLR 327 (LC) [153].
[17] 2003 2 BLLR 103 (CC).
[18] 116G. The court went on to point out that the second purpose of the LRA is to give effect to ILO obligations, thirdly, to provide a collective bargaining framework and finally to promote orderly

[the LRA] is capable of broader interpretation that does not limit fundamental rights, that interpretation should be preferred."[19]

The preamble to the Basic Conditions of Employment Act sets out its intent as follows:

> "To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the International Labour Organisation; and to provide for matters connected therewith."[20]

Human dignity as a core value and fundamental right[21] is afforded protection as evidenced in its enshrinement in the Bill of Rights of the Constitution[22] together with its neighbourly rights of equality, human rights[23] and freedoms,[24] which rights are constituative of social

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collective bargaining and effective dispute resolution (116G-H-117A).

[19] 119H. See also in general *In re: Certification of the Constitution of the Republic of South Africa* 1996 1996 10 BCLR 1253 (CC); *Business South Africa v the Congress of South African Trade Unions & another* 1997 6 BLLR (LAC) 683; *IMATU & others v Rustenburg Transitional Council* 1999 BLLR 1299 (LC) 1303F-I; *SANDU v Minister of Defence & others; Marapula & others v Consteen (Pty) Ltd* 1999 8 *BLLR* 829 (LC) 831 B; *Minister of Defence & others v SANDU & others* 2007 4 BCLR 398 (SCA) 401E-F; *Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 (A)[30]; *Sidumo* n 2 above [246] and the "Explanatory Memorandum" 1995 *ILJ* 278 285.

[20] 75 of 1997.

[21] In *Walters v Transitional Local Council of Port Elizabeth & another* 2001 BLLR 98 (LC) Landman J stated that: "I believe a "fundamental right" includes those rights set out in the "Bill of Rights"". (102D-F). Fundamental rights

[22] Sections 7(1) and 10.

[23] *Gcaba* n 9 above.

[24] Sections 7(1) and 9.

justice.[25]

In a labour law context it is fundamentally important that these rights be considered with reference to section 23[26] with particular emphasis on the right to fair labour practices.[27] The rationale therefore is that the right to fair labour practices is consonant with the right to human dignity, equality, and human rights.[28]

The relevant interpretive provisions of the Constitution provide as follows:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[29]

"The Constitutional Court, Supreme Court of Appeal and High court have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice"[30]

Requisite to the statutory recognition of the trust and confidence imperative is the necessary and appropriate interpretation of legislation in a manner that would give effect thereto. Not

[25] See "Towards social justice: an elusive and a challenging endeavour" Professorial Inauguration address delivered by Professor N Smit 28 October 2008. Also see Cardozo "The meaning of justice" ch 2 in "The paradoxes of legal science" in *Cardoza and The Law* (1982) 36.
[26] Sub-sections (1)-(6).
[27] In terms of subsection (1).
[28] See also section 3 of the Employment Equity Act 55 of 1998 ("EEA") which requires the EEA to be interpreted in compliance with the Constitution; so as to give effect to its purpose; taking into account any relevant code of good practice in terms of the EEA of other employment law and in compliance with ILO obligations. In this regard see *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) [60].
[29] Section 39(2).
[30] Section 173.

only is a literal interpretation required[31] that does not conduce to an absurdity[32]but also a purposive approach.[33]Put differently, when interpreting legislation, and when developing the common law as required in terms of sections 8, 39(2) and 173 the court is required to interpret such legislation in a manner that will promote the spirit, purport and objects of the Bill of Rights.[34]

Development of the common law in the realm of criminal justice is also presented here as a fleeting vignette where we see how the Constitutional Court[35] has concluded that the common law definition of rape should be extended.[36]A discussion of our courts being charged with the duty to interpret legislation in order to develop the common law would be lacking in ripeness without pausing to consider the implications that such interpretive methods may have, if any, on the doctrine of trias politika.[37]

[31] Per Prof Smit n 24 above 13 and the references to the cases of *Bastion Financial Services v General Hendrik Schoeman Primary School* 1999 2 SA 179 (SCA) 185B-C and *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [39]. Also see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 BCLR 1123 (CC) 1123 1141A-G.
[32] *CUSA v Tao Ying Metal Industries & Others* 2009 1 BLLR 1 (CC) 1 28F-G.
[33] Smit n 24 above 14 and the reference to *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC). See also *Equity Aviation Services (Pty) Ltd v CCMA* & Others 2008 12 BLLR 1129 (CC) 1129 1140G-1141D.
[34] Smit n 24 above 9. Although distinguishable insofar as the issue in the main related to the applicability of section 145, the principles relating to interpretation are nevertheless apposite as set out by Sachs J in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 BLLR 1097 (CC) [149]-[157].
[35] *Masiya v Director of Public Prosecutions, Pretoria & another* 2007 SA 30 (CC) [74].
[36] To include the act of non-consensual penetration of a penis into the anus of a female.
[37] To borrow the term as expressed by Moseneke "Oliver Schreiner memorial lecture: Separation of powers, democratic ethos and judicial

STATUTORY RECOGNITION AND SEPERATION OF POWERS

Kahn-Freund[38], when commenting upon bills of rights in labour law expressed concerns over the power that judges wield in their ability to interpret and to destroy.[39] Montesquieu is said to have remarked thus: "The judges of the nation are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor."[40] On the other end of the judicial interpretive theory scale we may want to recall the words of President Roosevelt who in a message to the United States Congress in 1908 stated: "The chief law makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret [...] they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to law-making"[41]

The view put forth by Montesquieu is rendered nugatory and untenable regard being had to our rich jurisprudence replete with examples of cases where the most eminent of jurists can hardly be described as having merely pronounced upon the law as inanimate beings. On the contrary their acclaimed contribution can best be described as jurisprudential animation.[42]

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function" 2008 *SAJHR* 341.
[38] Per Smit n 24 above.
[39] Kahn-Freund "The impact of constitutions on labour law" 1976 Cambridge Law Journal 240 244.
[40] Cardozo "The nature of the judicial process" Lecture IV in Cardozo *Cordozo on the Law* (1982) 169.
[41] *Ibid* 171.
[42] Consider the following cases by way of example and the impact they have had upon South African labour law: *Administrator, Transvaal & others v Zenzile & others* 1991 SA 21 (SA); *PPWAWU v Pienaar NO & Others* 1994 SA 204 (A); *Fedlife Assurance Ltd v Wolfwaardt* 2001 BLLR 1301 (A) [16]-[20] [[30]-[32]; *NUMSA & others v Bader Bop (Pty) Ltd & another* 2003 BLLR 103 (CC) [26]-[46].

Due recognition and account must, however, be had of the argument that our constitutional democracy must function subject to the doctrine of the separation of powers.[43] No issue can be had with the fact that parliament is the principle law-making arm of government. However, given the juridical nature and functions of what our courts do by virtue of the judgments and doctrine of *stare decisis* the primary law-making role played by parliament is not, it is submitted, exclusive to parliament, but one that is augmented by the secondary law-making role played by the courts. Parliament and the judiciary become so-called partners in the law-making process.[44] In the case of *In re: Certification of the Constitution of the Republic of South Africa, 1996*[45] the court stated[46] that "no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation".[47]

The restraint our courts have exercised from interfering in other branches of government has been correctly pointed out[48] with reference to case authority.[49] The constitutional mandate which our courts have[50] in general and the constitutional court in particular render them the "ultimate guardians of the Constitution".[51] Does this then lead us inescapably to concur with the sentiments articulated by Roosevelt that the courts are the final seat of authority?

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[43] Moseneke n 36 above and the authorities cited at n 30. See also Dlamini "The Political Nature of the Judicial Function" 1992 *THRHR* 411,412 and Johnson, Pete and du Plessis *Jurisprudence: A South African Perspective* (2001). Cf E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464-474)

[44] Ibid Dlamini 416.

[45] 1996 10 BCLR 1253 (CC).

[46] At [108].

[47] Moseneke note 36 above 349.

[48] Prof Smit note 24 above 13.

[49] *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 BCLR 1696 (CC) and *Doctors for Life International v Speaker of the National Assembly* 2006 SA 416 (CC) per Smit n 24 above.

[50] Regard being had to the provisions as contained in ss 39(2), 167(4)-(7), 169, 172 and 173 of the Constitution.

[51] Moseneke note 36 above 349. For further interesting reading consider ch iv "The role of the courts and the separation of powers" by O'Regan "From form to substance:the constitutional jurisprudence of Laurie Ackerman" 2008 *Acta Juridica* 1 10-17.

The argument that judges are ill-equipped to examine state budgets or policies[52] since they lack the necessary expertise, mandate and experience[53] fails to take into account that in many instances judges make orders and findings where they have relied solely on the evidence of experts in areas and fields of which they have no special knowledge[54] but in respect of which, after being apprised through evidence of the necessary material facts, they are able to bring to bear on the matter a mature and well reasoned finding.

COMMON LAW RECOGNITION

The importance of the law of contract in the modern world[55] may be attributed to its proximity with every form of economic activity;[56] no less so, it is submitted, in the realm of employment.[57]Clearly the rationale for a contract[58] can be expressed in the assertion that it

[52] Where called upon to do so given the facts and circumstances of the case presented before them.
[53] E Mureinik *op. cit.* 465.
[54] One such example is in the area of child custody and access where in many instances the High Court as upper guardian of all minor children, resorts to the assistance and guidance offered by the Office of the Family Advocate.
[55] The subject matter of this work is not intended to focus on the law of contract in any great detail other than is necessarily set out herein. For further reading see Christie *The Law of Contract* (2001) 1, esp. comment n 1. See Pearmain "Contracting for socio-economic rights: a contradiction in terms?(1)" 2006 *THRHR* 287 293. A brief historical synopsis is provided by Kleyn "The reality of real contracts" 1995 *THRHR* 26. For interesting reading on the constitutional protection afforded employees under international employment contracts see Calitz "Globalisation, the development of constitutionalism and the individual employee" *PER/PELJ* 10 2/115 available at http://www.puk.ac.za/opencms/export/PUK/htm (09-10-2009).
[56] See Hawthorne "Relational contract theory, principles of European contract law – long-term contracts, and the impact of implicit dimensions" 2007 *THRHR* 371. *Cf* Collins "Market power, bureaucratic power, and the contract of employment" (1986) *ILJ* (UK) 1 2 and Rycroft and Jordaan n 1 above 21 *et seq*. See also Wedderburn "Labour law, corporate law and the worker" 1993 *ILJ* 517 523.
[57] That it is competent for a court to grant an order of specific performance of a contract of employment see *Santos Professional Football Club (Pty) v Igusund & another* 2003 5 SA 73 (C) and *Nationwide*

is a means by which an agreement[59] between two parties may be enforceable in terms of the law.[60]It is submitted that the contract of employment is a necessary means by which parties are at liberty to formulate their rights and obligations in a manner that may advantage their interests.[61]

