

# CHAPTER 7

## CONTRACT OF EMPLOYMENT

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## A Introduction

The latter part of the industrial era in industrialised economies witnessed the “burying of the individual contract beneath layers of safeguards for the subordinate employee.”<sup>1</sup> The reality of the imbalance of power inherent in the employment relationship is not denied. In the light of worldwide trends towards individualisation, decollectivisation and deregulation in the quest for flexibility,<sup>2</sup> alternative means of attaining more equitable bargains between employers and employees should be explored. The resurgence of the individual contract of employment calls for an adaptation of the common law to accommodate these changes that have come about as a result of new world socio-economic circumstances.

It is trite that the social model of employment upon which labour law systems were based in the industrial era (and upon which the South African labour law dispensation is presently based) has to a large extent retreated and even collapsed in many countries.<sup>3</sup> This leaves individual employees more vulnerable to employer exploitation. Judges have in the past, and continue to ‘socialise’ the general law of contract in order to avoid harsh outcomes that result from differences in power between contracting parties.<sup>4</sup> This imbalance of power between the parties is not only present between employer and employee but can

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<sup>1</sup> Chin “Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism” 1997 10 *AJLL* 257-259.

<sup>2</sup> As discussed in chapters 5 and 6 *supra*.

<sup>3</sup> Arup “Labour Market Regulation as a Focus for Labour Law Discipline,” in Mitchell *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995), 29 explains this phenomenon as follows: “However widespread it once was, the norm of the industrial model of employment relations is now under attack from all sides. A norm of mass production and consumption, characterised by such features as large organisations, the assembly line mode of production, Keynesian economic policies, the welfare state, the nuclear family, suburbia, cultural homogeneity, specific work location, and gender segmentation, is often treated today as an ideological construct and indeed as an historical artefact.

A form of labour law was linked to this social structure – the law of industrial relations and collective bargaining, bolstered in some cases by centrally arbitrated awards and categorical legislative protections. The law’s subject was the full-time, unionised, industrial, male, bread winner...”

<sup>4</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

exist for example between the grantor of credit and the receiver of credit, or between suppliers and consumers and so on.<sup>5</sup>

## **B The Socialisation of the Law of Contract in Judicial Decision Making in South African Law**

### **1 Introduction**

Any discussion on the influence of decisions in the moulding of the law of contract must begin with an acknowledgment of the existence of judicial activism<sup>6</sup> as apposed to rigid legal formalism.<sup>7</sup>

The doctrine of precedent or *stare decisis* is part of our law.<sup>8</sup> This doctrine might *prima facie* suggest that the common law is static.<sup>9</sup> This is, however, not the case.<sup>10</sup> It will be demonstrated hereunder<sup>11</sup> that our common law has changed markedly in the last century or so. The duty of good faith, as well as the concepts

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<sup>5</sup> *Ibid.*

<sup>6</sup> Judicial activism refers to a system where fair outcomes should be reached in decisions. Such justice is achieved by the application of standards to the facts at hand. Each case is decided with reference to public policy considerations and what is best for the community. See Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 55.

<sup>7</sup> ‘Legal formalism’ implies that legal rules are applied in a mechanical way and certainty demands that judicial discretion is eliminated. A judges’ function is merely to apply these rules in a non-creative manner. The fact that such a strict application of rules might at times result in injustices is according to the adherents of legal formalism a small price to be paid for certainty of the law – Cockrell *ibid.*

<sup>8</sup> See *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA) par 26.

<sup>9</sup> See Cockrell *op cit* 55 where he states: “Reading the standard South African textbooks on the law of contract, one would be hard pressed to believe that any contentious policy issues existed in this area of the law. In these texts contract law is routinely presented as a seamless web of rules that possesses a determinative rationality of its own, such that answers to any disputes will be thrown up by the inexorable logic that is internal to the system itself. All legal problems are solved by the dextrous manipulation of a few ground rules that are assumed to be beyond controversy; the issues regarding the policy justification for those rules are usually brushed aside as ‘non-legal’ or short-circuited by a question-begging appeal to ‘freedom of contract’. In the result we are presented with the curious edifice of a law of contract that seems to be built around a valuational vacuum – the hard edges of legal policy have been smoothed away by the sandpaper of legal doctrine.”

<sup>10</sup> *Ibid.*

<sup>11</sup> Under sub-heading 3.

of *bonos mores*, reasonableness, unconscionability and so forth have on many occasions been interpreted and moulded by our courts so as to reflect the mores and surrounding socio-economic circumstances of the day.

Many of the *dicta* in support of a formalistic approach are nothing more than a facade to disguise the application of social policy behind the apparent strict application of legal precedent. An example of such a dictum is that of Kotze JA in *Weinerlein v Goch Buildings Ltd*<sup>12</sup> that reads: “Our common law, based to a great extent on the civil law contains many an equitable principle, but equity, as distinct from and opposed to the law does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of law.”

Despite making use of the doctrine of *bona fides* as the basis for the identification and acceptance of a fictitious fulfilment of a condition in discharge of duties in the facts before the court, Kotze JA nevertheless found it necessary to deny any creative role on the part of judges. As Olivier JA points out in his minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,<sup>13</sup> the problem with this dictum is that it implies a static, closed system, as if the principle of *bona fides* was established in the past and is not capable of different interpretations with reference to new legal norms. Olivier JA stated:<sup>14</sup> “Die probleem met hierdie stelling is dat dit skyn uit te gaan van ‘n statiese, afgeslote sisteem: as billikheid nie reeds as ‘n regsreël gepositiveer is nie, *cadit quastio*. Beteken dit dat die *bona fide*-beginsel êrens in die verlede iutgewerk is en nie in die toekoms tot nuwe regsreëls of verwerre aanleiding kan gee nie? Hierdie *dictum* staan vernuwing en aanpassing in die weg en reflekteer dat dit slegs die taak van die howe is om die reg te vind en nie te skep nie, ‘n seining wat nie by die gees van ons reg of die behoeftes van ons gemeenskap pas nie.” As Olivier JA opines, a *dictum* such as this, that denies any creativity on the part of judges and

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<sup>12</sup> 1925 AD 282 at 285.

<sup>13</sup> 1997 4 SA 302, at 319J-320A.

<sup>14</sup> *Idem*.

perceives the task of court as merely to apply the law as opposed to creating law, is out of touch with reality.<sup>15</sup>

*Dicta* of this kind are associated with the classical theory of the law of contract. This theory of the law of contract has its origins in the eighteenth and nineteenth centuries and is aligned to the theory of laissez faire and economic liberalism.<sup>16</sup> This theory emerged as a result of the industrial era. The paternalistic approach associated with the previous agrarian society was replaced by “an aggressive entrepreneurial industrial society in the nineteenth century”.<sup>17</sup> The foundation of such theory is formed by the notion of freedom of trade and hence freedom of contract. Such values are premised on the belief that contractants are on an equal footing when they negotiate. The role of the courts therefore is to enforce the terms of the contract as voluntarily agreed to by them. It is not for the courts to look into the fairness or otherwise of the bargain. This theory overlooks the inherent inequality that may exist between individuals that arise as a result of wealth, knowledge, positions of power and influence and so forth. Nevertheless, it appears prima facie, that the South African law of contract still adheres to this classical theory.<sup>18</sup> However, Cockrell is of the view that despite the views expressed in the “standard South African text books on the law of contract”, the South African law of contract is “shot through with normative commitments and the

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<sup>15</sup> See Olivier AJ’s minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* at 320B where he states that such an approach to a judges’ role is contrary to the spirit of our law and cannot cater for the needs of our society. See also Grové “Kontraktuele Gebondenheid, Die Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 *THRHR* 686 at 696 where he concludes that ‘reasonableness’ will play a greater role in the law of contract in the future. In the words of Lord Reid as quoted in Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian Employment Law” in Mitchell *Redefining Labour Law* (1995) 167: “There was a time when it was thought almost indecent to suggest judges made law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the common law in all its splendour... But we do not believe in fairy tales anymore.”

<sup>16</sup> Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 164.

<sup>17</sup> *Ibid.*

<sup>18</sup> Hawthorne *op cit* 163.

allegedly ‘value neutral’ veneer which covers the text book tradition is in truth only obtained by a sub privileging of certain values over others”.<sup>19</sup>

There are, however, many more dicta that support the approach of judicial activism. As early as 1909 Innes J stated: “There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.”<sup>20</sup> If the purpose of the law is the achievement of justice,<sup>21</sup> it follows that social policy considerations upon which the rules and doctrines of common law are based must be applied to the particular facts of each case. Even though it might prove difficult at times for a court to choose between conflicting values and interests this is part of a judge’s function.<sup>22</sup>

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<sup>19</sup> “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40. Christie shares this optimistic view and states in the preface to *The Law of Contract* (2001) 4<sup>th</sup> ed and states: “The South African law of contract continues to advance, and it seems to me that the gap between law and justice is steadily closing as the judges become more confident in applying the concepts of good faith and public policy. If the concepts can be further developed without undermining the predictability on which the law of contract must be founded, I anticipate even greater pleasure in preparing the next edition...”

<sup>20</sup> *Blower v Van Noorden* 1909 TS 890 at 905.

<sup>21</sup> See Van der Merwe and Van Huyssteen “The Force of Agreements: Valid, Void, Voidable, Unenforceable” 1995 *THRHR* 549 where it is categorically stated: “Justice and fairness are universally accepted to be the purpose- or at least a vital part of the purpose – of any system of law. Essential as the commitment to such an ideal may be, the legitimacy of a legal system depends finally on the extent to which it is experienced as just and fair in its particular applications.”

<sup>22</sup> Botha J in *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) acknowledged such judges function and stated: “Counsel for the plaintiff, echoing misgivings expressed in some of the cases referred to earlier, submitted that it must be a matter of extreme difficulty for a Judge to decide whether the enforcement of a right would amount to unconscionable conduct or great inequity. With great respect to others who have expressed such misgivings, I do not share them. A Judge must often, in the exercise of his judicial function, move about in areas of relative uncertainty, where he is called upon to form moral judgments without the assistance of precise guidelines by which to arrive at a conclusion. Examples in the field of contracts are the determination of whether a contract is contrary to public policy or contra bonos mores (see e.g. *Couzyn v Laforce* 1955 2 SA 289 (T)). The application of broad considerations of fairness and justice is almost an everyday occurrence in a court of law, for instance, in relation to awards of costs. I do not see why a judge should shirk from performing this kind of task, however difficult it may seem to be. Of course, in connection with the *exceptio doli*, difficult questions may and do often arise as to a Court’s freedom to depart from the rules and principles of the

It is submitted that the application of notions such as fairness and equity on a case-by-case basis is more likely to result in justice than adherence to a strictly rigid and formalistic approach.

## **2 Legal Rules and Standards of the Law of Contract**

### *2.1 Introduction*

If it is accepted that judges do have some discretion and that there is such a thing as “judge made law” and that judges are entitled to (in fact at times required and expected to) make value judgments, the following questions arise:

- (i) How are judges to exercise such discretion?
- (ii) What is the extent of such discretion?

These questions can only be answered by distinguishing between legal principles (or standards) and legal rules, and analysing the roles they play in the South African law of contract.

The law of contract can be examined in terms of its substance and its form.<sup>23</sup> Legal standards and rules make up the form component of the law of contract, while the “political morality that under press the law of contract”<sup>24</sup> makes up the substance component of the law of contract. The substance will influence the form of the law of contract.<sup>25</sup> Cockrell identifies two opposite extremes that form the “spectrum of substantive values”.<sup>26</sup> They are individualism<sup>27</sup> and collectivism.<sup>28</sup>

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substantive law, and I certainly do not wish to minimise that kind of difficulty in this field. However, in this particular case with which I am dealing, I do not perceive any difficulty of that kind.”

<sup>23</sup> Cockrell *op cit* 41-46.

<sup>24</sup> *Ibid* 41.

<sup>25</sup> See Kollmorgen and Rickert *op cit* 171 who state “Underlying social policy has always informed the standards of justice which have in reality, shaped the common law.”

<sup>26</sup> *Ibid*.

