THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case no: 017/09

In the matter between:

SOUTH AFRICAN MARITIME
SAFETY AUTHORITY Appellant

and

FAFIE FORTUNE MCKENZIE Respondent

Neutral citation: *SAMSA v McKenzie* (017/09) [2010] ZASCA 2 (15 February 2010)

Coram: MPATI P, NUGENT and MHLANTLA JJA and LEACH and WALLIS AJJA

Heard: **18 November 2009**

Delivered: **15 February 2010**

Summary: Contract of employment – unfair dismissal in terms of section 185 of the Labour Relations Act 66 of 1995 – whether section creates contractual right not to be unfairly dismissed.

ORDER

On appeal from: North Gauteng High Court (Vilakazi AJ, sitting as court of first instance):

It is ordered that:

1. The late lodging of the application for leave to appeal is condoned.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the court below is altered to read: 'The plaintiff's claim is dismissed and both parties are to pay their own costs.'
4. Both parties will pay their own costs in this appeal including the costs of the applications for condonation.

JUDGMENT

WALLIS AJA (MPATI P, NUGENT and MHLANTLA JJA and LEACH AJA concurring)

[1] Mr McKenzie was formerly employed by the South African Maritime Safety Association (SAMSA) as its chief internal auditor, but was dismissed on 1 March 2005 in a manner that he alleges was both procedurally and substantively unfair. After pursuing his remedies under the Labour Relations Act 66 of 1995 ('the LRA') and reaching a settlement with SAMSA in terms of which he was paid an amount equivalent to one year's salary, he instituted the present action claiming that his contract of employment was subject to 'an explicit, alternatively implied, further alternatively tacit term … that the employment contract would not be terminated by the Defendant or the Plaintiff without just cause'. He then alleged that this term had been breached in consequence of his having been dismissed 'in a procedural and substantive unfair manner'. This he contended entitled him to claim damages calculated on

the basis that he would otherwise have continued working for SAMSA until his retirement. The amount he claims is R5.2 million.

[2] SAMSA filed a plea containing four special pleas and these were set down for trial as separate issues before Acting Justice Vilakazi.[1] The parties proceeded on the basis that no evidence was necessary beyond certain documents that were attached to the pleadings or contained in a trial bundle and referred to without objection in the course of argument. The special pleas were dismissed and leave to appeal was refused. On petition to this Court an order was made in terms of section 21(3)(c)(ii) of the Supreme Court Act[2] directing that the application for leave to appeal be set down for hearing before this Court and, as is usual in such orders, directing the parties to be prepared to argue the merits of the appeal. It is on that basis that the matter came before us.

[3] At the outset two applications for condonation fell to be considered, the first relating to the late lodging of the application for leave to appeal and the second relating to the late filing of a replying affidavit in the application for leave to appeal. The first was not opposed on the ground that it was unnecessary. This is not correct as the application was lodged out of time.[3] Be that as it may this is clearly a case where condonation should be granted. As regards the second application it was delivered after this Court had made its order directing that the application be set down for argument. The replying affidavit added nothing to the consideration of the application and Mr Khoza SC, who appeared for SAMSA, did not persist with it. The costs attendant upon these applications will be dealt with together with all other questions of costs.

---

[1] We were informed from the Bar that the learned acting judge has regrettably since died.
[2] Act 59 of 1959.
[3] Leave to appeal was refused on 26 November 2008. Whilst the application for leave to appeal is dated 19 December 2008 it was only lodged with this Court on 15 January 2009, outside the period of 21 days provided for in section 21(2) of Act 59 of 1959.

[4] Turning to the merits of the application for leave to appeal, as is frequently the case with such applications, the outcome depends upon the merits of the case. As I am satisfied for the reasons that follow that the appeal should succeed it follows that leave to appeal should be granted.

[5] Among the special pleas filed by SAMSA was one nominally expressed as a challenge to the jurisdiction of the high court to consider the claim. Another raised as a defence to the claim the settlement agreement that was reached when Mr McKenzie pursued his remedies under the LRA. On the view that I take in this matter it is not necessary to consider that defence.

[6] When a jurisdictional challenge is raised the court must necessarily dispose of it before entering upon any further questions that arise in the case.[4] The nominal challenge in this case was raised in terms that have become familiar and it is not necessary to set them out in detail. In substance it was alleged that Mr McKenzie's remedies for unfair dismissal are those provided for in the LRA and that the high courts have no jurisdiction to grant such remedies.

[7] Once more, as in other cases that have come before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in *Gcaba v Minister of Safety and Security,*[5] the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts. In this case the particulars of claim could not have made it clearer that Mr McKenzie's claim is for damages for breach of contract. To the extent that authority is required

[4] *Masuku and Another v State President and Others* 1994 (4) SA 374 (T) at 378J-379 (A); *Makhanya v University of Zululand* [2009] ZASCA 69 para 29.
[5] [2009] ZACC 26; [2009] 12 BLLR 1145 (CC). This in turn endorsed the approach of this court in *Makhanya v University of Zululand*, above.