In addition to upholding the sanctity of contract and the principle of giving effect to the intention of the parties as articulated in the wording of the agreement[62] our courts have always taken account of the principles of good faith,[63] fairness and public policy as being fundamental to a contract. In *Meskin NO v Anglo-American Corporaton of SA Ltd & another*[64] Jansen J stated:[65] "It is now accepted that all contracts are bona fide...".[66]

Such sentiments were underscored by the Appellate Division[67] in *Eerste Nationale Bank*

Airlines (Pty) Ltd v Roediger & another 2008 1 SA 293 (WLD) [21].
[58] For purposes of this analysis references are, unless otherwise stated, to contracts of employment.
[59] See Kleyn n 14 above 16 27-29.
[60] Christie n 14 above 2, especially critical comments at n 6 thereof.
[61] See Fourie "Status en kontrak in die Suid-Afrikaanse arbeidsreg" 1979 *THRHR* 79 85 and Epstein "In defense of the contract at will" 1984 *University of Chicago LR* 947 948 982. The contract of employment has also been referred to as "a remarkable social and economic institution as important as the invention of limited liability for companies" See Deakin n 1 esp n 123. Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157 162 *et seq*; Epstein n 5 above 954; Brassey "The contractual right to work' 1982 *ILJ* 247 and Rycroft n 64 below 272. For a counter argument that the inequality of bargaining power between the parties grants the employee a mere "fictional" freedom to contract see in general Kahn-Freund "A note on status and contract in British labour law" 1967 *MLR* 635 639-640; Benjamin "The contract of employment and the domestic workers" 1980 *ILJ* 187; Collins n 8 above *et seq*; Elias n 3 above 112; Merrit "The historical role of law in the regulation of employment – Abstentionist or interventionist?" 1982 *AJLS* 56 82; Forrest "Political values in individual employment law" 1980 *MLR* 361 363; Fox *Beyond Contract: Work, Power and Trust Relations* (1974) 182-184 and Rycroft and Jordaan n 1 above 25.
[62] *Wyeth SA (Pty) Ltd v Manqele & others* (LAC) Case No. JA 50/03 [13].
[63] For interesting discussion on the origins of 'good faith' of *bona fides* in contract see Zimmerman and Whittaker (eds) *Good Faith in European Contract Law* (2000) 93-100.
[64] 1968 4 SA 793 (W).
[65] 320G-H.
[66] Vettori *The Employment Contract and the Changed World of Work* (2007) ch 2 26-27.
[67] As it was then known.

van Suid Afrika Bpk v Saayman[68] where Olivier JA[69] acknowledged the important role that principles of good faith have to play in the law of contract.[70]
Moreover, good faith was also recognised as being based on public policy.[71]

Whilst *Tuckers Land Development Corp v Hovis*[72] recognised that principles of "equity, fairness and public policy"[73]constitute "the fabric of the concept of good faith[74] *Brisley v Drotsky*[75] re-iterated the principle that South African law recognises and accepts that all contracts are premised on good faith.[76]

Significantly, it has been pointed out how Lord Denning in the case of *Lloyds Bank Ltd v Bundy*[77] "formulated a general ground for rescission based on the unequal bargaining power between the parties".[78]

The approach by our courts in this regard was initially, however, viewed less felicitously on account of the principle of sanctity of contract[79] and the principle of freedom to contract.[80] It is submitted, however, that the principle of freedom to contract which may be more apposite to commercial transactions[81] is non-suited to the inherent imbalance of power

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[68] 1997 4 SA 302 (A).
[69] In a minority judgment.
[70] Vettori n 16 above 26.
[71] *Ibid*. See also *Oakfields Thoroughbred & Leisure Industries Ltd v McGahey & another* 2001 10 BLLR 1147 (LC) 1154C.
[72] 1980 1 SA 645 (A) 651E 652A-D.
[73] Vettori n 16 above 33 esp n 65.
[74] *Ibid*.
[75] 2002 4 SA 1 (SCA) 15.
[76] Vettori *The Employment Contract and the Changed World of Work* (2007) ch 5 140 n 155.
[77] 1975 QB 326 339.
[78] Vettori n 16 above 28.
[79] Neels "Regsekerheid an die korrigerende werking van redelikheid (deel 2)" 1999 *TSAR* 256 and authorities referred to 269-272.
[80] See *Martin v Murray* 1995 *ILJ* 589 (C) 600E-H 604B referred to by Vetorri n 3 above 27. See also Van der Merwe and Van Huyssteen "The force of agreements: valid, void, voidable, unenforceable?" 1995 *THRHR* 549 564.
[81] Given that the parties to such an agreement are, all other things being equal, in a more equally balanced bargaining position such as one finds with an agreement to purchase and sell a moveable corporeal. Moreover, such an agreement may also be characterised by a once-off

typical of the employment relationship. Accordingly, allowance must be made for implying terms of trust and confidence which caters for the disparity of power between the parties.[82]

Development of our common law under the constitutional imperative of section 39(2) and to harmonise the common law with the Bill of Rights finds expression in cases such as, for example, *Old Mutual Life Assurance Co SA Ltd v Gumbi*;[83]*Boxer Superstores Mthatha & another v Mbenya*;[84]*Denel v Vorster*[85] and *Murray v Minister of Defence*.[86]

As pointed out[87] and evidenced in the matter of *Barkhuizen v Napier*[88] where "the majority stated that the principle of *pacta servanda sunt* is not a sacred cow that should trump all other considerations [.....]. The court [also] held that contractual agreements, just as all other law, are subject to constitutional supervision or control."[89] The significance of common law developments embracive of constitutional notions in the area of contract and

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transaction between purchaser and seller thereby not necessitating an ongoing relationship one finds between employee and employer. For further discussion in this regard see Hough "A common law agenda for labour law 1999 2 Web JCLI available at http://webjcli.ncli.ncl.ac.uk/1999/issue2/hough2.html (16-09-2009); Elias "The structure of the employment contract" 1982 *Current Legal Problems* 95 110. *Cf* Epstein "In defense of the contract at will" 1984 *The University of Chicago law Review* 947. See also *Martin* v Murray n 46 above 600H-J 602H.

[82] Brodie "Beyond exchange: the new contract of employment" 1998 (UK) *ILJ* 79 85 and Brodie "Mutual trust and confidence: catalysts, constraints and commonality" 2008 (UK) *ILJ* 329 331.

[83] 2007 8 BLLR 699 (SCA) 701E-F where Jafta JA held that the common law contract of employment incorporated by implication an employee's right to a pre-dismissal hearing.

[84] 2007 8 BLLR 693 (SCA) 696C-E where Cameron JA held that an employee's contractual claim arising from the employment relationship alleging her dismissal to have been "unlawful" was cognisable in the High Court.

[85] 2005 4 BLLR 313 (SCA) 318C-D where Nugent JA held that an employer was constitutionally obliged to adhere strictly to a disciplinary code incorporated into an employee's contract.

[86] 2008 6 BLLR 513 (SCA) 519B where Cameron JA held that the law and Constitution impose a continuing obligation of fairness towards the employee on the employer.

[87] Smit n 21 above 10.

[88] 2007 5 SA 323 (CC).

[89] Smit n 21 above 10. Also see dictum of Davis J in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 76 (CPD) 85C-D that the general principles of the law of contract are required to be developed in accordance with a constitutional community and that "Private power in South Africa is also accountable to the principles of the Constitution". In addition see Pearmain n 112 below.

labour law bodes well given, it is submitted, the jurisprudential cross-pollination that can flow and be culled from the inexorable association between the two disciplines.[90]

The court in *Harper v Morgan Guarantee Trust Co of New York, Johannesburg & another*[91] rejected argument that there was an obligation on an employer in exercising rights to terminate a contract on notice to have acted in good faith.[92] Whilst it has been argued[93] that the court in *Harper* was not referred to any authority on which to make a finding that the employer was under an obligation,[94] it would nevertheless have been permissible and, in fact, incumbent on the court to develop the law in accordance with the dictates of section 39(2) of the Constitution in the development of the common law.[95]

The view in *Harper* is to be contrasted, however, with the case of *Protekon (Pty) Ltd v CCMA & others*[96] wherein an implied contractual duty was found to exist imposing on the employer a duty to act fairly in terms of employment benefits. Moreover in *Carter v Value Truck Rental (Pty) Ltd*[97] the Labour court went so far as to describe the employment relationship "at common law and under the equitable dispensation created by the LRA"[98] as

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[90] Of significance in this regard is the remark: "Arguably the most significant implication to draw from *Carmichele* is the following: The common law has developed over centuries. It constitutes the repository of great wisdom. Its mysteries are best unraveled by specialists who reside in the Supreme court of Appeal and High Courts. We as the Constitutional Court can but engage in gentle, generalized jurisprudential prodding" Davis "Judge Ackermann and the jurisprudence of mourning" 2008 *Acta Juridica* 219 232.

[91] 2004 3 SA 253 (W).

[92] Bosch n 4 above 47. For an interesting discussion on comparative evolution of good faith in the modern world see Gordley "Good faith in contract law in medieval *ius commune*" ch 3 in Zimmerman and Whittaker (eds) *Good Faith in European Contract Law* (2000) 93

[93] *Ibid*, 47-48.

[94] See, however, *Tek Corporation Provident Fund and others v Lorentz* 1999 4 SA 884 (SCA). Although distinguishable on the basis that the matter had to do with whether an employer was entitled to the sole benefit of a pension fund contribution, the remark by Marais JA [24] is apposite that there is an obligation of good faith on an employer towards its employees relating to pension fund contributions [24].

[95] In this regard see *Air Products (Pty) Ltd v CWIU & another* 1998 1 BLLR (LAC) 13.

[96] 2005 7 BLLR 703 (LC) and the authorities referred to by Todd AJ 711F.

[97] 2005 1 BLLR 88 (SE).

[98] 100D.

one of *ubberimae fides*.