<sup>27</sup> Cockrell *op cit* 41 defines individualism as follows: “Individualism conceives of persons as atomistic units joined to other agents by bonds that are wholly contingent. The dominant ideas are those of individual autonomy and self-reliance. Other people are viewed with a guarded distrust, since there is an omnipresent danger that one’s personal liberty will be restricted when rival spheres of autonomy collide. Values are regarded as the subjective preference of the individual will, such that we are separated from others by our own idiosyncratic



The form that the law of contract will take is dependent on whether the substance is more collectivist or more individualist in nature.

## 2.2 Rules

If the law of contract is made up solely of rules (and there is no room for standards or principles), judges will have no creative function. A judges' role will be tantamount to that of an administrator and the rules will simply be applied to the facts at hand. With the emphasis on rules the main aim is to ensure certainty of the

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conception of the good life. In its economic form, individualism assumes a world of traders who meet briefly on the market floor, where they engage in discrete and furtive transactions. In its political form, individualism posits a universe of agents with exclusive control over their private domain of autonomy – a domain that is staked out on the perimeter by the claims of rights. In such a world, the role of the state is limited to the night watchman function of protecting each person's area of individual autonomy from uninvited intrusions. Legal relationships with others are first and foremost defined by free consent on the assumption that consent is itself a manifestation of individual autonomy; non-voluntary positive obligations are regarded with suspicion as potentially harmful restrictions on personal liberty.”

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Collectivism is described by Cockrell *ibid* as follows: “Collectivism is a loose term which I use to describe a scheme of association defined principally by its opposition to individualism. At this end of the spectrum we find an emphasis on ‘collective goods’ which concern matters of value that are neither mine nor yours but rather our; these collective goods depend on membership of a community and play a crucial role in constituting and identifying the individual agent. Collectivism is informed by a ‘communitarian’ vision, in terms of which the free-floating self comes to be replaced by the encumbered self who is an ‘implicated’ member of a community. According to this version of communal life, we are social beings with the benefits and burdens that come from living in a collective society. While individualism is a thesis of separation, communitarianism stresses the value of connection. It emphasizes reciprocity, solidarity and co-operation, and is committed to an ethics of altruism in terms of which the interests of others make a legitimate claim on us. Thus positive obligations are not exhausted by the category of consent, since such duties may also arise from the nature of the collective enterprise itself. We are said to be joined by communal ties, not separated by the boundaries of consent, such that open-ended obligations may flow from identity and relatedness even in the absence of voluntary choice.”



law.<sup>29</sup> Such mechanical application of rules by judges has been referred to as ‘formalism’.<sup>30</sup>

While admitting that such a rigid application of rules might at times result in unfairness, unreasonableness or injustice, those who prefer this approach feel that this is a small price to pay for certainty of the law.<sup>31</sup>

### 2.3 Standards

A preference for standards as opposed to rules has been referred to as ‘pragmatism’,<sup>32</sup> ‘judicial activism’ and ‘judicial realism’.<sup>33</sup> This approach acknowledges the role of social policy in judicial decision-making. More emphasis is placed on ensuring an equitable, fair and reasonable result than on ensuring certainty of the law. Consequently social policy considerations must play a role in determining the outcome reached by the judicial officer. Since these standards or policy considerations might at times be somewhat vague and abstract, their application could result in a certain amount of uncertainty in the law. Proponents of such an approach<sup>34</sup> suggest that a little uncertainty in the law is a small price to pay for a fairer, more equitable and just system. The judge or judicial officer has a creative role to play – all facts and circumstances of a case are ascertained on a case-by-case basis and the most appropriate (in the sense of fair) standards are applied.

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<sup>29</sup> It is interesting to note that the argument that “the reality of decision making within common law involves a significant role for considerations of social policy can only increase predictability” has been convincingly put forward. See Kollmorgen and Riekert *op cit* 167ff.

<sup>30</sup> Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian Employment Law” in Mitchell *Redefining Labour Law* (1995) 167 and Cockrell *op cit* 42.

<sup>31</sup> Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40 at 43.

<sup>32</sup> *Ibid.*

<sup>33</sup> Kollmorgen and Riekert *op cit* 172.

<sup>34</sup> See for example Neels “Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg” 1999 *TSAR* 684.

### **3. Rules and Social Policy in the South African Law of Contract**

#### **3.1 Introduction**

It might prima facie appear that there is no link between rules and standards. This is not the case as most rules are created with certain policy considerations in mind. What follows is a brief overview of how certain rules in the law of contract operate to prevent bargains between individuals from being unreasonable or unfair.

The starting point in the South African law of contract is that in order for a contract to be valid there must be consensus.<sup>35</sup> Where there is no consensus there is no contract, that is, the contract is void.<sup>36</sup> The basis of liability is the individual's consent.<sup>37</sup> At common law, where consensus is obtained in an improper manner, for example where the person was coerced by some threat of violence or other deciment (duress) to enter into the contract, or the person gained the wrong impression concerning certain material facts as a result of the other party's misrepresentation, there is said to be a defect of will. Such defect of will justifies the setting aside of the contract. In other words, such a contract is considered to be 'voidable'.<sup>38</sup>

South African law has developed to allow the setting aside of a contract in cases of undue influence<sup>39</sup> and improperly obtained consent generally.<sup>40</sup> Procedural fairness refers to situations where at the time of entering into the contract there existed irregularities in the manner in which the consent was obtained.<sup>41</sup> Consent

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<sup>35</sup> Van der Merwe *et al Kontraktereg: Algemene Beginsels* (2003) 17.

<sup>36</sup> *Ibid.*

<sup>37</sup> Hence reference to the "choice theory" which has been referred to as the "quintessence of individualism," Cockrell *op cit* 48.

<sup>38</sup> Van der Merwe and Van Huyssteen "The Force of Agreements: Valid, Void, Voidable, Unenforceable?" 1995 *THRHR* 549, 565.

<sup>39</sup> See sub-heading 4.3 below.

<sup>40</sup> *Ibid* and *Plaaslike Boeredienste (Edms) Bpk v Chemfos (Bpk)* 1986 1 SA 819 (A).

<sup>41</sup> Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" *Stell LR* 1990 1, 7, 18; Grové "Kontraktuele Gebondenheid, die

obtained through duress, undue influence and misrepresentations (defects of will) refer to procedural unfairness.

A *iustus error* can result in there being no consensus and hence no contract.<sup>42</sup> This is the case where the contractant wishing to set the contract aside laboured under a misapprehension concerning the contents of the contract that is material (in other words such error goes to the very root of the contract); such misapprehension is reasonable; and is a result of the wrongful action of the other party.<sup>43</sup> In such a case there appears to be consensus but in reality there is none.

Substantive fairness, on the other hand, refers to the contents of the contract as opposed to the means used to acquire consensus.<sup>44</sup> A value judgment is made *ex post facto* in order to ascertain whether or not the contract is in the public interest.<sup>45</sup> What is in the public interest is determined with reference to vague criteria such as *boni mores*, public policy and the principles embodied in statute such as the Bill of Rights in the Constitution.<sup>46</sup> Where, for example A sells an unlicensed gun or uncut diamonds illegally to B, the maxim *ex turpi causa non oritur actio* is applicable. The contract is void because it is illegal and also because it is contrary to public policy. This is so even though both parties consented to the terms of the contract, such consent was not improperly obtained, and there was no *iustus error*. The substantive fairness of contracts is discussed in more detail *infra*.<sup>47</sup>

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Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 THRHR 687, 692; Van der Merwe and Van Huyssteen *op cit* 78.

<sup>42</sup> Grové *op cit* 693.

<sup>43</sup> See *Spindrifter v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Steyn v LSA Motors* 1994 1 SA 49 (A); *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A).

<sup>44</sup> Grové *op cit* 694.

<sup>45</sup> See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) for an overview of what is meant by ‘public interest’.

<sup>46</sup> Grové *idem*.

<sup>47</sup> See sub- heading 4.2.

Since our law of contract is premised on the classical theory of contract it follows that there is an emphasis on rules as opposed to standards (i.e. procedural fairness).<sup>48</sup> The rules that enable the setting aside of a contract on the basis that consensus was improperly obtained are discussed hereunder.

### 3.2 *Improperly Obtained Consent*

#### (a) *Misrepresentation*

Where a party enters into a contract on the basis of a misrepresentation (usually made during the course of negotiations) by the other party, and such misrepresentation results in a material error, there is no consensus. Consequently the contract is void.<sup>49</sup>

#### (b) *Duress and Undue Influence*

The doctrines of duress and undue influence were introduced to invalidate contracts where one of the contracting parties coerced or forced the other party to enter into a contract he or she would otherwise not have entered into. In such cases consent is said to have been improperly obtained in the sense that the contract was not entered into voluntarily.<sup>50</sup> Duress can either be exercised directly by threatening violence,<sup>51</sup> or indirectly by threatening some harm or prejudice,<sup>52</sup> for example the threat of prosecution,<sup>53</sup> or the threat of abandonment by a spouse,<sup>54</sup> or the threat of some kind of economic sanctions,<sup>55</sup> or civil proceedings.<sup>56</sup>

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<sup>48</sup> Van der Merwe *et al op cit* 1.

<sup>49</sup> For a detailed discussion on the elements of misrepresentation, the different kinds of misrepresentations, the remedies available to the aggrieved party, see Van der Merwe *et al op cit* 95.

<sup>50</sup> See Hawthorne "The Principle of Equality in the Law of Contract" 1995 *THRHR* 169.

<sup>51</sup> Threat of physical violence is called *vis absoluta*, see Van der Merwe *et al op cit* 85.

<sup>52</sup> A threat of harm or prejudice in order to induce another person to enter into a contract is known as *vis compulsive*, *ibid*.

<sup>53</sup> In *Ilanga Wholesalers v Ebrahim and Others* 1974 2 SA 292 (D) the creditor used the threat of criminal prosecution to induce a debtor to sign an acknowledgment of debt.

<sup>54</sup> *Savvides v Savvides* 1986 2 SA 325 (T).

<sup>55</sup> *Malilang and Others v MV Houda Pearl* 1986 2 SA 714 (AD).

At common law fraud and duress were accepted as grounds for setting aside a contract.<sup>57</sup> Towards the end of the nineteenth century a third specific ground, namely undue influence,<sup>58</sup> came to be accepted as justifying the setting aside of a contract.<sup>59</sup> Another ground, namely improperly obtained consent generally has also been accepted by the courts.<sup>60</sup> The ground for setting aside a contract in the form of improperly obtained consent generally has not been accepted without criticism.<sup>61</sup> The fact that the notion of improperly obtained consent generally is not part of our law from a historical perspective; duress and misrepresentation are sufficient to prevent such improperly obtained consent; and lastly, the fact that such notion is incapable of a precise and accurate definition resulting in uncertainty of the law, are some of the arguments levelled against the inclusion of this ground for the setting aside of contracts.<sup>62</sup>

In terms of the classical theory of contract an individual's freedom to contract is of paramount importance.<sup>63</sup> Certainty of the law is also a major policy objective. It follows that rules as apposed to standards would form the major component of such a system of law. The fact remains, however, that most rules are put in place in order to pursue some kind of policy objective. In other words rules are normally motivated by standards. Such rules, therefore, cannot be immune from values, norms and the like. The value or policy consideration applicable to the rules discussed above is the sanctity of an individual's free will. Or alternatively, as Cockrell states:<sup>64</sup> "The defences of 'misrepresentation', 'duress' and 'undue

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<sup>56</sup> *Slater v Haskins* 1914 TPD 264.

<sup>57</sup> Van der Merwe *et al op cit* 95.

<sup>58</sup> Undue influence has its origins in English law - Van der Merwe *et al op cit* 92.

<sup>59</sup> *Preller v Jordaan* 1956 1 SA 483 (A).

<sup>60</sup> See *Plaaslike Boeredienste (Edms) Bpk v Chemvos Bpk* 1986 1 SA 819 (A) where the agent of the other contracting party was bribed into consenting on behalf of his principal. Such consent was said to have been improperly obtained.

<sup>61</sup> See Van der Merwe *et al op cit* 95-98.

<sup>62</sup> *Ibid.*

<sup>63</sup> See *Bank of Lisbon and South Africa Ltd v De Ornelas & Another* 1988 (3) SA 580 (A).

<sup>64</sup> Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 at 56.

influence' may be usefully recast in the language of bona fides. It is sometimes suggested that the reason why these defences render contracts voidable is because they induce 'defects in the will' (albeit that these defects fall short of nullifying consent). But this explanation looks in the wrong place, for the better view is that the defect resides not in the promisor's will but rather in the improper conduct of the promisee. For one thing the misplaced emphasis on the promisor's will seem to be 'agent neutral' and quite unable to account for the fact that the law requires that the misrepresentation or undue influence derive from the promisee and not from a third party. These three defences are all concerned with the legitimacy of the promisee's conduct, and one way of linking them is to say that they all amount to instances of bad faith conduct from which the law will not allow the promisee to benefit."<sup>65</sup>

Whether one accepts Cockrell's argument that bona fides is the underlying value, or that the underlying value is the ability to enter into contracts freely, the result is the same – these rules are value-laden.

### 3.3 *Tacit Terms and Implied Terms*

Those who adhere to the theory of formalism<sup>66</sup> would like to believe that contractual terms are determined solely by the will or intent of the respective parties. Tacit terms are supposedly based upon the common intention of the parties.<sup>67</sup> Implied terms are implied by the law and their content is determined with reference to broad concepts such as fairness and reasonableness.<sup>68</sup> Terms that

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<sup>65</sup> A similar view is expressed by Van der Merwe and Van Huyssteen *op cit* 566: "In the final analysis, the major consideration in instances of rescission is not the integrity of the will of the aggrieved contractant, but the propriety or impropriety of the conduct which causes the defect of will. Determining impropriety requires an evaluation of the conduct by means of objective standards which serve to determine illegality, for example the boni mores, good faith and reasonableness."

<sup>66</sup> See footnote 7 *supra*.

<sup>67</sup> Examples of such terms implied by law are found in sale agreements in the seller's implied warranty against defects and in the undertaking by the lessor in a contract of lease to quiet enjoyment and absence of defects.

<sup>68</sup> Neels "Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid" (1999) *TSAR* 684 at 696. Changing socio-economic circumstances, such as amended trade practices, are relevant in this regard. See *Afrox Healthcare Bpk v*

are implied *ex lege* (or *naturalia*) need not necessarily coincide with the intention of the contracting parties.<sup>69</sup> It has been argued that such *ex lege* terms do reflect the intention of the parties since individuals wishing to exclude these terms are free to do so. This argument is not entirely convincing. This is because of the courts' general aversion to exemption clauses.<sup>70</sup> The approach of our courts is that although valid these clauses must be interpreted restrictively. This suspicion towards exemption clauses by our courts is evident in many cases<sup>71</sup> as well as the accepted rule that it is not possible to exclude liability for fraud in terms of an exemption clause.<sup>72</sup>

An attempt is also made by those who adhere to theory of formalism to ascribe tacit terms to the intention or will of the contracting parties. Such intention is said to be 'actual' or 'imputed'.<sup>73</sup> The basis for allowing such 'imputed' intention is that if the contracting parties had been alerted to the possibility of such a term at the time of entering into the contract, they would have agreed to such term. There is in other words no consent – how could there have been consent, if at the time of entering the agreement the parties did not even think of the imputed term? The absence of real consent necessitates recourse to the courts' subjective interpretation of what in its opinion the parties would have agreed to.<sup>74</sup> This in turn necessitates recourse to standards.<sup>75</sup> Neels suggests that the role of

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*Strydom* 2002 4 All SA 125 (SCA) 131 where Brand JA cites *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) at 804C-806D and *Durban's Water Wonderland (Pty) Ltd v Botha & Another* 1991 All SA 411 (1999 1 SA 982) (SCA) at 989 as authority for this view.

<sup>69</sup> Cockrell *op cit* 53.

<sup>70</sup> An exemption clause excludes a remedy that a contracting party would otherwise have had access to in terms of common law.

<sup>71</sup> See *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C) at 652-5; *Zietsman v Van Tonder en Ander* 1989 2 SA 484 (T).

<sup>72</sup> *Wells v South African Alumenite Company* 1927 AD 69.

<sup>73</sup> See Cockrell "Substance and Form in the South African Law of Contract" 1992 SALJ 53.

<sup>74</sup> See Vorster "The Basis for the Implication of Contractual Terms" 1988 TSAR 161, 163-169.

<sup>75</sup> Cockrell *op cit* 56 expressed himself thus: "In truth the absence of 'real consent' opens the door so as to allow the courts to imply those terms which are considered to be fair and reasonable, and which are then justified retrospectively as deriving



reasonableness and fairness in imputing implied and tacit terms should be openly admitted instead of concealing such role behind fictions of individualism and formalism.<sup>76</sup>

In conclusion, it appears that implied and tacit terms like the rules relating to the setting aside of contracts where consensus was ‘improperly obtained’ also have their roots in standards such as reasonableness, fairness and good faith.

### 3.4 *Estoppel and Iustus Error*

A distinction between the so-called ‘reliance theory’ and the ‘choice theory’ must be made. In terms of the choice theory liability is based on individual consent. The ‘reliance theory’,<sup>77</sup> on the other hand, has its basis on the notion that an individual should be held liable for the harm caused to others as a result of reliance on such individual’s original promise.<sup>78</sup> This theory clearly imposes liability on communitarian as opposed to individual standards. Liability is premised upon the reasonableness of such reliance. Voluntary assumption of liability can thus be negated and the party who created the wrong impression is prevented from holding the party, who reasonably relied on such impression, liable. This application of the reliance theory in South African law is called ‘estoppel’. The principle of estoppel can also function negatively in the sense that it not only can negate liability where there was consent, but it can also operate to create liability where there is no consent. This was the case in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*.<sup>79</sup>

The principle of *iustus error* can also operate to negate liability on the part of the party who made the error provided such error was reasonable or where the other

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from ‘imputed consent’: A communitarian standard for the content of contractual obligation is thus achieved while remaining true to the language of individualism.”

<sup>76</sup> *Op cit* 694-697.

<sup>77</sup> Also known as the ‘harm-to-interests theory’.

<sup>78</sup> See Cockrell *op cit* 46-50.

<sup>79</sup> 1958 2 SA 473 (A).

party unreasonably relied on the appearance of consent.<sup>80</sup> It is interesting to note that the party who is at 'fault' is penalised. Thus contractual liability has a similar basis to delictual liability and the party who is at 'fault' is held liable *ex contractu* even though there is no consent. Once again, to conclude it appears that standards in the guise of rules prevail. In the words of Cockrell:<sup>81</sup> "In the result, the principle of autonomy shades into the principle of reliance, and the ascription of responsibility is made to centre on the reasonableness of the act of reliance. This shift in emphasis allows for the imposition of community standards of tortious reasonableness in a contractual setting." And "...the intrusion of the law of negligence into the traditional domain of contract suggests the existence of a rival interpretation of obligations under which the purpose of contract is to compensate for harm caused to the interests of others and which is not exhausted by the extent of the responsibility that was voluntarily assumed. In this we can discern a collectivist standard existing alongside the rule of privity; it reflects an ethos of open-ended obligation rather than sharply defined contractual commitment."<sup>82</sup>

#### **4 Standards and Social Policy in the South African Law of Contract**

##### **4.1 Introduction**

In order for a contract to be valid it must be legal<sup>83</sup> but at times it is not all that simple to determine legality. If justice and fairness are universally accepted to be the purpose – or at least a vital part of the purpose – of any system of law,<sup>84</sup> it follows that legality should be determined with reference to a balancing of different interests – what is fair or just in term is determined by concepts such as 'public policy' and 'public interest'. These terms have not been given precise content by our courts<sup>85</sup> and are often used interchangeably.<sup>86</sup> It is trite that contracts that are

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<sup>80</sup> See *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T) and Lubbe "Estoppel, Vertrouensbeskerming en die Struktuur van die Suid-Afrikaanse Privaatreg" 1991 TSAR 1 at 15.

<sup>81</sup> *Op cit* 48.

<sup>82</sup> *Op cit* 52.

<sup>83</sup> The maxim *ex turpi causa non oritur actio* means that an illegal agreement is void and that no contract comes into being.

<sup>84</sup> Van der Merwe & Van Huyssteen *op cit* 549.

<sup>85</sup> The meaning of these concepts is discussed under the heading "Public Policy and Bona Fides" in section 4.2 *infra*.

contrary to public policy are unenforceable.<sup>87</sup> “Public policy should properly take into account the doing of simple justice between man and man”.<sup>88</sup> As such contracts including contracts of employment that if strictly applied would be unfair can be declared unenforceable by the courts.<sup>89</sup> The fact that there is an imbalance of power between the parties has been recognised as a factor to take into account in determining whether the contract is contrary to public policy. In *Afrox Healthcare Bpk v Strydom*<sup>90</sup> where Brand JA declared: “Wat die eerste grond betref spreek dit eintlik vanself dat ‘n ongelykheid in die bedingingsmag van die partye tot ‘n kontrak op sigself nie die afleiding regverdig dat ‘n kontrakbeding wat tot voordeel van die ‘sterker’ party is, noodwendig teen die openbare belang sal wees nie. Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel ‘n faktor is wat, tesame met ander faktore, by oorweging van die openbare belang ‘n rol kan speel.”

A one-sided emphasis on the protection of one of the parties’ interests at the expense of the other party, can possibly be an indication that the contract is contrary to bona fides.<sup>91</sup>

It is not denied that the *stare decisis* rule is part of our law. This fact has often been re-iterated by our judges.<sup>92</sup> Nevertheless this rule is not inconsistent with the fact that notions such as boni mores and public policy considerations, or the interests of the public one not static.<sup>93</sup> Furthermore it is the courts’ prerogative to

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<sup>86</sup> See *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 4 SA 874A 891-893.

<sup>87</sup> *Ibid.*

<sup>88</sup> Per Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 1G with reference to *Jajbhay v Cassim* 1939 AD 537 544.

<sup>89</sup> See *Katzen v Mguno* 1954 1 SA 277 (T) where Ramsbottom J held that an old African woman (of about 90 years) who was illiterate, almost deaf and blind and clearly did not understand the contract could not be liable on the contract. See also *Sasfin v Beukes (Pty) Ltd op cit* where the contract was found to be contrary to public policy and unenforceable.

<sup>90</sup> 2002 4 All SA 125, (SCA) 130.

<sup>91</sup> Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 *THRHR* 687 at 695.

<sup>92</sup> See *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) at 134-135.

<sup>93</sup> See *Carmichele v Minister of Safety and Security & Another* 2001 4 SA 938 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 All SA 421 (SCA);

develop the law.<sup>94</sup> In developing the law judges must have recourse at times vague to principles of fairness, justice, the public good, boni mores and so forth.<sup>95</sup> Instances where the courts have utilised their discretion and relaxed certain rules in the interests of justice include the following: relaxing the *in pari delicto*-rule,<sup>96</sup> recognising that if a contract is contrary to public policy it is unenforceable<sup>97</sup> and reducing a stipulated penalty to a sum the court considers being fair.<sup>98</sup>

Neels put forward the view that the court must first identify the *prima facie* legal rules applicable, and then the possible unfairness or unreasonableness in the strict application of such rules. Thereafter, it must weigh up the need for certainty of the law against the extent of unreasonableness or unfairness in the strict application of the rule in coming to its final ruling.<sup>99</sup>

#### 4.2 Public Policy and Bona Fides

The concepts of public policy and *bona fides* would qualify as standards as opposed to rules. As such they do not enjoy the same status in terms of applicability. Du Plessis and Davis state:<sup>100</sup> “It is a trite observation, however, that judges and lawyers are generally reluctant to apply such vague notions as morality and public policy – it is almost as if such principles and policies are inferior to rules. Therefore it is considered important that decisions should either be based entirely on clear rules or made to appear as such.”