More particularly the incident of trust and confidence was specifically dealt with in the case of *Council for Scientific & Industrial Research v Fijen*[99] where Harmse JA held:

> "It is well established that the relationship between the employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the "innocent" party to cancel the agreement [...] On 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. There are some judgments in the LAC to this effect (eg *Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union* (1991) 12 *ILJ* 1032 (LAC))"[100]

It can be accepted that our labour law recognises that the employment relationship is one which is based on good faith from which arises a reciprocal obligation of trust and confidence.[101] Brassey[102] and Hepple[103] describe the obligation as constituting a general expectation of cooperation between the parties. It is submitted that the expectation is one consistent with the notion that neither party will do anything, alternatively will refrain from conduct, that will cause material harm to the other party sufficient to warrant a breakdown in the trust relationship, alternatively materially adversely affect the confidence that each has, or is expected to have on the other.

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[99] 1996 6 BLLR 685 (AD) (as it was then referred to).
[100] 691I-692A.
[101] See *Nxele v Chief Deputy Commissioner, Department of Correctional Services* 2008 12 BLLR 1179 (LC) 1194A; *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA) [11] and [12]. See also *MEC, Department of Roads & Transport, Eastern Cape v Giyose* 2008 5 BLLR 472 (E) [23]
[102] *Employment and Labour Law (2000) Vol. I ch 1 26.*
[103] *Employment Law* (1981) 134.

In as much as the notion of mutual trust and confidence clearly has a functionary role to play in maintaining the ongoing nature of the employment relationship and indeed fostering a general sense of cooperation between the parties that can only conduce to a general sense of dignity and well being so too is it important for it to be transposed by some means into the realm of fair labour practices thereby fulfilling an all pervasive role in labour law that would be to the benefit of all role players.

EXTENDING THE PRINCIPLE OF MUTUAL TRUST AND CONFIDENCE TO THE DEVELOPMENT OF FAIR LABOUR PRACTICES

Before the constitutionalisation of our labour law system and shortly after the establishment of the Industrial Court[104] Cheadle posited the following interesting question apropos the first unfair labour practice[105] case:

> "Apart from divining 'fairness' from the policy considerations underlying legislation, how is the Industrial Court going to deal with the concept of 'fairness'? Fairness is obviously a policy decision and like other policy decisions which require pronouncements by the courts, it can be expected that the court will rely on the 'prevailing values of fairness in the community' and the test of the 'reasonable man' Both are fictions. It is not a sociological

[104] In 1979 pursuant to recommendations by the Wiehahn Commission in 1977.

[105] For historical development of the statutory term 'unfair labour practice' in terms of section 1 of the Industrial Conciliation Amendment Act 94 of 1979 which defined an unfair labour practice to the current codification of unfair labour practices in terms of s186(2) of the LRA and item 2(1) of the former Schedule 7 to the LRA see Van Niekerk et al Law @ Work ch VIII 163 165-167 and Du toit *et al Labour Relations Law* (5th ed) 6-58 481.

> 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."[106]

Prior reference to the ongoing nature of the employment relationship emphasises the dynamism of the fluctuation in the reciprocal needs and demands of the parties to the employment relationship. It is this attribute that distinguishes it and sets it apart from other types of relationships. The ongoing relationship and the interests it gives rise to can never be described as static. They are in a constant state of flux as they respond to the surrounding dictates of the socio-economic and political milieu in which the parties find themselves at any particular time; a situation only attenuated by the ever present phenomena of globalisation.[107]

To strike a balance between the respective interests of employee and employer was indeed a path which the Industrial Court was charged with having to navigate between Scylla and

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[106] Cheadle "The first unfair labour practice case" 1980 *ILJ* 200 201. In *Metal & Allied Workers' Union & another v Mauchle (Pty) Ltd t/a Precision Tools* 1980 3 *ILJ* 227 (IC), which case forms the subject matter of the aforesaid article by Cheadle, the learned author points out how Parsons DP did not find *in casu* that the alleged act concerning trade union membership and employee participation in trade union affairs was an unfair labour practice but how rejection of arguments *in limine* that it could not be an unfair labour practice left the path open, given the right sets of facts and circumstances, for the alleged act to constitute an unfair labour practice.

[107] For general discussion in this regard see Wedderburn "Labour law 2008: 40 years on" 2007 (UK) *ILJ* 397 398-402; Samara "Development, social justice and global governance: challenges to implementing restorative and criminal justice reform in South Africa" 2007 *Acta Juridica* 113 118-120; *Time Magazine* 29 September 2008 49-50; *Time Magazine* 6 April 2009 22-23; *Time Magazine* 14 September 2009 38-44; Zahn "The *Viking* and *Laval* cases in the context of European enlargement" 2008 Web Journal of Current Legal Issues" 13 available at http:webjcli.ncl.ac.uk/2008/issue3/zahn3.html (24-10-2009) and Calitz "Globalisation, the development of constitutionalism and the individual employee" available at http:www.puk.ac.za.opencms/export/PUK/html (09-19-2009).

Charybdis in its contributions towards industrial peace.[108] The challenge, however, did not prove unfruitful inasmuch as it gave rise to the development of an unfair labour practice jurisprudence based on equity and fairness.[109]

In *United National Public Servants Association of SA v Digomo NO & others*[110] a full bench of the SCA emphasised[111] that LRA remedies available to employees in respect of conduct constituting unfair labour practices was not exhaustive of remedies available to employees in the course of the employment relationship[112] that may be determinable in civil courts. In the absence of legislation upon which a party is able to rely in order to claim relief there is always the common law remedy that a claimant can then seek to rely upon to claim appropriate relief regard being had to the circumstances.[113]

Section 23(1) of the Constitution guarantees the right to fair labour practices which Cheadle argues[114] has been comprehensively dealt with by the court in *NEHAWU v University of Cape Town*.[115] This precarious balance, however elusive it may be, which is sought to be

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[108] *Consolidated Frame Cotton Corporation v The President, Industrial Court* 1986 7 *ILJ* (IC) per Du Toit n 66 above 481.
[109] See generally Ngcukaitobi n 2 above 848; Le Roux et al "Substantial competence of Industrial Courts" 1987 *ILJ* 197; O'Regan "Reflecting on 18 years of labour law in South Africa" 1997 *ILJ* 889. See also *Cobra v Watertech v NUMSA* 1995 6 BLLR 1 (LAC); *National Hotel, Liquor, Restaurant & Retail Workers Union & others v PE Hotels Group t/a Edward Hotel* 1995 5 BLLR 85 (IC) and *Caroline's Frozen Yoghurt Parlour (Pty) Ltd & another* 1995 2 BLLR 68 (IC).
[110] 2005 12 BLLR 1169 (SCA).
[111] 1170G-I.
[112] With reference to *Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 (A) and *Fredericks v MEC for Education and training, Eastern Cape* 2002 2 BLLR 119 (CC).
[113] *Fose v Minster of Safety and Security* 1997 3 SA 786 (CC). See also the case of *Du Plessis v De Klerk* 1996 SA 850 (CC) 904 [106] referred to as authority for the principle that the common law, as buttressed by the Constitution is flexible and can have horizontal application in private matters. See also *Carmichele*.
[114] Cheadle "Labour law and the Constitution" 2007 SASLAW Annual Conference.
[115] 2002 ZACC 27 [40]. The Constitutional Court noted how the focus in section 23(1) is in essence on the relationship between the employee and employer and a continuation of that relationship with due cognisance being had to that right the court must be alive to the

struck between employee and employer in a bid to achieve fairness was also foreshadowed in remarks made by Landman J in NEWU v CCMA & others[116] where the question was posed as to what constitutes a fair labour practice as contemplated by the Constitution?
In remarking that it is clearly incapable of precise definition and characterised by the fact that an unfair labour practice is prohibited, Landman J proceeded to discuss the meaning of a fair labour practice.[117] Landman J considered that the then "residual unfair labour practices"[118] as contained in the LRA was not intended to deal exhaustively with the entire concept of a fair labour practice as contemplated in the Constitution.[119]

The LRA provides that every employee has the right not to be subjected to an unfair labour practice. [120] The actual meaning of an unfair labour practice, which ironically neither the court in NEHAWU[121]nor NEWU[122]were capable of defining with any degree of precision, is meticulously set out by the legislature as "any unfair act or omission that arises between

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tensions between the respective interests of the parties inherent in labour relations and to accommodate, where possible these interests in order to arrive at a balance required by the concept of fair labour practices. See *Equity Aviation Services (Pty) Ltd v CCMA & others* 2008 BLLR 1129 (CC) 1129 1141A.

[116] 2004 BLLR 165 (LC).

[117] 167G-168G. With reference to the meaning of a fair labour practice in respect of: (a) the Labour relations Act 28 of 1956 as a matter of equity and fairness (b) the fact that the idea of equity between the parties is not always absolute in that in certain circumstances an employee may commit conduct which although lawful is unfair as against the employer (c) fairness and equity in labour relations are intended to be regulated in the ordinary way by the appropriate legislation as as contemplated by section 23(1) of the Constitution and (d) the rules of common law and in particular as contained in the contract of employment are en important regulatory method of a means of monitoring conduct since a breach thereof by either party may give rise to an unfair labour practice.

[118] Regulated at the time of the referral of the dispute by item 2(1) of part B of Schedule 7 to the LRA but subsequently repealed by the Labour Relations Amendment Act 12 of 2002 and currently regulated in terms of sections 185, 186(2), 191, 193 and 194 of the LRA. Also see "Explanatory Memorandum" 1995 *ILJ* 278 333-334.

[119] 168J-169A. See also dictum by Nugent JA in *United National Public Servants Association of SA v Digomo NO & others* 2005 BLLR 1169 (SCA) 1170G.

[120] Section 185(b).

[121] See Cohen "Understanding unfair labour practices" 2004 *SAJHR* 482 483.

[122] 167G.

an employer and an employee" in respect of certain matters details in four finite categories.[123]

THE RESTRICTIVE NATURE OF THE LRA DEFINITION OF AN UNFAIR LABOUR PRACTICE

The restrictiveness of remedies offered by the LRA in addressing unfair labour practices is evidenced first and foremost by confining itself to an employee-employer relationship. Naturally, atypical employees such as casual workers, part-timers, outsourced/sub-contractors, independent contractors, immigrants and informal sector workers risk potential excluded from the definition.[124] Recourse would have to be had to the provisions of section 23(1) and (2) of the Constitution to argue that every worker has the right to fair labour practices.[125]

Remedies in respect of which relief may be granted involve in all instances claims that an employee may have against an employer. No provision is made in the LRA for circumstances where an employer may have a claim against an employee. This is borne out by the NEWU case which concerned the resignation of a union official without notice to the union as the employer.

A further example is the matter of *Maseko v Entitlement Experts*[126] where an employer's claim against an employee for damages on the basis of unfair desertion was dismissed consequent to the CCMA finding it had no jurisdiction in terms of the LRA. In parity of

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[123] As listed in paragraphs (a)-(d) of sub-section (2).
[124] Subject of course, to any person being deemed an employee in terms of the provisions of section 83 (1) of the Basic Conditions of Employment Act 75 of 1997.
[125] See Cheadle n 112 above 6. Consider also the cases of *Discovery Health Ltd v CCMA & others* 2008 BLLR 633 (LAC) 643C-645B and *"Kylie" v CCMA & others* 2008 BLLR 870 (LC) 876D-F.
[126] 1997 BLLR 317 (CCMA).

reasoning, an employer who is confronted with a situation where an employee is in breach of the duty of trust and confidence[127]would be precluded from approaching the CCMA for any relief albeit that in terms of the remedies for an unfair labour practice the arbitrator may, inter alia, determine any unfair labour practice on terms that the arbitrator deems reasonable.[128]

In *SALSTAFF obo Vrey v Datavia*[129] it was found that an alteration from financial to administrative duties with no loss of status or pay but that failure to consult the employee concerning the change amounted to a demotion and constituted an unfair labour practice in terms of the LRA. Whilst not disregarding steeped principles of our law[130]another no less important principle, it is submitted, would be the reciprocal duty of trust and confidence which on a balance may go a long way in evidencing the absence of a demotion.[131]

The issue of the LRA unfair labour practice only concerning itself with disputes arising *ex lege* or *ex contractu* has played itself out in numerous cases.[132] Whilst no quibble can and should be raised with the fact that economic demands are matters
best resigned to the realms of collective bargaining and industrial action[133]the point is that relief as currently provided for to potential applicants seeking to rely on a claim for an unfair labour practice is too claim specific. That an applicant is required to couch her/his claim as a promotion/demotion/provision relating to benefits by way of example in order to seek relief is unfair given not only the onus which the applicant attracts but also the

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[127] Presuming such breach to be premised on conduct that the employer cannot reasonably be expected to tolerate, for example, where it is clearly and abundantly apparent that the employee is by design acting *male fide* in order to set the employer up in order to build or create a case for a constructive dismissal.
[128] Section 193(4).
[129] 1999 BALR 757 (IMSSA).
[130] Such as the audi alteram partem rule.
[131] Regard being had to all the facts and circumstances of each case.
[132] See for example: Hospersa v Northern Cape Provincial Administration 2000 21 *ILJ* 1066 (LAC); Schoeman & another v Samsung Electronics SA (Pty) Ltd 1997 10 BLLR 1098 (LC) and Protekon (Pty) Ltd v CCMA & others 2005 BLLR 703 (LC) as referred to by Du toit *et al Labour Relations Law* (5th ed) 493-495.
[133] *Ibid* Du toit 493 and Grogan *Workplace Law* (6th ed) 237-241.

arbitrary and rather artificial construction and categorisation of the claim.

It is submitted that this has the potential of working a hardship against applicants. In particular applicants not as urbane, sophisticated, educated or informed as other applicants who can readily distinguish the different nuances that may arise for example, between unfair conduct relating to the provision of benefits or a demotion. However, the problem is not merely contingent on the expertise or intellectual wherewithal of the applicant. A mere perusal of our law reports and labour law text books will quickly reveal that an understanding of the LRA legislative definitions of promotion, demotion, benefits, training and the like have been the focus of considerable judicial and academic debate. What does the layperson as an applicant referring an unfair labour practice claim to the CCMA decide to elect from the straight-jacket list of categories given to her/him by the legislature in terms of the LRA.[134]

It is submitted that the extension of mutual trust and confidence as a material factor in determining fair labour practice disputes should be able to function as a practical alternative to the current LRA list of unfair labour practices. It has been argued in this paper that mutual trust and confidence is conceived basically of dignity[135]and good faith.

Using an example of where an employer is faced with a situation where an employee resigns without notice and the employer incurs damages as a result thereof. As section 186(2) of the LRA is currently worded, and as based on the authority of *NEWU* we know that the employer has no recourse in terms of what the LRA has to offer. However, as

[134] It is respectfully submitted that the so-called help desk and personnel one commonly encounters at the various CCMA centres whilst no doubt endeavouring to assist members of the public as best they can cannot be taken to be a reliable source of assistance or professional service in terms of any recommendation or advice as to how An applicant ought to lodge his/her claim at the CCMA.

[135] For an interesting debate on dignity and freedom under the law see Fagan "Dignity and the political right to freedom" 2008 *Acta Juridica* 177.

correctly pointed out by Landman J in *NEWU*, the employer may either issue summons in a civil court for salary in lieu of notice,[136]seek a mandamus compelling the employee to adhere to the terms of the employment contract[137] or approach the court on the basis of section 23 of the Constitution declaring the employee's actions to have been an unfair labour practice.[138]

Clearly, the employer has his common law remedies and his rights under the Constitution which he is at liberty of exercising.

This, however, requires some closer examination. We recall the principle enunciated in *NEHAWU* that an employer is as much entitled to fairness as is an employee. Employees without exception have at their disposal the remedies set out in the LRA which has as one of its stated purposes:

> "to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution servives [sic] accredited for that purpose;
>
> to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act."[139]

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[136] *NEWU* 169B-C.
[137] Ibid where the reference is made to *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 5 SA 73 (C).
[138] Ibid 168C-E.
[139] Preamble to LRA.

In the first instance, the employer in our stated example is denied the simple procedural entitlements afforded to employees. The pursuit of common law remedies in other *fora*, whilst a right that can be exercised, as correctly pointed out by Landman J, is also a right that comes at a cost taking into account the prohibitive legal cost associated therewith and the delay germane to civil litigation proceedings.[140]

Secondly, the Constitutional Court in *SANDU v Minister of Defence &* others[141] made it clear that one cannot bypass legislation giving effect to a constitutional right and rely directly on the Constitution without first challenging the legislation falling foul of the Constitution.[142] We know that in *NEWU* the applicant trade union, as employer, unsuccessfully challenged the constitutionality of the then residual unfair labour practice provision[143]for failing to embrace an unfair labour practice committed by an employee.

The upshot of this is that until such time as s186(2) is declared unconstitutional for failing to provide equal protection for employers against unfair labour practices committed by employees, an employer is precluded from relying directly on section 23(1).[144]

In the absence of a successful constitutional challenge to the unfair labour practice definition as currently contained in the LRA, alternatively an amendment thereto by the legislature[145]our hapless employer has no option but to rely on the development of the common law in terms of the provisions of section 39(2) as read with section 173 of the Constitution. Moreover, the dispute may also be determined before the Labour Court.[146]

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[140] Manifested by way of example, in interlocutory applications and the formal compliance required with the applicable rules of practice.
[141] 2007 9 BLLR 785 (CC).
[142] *Ibid* [51].
[143] And the EEA.
[144] Cheadle note 112 above 2-3. See also *Tsika v Buffalo City Municipality* 2009 BLLR 272 (E) 295F.
[145] In respect of which there is no current likelihood.
[146] In terms of sections 157 and 158 of the LRA.

FASHIONING A COMMON LAW REMEDY

The development of our common law[147] according to the tenets of the Constitution as expressed in section 39(2) has been said[148] to be an ardently enthusiastic task on the part of our courts. Support for the aforesaid contention can certainly be garnered from recent decisions of our courts.[149]Cheadle on the other hand has urged that a different more subtle approach adopted.[150]For him it is less about an obligation to develop the common law and more about an obligation to develop what Cheadle refers to as criteria for when the common law should be developed.[151] It would appear that Cheadle's principle criticism directed against the dictum as formulated in *Carmichele v Minister of Safety and Security*[152] is from whence the court derived its obligation to develop the common law given that the court simply referred to the provisions of section 39(2) and 173, whereas section 8(3), as Cheadle contends is the constitutional imperative[153]to be engaged.

In other words, in terms of section 8(3) if common law development is to take place n order to give effect to a right there must be no legislation in place that gives effect to the right.

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[147] In terms of section 173
[148] Per Prof Smit n 24 above 9.
[149] See in this regard, for example: *Old Mutual Life Assurance Co Ltd v Gumbi* 2007 BLLR 699 (SCA)701E-F*; Boxer Superstores Mthatha & another v Mbenya* 2007 BLLR 693 (SCA) 696C-E; Murray v Minister of Defence 2008 BLLR 513 (SCA) 516H-517C; *Nakin v MEC, Department of Education, Eastern Cape & another* 2008 BLLR 489 (Ck) 504504D-505A. *Cf Gcaba v Minister for Safety and Security & others* 2009 ZACC 26 (CC) [71]; *Mohlaka v Minister of Finance & others* 2009 BLLR 348 (LC) [20] and *Mogothle v The premier of the Northwest Province & others* 2009 BLLR 331 (LC) [24]. The development that has given rise to strongly charged debate as to whether there should be a separate dispensation for the resolution of public sector employees does not form the subject matter under discussion. For further reading in this regard consider: Stacey "Administrative law in public-sector employment relationships" 2008 *SALJ* 307; Ngcukaitobi & Brickhill "A difficult boundary" Public sector employment and administrative law" 2007 *ILJ* 769.
[150] Note 113 above 5.
[151] *Ibid*.
[152] 2001 SA 938 (CC).
[153] Note 113 above 6.

Cheadle further hastens to add and remind as of the court's own admonishment in *Carmichelle* that "....judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary."[154]

It is respectfully submitted that the following critical response can be levelled against Cheadle's criticism.

Firstly, Cheadle is indeed correct insofar as reference is made to section 8(3), however, in failing to mention section 8(3) is not *per se* indicative that the court failed necessarily to apply its mind thereto. Clearly the court applied its mind with necessary judicial caution remarking that it is not in each and every case that the common law will be developed.[155]

Secondly, the imperative to develop the common law as it appears in section 8(3) where legislation does not give effect to a right or section 173 taking into accounts the interests of justice in either instance gives rise to a demonstrative imperative based on either the absence of legislation or the interests of justice for the Courts "to develop the common law".

Thirdly, whilst Cheadle refers to general underlying policies (such as the institutional structure of what is envisaged that the CCMA has to offer in resolving disputes)[156] the point to be made is that where the common law has been developed is in areas where clearly there had been no specific legislation regulating or making provision therefor, such as the right to a pre-dismissal hearing prior to the common law decision in this respect.[157] Alternately, there was no specific legislation stating that an employer may not deviate from a disciplinary procedure that formed part of an employee's contract of employment prior to

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[154] *Ibid*.
[155] *Carmichele* par [39].
[156] Note 113 above 6. And in respect of which for reasons already mentioned there is indeed much merit in terms of the expeditious resolution of disputes as invisaged in the Preamble to the LRA and section 138(1) of the LRA.
[157] *Old Mutual Life Assurance Co Ltd v Gumbi* 2007 8 BLLR 699 (SCA).

the pronouncement thereon by the SCA.[158] The fact that the SCA[159] has sought to expand upon the statutory definition of constructive dismissal[160] is warranted in the interests of justice, the rationale for which is argued later in this paper.