The strict enforcement of contracts in terms of the classical theory of contract has no room for judicial discretion. Our courts have generally been averse to such

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*Ryland v Edros* 1996 4 All SA 557 (1997 2 SA 690 (C)); and Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg” *Stell LR* 1990 1 at 11.

<sup>94</sup> *Afrox Healthcare Bpk v Strydom op cit* 135.

<sup>95</sup> See *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W) 215 F-G.

<sup>96</sup> *Jajbhay v Cassim* 1939 AD 537; *Van der Merwe et al op cit* 152.

<sup>97</sup> *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891.

<sup>98</sup> S 3 of the Conventional Penalties Act 15 of 1962.

<sup>99</sup> Neels “Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid” 1999 *TSAR* 684 at 685.

<sup>100</sup> “Restraint of Trade and Public Policy” 1984 *SALJ* 86 at 91.

judicial discretion, and where it has been applied there have been warnings that such discretion should be applied with caution and sparingly.

This is clear from *Afrox Health Care v Strydom*<sup>101</sup> where Brand JA refers to Smalberger JA, in *Sasfin (Pty) Ltd v Beukes*,<sup>102</sup> with apparent approval: “The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ‘the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds’...In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.”

A preference for the standards of freedom of contract and certainty over equity can be gleaned from our cases.<sup>103</sup> In *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*<sup>104</sup> it was held that despite the fact that the principle of freedom of contract and *pacta servanda sunt* are not absolute values, there is no general substantive defence based on fairness since the *exceptio doli* is a

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<sup>101</sup> 2002 4 All SA (SCA) 129.

<sup>102</sup> 1989 1 SA 1 (A).

<sup>103</sup> See Hawthorne “Equality in Contract Law” 1995 *THRHR* 174 where she stated: “Most judges ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality, and continue to uphold the assumptions of the nineteenth century... Thereby they refuse to use the judicial function for measures of social and economic redistribution.” Also see *Tamarilla (Pty) Ltd v BN Artken* 1982 1 SA 398 (A); *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 1999 3 SA 389 (SCA) at 420F; *Brisley v Drotsky*, unreported, case number 432/2000 (SCA); *De Beer v Keyser and Others* 2002 1 SA 827 (SCA) 837C-E.

<sup>104</sup> 1988 3 SA 580 (A) 613.

“superfluous, defunct anachronism”.<sup>105</sup> This decision was severely criticised by many<sup>106</sup> and the concepts of public policy and *bona fides* have nevertheless subsequently been utilised to set aside contracts.<sup>107</sup> This is because as pointed out by Olivier JA,<sup>108</sup> a general substantive defence based on equity is unnecessary as all contracts are *negotia bonae fide*. Olivier JA went to great lengths to demonstrate that all contracts in our law are *bona fide*,<sup>109</sup> and that in applying the principles of *bona fides* and public policy judges are required to exercise their discretion.<sup>110</sup>

Our case law is inundated with authority for the view that the *bona fide* principle is recognised as part of our law<sup>111</sup> and this view is also generally accepted by

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<sup>105</sup> At 607B per Joubert JA.

<sup>106</sup> See Cockrell “Substance and Form in the South African Law of Contract” (1992) *SALJ* 59; Neels *op cit* 689; Glover “Good Faith and Procedural Unfairness in Contract” 1998 *THRHR* 328; Cornelius “Bepaalde Verskyningsvorme van Goeie Trou in die Kontraktereg” 2001 *TSAR* 255; Lewis “The Demise of the Exceptio Doli: Is There Another Route to Contractual Equity?” 1990 *SALJ* 26 at 30; Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” 1990 *Stell LR* 7 at 10; Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 157 at 166; Van der Merwe, Lubbe and Van Huyssteen “The *Exceptio Doli Generalis: Requiescat in Pace – Vivat Aequitas*” 1989 *SALJ* 235.

<sup>107</sup> See *Sasfin v Beukes (Pty) Ltd* 1989 1 SA 1 (A); Olivier JA’s dissenting judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (A); and *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) where it was acknowledged that public policy must take into account the necessity of doing simple justice between man and man, and a court may set a contract aside which is contrary to public policy aside.

<sup>108</sup> In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (A) at 322 F-H Olivier JA states with reference to the *exceptio doli generalis*: “Hierdie regsmiddel is in die Romeinse reg geskep deur die praetor en was daarop gemik om ‘n eiser af te weer wanneer hy ‘n geding instel wat volgens die streng reg geoorloof is, maar waar die bring van die aksie self as *dolus* beskou is. *Dolus* het hier beteken groot onbillikheid of onregverdigheid, dws strydig met die *bona fides*. So ‘n remedie was nie nodig by die *negotia bonae fidei* nie, want daar kon die *bona fides* vryelik deur die regter se diskresie tereg kom, aangesien van die regter verwag is om in elke sodanige geding die *bona fides* toe te pas. Toe alle kontrakte in die Romeins-Hollandse reg *negotia bonae fidei* geword het, het die noodsaak aan ‘n regsmiddel soos die *exceptio doli generalis* weggeval. Die regter het egter steeds die diskresie behou om *bona fides* te laat geld.”

<sup>109</sup> See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 320-326.

<sup>110</sup> *Ibid* 318-320.

<sup>111</sup> *Weinerlein v Goch Buildings Ltd* 1925 AD 282 where Wessels JA said: “The commentators put it thus: As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case



academics.<sup>112</sup> However, the exact content of the principles of bona fide and public policy remain vague.<sup>113</sup> Some writers are of the view that the principles of bona fide and public policy are distinct and separable and that transactions that are contrary to bona fide must be distinguished from those that are contrary to public policy.<sup>114</sup> It is submitted, however, that Olivier JA correctly pointed out that these two concepts are interlinked since public policy demands that the principle of bona fide be applied.<sup>115</sup> This view is also that of Lubbe who argues as follows: “Afgesien daarvan dat dit moeilik is om die grens tussen hierdie elemente te trek, opereer etiese en beleidsoorwegings nie in isolasie van mekaar nie. Dit wil voorkom asof

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against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim... It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, date back to remote antiquity and is embodied in the maxim ‘*summum jus ab aequitate dissidens jus non est*.’” In *Meskin NO v Anglo-American Corporation of SA Ltd & Another* 1968 4 SA 793 (W) at 320 G-H Jansen J put it this way: “It is now accepted that all contracts are bona fide (some are even said to be *uberrimae fidei*). This involves good faith (*bona fide*) as a criterion in interpreting a contract and in evaluating the conduct of the parties both in respect of performance and its antecedent negotiation.” See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Mort NO v Henry Shields-Chiat* 2001 1 SA 464; *Sasfin v Beukes op cit*; *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 816 (A); *Ismail v Ismail* 1983 1 1006 (A); *Mutual and Federal Insurance Co Ltd v Oudshoorn Municipality* 1985 1 SA 419 (A); *LTA Construction Bpk v Administrateur Transvaal* 1992 1 SA 473 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W).

<sup>112</sup> See Cornelius “Bepaalde Verskyningsvorme van Goeie Trou in die Kontraktereg” 2001 *TSAR* 241; Neels “Die Aanvullende en Beperkende Werking van Redelikheid in die Kontraktereg” 1999 *TSAR* 684 at 693; Glover “Good Faith and Procedural Unfairness in Contract” 1998 *THRHR* 334-335; Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” 1990 *Stell LR* 7 at 9; Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid 1998 *THRHR* 687 at 693-694.

<sup>113</sup> Brand JA in *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) at 136 refers to good faith, reasonableness, fairness and justice as ‘abstrakte idees’.

<sup>114</sup> See Kerr “Morals, Law, Public Policy and Restraints of Trade” 1982 *SALJ* 183; Trakman 1977 *SALJ* 327; Corbett 1987 *SALJ* 63; Du Plessis and Davis “Restraint of Trade and Public Policy” 1984 *SALJ* 88. See also *Afrox Healthcare Bpk v Strydom op cit* where Brand JA dealt separately with public policy and *bona fides*.

<sup>115</sup> See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1977 4 SA 302 (A) at 322 and 324.



so ‘n gefragmenteerde benadering nie meer houbaar is nie. Meer aanvaarbaar is ‘n algemene norm van openbare belang wat rekening hou met die *boni mores*, regsbeleid en statutêre verorderinge as relevante oorwegings.”<sup>116</sup>

The view that the concepts of *bona fide* and public policy should be given more concise and specific content has been put forward.<sup>117</sup> According to Olivier JA<sup>118</sup> *bona fides* is a product of the community’s perceptions of reasonableness and fairness. He stated: “Die *bona fides*, wat weer gebaseer is op die redelikeheidsopvattinge van die gemeenskap, speel dus ‘n wye en onmiskenbare rol in die kontraktereg.” Admittedly this does not bring one closer to a definitive concept. However, given the fact that public policy cannot remain static<sup>119</sup> and must changed and develop as the socio-economic milieu and even mores within the community within which it operates develop and change, it is difficult to draw up a numerus clausus of criteria that result in fairness, reasonableness, or justice i.e. criteria that are in line with *bona fide* and public policy. This is precisely why recognition of the fact that judges can and do play an activist role is inevitable.

It has been suggested that the role of *bona fide* in setting aside contracts that would otherwise be unfair or unreasonable is growing.<sup>120</sup> Cornelius<sup>121</sup> comes to this conclusion on the basis of an overview of South African case law where our courts applied the principle of good faith to contracts so as to attain a fair and reasonable result.<sup>122</sup> Grové reaches the same conclusion and concludes:

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<sup>116</sup> Lubbe *op cit* 11.

<sup>117</sup> Hawthorne *op cit* 171 and Neels *op cit* 690.

<sup>118</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO op cit* 321.

<sup>119</sup> Lubbe *op cit* 11 and *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891 where it was stated that “opvattinge oor wat die openbare belang is of wat die openbare beleid vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander”.

<sup>120</sup> Cornelius *op cit* 255 and Grové *op cit* 695.

<sup>121</sup> *Ibid.*

<sup>122</sup> Amongst the cases discussed are *Katzen v Mguno* 1954 1 SA 277 (7) and *Eerste Nasionale Bank v Saayman NO op cit*. These cases both dealt with a situation that involved an imbalance of bargaining power between the parties and an exploitation of the situation. In both cases the terms of the contract were not applied because to do so would be unfair and contrary to public policy. This is particular relevant for

“Wat wel duidelik is, is dat die begrip ‘redelikheid’ in die toekoms ‘n baie groter rol in ons kontraktereg gaan speel.”<sup>123</sup>

The view that the Constitution, in providing for the right to equality, is going to result in an increased role played by the concepts of bona fide, fairness, justice and the like in the law of contract has been adhered to *inter alia* by Hawthorne,<sup>124</sup> Neels,<sup>125</sup> and Van der Merwe and Van Huyssteen.<sup>126</sup> The constitutional right to fair labour practices<sup>127</sup> is obviously of great relevance to the contract of employment. In *Denel (Pty) Ltd v Vorster*<sup>128</sup> Nugent JA, after noting that section 39(2) of the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights, ruled as follows with reference to the constitutional right to fair labour practices: “If the new constitutional

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the contract of employment due to the inherent imbalance of power between employer and employee.

<sup>123</sup> Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid “ 1998 *THRHR* 687 at 696.

<sup>124</sup> Hawthorne in “The Principle of Equality in the Law of Contract” 1995 *THRHR* 157, after having discussed the concept of equality and the classical theory of contract, demonstrates that the classical theory of contract, which still forms the basis of our law, is incapable of ensuring equality. This is so because “classical theory does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract” (166). After demonstrating that “mechanisms to guarantee equality” (175) from part of South African law, the submission is made that the constitutional right to equality will have a significant impact on the law of contract by increasing the role played by the concepts of fairness and bona fide.

<sup>125</sup> Neels “Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid” 1999 *TSAR* 684 where he states: “Mede as gevolg van sekere bepalings in die grondwet, is dit waarskynlik dat die invloed van redelikheid en billikheid in Suid-Afrikaanse reg sal toeneem.”

<sup>126</sup> Van der Merwe and Van Huyssteen “The Force of Agreements: Valid, Void, Voidable, Unenforceable?” (1995) *THRHR* 549 at 550 express themselves as follows: “In a system of law within a constitutional state the process of balancing interests must take place within the framework of the constitution and will regard for the principles and values of the broader society which are reflected in the constitution. In the sphere of contract these principles and values may receive effect mainly in so far as they are subsumed in rules and principles of private law, and particularly contract law, such as the concepts of ‘public policy and public interest’ and ‘reasonableness and good faith’.

<sup>127</sup> The topic of discussion in ch 8 *infra*.

<sup>128</sup> *Op cit* 2004 *ILJ* 659 (SCA).

dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect.” In *Fedlife Assurance Ltd v Wolfaardt*<sup>129</sup> the constitutional right to fair labour practices was read into the contract of employment as an implied term.

A somewhat different approach is taken by Brand JA in the *Afrox Healthcare* case.<sup>130</sup> With reference to section 39(2) of the Constitution<sup>131</sup> which requires that in developing the common law, the courts must promote the spirit of the Constitution, the court cited Cameron AR in *Brisley v Drotsky*<sup>132</sup> with apparent approval: “Public policy...nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise ‘public policy’ is now rooted in our constitution and the fundamental values it enshrines” and “The Constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perspective restraint...contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity”.<sup>133</sup> Brand JA then went on to hold that *in casu* the term of the contract was not contrary to public policy by attaching more weight to the principle of freedom of contract than the principle of equity.

## **5 Conclusion**

The law of contract as taught in most South African textbooks does not reflect the reality of how the law of contract has been interpreted by our courts.<sup>134</sup> Hawthorne ascribes this fact to “socio-economic developments, for example the concentration

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<sup>129</sup> [2001] 12 BLLR 1301 (A).

<sup>130</sup> 2002 4 All SA 125 (SCA).

<sup>131</sup> Act 108 of 1996.

<sup>132</sup> Unreported, case number 432/2000.

<sup>133</sup> 133(b).

<sup>134</sup> See Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 164 at 166.

of power in business and industry, the increasing awareness of fundamental human rights and the expansion of the functions of state”.<sup>135</sup>

Reasonableness and fairness can be said to have grown to the stature of legal rules. This is because they are the “basic materials used in judicial decisions”.<sup>136</sup> As has been demonstrated above legal rules have their origins in principles and standards and the point has been made that the distinction between rules and standards is sometimes blurred.<sup>137</sup> Further emancipation of society in the light of our progressive constitution will contribute to increasing the potential part to be played by fairness and justice in our law of contract. Hopefully judges in the future will use their discretion imaginatively to create a body of precedent that will ensure fairness where there is an inherent imbalance of power between the parties such as in a contract of employment.

## **C England**

### **1 Introduction**

From 1981-2001, the coverage of collectively bargained agreements in England declined from 83% of the workforce to 35% of the workforce.<sup>138</sup> This has resulted in an increase in the use of individual employment contracts for setting terms and conditions. The renewed importance of the common law for the protection of employees has been acknowledged by the judiciary. In the case of *Johnson v Unisys Ltd*<sup>139</sup> Lord Steyn made the remark that as a result of the decreasing coverage of collective bargaining: “...individual legal rights have now become the main source of protection of employees.” The inherent imbalance of power in the employment relationship has resulted in a situation where management often imposes its own terms and conditions on the employee in a standardised contract

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<sup>135</sup> *Ibid.*

<sup>136</sup> Du Plessis and Davis “Restraint of Trade and Public Policy” 1984 *SALJ* 86 at 90.

<sup>137</sup> See Van der Merwe and Van Huyssteen *op cit* 567.

<sup>138</sup> Hepple and Morris “The Employment Act 2002 and the Crisis of Individual Employment Rights” 2002 *ILJ* (UK) 245 247.

<sup>139</sup> (2001) 2 All ER 801 at 811.

on a take it or leave it basis.<sup>140</sup> Consequently, the need to strengthen, ameliorate and enforce individual rights has come to the fore. Recent court decisions (which are discussed hereunder) have developed the common law by the use of implied terms, most notably the duty to maintain trust and confidence, in order to address the *lacuna* created by the de-collectivisation of employment relations.

Extensive statutory regulation in the 1970's led many labour lawyers to believe that the contract of employment had a minimal role to play in the regulation of the employment relationship. Many share the view that the contract of employment is not the appropriate vehicle for the pursuance of justice due to the imbalance of power inherent in the employment relationship.<sup>141</sup> However, as is the case in South African law, one cannot escape from the fact that the individual contract of employment forms the basis of the employment relationship. The combined effect of deregulation and the general decline of trade unions have re-established the importance of the individual contract of employment in regulating employment relations.

## **2 Public Policy**

Usually the starting point of any discourse concerning English labour law is the written works of Kahn-Freund.<sup>142</sup> Kahn-Freund's view was that the contract of employment is a fiction of real agreement since the imbalance of power inherent in the relationship renders any meaningful negotiation between the employer and an

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<sup>140</sup> Deakin "Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 130-131.

<sup>141</sup> Freedland "The Role of the Contract of Employment in Modern Labour Law" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 17 where he states: "Labour lawyers tended to conclude that the statute law had almost comprehensively superseded the common law as the regulatory structure for the individual employment relationship, largely reducing the law of the contract of employment to the status of an interpretative jurisprudence for the relevant statute law. From that perspective the main role of the law of contract of employment had become that of telling you to which workers the statutory regulations applied and what meaning to attach to concepts such as dismissal."

<sup>142</sup> Freedland *op cit* 17.

individual employee impossible. The obvious result is that the employer is almost at liberty to impose any conditions of employment on the employee.<sup>143</sup>

The English law of contract is characterized by the underlying principle that contracts should be fair. This truism is aptly expressed in the following *dictum* of Bingham LJ: "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing. English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."<sup>144</sup>

One of the consequences of the principle of 'fair play' is the doctrine of inequality of bargaining power. This doctrine is especially relevant in the context of a contract of employment given the inherent imbalance of power between employer and employee. Lord Denning proposes this doctrine as follows: "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."<sup>145</sup>

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<sup>143</sup> Wedderburn *The Worker and the Law* 3<sup>rd</sup> ed (1986) 326-343.

<sup>144</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) 1 QB 433 at 439.

<sup>145</sup> *Lloyds Bank Ltd v Bundy* (1975) QB 326 (CA) 339, (1974) 3 All ER 757 765d-f.

The doctrine allows the contractant to rescind from the contract in circumstances where the contract's terms were unfair because of the contractant's bargaining power being impaired by personal circumstances such as poverty and ignorance.

Despite these principles and doctrines, there is still uncertainty as to whether the contract of employment is a contract of good faith.<sup>146</sup> This is discussed under the next section.

### **3 An Implied Term of Mutual Trust and Confidence**

#### **3.1 Introduction**

*Malik v Bank of Credit and Commerce International*<sup>147</sup> is the *locus classicus*<sup>148</sup> for authority that in all employment contracts there exists an implied term of trust and confidence.<sup>149</sup> Lord Steyn described the implied term, in this decision, as follows:

“The employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”<sup>150</sup> In this case, the plaintiff employees were dismissed on redundancy grounds. They claimed that the bank had breached the implied term of trust and confidence by running its business in a corrupt manner. Consequently, they argued, their long association with the bank had seriously decreased their job prospects due to the stigma, which now attached to the bank and its ex-employees.

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<sup>146</sup> Brodie “Beyond Exchange: The New Contract of Employment” 1998 *ILJ* (UK) 76 at 86-87.

<sup>147</sup> 1997 IRLR 462.7

<sup>148</sup> The notion of this implied term however did not make its first appearance in the *Malik* case. See Lindsay “The Implied Term of Trust and Confidence” 2001 *ILJ* (UK) 2-3 and Brodie *op cit* 81-84 for a discussion of previous cases where this implied term of trust and confidence was considered.

<sup>149</sup> In *Imperial Group Pension Trust v Imperial Tobacco Ltd* 1991 IRLR 66 70, Browne-Wilkinson J said: “In every contract of employment there is an implied term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

<sup>150</sup> Par 8.



The argument that, since the dishonest conduct was aimed at the bank's clients and not the employees, it did not constitute a breach of the implied term of trust and confidence was rejected. It was held that this dishonest conduct was nevertheless likely to undermine the trust and confidence required in an employment relationship.

In *Bank of Credit and Commerce International SA (in liq.) v Ali*<sup>151</sup> on the basis of *Malik*, a 'stigma' claim was brought against an employer for conduct that took place before the *Malik* decision even though stigma claims were not known to exist until that decision in 1997. The employees had received an additional redundancy payment 'in full and final settlement of all or any claims' which they might have against the bank. The employees argued that at the time they signed the release they had no idea of the corrupt manner in which the bank had conducted its business and that they could therefore not be held bound by the release. On the basis of *Malik*, the employees argued that the bank had breached the implied term of trust and confidence by not disclosing its fraudulent conduct to them. Lightman J referred to the case of *Bell v Lever Brothers Ltd*<sup>152</sup> where there was found to be no duty of disclosure in an employment contract since the contract of employment is not a contract *uberrimae fidei*, and concluded that the bank had not breached its obligation of trust and confidence by not disclosing its fraudulent conduct to the employees.

In the second case involving the same parties, *Bank of Credit and Commerce International SA (in liq) v Ali (No 2)*<sup>153</sup> Lightman J considered the decision of the House of Lords in *Malik* and concluded that the bank's fraudulent conduct was sufficiently serious to constitute a breach of the trust and confidence term. In other words, even though failure to disclose the fraudulent conduct did not constitute a breach of the implied term of trust and confidence, the conduct itself did constitute

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<sup>151</sup> (1999) 2 All ER 1005.

<sup>152</sup> (1932) AC 1 (1931) All ER Rep 1.

<sup>153</sup> (1999) 4 All ER 83.

such a breach. However, he held that the claim should fail because the wording of the release was sufficiently broad to include this claim.

The Court of Appeal<sup>154</sup> reversed Lightman J's decision. Even though a majority of the Court of Appeal was in agreement with Lightman J that the language of the release was sufficiently comprehensive to embrace the claim, they found it to be unconscionable to allow the bank to rely on the release in order to bar the claim.

In *Bank of Credit and Commerce (in liq) v Ali and Others*,<sup>155</sup> the bank's liquidators appealed to the House of Lords. The appeal was dismissed (Lord Hoffman dissenting), on the basis that the release could not be construed as including claims which at the time of entering into the contract, the parties could not possibly have contemplated. What is of relevance is that it seems to have been accepted by the courts that fraudulent or dishonest means of conducting business can be construed as a breach of the implied term of trust and confidence rendering the employer vulnerable to a claim for damages because of such breach.

The content and scope of this implied obligation of mutual trust and confidence has been examined in a number of cases.<sup>156</sup> Of great significance is the case of

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<sup>154</sup> (2000) 3 All ER 51, (2000) ICR 1068.

<sup>155</sup> (2001) 1 All ER 961 (HL).

<sup>156</sup> In *University of Nottingham v Eyett* (1999) 2 All ER 437 it was held that the university did not breach the implied term of trust and confidence by a failure to inform the employee that he would have received a higher pension if he had worked for an extra month. In *Johnson v Unisys Ltd* (2001) 2 All ER 801 the employee claimed that the manner in which he was dismissed caused him to suffer a nervous breakdown thus impairing his ability to find work. He relied on the implied term of trust and confidence contending that the employer had breached that term by not giving him a fair hearing and by breaching its disciplinary procedure. The House of Lords dismissed the claim on the basis that since statute provided a remedy for unfair dismissal and he had already been compensated in terms thereof, a common law right to recover financial loss resulting from the manner of dismissal would be inconsistent with the statutory regime of unfair dismissal. This decision has been criticized for preventing the common law from developing so as to "reflect modern perceptions of how employees should be treated fairly and with dignity." (Collins 2001 *ILJ* 305). In other words it appears that employees might be better protected in circumstances where there is no applicable legislation (see Hepple and Morris "The Employment Act 2002 and the Crisis of Individual Employment Rights" 2002 *ILJ* (UK) 245 at 247).