Fourthly, the criteria to which Cheadle makes reference as opposed to a general obligation which the courts have[161] in developing the common law is simply, it is submitted, the very values and principles comprising the relevant sections of the Constitution upon which the court is required to exercise its judicial discretion when applying its mind to specific sections like 8(3), 39(2) and 173. The imposition of a set of "constitutional criteria" would, it is submitted, be subversive of the spirit of judicial independence when judges are called upon to interpret that which is before them simply on account of the fact that each case, however difficult, is to be decided casuistically with regard to its own facts and circumstances.[162]

Finally, it is submitted[163] that the judiciary does form an integral and active part of the law-making process.[164] This is a reality we should have no reason to shy from or ignore. Whilst Cheadle is not alone in the concern he expresses[165]it is submitted that the role envisaged by the court as articulated in *NEHAWU*, namely a supervisory one of ensuring that legislation giving effect to constitutional rights is properly interpreted and applied, is indeed a misplaced concern in light of our wealth of jurisprudence which directs more often than not a conservative yet custodial approach on the part of the bench to apply the canons of

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[158] *Denel (Pty) Ltd v Vorster* 2005 4 BLLR 313 (SCA).
[159] *Murray v Minister of Defence* 2008 BLLR 513 (SCA).
[160] Section 186(1)(e) of the LRA.
[161] *Carmichele* n 31 above.
[162] Whilst due account is taken of Cheadle's comment this is not, however, to suggest that no regard is had to considerations concerns of reckless judicial activism
[163] For reasons dealt with above.
[164] On jurisprudential debate of judge-made law see Hart *The Concept of Law* (1997) 141 272.
[165] See the remarks per Langa CJ in *Chirwa v Transnet & others* 2007 ZACC 23 [174] that: "We must be careful not to substitute our preferred policy choices for those of the legislature". This was subject, however, to the rider that "the legislation must not offend the Constitution", the ultimate judge of which is the court itself.

legislative interpretation within the constitutionally rich democratic limitations of our legal system.[166]

Accordingly, it is imperative that in the absence of legislation giving effect to a right,[167]alternatively taking into account the interests of justice[168]providing where it is in the interests of justice it must be re-iterated that it is incumbent on the court to develop the common law to give effect to section 39(2).[169]

The resultant common law remedy for our employer excluded from the legislative unfair labour practice provisions of LRA would be due recognition by our courts of a breach of the duty of trust and confidence fundamental to the employment relationship. A finding in this regard should give rise to certain entitlements on the part of the employer in the form of compensation, damages or even specific performance.

Cheadle would argue[170] there is no need to develop the common law since remedies already exist in the form of claiming damages for breach of contract or seeking a mandamus. My submission, however, is whilst breach of contract or a mandamus may indeed provide the employer with some form of legal remedy it fails to provide him with the full remedy and protection which the Bill of Rights provides which is that "everyone is entitled to fair labour practices".[171]The equality provision in the Bill of Rights also provides that "Everyone is equal before the law and has the right to equal protection and benefit of

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[166] See for example, *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 BCLR 1123 (CC) 1123 1141A-G; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 BCLR 771 (CC) 828 [168]-[176]-a case dealing with access by the media to restricted material; *Sidumo v Rustenburg Platinum Mines* 2008 BCLR 158 (CC) 176G-178B; *Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 (A)[30]-[32]; *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC) 114B-122G and *SANDU & another v Minister of Defence & others; SANDU v Minister of Defence & others* 2003 9 BLLR 932 (T) 944I-954I.
[167] Section 8(3)(a) of the Constitution.
[168] Section 173 of the Constitution.
[169] Per Prof Smit n 24 above.
[170] Note 113 above 4 [13].
[171] Section 23(1).

the law".[172] As long as the employer is excluded from the fair labour practice provisions of the LRA, it cannot be gainsaid that the employer is being treated equally or enjoying fair labour practices.

The fair labour practice benefits an employer would otherwise stand to enjoy would she/he be allowed to participate under the provisions of the LRA must therefore effectively be given recognition through the common law in embracing principles that would take into account not the jurisprudence relevant to breach of contract or a mandamus order, but rather such jurisprudence as informed by the trust and confidence imperative of the employment relationship.

The position of an atypical employee in South African labour law is one which will continue to be the subject of considerable debate.[173]It has been submitted above that save in the instance of a ministerial determination in terms of the BCEA, individuals who do not find themselves within the narrow ambit of the definition of employee[174] will obviously not be qualified to claim relief under the unfair labour protection provisions of the LRA. Greater hope for such an applicant may lie with claiming that she/he is a worker in terms of the broader definition and meaning given thereto as recognised in ILO Conventions[175]and our common law.[176]

A practical difficulty, however, which is anticipated is that a casual worker who has been employed on a part-time basis who has not received due recognition for her work in the

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[172] Section 9(1).
[173] See Benjamin "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *ILJ* 787; Thompson "The changing nature of work" 2003 *ILJ* 1793; Benjamin "Informal work and labour rights in South Africa" 2008 *ILJ* 1579 and Olivier "Extending labour law and social protection: the predicament of the atypically employed" 1998 *ILJ* 669.
[174] Section 213 of the LRA, as read with the presumption contained in section 83A of the BCEA.
[175] Convention 87 of 1948 and convention 98 of 1949.
[176] *Discovery Health Ltd v CCMA & others* 2008 7 BLLR 633 (LAC) at [28] and *SANDU v Minister of Defence & others* 2007 9 BLLR 785 (CC).

form of not being promoted despite impeccable service meriting promotion who approaches the CCMA alleging an unfair labour practice is likely to be faced with a point *in limine* claiming that the CCMA lacks jurisdiction for want of a lack of an employment relationship. Only after successfully discharging the onus of proving that the CCMA has the necessary jurisdiction[177]would the worker then be entitled to engage the provisions of section 186(2) against the employer.

Whilst it is acknowledged that there is common law authority that extends the provisions of section 23 of the Constitution to persons who would otherwise formerly be excluded, it is submitted that it would be in the interests of justice[178] if the common law could similarly be developed to include workers who allege an unfair labour practice has been perpetrated against them by their employers in such a way as to constitute a breach of the duty of trust and confidence imperative.

A claim of alleged unfair labour practice or breach of the trust and confidence aspect of the employment relationship is one that can arise in a private employment relationship as much as it can in on one that is earmarked as a public sector employment relationship.

Much of the authority referred to in respect of the development and evolution of the labour and common law as judicially interpreted has resulted in a much broader debate.[179] The nature of that debate, namely whether the High Court and Labour Court should have concurrent jurisdiction in respect of public sector dismissal and the extent to which a dismissal of a public servant can be said to constitute an administrative act[180]whilst unavoidably characterising such debate in the main, does not, it is submitted, detract from

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[177] See Rule 14 of the Rules for the Conduct of Proceedings before the CCMA.
[178] In terms of section 173 of the Constitution.
[179] See Van Jaarsveld, Fourie and Olivier "Labour relations in public service" in *Principles and Practice of Labour Law* (updated service 2009).
[180] For purposes of the Promotion of Administrative Justice Act 3 of 2000.

the argument that development of the common law to embrace mutual trust and confidence as fundamental aspects of the employment relationship is important especially with reference to unfair labour practices.

THE IMPERATIVE OF MUTUAL TRUST AND CONFIDENCE WITH CONSTRUCTIVE DISMISSAL: AN INCONGROUS UNION?

Constructive dismissal, not unlike the law of unfair labour practice, is statutorily governed in terms of the LRA which states the following:

> "'**Dismissal**' means that –
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> (d) ....
>
> (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."[181]

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The common law principles of our labour law are clear as they spell out the substantial risks in discharging the onus[182] together with the requisite circumstances that would conduce to a situation of intolerance on the part of the employee.[183]

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[181] Section 186(1)(e).
[182] See *Watt v Honeydew Dairies (Pty) Ltd* 2003 ILJ 466 (CCMA) 475C.
[183] In general see: *Jooste v Transnet Ltd t/a SAA* 1995 5 BLLR 1 (LAC); *Pretoria Society for the Care of the Retarded v Loots* 1997 6 BLLR 721 (LAC) and *CEPPWAWU & another v Glass & Aluminium 2000 CC* 2002 5 BLLR 399 (LAC) and *Marsland v New Way Motor & Diesel Engineering* 2008 11 BLLR 1078 (LC) 1093C-D.

Cheadle would argue that no imperative justifies the development of either the legislative or the common law since in both instances we have principles giving effect to the right to claim a constructive dismissal and be granted the relief that goes with a successful claim in that regard. The former presents itself in the form of section 186(1)(e) whilst the latter as the sum collection of case authority that constitutes our common law. In light of recent case developments, however, it is submitted that there has indeed been an imperative for the development of our common law in the realm of constructive dismissal disputes for the reasons that appear hereinbelow.

The commissioner in *Watt v Honeydew Dairies* remarked on the problems facing an applicant alleging a constructive dismissal. In the first instance the claimant is saddled with having to prove a resignation and the risk associated therewith. In the second instance, the claimant must prove that objectively speaking continued working conditions were rendered intolerable by the employer. Finally, the claimant is required to prove all of this, regard being had to the objective nature of the enquiry in the context where there are no clear guidelines since each case of constructive dismissal is decided according to its own merits.[184]

It is submitted that the aforesaid observations can only be underscored and contextualised by the experience of any legal practitioner who has been involved in representing a client in a constructive dismissal dispute matter where the extent of the enormity of the onus which is required to be discharged cannot and should not be underestimated.

It is for this very reason that one is propelled to backtrack and re-visit the intended moral basis upon which the employment relationship was intended to play itself out. Linked to the economic necessity for the relationship is the imperative of mutual trust and confidence or the deference to human dignity and good faith. A reciprocal expectation that neither party would intentionally do anything inimical to the relationship is neither fanciful nor

farfetched. In the case of *Nxele v Chief Deputy Commissioner, Department of Correctional Services*[185]Zondo JP interpreted section 186(1)(e) as imposing an obligation on an employer "not to do anything that would make an employee's 'continued employment intolerable for the employee'".[186] It is submitted that the simple interpretation by Zondo JP of the statutory provision is encouraging for two reasons. Firstly, it gives effect to the principle of mutual trust and confidence as recognised by our court in *Council for Scientific & Industrial Research v Fijen*. Secondly, it develops our common law inasmuch as it imposes upon the employer an obligation or onus to desist from conduct that would otherwise render continued employment intolerable for the employer.