*Lewis Motorworld Garages*.<sup>157</sup> In this case the employer had unilaterally changed the terms and conditions of employment. The employee had tacitly accepted the change. The employer was prevented from relying on the employee's tacit acceptance on the basis that its conduct amounted to a breach of the implied term of trust and confidence.

The case of *O'Brien v Transco plc (formerly BG PLC)*<sup>158</sup> is applicable *in casu*. In this instance, O'Brien, who was initially employed by BG through an agency in 1995, was not offered the same enhanced redundancy terms as the other 'permanent employees' on the basis that BG did not consider him to be a 'permanent employee'. O'Brien brought a claim against BG on the basis of a breach of the implied term of trust and confidence. The employment tribunal found, as a preliminary issue, that O'Brien did qualify as a permanent employee and that by not offering him the same redundancy terms as the other employees BG had breached its duty of trust and confidence. This finding was upheld by both the Employment Appeal Tribunal (EAT)<sup>159</sup> and the Court of Appeal. The Court of Appeal held that if the effect of the conduct, or its likely effect were to destroy or seriously damage trust and confidence, then there would be a *prima facie* breach of the implied term of trust and confidence. Once a *prima facie breach* is identified, the second stage of the enquiry is the determination of whether the employer acted without 'reasonable or proper cause'. The fact that BG held the belief that O'Brien was not a permanent employee was held not to justify the breach.

The consequence of this two-stage enquiry is that: "whether or not the employer had reasonable or proper cause to act as it did will inevitably impact on the effect the conduct had on trust and confidence. Similarly, the question of whether the employer had reasonable and proper cause for certain conduct must be considered in the light of the impact that that conduct had on the employee."<sup>160</sup>

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<sup>157</sup> (1985) IRLR 445.

<sup>158</sup> (2002) All ER (D).

<sup>159</sup> (2001) All ER (D) 169.

<sup>160</sup> Fisher and Biddle "Is there an Obligation of Fair Dealing to Employees?" May 2002 *All England Legal Opinion* 18 9.

This implied term of trust and confidence is a fundamental term. Consequently, any breach thereof will constitute a material breach of contract.<sup>161</sup> The purpose of the implied obligation is to “ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship.”<sup>162</sup> Such obligation therefore, is not limited to unacceptable conduct during the course of the relationship.

### 3.2 Contracting Out of Implied Terms

The traditional or “orthodox view is that this implied obligation may be displaced or qualified by express agreement or necessary implication.”<sup>163</sup> However, a different view has been convincingly argued by Brodie.<sup>164</sup> It was contended in *Johnstone v Bloomsbury HA*<sup>165</sup> that there is a difference between terms implied in fact and terms implied in law. Where the term is implied in fact it can be contracted out of by an express term. Where, however, the term is implied in law, it cannot be overridden by an express term. This distinction, however, has been rejected as having “no basis in authority”.<sup>166</sup> Perhaps the distinction that was alluded to in the *Johnstone* case was that described in *Scally v Southern Health and Social Services Board*.<sup>167</sup> In this case Lord Bridge identified two types of implied terms: the first type must satisfy the conventional requirements for implied terms, namely, that the term must be reasonable and equitable, it must be necessary from a business efficacy point of view, it must be obvious and it must be capable of clear expression.<sup>168</sup> The second kind of implied term is “based on wider considerations,

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<sup>161</sup> Fisher and Biddle *op cit* 8; see also *Courtlands Northern Textiles v Andrew* (1979) IRLR 84.

<sup>162</sup> *Johnson v Unisys Ltd* (2001) All ER (HL) 801 813 per Lord Steyn

<sup>163</sup> Per Lord Steyn in *Johnson v Unisys Ltd op cit* 809.

<sup>164</sup> See Brodie “Beyond Exchange: The New Contract of Employment” 1989 *ILJ* (UK) 76.

<sup>165</sup> (1991) ICR 269 276-277

<sup>166</sup> Brodie *op cit* 83.

<sup>167</sup> 1999 IRLR (HL) 522, 525.

<sup>168</sup> Lindsay “The Implied Term of Trust and Confidence” 2001 *ILJ* (UK) 2.

for a term which the law will imply as a necessary incident of a definable category of contractual relationship.”<sup>169</sup> Lord Steyn referred to this kind of implied term in the *Malik* case where he stated that this kind of implied term arises as an “incident of all contracts between employer and employee.”<sup>170</sup> Oddly, in an *obiter dictum*, Lord Steyn, in the same case, stated, “...implied terms operate as default rules. The parties are free to exclude or modify them.”<sup>171</sup> However, as Lindsay points out:<sup>172</sup> If a term is an incident of all contracts, how is it possible to contract out of such term?

If the contract of employment is classified as a *bona fide* contract it would not be possible to contract out of the implied term of trust and confidence, since such term would go to the very root of the contract. As seen above, the judiciary has perceived the implied term as material term going to the very root of the contract,<sup>173</sup> as an incident of every contract of employment,<sup>174</sup> and has even described this term as the “implied obligation of good faith”.<sup>175</sup> Lord Steyn, in *Johnson v Unisys Ltd*, said: “It could also be described as an employer’s obligation of fair dealing”.<sup>176</sup> Also, the fact that the employer was precluded from relying on general principles of contract law because it had breached the implied term of trust and confidence in *Lewis v Motorworld Garages*<sup>177</sup> is most significant in the introduction of an element of good faith in the contract of employment. So too is the decision of *Scally v Southern Health and Social Services Board*,<sup>178</sup> where without making mention of an implied obligation of trust and confidence it was held that the employer owed the employee a duty of disclosure with reference to concerning employees rights to purchase added years of pensionable service.

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<sup>169</sup> *Scally v Southern Health and Social Services Board* 1999 IRLR (HL) 522 at 525.

<sup>170</sup> Lindsay *op cit* 10.

<sup>171</sup> *Malik op cit* 15.

<sup>172</sup> Lindsay *op cit* 10.

<sup>173</sup> *Courtlands Northern Textiles v Andrew op cit* 86.

<sup>174</sup> *Malik op cit* 15.

<sup>175</sup> *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* (1991) 1 WLR 589.

<sup>176</sup> *Op cit* 813.

<sup>177</sup> *Op cit*.

<sup>178</sup> *Op cit*.

Another way of preventing the contracting out of the implied term of trust and confidence would be to argue as Brodie<sup>179</sup> does that such prevention is based on public policy considerations. He believes that in situations where there exists an inequality of bargaining power “it is appropriate that implied terms, of fact or law, operate as default rules.”<sup>180</sup> The judiciary has been a most willing partner in pointing out the renewed relevance of insisting on the implied term of trust and confidence in order to protect the employee. For example Lord Steyn in *Johnson v Unisys Ltd*, stated: “...the need for implied terms in contracts of employment protecting employees from harsh and unacceptable employment practices. This is particularly important in the light of the greater pressure on employees due to the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets.”<sup>181</sup>

#### **4 Atypical Employees**

The question whether the implied term of trust and confidence should also apply to contracts entered into by atypical employees is not certain. The rising number of atypical employees have led academics<sup>182</sup> as well as the judiciary<sup>183</sup> to conclude,

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<sup>179</sup> Brodie *op cit* 83-85.

<sup>180</sup> *Ibid* 85.

<sup>181</sup> 2001 (2) All ER 801 at 809.

<sup>182</sup> Lindsay *op cit* 11 where he states: “There are plenty of agencies willing to supply companies with workers...There are plenty of workers who find that form of self-employment the best or the only course open to them. There are plenty of companies who find it cheaper and easier to pay the Agency (which of course, adds its own costs and profits to the costs it incurs in paying the worker) rather than bearing the pension NIC, holiday pay, sickness and other expenses that it incurs in relation to its employees. The employer also hopes to gain the convenience of the ability to procure the equivalent of an instant dismissal and the avoidance of redundancy money. The growth in this form of employment has been remarkable. There is an irony that almost any new enhancements of employees’ terms of employment, which almost invariably add to the cost of employing someone, risk driving more people into this particular form of self-employment. A perpetuated exclusion of all the self-employed from the benefits of the implied term would leave a huge number unprotected and could even, of itself drive more into this form of self-employment.” See also Freedland “The Role of the Contract of Employment in Modern Labour Law” in Betten *The Employment Contract in Transforming Labour Relations* (1995) 21 where it is suggested that “the law of the contract of employment ought to cover the territory of work relationships more broadly.”

on public policy grounds that the term of trust and confidence should also be implied in contracts involving atypical employees.

## 5 Conclusion

Despite the decision of the House of Lords in *Bell v Lever Brothers*<sup>184</sup> where it was held that the employee was under no obligation to disclose his own misconduct to the employer since the contract of employment was not a contract of *uberrimae fides*, as seen above, there are many judicial references to the concept of good faith with reference to the contract of employment. It should be borne in mind that this case was decided in 1932 and it is common knowledge that employment relations have changed dramatically since then.<sup>185</sup> Brodie<sup>186</sup> describes the reasoning in this case as ‘outmoded’ as does Freedland.<sup>187</sup> As Brodie<sup>188</sup> points out, “Bell has already been distinguished in *Sybron Corp v Rochem*<sup>189</sup> where it was held that in certain circumstances, an employee may be under a duty to report the misconduct of fellow employees. Crucially, where such a duty arises the employee is still obliged to report even where he will incriminate himself. It has been said that *Sybron* confirms ‘...the existence of a developing judicial creativeness so far as the fiduciary obligations of employees are concerned, especially where they are senior employees in high trust roles.’”

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<sup>183</sup> In *Spring v Guardian Assurance plc* (1994) ICR 596 (House of Lords), even though the judges were uncertain and even at variance with each other as to whether a contract of employment existed between the parties, they held that the company was bound by the standard of obligation present in contracts of employment. See also *O’Brien v Transco plc (formerly BG plc)* (2002) All ER (D) 80.

<sup>184</sup> (1932) AC 1.

<sup>185</sup> Lord Hoffmann, in *Johnson v Unisys Ltd op cit* 815-816, describes such change as follows” “but over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but also an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality.”

<sup>186</sup> *Op cit* 88.

<sup>187</sup> Freedland “High Trust, Pensions, and the Contract of Employment” 1984 *ILJ* (UK) 25, 31.

<sup>188</sup> Brodie *op cit* 89.

<sup>189</sup> (1983) ICR 801.



The creativity judges are entitled, perhaps even obliged to display in order to achieve equity has often been referred to by the judiciary. For example, Lord Nicholls in *Bank of Credit and Commerce International SA (in liq) v Ali*<sup>190</sup> cited Wigmore's observation that the law of interpretation had progressed "from a stiff and superstitious formalism to a flexible rationalism"<sup>191</sup> and concluded that: "today there is no question of a document having a legal interpretation as distinct from an equitable interpretation." In applying the common law to the prevailing socio-economic milieu, it appears that judges have introduced "a significant element of good faith into the regulation of the employment relationship."<sup>192</sup>

## D Australia

### 1 Introduction

General principles of the law of contract have been relatively insignificant in shaping employment relations in Australia since the beginning of the 20<sup>th</sup> century.<sup>193</sup> This is because "as the 20<sup>th</sup> century progressed, the common law principles, and indeed the contract of employment itself, were increasingly marginalised in practical terms by the emergence of State and Federal systems of compulsory conciliation and arbitration."<sup>194</sup> In the 1980's as a result of the growing globalisation and internationalisation of product and service markets, as well as the recession experienced by most major economies, the collective industrial relations system of compulsory conciliation and arbitration was seen by many as

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<sup>190</sup> *Op cit* 971.

<sup>191</sup> Chadbourn (ed) *Wigmore on Evidence* (1981) vol 9 (Chadbourn revision) par 2461.

<sup>192</sup> Brodie *op cit* 79.

<sup>193</sup> Chin "Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism" 1997 *Australian Journal of Labour Law* 257 at 258 where the author states: "From the beginning of this century the common law contract of employment has lain submerged between accretive layers of Commonwealth and state compulsory arbitration machinery. Arbitration, and the consequent subordination of the common law governing the individual employment relationship, was a fundamental tenet of the national consensus that attended Federation in 1901 and which endured until recent years. This consensus, dubbed by one commentator the 'Australian Settlement', revolved around the twin pillars of industry protection and centralised wage fixation."

<sup>194</sup> Creighton and Mitchell "The Contract of Employment in Australian Labour Law" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 133. See 133-136 for a discussion of the history and reasons for the evolution of such system.

an impediment to economic growth and recovery. Consequently,<sup>195</sup> the legislature saw fit to “decentralise workplace bargaining and to de-collectivise industrial relations by diminishing the role of trade unions and promoting individual contracts.”<sup>196</sup>

Nevertheless, as in English law, the contract of employment has always formed the basis or foundation of any employment relationship. As such, Australian commentators have described the contract of employment as the ‘cornerstone’ of Australian labour law.<sup>197</sup> In the light of the individualization of employment relations in Australia<sup>198</sup> and the fact that the contract of employment forms the basis of the relationship it is not surprising that the contract of employment should gain more relevance in setting terms and conditions in the employment relationship.

## **2 Good Faith as an Underlying Philosophy in the Law of Contract**

There is much scepticism concerning the ability of the law of contract to redress the inherent imbalance of power between employer and employee.<sup>199</sup> Generally, the common law is not concerned with the fairness of the substantive content of a contract.<sup>200</sup> The traditional emphasis on the freedom of contract usually leads to the conclusion that the parties can agree to anything as long as they do not agree to something that is unlawful or contrary to public policy.

However, it may under certain circumstances be possible to escape the provisions of an unfair bargain, for example, where there was some form of procedural unfairness when the contract was entered into in that consent was improperly obtained because of undue influence or duress. One of the obstacles identified is the courts’ insistence on something more than inequality of bargaining power in

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<sup>195</sup> See section on Australia in ch 6 *supra*.

<sup>196</sup> Chin *op cit* 260.

<sup>197</sup> Creighton and Mitchell *op cit* 136-137.

<sup>198</sup> For a brief discussion of the legislative changes see Chin *op cit* 260-265.

<sup>199</sup> Chin *op cit* 272-279, Stewart “The Legal Framework for Individual Employment Agreements in Australia” in Deery and Mitchell *Employment Relations- Individualisation and Union Exclusion* (1999) 24-25 and Creighton and Mitchell *op cit* 141-147.

<sup>200</sup> Creighton and Mitchell *op cit* 143.

order to grant relief to a victim of an unfair bargain. Usually the courts have required, in addition to unequal bargaining power, some form of ‘unconscionable conduct’ on the part of the dominant party.<sup>201</sup> Another stumbling block is the fact that the courts have required that the ‘illegitimate pressure’ placed on the party must have rendered the party incapable of exercising free will in order for a contract to be vitiated on the basis of undue influence or duress.<sup>202</sup> Chin therefore concludes that “...the problem lies in the extent of pressure which the law is prepared to countenance. On closer inspection it appears the law has a high tolerance indeed.”<sup>203</sup>

However, in the light of the fact that much of the protection enjoyed by employees in terms of the compulsory arbitration system has been removed, it is hoped that the judiciary will be innovative and mould the common law in order to adapt it to the changed, prevailing socio-economic circumstances. Social policy has always played a crucial role in judicial decision-making.<sup>204</sup> Cause for optimism is to be found in the malleability of the common law. In the words of Owens: “Much can be achieved legislatively but legislation is constituted by words, denoting categories and demarcating boundaries. There is a limit to legislation, but there is no limit to law. The structure of the common law recognizes no boundaries. Thus, the great advantage of the common law is its ability to respond precisely to changing contexts in its delivery of individual justice. The greatest failure of labour law is to have lost sight of this. In fact, in recent times the common law has been treated as if it were legislation so that it has become unnecessarily rigid, seemingly unable to adapt to changing contexts. With few exceptions the common law of work relationships has been confined behind artificial borders.”<sup>205</sup> The most exciting common law transformation in response to the changing world of work, as in

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<sup>201</sup> See Chin *op cit* 273, Stewart *op cit* 24 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 459, *Webb v Australian Agricultural Machinery Pty Ltd* (1990) 6 WAR 305 312-13.

<sup>202</sup> Stewart *op cit* 24.

<sup>203</sup> *Ibid* 273.

<sup>204</sup> See Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian employment Law” in Mitchell *Redefining Labour Law* (1995) 167-198.

<sup>205</sup> “The Traditional Labour Law Framework: A Critical Evaluation” in Mitchell *Redefining Labour Law* (1995) 17.

England, has been the recognition that there is an implied obligation not to damage or destroy the trust and confidence between the parties and thereby undermine the employment relationship.<sup>206</sup>

### **3 Conclusion**

Despite the high costs of litigation<sup>207</sup>, the potential of this implied term to redress the imbalance of power between the parties should not be overlooked.<sup>208</sup> The fact that the courts have adhered to a formalistic approach in the past does not necessarily rule out the possibility of the judiciary adopting an approach that is more appropriate to the changing world of work and the current socio-economic circumstances. There are no reasons why the scope of this implied obligation should not be extended to cater for different circumstances, and be extended in order to offer protection for atypical employees as well.

## **E United States of America**

### **1 Introduction**

There are various sources giving rise to obligations between employers and their employees. Arnow–Richman stated as follows in this regard: “Modern employment is a multi-faceted relationship comprised of far more than the exchange of money for labour. Employers typically make other commitments to workers besides the promise of pay. They offer opportunities for extra- wage compensation and benefits, such as pensions, bonuses, and health insurance, which are administered through written policies that create expectations, if not legal entitlements, among participating workers. They also make informal promises through their managers and other agents who may provide assurances of long-term work, opportunities for training and development, and future promotions and advancements. Similarly employees know that they must do more than simply

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<sup>206</sup> *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR at 144; *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186 at 191.

<sup>207</sup> See Chin *op cit* 272-278.

<sup>208</sup> See Christie “The Contract of Employment and Workplace Agreements: A Commentary” in Ronfeldt and McCallum (eds), 1993 ACIRRT Monograph No 9 1993 where the prospect of the courts developing a general duty of good faith in the employment relationship is discussed.

show up to work to receive the benefits of employment. Many employers issue personnel handbooks that promulgate disciplinary rules, company procedures, and policies on everything from tardiness to conflicts of interest.<sup>209</sup> .....Employees anticipate that their work obligations will develop and change over time, and they know they must oblige instructions and assignments that may exceed the bounds of any static job description. In return they expect employers to abide by the letter and spirit of their official and unofficial promises, exercising managerial discretion equitably and making exceptions to the company policy where appropriate.”<sup>210</sup>

Given the multiple sources of these obligations, the courts are faced with a formidable task when a dispute arises as to the exact content of these obligations. In answering these questions the American courts have historically turned to the rules of the law of private contracts.<sup>211</sup>In doing so the courts have faced the following policy choice: “Whether the court is only an agent of the contract called upon consequently to apply the intent of the parties even though the terms may have been stated unilaterally and irrespective of what they provide; or whether the court, as a public body, is bound by larger societal values to construe, to limit, or even to nullify contract terms in order to lessen overreaching or an abuse of power, even where expressly reserved...though the tension between positivism and the public function is inevitable and abiding, there is no dispute that the latter is permissibly performed in appropriate cases; the tension lies in deciding what those circumstances are.”<sup>212</sup>

What follows is an overview of the way the courts have managed to come to the assistance of employees in cases where the courts deemed it necessary to do so.

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<sup>209</sup> Discussed *infra*, under the heading “Employer Rules and Policies”.  
<sup>210</sup> “The Role of Contract in Modern Employment Relationships” 2003 *Texas Wesleyan Law Review* 1.  
<sup>211</sup> *Ibid* 2.  
<sup>212</sup> Finkin “Regulation of the Individual Employment Contract in the United States” in Betten *The Employment Contract in Transforming Labour Relations* (1995) 167.

## **2 The Rules of the Private Contract Law**

### *2.1 Introduction*

Finkin has identified and examined “six areas that supply a kind of legal framework of the common law of contract; (1) offer and acceptance; (2) requirement of a writing; (3) consideration; (4) definiteness of terms; (5) ‘illusory’ promises; and, (6) unilateral modification.”<sup>213</sup> The way the courts have interpreted these rules provides insight as to how the courts have made use of the common law of contract in order to protect the interests of the employee against employer abuse of power. They are discussed in turn below.

### *2.2 Offer and Acceptance*

A requirement for the creation and validity of a private contract is the existence of mutual assent.<sup>214</sup> The courts, in determining the existence of consensus, or the existence of an offer and an acceptance (mutual assent), have adopted a rather flexible approach. As Finkin states: “There is no doubt, however, that a manager’s statements made with actual or even only ‘apparent authority’ on the part of the employer and conveying a commitment of sufficient definiteness – most often a concomitant on compensation or, less often, to job security – can supply a term of the employment which, if accepted by the applicant or employee, rises to a contractual commitment.”<sup>215</sup> In most jurisdictions the terms of a written contract may be altered orally. Consequently, where companies have attempted to exclude contractual liability for such statements by requiring all agreements to be in writing and signed by a designated company officer, it is likely that this limitation will be of no force and effect.<sup>216</sup>

Contracts can be created orally or tacitly. An employer’s well established practice with reference to severance pay, leave pay and bonuses has been taken to be

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<sup>213</sup> *Ibid* 172-177.

<sup>214</sup> Arnow-Richman *op cit* 2.

<sup>215</sup> Finkin *op cit* 172-173.

<sup>216</sup> *Idem*.

sufficient to establish a mutual assent and consequently a contractually binding term.<sup>217</sup>

### 2.3 *Contract Must be in Writing*

Most states have legislation to the effect that in order for a contract that is to last for longer than a year to be enforceable it must be in writing.<sup>218</sup> As far as the applicability of this rule to contracts of employment is concerned the courts have applied a very open ended interpretation: “The generally prevailing view, not without dissent or doctrinal criticism, is that the contract of ‘permanent’ employment subject to termination for cause or other good reason- is capable of being performed within a year; and so an oral commitment of that nature would be enforceable years after it arguably had been made.”<sup>219</sup>

### 2.4 *Consideration*

In order to render the agreement enforceable there must be an exchange of promises or the doing of an act.<sup>220</sup> At its simplest, this means that in exchange for remuneration in the form of a salary an employer will offer his/her services to the employer. The problem arises when the contracts in question concern so-called ‘permanent’ employment. In such cases the courts have taken the view that something in addition to the offering of services by the employee is necessary to fulfil the requirement of consideration.<sup>221</sup> The reasoning behind this was that “the commitment was thought accordingly, to be so ‘highly improbable’, especially where oral and uncorroborated, that the courts were reluctant to enforce it absent some additional circumstance to indicate that such a commitment had indeed been made.”<sup>222</sup> However, where the employee has been able to demonstrate detrimental reliance on the employer’s act or representation, some courts have

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217 *Idem.*

218 *Idem.*

219 Finkin *op cit* 174.

220 *Idem.*

221 Finkin *op cit* 175.

222 *Idem.*



come to the rescue of the employee by making use of a doctrine of “promissory estoppel” in order to render the representation enforceable.<sup>223</sup>

### 2.5 *Definiteness of Terms*

In order to render an obligation enforceable its terms must be sufficiently certain. For example, the courts have refused to enforce general undertakings such as “generalized assurances of good or fair treatment or confident expectations of long duration”.<sup>224</sup> However, where a certain amount of certainty or definiteness is ascertainable by looking beyond the terms of the contract, and the courts were of the opinion that fairness demanded that such term be enforced, the courts have read certainty into the term. An example of such a situation is where “reasonable” compensation has been held to be sufficiently definite or certain by having reference to the surrounding circumstances such as the going rate for that particular job in the industry, the type of work to be performed, and the employer’s custom, usage or practice.<sup>225</sup>

### 2.6 *Illusory Promises*

This occurs when the employer reserves for itself the right to decide the extent or application of a particular obligation.<sup>226</sup> Although some courts have held such obligations to be unenforceable, other courts have held that “an employer cannot reserve to itself the power to declare its underlying obligation an illusion”. Therefore for example, an employer cannot reserve for itself the right to terminate a fixed term contract before the expiry date for no good reason,<sup>227</sup> or promise benefits without an obligation to pay.<sup>228</sup>

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<sup>223</sup> *Grouse v Group Health Plan* (1981) 306 N.W. 2d 114 (Minn.)