The development of the common law in accordance with section 39(2) of the Bill of Rights was taken a step further by Cameron JA in *Murray v Minister of Defence*[187] where the SCA was called upon to consider the appeal from the Cape High Court who had dismissed a constructive dismissal claim of a commander from the South African Navy. Instead of basing his claim on the provisions of the LRA the appellant had chosen to issue summons claiming R2.97 million in lost income as a result of a constructive dismissal.

Cameron JA gives an account of how our law came to adopt the term "constructive dismissal" from English law[188] and proceeds to state that by virtue of the constitutionally developed common law and section 23(1) a "non-LRA employee"[189] who is able to demonstrate that unfair conduct towards him on the part of the employer caused him to resign would be entitled to claim damages on the grounds that "all contracts are subject to

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[184] 475C.
[185] 2008 12 BLLR 1179 (LAC).
[186] 1194A.
[187] 2008 6 BLLR 513 (SCA).
[188] Referring significantly to the fact that when our courts adopted it from English law in the 1980's simultaneous therewith they adopted the English approach of implying into the employment contract a general term that the employer "would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee..." 518B-D.
[189] 518E.

constitutional scrutiny".[190] In jettisoning the concept of repudiation[191]Cameron JA proceeds to state that the substance of the enquiry which is invoked by our Constitutional dispensation is simply that the law imposes "a continuing obligation of fairness towards an employee on...the employer when he makes decisions affecting the employee in his work".[192]

In upholding the appeal it is noteworthy how the SCA in *Murray* saw the imperative to develop not only the common law in order to give effect to the spirit, purport and object of the Bill of Rights but also extend such development to the common law contract of employment in order to give effect to the obligations of confidence and trust which imposes on all employers a duty to deal fairly with their employees.

It is submitted that the development of the common law as reflected in the *Murray* decision is a positive contribution and evolution of our common law. It broadens the scope of passageway for employee applicants seeking to pursue constructive dismissal claims in a manner that is conducive to the exercise of their rights in terms of the Constitution. In other words, an applicant may rightfully proceed against her/his employer on the basis of a breach of a general obligation of fairness arising from the employment contract as opposed to being confined to the narrow legislative confines of section 186(1)(e) .

Key to a comprehensive understanding of the role played by the mutual confidence and trust imperative in South African labour law is to focus attention on the extent to which it is treated in foreign territories.

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[190] 518E-F where Cameron JA also referred to Barkhuizen v Napier 2007 5 SA 323 (CC).
[191] 519A and the authorities cited at n 12.
[192] 519B.

A PERSPECTIVE OF THE INTERNATIONAL, SUPRA-NATIONAL AND REGIONAL REGULATION OF THE MUTUAL TRUST AND CONFIDENCE IMPERATIVE OF THE EMPLOYMENT RELATIONSHIP: A CASE OF GENERAL RECOGNITION AND LACK OF REGULATION

Recognition of the imbalance of power in the employment relationship[193] and the fact that generally a contract continues to function as the basis for the employment relationship[194] is underpinned by a basic duty of good faith and confidence.[195] We are reminded of the necessity of this duty in order to limit the negative effect of the unequal bargaining position of the parties and ensure that contracts of employment are interpreted according to the dictates of good faith and public policy.[196] The implied term should be given greater recognition in addressing the imbalance of power[197] between the parties in order to guard against the improper exploitation of employee interests by employers.[198]

[193] Vettori *The Employment Contract and the Changed World of Work* (2007)ch 1 14-21; Clark "Towards a sociology of labour law: an analysis of the German writings of Otto Kahn-Freund" in Lord Wedderburn of Charlton *et al Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) 82-83, 94 and 99; Kahn-Freund *Labour and the Law* (1977)4.
[194] See *MEC, Department of Health, Eastern Cape v Odendaal & others* 2009 5 BLLR 470 (LC) at [49]-[50]. See also *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A); *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) and *Niselow v Liberty Life Association of Africa Ltd* 1996 17 *ILJ* 673 (LAC).
[195] See article by Bosch "The implied term of trust and confidence in South African Labour Law" 2006 *ILJ* 28 48 wherein reference is made to the case of *Council for Scientific & Industrial Research v Fijen* 1996 17 ILJ 18 (A) where, at 691, the court referred to the implied term of confidence and trust that is reciprocal in nature and found to be in every contract of employment.
[196] Vettori n 1 above ch 2 27-28. See also "Unions and the duty of good faith in employment contracts" 2003 *The Yale Law Journal* 112 available at http://www.yalelawjournal.org/112/7//1881_aditi_bagchi.html(18-08-2009). Also see *Department of Health v Jones & another* 2009 3 BLLR 195 (LC) at [19].
[197] The SCA has recognised the imbalance of power in determining whether a contract is contrary public policy. See *Eerste Nationale Bank van Suid Africa Bpk v Saayman* 1997 4 SA 302 (A), as referred to by Vettori, n 1 above. See also *Oakfields Thoroughbred & Leisure Industries Ltd v McGahey & another* 2001 10 BLLR 1147 (LC) at 1154C.
[198] Bosch n 3 above 31 and the authority cited at n 19.

Whilst freedom of association and collective bargaining are essential methods of realising such rights,[199] it is submitted that the implied term of good faith and confidence is as important in developing and realising fair labour practices[200] as well as addressing the imbalance of power in the employment relationship.

The re-iteration of globalisation is made to emphasise its decrease in collective bargaining which has resulted in an increase in the number of individual employment contracts and emergence of atypical forms of employment.[201] An increase in the number of individual employment contracts and atypical employment only highlights the need to encourage, foster and maintain good faith and confidence in employment contracts as is borne out by the comment: "The implied obligation of mutual trust and confidence has assumed, in a short space of time, considerable significance within the law of the employment contract."[202]

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[199] See, for example, *NUMSA & others v Bader BOP (Pty) Ltd & another* 2003 2 BLLR 103 (CC) at [13] and [31]-[36] and *SANDU v Minister of Defence & others* 2007 9 BLLR 785 (CC) at [50].

[200] See the obiter remarks made by Cheadle AJ in *Booysen v SAPS & another* 2008 10 BLLR 928 (LC) at [22].

[201] Vettori n 1 above ch 5 where the author refers to a decline in collective bargaining agreements in England for the period 1981-2001 of 83% to 35% of the workforce. See also Olivier "The end of labour law in the global workplace context? A South and Southern African response" paper presented at the Fifth International Conference in Commemoration of Prof Biagi in Modena, Italy, March (2007)2-3, 5 and 8-10; Locke, Kockan, Romis and Qin "Beyond corporate codes of conduct: Work organisation and labour standards at Nike's suppliers" 2007 *International Labour Law Review* 21 22; Collins "Legal responses to the standard form contract of employment" 2007 *ILJ* (UK) 2; Pollert "The unorganised worker: The decline in collectivism and new hurdles to individual employment rights" 2005 *ILJ* (UK) 217 217-219; Brown & Oxenbridge "Trade Unions and Collective Bargaining: Law and the Future of Collectivism" in Barnard, Deakin & Morris *The Future of Labour Law* (2004) 63 64-65 and D du Toit "What is the future of collective bargaining (and labour law) in South Africa?" 2007 *ILJ* 1405. To the extent that collective bargaining is integral to the setting of terms and standards of the employment agreement, alternatively, its decline resulting in the increase of individualised employment contracts, its influence and relevance within the context of ILO C87 and C98 as indirectly affecting the mutual obligation of good faith and confidence in employment contracts cannot, it is submitted, be disregarded.

[202] Brodie "Mutual Trust and Confidence: Catalysts, Constraints and Communality" 2008 37 *ILJ* (UK) 329.

An overview of the international, supra-national and regional regulation of the mutual trust and confidence imperative in the employment relationship attempts to show a general recognition of the imperative yet a general lack of harmony in the regulation thereof.

FOREIGN PERSPECTIVES

Whilst the reference to and importation of foreign jurisdictional material has been criticised by some[203] there are those who accept and recognise as an indispensible need, the necessity to have regard thereto.[204] Mindful of, *inter alia*, historical, legal and socio-economic differences it is submitted that a contextualized and constructive adoption thereof is consonant with the principles of the Constitution[205] and an important means of exchange of juridical ideas, however, the practical efficacy of importing foreign material

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[203] See Markesinis and Fedtke *Engaging with Foreign Law* (2009) at 131 n 13 per the dictum in *Bernstein and others v Bester NO & others* 1996 4 BCLR 449 (CC) by Kriegler J. See also Cooper "The boundaries of equality in labour law" 2004 *ILJ* 813 750.

[204] In this regard, see Javillier "The employer and the worker: the need for a comparative and international perspective" ch 17 in Davidov and Langille *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (2006)355 356; Gravel and Delpech "International labour standards: Recent developments in complementarity between the international and national supervisory systems" (2008)147: 4 403 404; and Olivier n 9 above 17-20. See also the dicta by Pillay J in *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC) at 964F referring to "a new optic" the court wished to acquire by inviting the parties to address the court on international and foreign law by considering how similar problems are solved by other judges. For a debate on general arguments in this regard, see Forsyth "The 'transportability' debate in comparative law and comparative labour law: implications for Australia borrowing from European law" *Centre for Employment & Labour Relations Law* Working Paper No. 38 June 2006.

[205] See sections 232 and 233 of the Constitution as read with ss 1(b) and 3 (b) and (c) of the Labour Relations Act 66 of 1995. See in general *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others* 1997 6 BLLR 697 (LAC) at 701 and *Discovery Health Ltd v CCMA & others* 2008 7 BLLR 633 (LAC) at [28]. See also *NUMSA & others v Bader* n 8 above at 116G-119G.

may not always be practicable and should be approached cautiously.[206]

AN INTERNATIONAL PERSPECTIVE

In addition to the pursuit of social justice,[207]the Treaty of Versailles has as one of its goals the "eradication of unacceptable working conditions"[208] which goal is underscored by the principles of the Declaration of Philadelphia.[209] To gauge the international perspective, reference is had to Australia and Canada.