<sup>224</sup> *Finkin op cit* 176.

<sup>225</sup> *Idem.*

<sup>226</sup> *Idem.*

<sup>227</sup> *Rothenberg v Lincoln Farm Camp, Inc* (1985) 755 F. 2d 1017 (2d Cir.)

<sup>228</sup> *Mabley and Carew Co. v Borden* (1935) N.E 697.

## 2.7 *Unilateral Modification*

Since employment contracts are held at will, either party can terminate the contract at any point in time for whatever reason, even no good reason at all.<sup>229</sup> Given this fact, many consider the contract of employment to be a unilateral agreement.<sup>230</sup> Since contracts of employment are terminable at will, obligations endure so long as the employer desires them to. If an employer wants to alter the terms and conditions of employment, it can threaten termination if these new terms and conditions are not accepted. The continuance of service constitutes an acceptance and payment for those services constitutes consideration.<sup>231</sup> Finkin states: “More recently, however, at least some courts have been troubled by that approach, especially where the employment is conditioned upon the relinquishment of a previously earned benefit or job right, and have required a showing of actual consent, or additional consideration other than retention in employment or have applied notions of fraud or duress to limit the employer’s power in that regard.”<sup>232</sup> In *Robinson v Ada S. McKinley Community Services*<sup>233</sup> the court required that actual consent by the employee be proved, and in *Goodwyn v Sencore, Inc.*,<sup>234</sup> the court disallowed the employer’s threat to terminate if the employee did not abide to renewed terms on the basis of duress. Consequently the employee was not obliged to accept the new terms of the contract. According to Arnow-Richman it is not surprising that the courts should come to the rescue of employees in these circumstances. She observes: “...courts often resist the conclusion that a disputed employment contract is gratuitous, particularly in cases involving employers reneging to the detriment of employees. And no wonder. Given the economic significance of work to the individual, as well as the centrality of work in our society, the promises and commitments of those we work for play a crucial role in shaping our lives. For many people, personal happiness, sense of purpose, and

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<sup>229</sup> Every jurisdiction except for Montana adopts the employment at will doctrine. See Rothstein *Employment Law* (1999) 1-4.

<sup>230</sup> Arnow-Richman “The Role of Contract in the Modern Employment Relationship”2003 *Texas Wesleyan Law Review* 2.

<sup>231</sup> Finkin “The Individual Employment Contract in the United States “ in Betten *The Employment Contract in Transforming Labour Relations* (1995) 177.

<sup>232</sup> *Idem.*

<sup>233</sup> (1994) 19 F. 3d 359 (7<sup>th</sup> Cir.)

<sup>234</sup> (1975) 389 F. Supp. 824 (D.S.D.)

sense of success, in addition to financial security, all depend significantly on their experiences in their jobs.<sup>235</sup>

### **3 Employer Rules and Policies**

One of the most important sources of employee obligations is contained in employer rules and policies. These policies incorporate rules into the individual contract of employment.<sup>236</sup> The adoption of these rules became prevalent after the Second World War.<sup>237</sup> Most jurisdictions have held that these rules are contractually binding terms.<sup>238</sup> These policies and rules usually come in the form of personnel handbooks issued by the employer.<sup>239</sup> These rules, however are generally for the benefit of the employer: Finkin explains: “The incorporation of employer rules into individual contracts underlines a key aspect of industrialisation- the division of labour and the growth of large corporate enterprises. Employers adopted rules to enhance their control of the workforce- rules providing for working time, fines for absences or tardiness, prohibitions on leaving the premises, even from engaging in casual conversation.”<sup>240</sup>

This type of arrangement is typical of a big manufacturing plant prevalent in the industrial era. As the world of work has changed since the 1970s and 1980s,<sup>241</sup> these types of rules have become less prevalent.<sup>242</sup> Since the main purpose of these rules is the attainment of employer control of the employees, they do not play any meaningful part in enhancing employee interests.

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<sup>235</sup> *Op cit* 4.

<sup>236</sup> Finkin *op cit* 178.

<sup>237</sup> *Idem.*

<sup>238</sup> *Ibid* 179.

<sup>239</sup> Arnow-Richman “The Role of Contract in the Modern Employment Relationship” 2003 *Texas Wesleyan Law Review* 1.

<sup>240</sup> Finkin *op cit* 178.

<sup>241</sup> See Befort “Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work” 2003 *Berkeley Journal of Employment and Labour Law* 155-159.

<sup>242</sup> *Ibid* 158.

## **4 Dismissals**

### *4.1 Introduction*

Dismissals are not classified as unfair labour practices as they are in English law. However, since the principles of fairness and equity are always relevant with reference to 'unfair labour practices', it might be relevant to discuss the American law of dismissals in this context.

### *4.2 The Common law status of the contract of employment*

Employees who are not members of trade unions are dependent on the common law for protection against unfair dismissal. The basic common law principle is that unless there is a specific stipulation to the contrary in the contract of employment, every employment contract is terminable by either party, at any time. This is how contracts of employment came to be called contracts 'at will'.<sup>243</sup> The courts have developed three broad categories of exception to the 'at will' theory in order to attain some kind of fairness. These exceptions take the form of public policy, breach of implied term, and the implied covenant of good faith and fair dealing.

### *4.3 Implied Terms*

In order to show that the dismissal was unfair the employee must prove that the employer had at some stage (during the job interview or during the course of employment) implied orally, tacitly or in writing that he/she would only be dismissed for 'just cause'.<sup>244</sup> 'At will' employees cannot establish causes of action for breach of contract and breach of the implied covenant of good faith and fair

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<sup>243</sup> See Raza and Anderson *op cit* 452 where the authors state: "Since the 1960's, suggestions have been made to the effect that the at will doctrine should be substantially modified to provide greater protection for non-union employees against 'unjust' termination of employment. The demand for change acquired considerable momentum and by the early 1980's, it had become a viable movement. As the decade of the 1980's closed, there emerged a consensus amongst scholars that, although the at will doctrine remains the general rule of employment, it has been greatly narrowed in scope by exceptions from court decisions and enactments by state legislatures".

<sup>244</sup> *Foley v Interactive Data Corporation* 765 P 2d 373 (1988).

dealing.<sup>245</sup> The courts have developed three broad categories of exception to the 'at will' theory in order to attain some kind of fairness.

#### 4.4 Public Policy

Some examples of where employees have been protected from unfair dismissal on the basis of public policy is where they were dismissed for refusing to commit a crime,<sup>246</sup> whistle blowing on the employers' illegal activities,<sup>247</sup> and for serving on a jury against the employer's wishes.<sup>248</sup>

#### 4.5 Implied Covenant of Good Faith and Fair Dealing

This principle is derived from commercial law. Basically it requires the parties to conduct themselves in an honest manner and not to take unconscionable advantage of the other party in executing and in entering into the contract. However, because of the vague and nebulous nature of this principle, and because most contracts of employment of the 'at will' <sup>249</sup> the courts seldom apply it.<sup>250</sup> For example, in the case of *Life Care Centers of America, Inc v Dexter*<sup>251</sup> the court held that in order for a duty to arise under the implied covenant of good faith and fair dealing in an employment contract there must be a showing of a special relationship of trust and reliance between the employee and the employer. In this case the fact that the employee had worked for the employer for a period of six years was insufficient to establish the required special relationship. The court held that long term employment will be sufficient to support a cause of action for breach of the implied covenant of good faith and fair dealing only if it is coupled with a

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<sup>245</sup> *Egerer v Computer Parts Unlimited, Inc.* (2002) WL 31648790, *Schlichtig v Inacom Corp* (2003) US District Court New Jersey (2003) civil action No 99- 1208 (SSB), *Horton v Darby Electric Co Inc* (2004) IER 1058 SC.

<sup>246</sup> *Nees v Hocks* 272 Or. 210 (1975).

<sup>247</sup> *Tameny v Atlantic Richfield Co* 27 Cal. 3d 167 (1980).

<sup>248</sup> *Palmateer v International Harvester Co* 85 111 2d 124 (1981).

<sup>249</sup> See footnote 112 *supra*.

<sup>250</sup> Raza and Anderson *op cit* 455.

<sup>251</sup> (2003) 19 IER WY 38.

discharge calculated to avoid employer responsibilities to the employee, such as the payment of benefits.<sup>252</sup>

#### 4.6 *Regulation of dismissals and other employer disciplinary action by collective agreement*

Unionised employees are protected against unfair conduct of the employer in terms of collective agreements, which prohibit unfair disciplinary action and require 'just cause' for dismissals to be fair. What constitutes 'just cause' has been interpreted by arbitrators and depends on the surrounding circumstances. Although what constitutes 'just cause' inevitably depends on the industrial setting and the special circumstances, arbitrators have achieved substantial consensus about underlying principles and many detailed rules.<sup>253</sup>

One of these underlying principles is that employees have the right to work and they cannot be deprived of such right without 'just cause'.<sup>254</sup> Arbitration law recognizes that an employee's job may be his most valuable asset, and the value of that asset increases with length of service.<sup>255</sup> Although the rules that an employer sets down are open to scrutiny by an arbitrator, as long as the rules are reasonable and they have a commercial rationale they will not be interfered with.<sup>256</sup>

## 5 **Conclusion**

As seen above, there might be some cases where the judiciary has made use of its judicial discretion in the application of common law to come to the rescue of employees who in the opinion of the court had become victims of employer abuse of power. However, given the fact that the employment relationship is a "contract

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<sup>252</sup> In both this case and in *Horton v Darby Electric Co Inc* (2004) IER 1058 SC, it was held that failure to follow a procedure of progressive discipline as provided for in the employee handbook did not constitute a breach of the implied covenant of good faith and fair dealing because in both cases the contracts were 'at will'.

<sup>253</sup> Summers "Individual Protection" 1976 *Virginia Law Review* 481, 500.

<sup>254</sup> Poolman *Principles of Unfair Labour Practice* (1985) 132-133.

<sup>255</sup> Summers *op cit* 506.

<sup>256</sup> *Idem*.

at will”<sup>257</sup>, the judiciary can do little to protect employee interests. The stark reality, in this kind of situation is that, especially in times of high rates of unemployment, and in the case of unskilled workers, the agreement can be conceived of as a unilateral agreement.<sup>258</sup> Employees consequently have very little influence (if any), in determining terms and conditions on creation of the relationship and even later when terms and conditions are unilaterally altered by the employer. In fact, some argue that since historically employment was considered a “legal status” and not a private contract, employment decisions sounding in contract law offer very limited solutions to the problems associated with the employment relationship.<sup>259</sup>

Furthermore, as pointed out by Finkin,<sup>260</sup> compensation is limited to the amount of damages that would put the employee in the same position had there been no breach, less mitigation, from which the employee must pay legal fees. The result of this is that, “contract cases tend to be pursued by the better paid, especially managerial employees, i.e. primarily those for whom the sums eventually involved might justify the expense.”<sup>261</sup>

## **F Conclusion**

The South African law of contract, the “cornerstone of the edifice of labour law”<sup>262</sup> is sufficiently malleable to be adapted, without loss of necessary predictability so that legitimate interests of employees can be accommodated. The experience of other countries is enlightening in demonstrating how the gap between law and justice can be closed by the application of good faith and public policy in the employment relationship.

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<sup>257</sup> See Arnow-Richman *op cit* 2.

<sup>258</sup> *Idem*.

<sup>259</sup> Snyder “The Role of Contract in the Modern Employment Relationship” (2003) *Wesleyan Law Review* 45.

<sup>260</sup> Finkin *op cit* 180.

<sup>261</sup> *Idem*.

<sup>262</sup> Kahn-Freund in Flanders and Clegg *The System of Industrial Relations in Great Britain* (1954) 45.