Australia ratified ILO Convenion 87 and Convention 98[210] in 1973. Moreover, it is also party to a number of other international instruments.[211] As a member of the ILO it is

[206] See Javillier n 12 above 355 & 365 and Cooper "Strikes in essential services" 1994 *ILJ* 903 929. See also Article 427 of the Treaty of Versailles which has been referred to in the following context: "differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment" per Servais *International Labour Law* (2005)26.

[207] Apart from social justice as a vital ingredient in establishing universal and lasting peace, the Preamble to the Constitution of the ILO also recognises, *inter alia*, the urgent improvement of conditions of injustice impacting upon the vulnerability of workers. See Brownlie *Basic Documents in International Law* (2009) 34.

[208] Servais n 14 above 25.

[209] *Ibid* 28-29. It is submitted that the aforesaid principles are consonant with the principle of mutual faith and confidence with regards, for example, to issues such as the raising of standards of living, the effective recognition of the right of collective bargaining and freedom of association. See also the recognition of the inherent right of dignity as enshrined in the Preamble of the International Covenant on Economic, Social, and Cultural Rights. This also informs the South African labour law perspective which regards the right to dignity as a constitutional foundational value. In this regard see *Booysen v SAPS* & another n 8 above at [34].

[210] See ILOLOEX Database of International Labour Standards (LLM labour law semester II (2009) coursework lecture material) available at http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(South Africa)(29-07-2009).

[211] Namely, the International Covenant on Civil and Political Rights; the International Covenant on Economic and Social Rights; the ILO 1998 Declaration on Fundamental Principles and Rights at Work; and Termination of Employment Convention (No. 158). See Fenwick *et al* below n 33 6 13.

submitted that it is incumbent on Australia to give effect to such principles in a manner that would give expression to the obligation of good faith and confidence in employment contracts. The failure by Australian courts to accept a general requirement of good faith in commercial contracts[212] contrasts with the South African position recognising the concept of good faith.[213]

The position regarding employment contracts, however, is different. In the case of *Russel v the Trustees of the Roman Catholic Church for the Archdiocese of Sydney,*[214] the New South Wales Supreme Court in Australia found that the contract of employment implied into it an automatic duty of good faith that the employer, namely the Church, would not, without proper and reasonable cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.[215] On appeal, however, the New South Wales Court of Appeal[216] left unsettled the question of the implied duty of faith and confidence[217] in the employment relationship and by so doing also rejected the finding of the court *a quo* that the employer had been in breach thereof.[218]

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[212] See Vettori n 1 above ch 2 32 n 55 and 57 and Capuano "Not keeping the faith: a critique of good faith in contract law in Australia and the United States" 2005 *Bond Law Review* 29 34 and 42-47.
[213] See Pearmain "Contracting for socio-economic rights: A contradiction in terms?(1)" 2006 *THRHR* 287 esp. authorities cited at n 2-8. See also Vettori n 1 above ch2 33 n 65 and 66.
[214] 2007 NSWSA 104 wherein the employee's employment was terminated pursuant to allegations of sexual impropriety following an investigation by the employer in which a key witness was interviewed telephonically as opposed to in person.
[215] At 238 182.
[216] 2008 NSWCA 217.
[217] By finding that although good faith and confidence were implied terms in the employment contract, the employer had a right to pursue its own interests, for reasonable and proper cause, even if adverse to those of the employee and to even terminate the employment relationship without notice to the employee. See Mallesons Stephen Jaques "Implied duties of good faith and mutual trust and confidence" available at http: www.mallesons.com/publications/2008/Nov/9682049w.htm (18-08-2009)
[218] *Ibid*.

Drawing on English law,[219] the Supreme Court of Australia[220] recently found[221] mutual trust and confidence as an implied term to form part of Australian employment contracts.[222] This should serve to enhance the rights and interests of employees subject to the regulatory scheme of Australian Workplace Agreements[223] and legislation[224] that may otherwise fails to optimally represent the interests of employees.[225]

After ratified ILO Convention 87 in 1972, Canada has still yet to ratify ILO Convention 98.[226] In Canada, initial reticence was evident in the Supreme Court's approach to permitting an employee to rely on an implied term of trust and confidence in an employment contract.[227] This translated into clamant calls for Canadian courts to imply a

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[219] *Malik v Bank of Credit and Commercial International SA* 1997 3 All ER 1. See also in general Brodie n 10 above 345 and the authority cited at 341.

[220] *McDonald v State of Australia* 2008 SASC 134 (21 May 2008).

[221] In circumstances where the plaintiff employee claimed a material breach of the implied term of trust and confidence of the employment contract by his employer, the Department of Education and Children's Services by, *inter alia*, providing additional work and failing to provide a safe workplace that rendered continued employment intolerable leaving him (the employee) with no option but to claim constructive dismissal. The Supreme Court upheld the claim and awarded damages.

[222] Rigbycooke lawyers "Employment law: duty of mutual trust and confidence" available at http:www.google.co.za/search?q=duty+good+faith+and+confidence+australian+employment+law+btnG=S (01-09-2009). See also "Employment law in Australia: recent cases" available at http://www.whoswholegal.com/news/features/article/12396/employment-law-australia-re... (24-08-2009).

[223] See Forsyth "Re-regulatory tendencies in Australian and New Zealand Labour Law" *Centre for Employment and Labour Relations Law* Working Paper No. 21 March 2001 4-6.

[224] The Workplace Relations Act 1996 (Cth).

[225] See Fenwick *et al* "Submissions to the Minister for employment and workplace relations, the Honourable Kevin Andrews, MP concerning a ministerial review of the Workplace Relations Act 1996 (Cth)" *Centre for Employment and Labour Relations Law* December 2004 8 and 28. Also see Riley "The evolution of the contract of employment post workchoices" (2006) University of New South Wales Law Journal 166 B available at http://www.austlii.edu.au/journals/UNSWLAWJI/2006.9.html (18-11-2009).

[226] However, as a Member State of the ILO Canada is said to have committed to uphold the standards of ILO C98. See Burkett, Craig and Gallagher "Canada and the ILO: freedom of association since 1982" available at http:www/expert.ca/labour/files/Canada%20and%(01-09-2009).

[227] *Vorvis v Insurance Corporation of British Columbia* 1989 1 SCR 1085 available at http://www.canlii.org/en/ca/scc/doc/1989/1989canlii93/1989canlii93.html (01-09-2009) 1-21 esp at 9. See also Fudge "The limits of good faith in

duty of good faith and confidence given that the majority of federal jurisdictions failed to provide any statutory unfair dismissal protection mechanisms thereby resulting in a general need for protection of a larger number of employees through means of importing the duty of good faith and confidence into employment contracts.[228]

Relief came, however, with the case of *Wallace v United Grain Growers Ltd*[229] where the Supreme Court recognised that the law had developed sufficiently to accept that a duty of good faith and confidence could be implied *ex lege* into the employment contract between the parties.[230] Subsequent decisions leave little doubt that the duty of good faith and confidence is considered a term to be implied in employment contracts.[231]

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the contract of employment: from *Addis* to *Vorvis* to *Wallace* and back again?" 2007 *Queen's Law Journal* 529 534-549. The fact that the author proceeds to criticise the *Wallace* decision for having used the issue of good faith to increase the damages granted to the employee who claimed the employer acted in bad faith (at 567-571)does not form part of the subject matter of this discussion.

[228] Fudge *Ibid* 536-538. The slow decline in the percentage of unionised workers in Canada for the period 1982-2002 underscores the need to safeguard employee interests by implying into employment contracts a duty of good faith and confidence. Also see Burkett *et al* n 34 above. *Cf* Du Toit "What is the future of collective bargaining (and labour law) in South Africa?" 2007 *ILJ* 1405 1413.

[229] 1997 3 SCR 701 which had to do with an employee who claimed damages for having been summarily dismissed by the employer after a 14 year tenure as the company's top salesperson.

[230] At 136. The majority decision of the court, which upheld the trial court's award of 24 months' salary, had regard to the fact that the need to imply the term of good faith was premised on the fact that the employment relationship was unlike other contracts given the unequal bargaining power between the parties as a result of which greater protection had to be afforded the vulnerable employee and that an implied duty of good faith was consistent with the obligation of fair dealing and good faith in other areas of contract law (at 138 and 145).

[231] See, for example: *Evans v Teamsters Local Union No. 31* 2008 1 SCR 661 at [93] available at CanLII. http://www.canli.org/en/ca/scc/doc/2008/2008scc20/20.html (01-09-2009); *Honda Canada Inc. v Keays* 2008 SCC 39 at [81] available at CanLII http://www.canlii.org/en/ca/scc/doc/2008/2008scc39/2008scc39.html (01-09-2009) and *Colwell v Cornerstone Properties Inc.* 2008 OJ NO (SC) available at http://CanLII- 2008 CanLII 66139 (ON S.C.)(31-08-2009). Moreover, the Charter of Rights and Freedoms forming the bill of rights in the Constitution of Canada Act of 1982 is said to have been interpreted with greater emphasis on labour rights as 'socio-economic and collective in nature' than individual civil liberties since the case of *Reference Re Public Service Employee Relations Act (Alberta)* 1987 1 SCR 313. See Burckett *et al* n 34 above 1-2. Such a dispensation

SUPRA-NATIONAL PERSPECTIVE

The Treaty of Rome that created the European Community ('EU') is said to have found a unique international order in terms of which the member states[232] have limited their sovereign rights[233] but continue to retain their inherent national sovereignty.[234] So too

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would no doubt inform the need for a judicial interpretative approach to recognise the individual right of the employee as fundamentally important. See also the remark by Pillay J in *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) at [62], which although distinguishable insofar as the *Standard Bank* case has to do with disability and incapacity, the principle of constitution protection for individual employees remains apposite. See also Burkett *et al* n 34 above 6 and 44 where the implications of the decision of the case of *Dunmore v Ontario* 2001 *SCJ* No. 87 evidence an attempt at 'protecting the constitutional freedom of the worker' which, it is submitted, would align itself with the constitutional protection afforded employees in terms of section 23 of the Constitution. This is not, however, to suggest that collective rights and interests are to proverbially be sacrificed on the altar of individual rights and interests. The issue, it is submitted, is one that pertains to a balanced and proper advancement of the rights and interests of employees. See also *Shafron v KRG Insurance Brokers (Western) Inc.* 2009 1 SCR 157 [15]-17] available at http://csc.lexum.umontreal.ca/en/2009/2009scc6/2009scc6.html (18-09-2009)where in dealing in a restraint in trade clause in an employment contract the Supreme Court gives due acknowledgement to the fact that it will give greater scrutiny to such restraint clauses in employment agreements than in commercial agreements given the imbalance in power between employee and employer. In the more recent decision of *RBC Dominion Securities Inc v Merrill Lynch Canada Inc & others* 2008 3 SCR 79 http://csc.lexum.umontreal.ca/en/2008/2008scc54/2008scc54.html (18-11-2009)the Canadian Supreme Court upheld an appeal in part for damages against a branch manager in an action for breach of implied terms of the employment contract. The majority found that the manager had breached the contractual duty of good faith. Interestingly, in a minority dissenting judgment, Abella J stated concerns about the expansion of the scope of the duty of good faith as "representing a novel and potential enormous liability on employees" She unwelcomed the development given the imbalance of power in the employment relationship. [52]

[232] 27.

[233] See Bercusson *European Labour Law* (1996) 1 6.

[234] See Timmermans "General aspects of the European Union and the European Communities" ch II in Kaptyn & VerLoren van Themaat *The Law of the European Union in the European Community* (2008) 55; Olivier "Globalisation or fragmentation of international law: challenges for harmonisation" 2008 *De Jure* 437 440-441; and Treu "European collective

have they retained their legal systems in general and labour law systems in particular.[235] The need for member states of the EU to adapt to the effects of globalisation through greater flexibility in employment agreements taking into account atypical forms of employment and matters pertaining to individual dismissals is also required.[236] With reference to the European Convention on Human Rights,[237] Hepple states that the duty of trust and confidence co-exist with a duty to act in accordance with ILO conventions.[238]

Member states are in addition subject to the constraints of European law and standards imposed by the ILO such as, for example, the Convention on the law applicable to contractual obligations of 19 June 1980 ("the contractual convention").[239] Whilst providing for individual employment contracts, the terms of the contractual convention[240] are generic in nature[241] with the intention of giving effect to the law chosen by the parties.[242]

Despite there being no formal code of rules of fundamental rights there is said to be "constitutional traditions common to the Member States"[243] to which the ECJ and the

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bargaining levels and the competences of the social partners" Davies, Sciarra, Lyon-Caedn & Smits (eds) *European Community Labour Law Principles and Perspectives* (1996) 169 172-173 and 185.

[235] In this regard one need only compare, for example, the German labour law system with that of the United Kingdom. See, in general Collins, Ewing and McColgan ch2 *Labour Law* (2001) 29 and Ewing "The implications of *Wilson* and *Palmer*" 2003 *ILJ* (UK) 1 21-22.

[236] See Green Paper on "Modernising labour law to meet the challenges of the 21st century" (22 November 2006) 1 2-5 7-11 available at http://ec.eurpoa.eu/employment_social/labour_law/docs/2006/green_paper_en.pdf (27-03-2009).

[237] Adopted by the Council of Rome in 1950. See Collins *et al* n 43 above 29.

[238] See Brodie n 10 above 334 and Collins *et al Ibid*.

[239] Blanpain *European Labour Law* (2006) 690. It has been pointed out that the most important standards imposed by the ILO are the conventions. See Van Niekerk *et al* ch2 "International labour standards" in *Law @ Work* (2008) 17 21-22.

[240] In terms of Article 6.

[241] Insofar as they make provision, *inter alia*, for the parties to choose a particular law to govern their individual employment agreement.

[242] Article 3.

[243] See case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel* referred to in article on

European Court of Human Rights can and do subscribe in determining matters with reference to EU legislation and other instruments.[244]

A model of a European individual employment contract was drafted at the request of the Commission of the European Communities which model contract aimed at harmonisation of the then ten members of the EEC.[245] The preamble thereto sought to impose mutual obligations on the parties to perform the contract in *good faith*.[246]

Affording every worker the right to protection against unjustified dismissal and working conditions which respect her right to health, safety and dignity[247] aligns itself, it is submitted, with an implied duty of good faith and confidence.[248] In addition, Article 4 of the Termination of Employment Convention[249] provides that there shall be a valid reason justifying the termination of the employment of a worker.[250]

The EC in the case of *Akavan Erityisalojen Keskusliitto AEK ry & others v Fujitsi Siemens Computers Oy*[251]gave rulings on the extent to which it was incumbent on the employer to give effect to various Directives regulating the termination of workers' services for operational requirements. The fulfilling of the obligations by the employer in

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"European Union" available at http://en.wikipedia.org/wiki/European Union (05-09-2009).

[244] Such as the Charter of Fundamental Rights of the EU, which although not legally binding as yet, will become binding if the Lisbon Treaty comes into effect on 01 October 2009. See also the European Convention on Human Rights which is politically but not legally binding.

[245] Ramm ch 21 "Model of a European individual employment contract" in Blanpain and Millard (eds) *Comparative Labour Law and Industrial Relations* (1982)378.

[246] With reference to respect of mutual freedom of private, social and political life and the freedom to associate and to organise. *Ibid 379*.

[247] See Articles 30 and 31 of the Charter of Fundamental Rights of the European Union.

[248] It could hardly be the case for any employer to state having given effect to such obligations through conduct that is *male fide*.

[249] No. 158 of 1982.

[250] Three recognised grounds, as is the case in terms of section 188(1) of the LRA, are identified as valid reasons for termination, namely capacity, conduct or operational requirements.

[251] Case C-44/08 available at http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=employer%27s+obligations&lang=(10-09-2009).

this regard, it is submitted, is evidence of an invocation and enforcement by the court of the duty of good faith and confidence.[252] As much as the harmonisation of individual legal systems[253] would be a welcome ideal one cannot ignore the reality that harmonisation of individual contractual terms relating specifically to mutual trust and confidence may be even more difficult, if not impossible[254] to achieve on a supra-national level.[255]

REGIONAL PERSPECTIVE

The SADC Charter of Fundamental Social Rights in SADC ("the Social Charter") expressly enjoins Member States[256] to observe certain basic rights such as freedom of association, collective bargaining, and equality of treatment as proclaimed in the Constitution of the ILO and Declaration of Philadelphia.[257] Such recognition underscores one of the essential principles, objectives and undertakings articulated in the binding

SADC Treaty,[258]namely human rights, democracy and the rule of law.

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[252] See also *Mono Car Styling SA, in liquidation v Dervis Odemis & others* Case C-12/08 available at http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=employer%27s+obligations+lang=(19-09-2009)where court reaffirmed the obligations upon an employer undergoing a redundancy process.

[253] As referred to by Olivier in n 42 above 440.

[254] See Treu n 42 above 187 and Green Paper n 44 above 10-12.

[255] In this regard it is relevant to consider the continuing effect of to be had on member states by the EC of the values and principles espoused in the ILO Declaration of Fundamental Principles and Rights at Work of 1998; the IOL Declaration on Social Justice for a Fair Globalization adopted 10 June 2008. For further reading see Hepple "Globalisation or fragmentation of international law: challenges for harmonization" 2008 *De Jure* 437.

[256] See Olivier n 9 above 25.

[257] Article 3.

[258] See Article 4(c) of the Treaty of the Southern African Development Community available at http://216.239.59.104/search?q=cache:nBAarlk-

This is not dissimilar to the rights in section 23 of the Constitution[259], which are necessary for the promotion of a fair working environment which rights must of necessity it is submitted give effect to the mutual right to good faith and confidence in a contract of employment. Whilst examples may be referred to where ILO principles and norms are employed in developing local jurisprudence[260] and where the labour court of Namibia had to do with an appeal concerning bad faith conduct on the part of the employer, [261] the reality is that there is a lack of a coherent, consolidated and harmonised response by Member States in this regard on account of diverse socio-economic[262] and political[263]factors.

CONCLUSION

The imperative of mutual trust and confidence in the employment relationship based as it is on the fundamental importance of human rights and dignity is essential to the maintenance of the employment relationship. In as much as confidence and trust are issues taken merely for granted in the daily hurly-burly dynamic of the employment relationship they are, nevertheless, material considerations that come to the fore when assessments are made as to the continued tenability of the employment relationship.

EqvUJ:www.chr.up.ac.za/hr_docs/afri...(06-11-2008).

[259] And the other fundamental rights as contained in the Bill of Rights, for example, the right to equality, human rights, human dignity, freedoms, the rule of law.

[260] See Kauesa v The Minister of Home Affairs & others, referred to by Olivier n 9 above 25 esp. n 57.

[261] See Josob v Namibia Brewers (Pty) Ltd (Case No.: LCA 18/2008).

[262] See Olivier n 9 above 32-36.

[263] See recent media reports "Zuma tells Mugabe to quit stalling tactics" *Sunday Times* (30-08-2009) and "'Friendly' EU meets Mugabe" *Sunday Times* (13-09-2009).

Inadequacies often created by the inability of the employment contract to appropriately address the imbalance of power in the employment relationship[264] is addressed by way of the constitutional recognition of the basic human rights as enshrined in the Bill of Rights an underscored by various ILO instruments.

As participators in a constitutional democracy it is incumbent on the judiciary with due recognition being had to their limitation of powers not merely to pay proverbial lip service to the black letter of the law, but with due regard being had to their ultimate responsibility of ensuring that the rights, freedoms and values of all citizens of the country, employee and employer, are "to be treated with equal respect"[265] when interpreting labour laws and or other legislation or instruments or agreements that impact upon the employment relationship between the parties as measured against sections 8 39(2), and 173 of the Constitution.

The importance of judicial activism, used appropriately, lies in the fact that with reference to cases such as *Barkhuizen*; *Denel* and *NEHAWU* the common law can be developed more flexibly to recognise unfair labour practice claims outside the current rigid confines of section 186(2) of the LRA. Moreover, the narrow statutory provisions of section 186(1)(e) of the LRA have imposed, it is submitted, unnecessary and undue hardships on applicants claiming constructive dismissal. The SCA in the *Murray* decision[266] has developed the common law to align it with constitutional and contractual law principles thereby allowing prospective constructive dismissal applicants greater flexibility. Moreover, the court has given greater recognition, it is submitted to the imperatives of trust and confidence.

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[264] Rycroft and Jordaan *A Guide to South African Labour Law* (2 ed) 20.
[265] Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* (2001) 116.
[266] And it is submitted to a more limited extent by the ruling handed down by the court in *Xele*.

Whilst the necessary international, supra-national and regional instruments clearly exist that recognise this imperative, the lack of harmony as to the regulation thereof clearly charges each jurisdiction with the task of utilizing the implied term in a manner that addresses the imbalance of power in the employment relationship evolves the employment relationship in a manner that gives optimal effect to the fundamental values and principles upon which same is found.[267]

Since confidence and trust is integrally linked to the employment relationship there can be no doubt that as an imperative thereto it will continue to play a materially vital role as the relationship evolves.

[267] See Javillier n 12 above 372.

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