Fedlife Assurance Ltd v Wolfaardt makes it clear that a claim for damages for breach of contract falls within the ordinary jurisdiction of the high courts, albeit that the contract is one of employment. In *Tsika v Buffalo City Municipality*[6] Grogan AJ concluded, after reviewing subsequent decisions, that the position remains that

'[t]his court and other civil courts retain their common law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment …'

[8] As was the case in *Fedlife*, and in other cases purporting to raise similar challenges, the plea, properly construed, does not raise a jurisdictional challenge at all. In substance what is alleged in the plea is that the Labour Relations Act is the exclusive source of remedies for unfair dismissal, with the result that Mr McKenzie has no contractual claim. That is not a challenge to the jurisdiction of the high court to consider the pleaded claim – it is a challenge to the validity of the pleaded claim. I can only echo, in relation to the facts of this case, what Nugent JA said in *Makhanya*[7] in regard to special pleas purporting to be pleas to the jurisdiction of the court such as the present one. I adapt his words to the facts at present before us:

'Once more, so it seems to me, [this case], like all the cases that preceded it, [is] not about jurisdiction at all. It [is] about whether there [is] a good cause of action. In my view the least said about jurisdiction in such cases the better because, once that red-herring is out of the way, courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA.'

[9] When properly construed, the contention on behalf of the appellant is that the right in terms of s185 of the LRA, taken together with the remedies for a breach of that right contained in s194 and the procedures prescribed for

---

[6] 2009 (2) SA 628 (ECD) para 66.
[7] Footnote 6, *supra*, para 93.

adjudicating disputes over unfair dismissals in s191, constitutes a complete statement of the extent of the rights in respect of unfair dismissal. They are entirely statutory in origin and content and give rise to no contractual obligation.[8] That puts in issue the correctness of the allegation in the particulars of claim that Mr McKenzie's contract of employment was subject to the condition that it could not be terminated without just cause. SAMSA pleaded over and in its main plea it admitted this allegation contrary to the special plea. However that plea over was dependent on the failure of the special plea and when seen in its context, and in the light of the concession, (referred to in the next paragraph), that there was no express term to that effect, it is no more than a concession of law by counsel who drew the plea. Accordingly it cannot be said to be binding if it does not truly reflect the law.[9]

[10] Bearing in mind that the breach of contract is said to lie in the 'unfair dismissal' of Mr McKenzie the allegation in the particulars of claim that the contract could not be terminated 'without just cause' must be taken to mean that it could not be terminated unfairly and this is the basis of the case advanced by Mr McKenzie. In the first instance he alleges that the term was 'explicitly', that is, expressly agreed. It is not disputed that the express terms of the contract were embodied in his letter of appointment, which contains no such provision. Its outward appearance is of a conventional contract of employment terminable on the giving of reasonable notice by either party. Under the heading 'Terms and conditions of employment' it is said that these are embodied in SAMSA's Human Resources Policy, which *inter alia* caters for a notice period.

---

[8] There is authority for this approach. Cheadle AJ said in *Booysen v SAPS and another (*2009) 30 ILJ 301 (LC) para 37: 'The right to fair labour practices is given effect to by the LRA and other labour legislation. Apart from challenges to the constitutionality or interpretation of that legislation or the development of the common law where there is no legislation, the right plays no other role and does not constitute a separate source for a cause of action.'

[9] *Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others* 1979 (3) SA 1331 (W) AT 1334D*; De Polo v Dreyer* 1990 (2) SA 290 (W) at 300G-H.

Accordingly no support for the pleaded term is to be found in the written contract and the allegation that it was expressly agreed can be rejected. This was accepted by the appellant's attorney.

[11] In the alternative it is alleged that the term arises either by way of an implied term or as a tacit term. Corbett AJA explained the difference between the two in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*.[10] An implied term properly so called is a term that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such a contract, subject only to the parties' entitlement in certain, but not all, instances to vary it by agreement. Where reliance is placed on such a term the intention of the parties will not come into the picture and the issue is the purely legal one of whether in those circumstances in relation to a contract of that particular type the law imposes such a term on the parties as part of their contract. A tacit term is a term that arises from the actual or imputed intention of the parties as representing what they intended should be the contractual position in a particular situation or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question.

[12] In our law as it stands at present[11] the usual test for the existence of a tacit term is that of the interfering bystander who asks what is to happen in the particular situation and receives the answer: 'Of course X will be the position. It is too obvious for us to say so.'[12] The application of that test in relation to the

[10] 1974 (3) SA 506 (A) at 531D-532G.
[11] The English law from which we have derived this test has recently undergone some restatement in A*ttorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 11; [2009] 2 All ER 1127 (PC).
[12] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532G-533C*; Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827B-828B; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D.

term pleaded on behalf of Mr McKenzie is destructive of the contention that his employment contract is subject to that term. I have little doubt that the bystander's query as to what would happen if Mr McKenzie was unfairly dismissed would have attracted the response: 'That is dealt with in the LRA. We don't need to provide for it', rather than the unequivocal and mutual agreement that is the necessary cornerstone of a case founded on a tacit term. If the question had been posed in terms that suggested there might be a contractual entitlement to the damages claimed in this case that might have been welcomed by Mr McKenzie, but I doubt that SAMSA would have agreed.[13]

[13] That leaves, as the foundation for the pleaded allegation, only the possibility of an implied term properly so called. Such a term could either be said to flow from the provisions of s185 of the LRA dealing with unfair dismissal or could lie in a development of the common law in accordance with section 39(2) of the Constitution. In argument the appellant based his case on the first of these and it is that argument that I now address. In doing so I first address some issues of principle.

[14] The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation. The nature of the latter rights may vary. They may be conferred by way of mandatory injunctions, such as the provision in the Truck Acts[14] in England, which have been carried over into South African legislation dealing with employment, in terms of which an employee's wages must be paid in cash in the currency of the country.[15]

---

[13] See the remarks of Jenkinson J in *Gregory v Philip Morris Ltd* (1988) 80 ALR 455 at 459 and the judgment of McHugh J and Gummow J in *Byrne v Australian Airlines Ltd* 185 CLR 410 at 443 to 446.
[14] The Truck Act 1831; Truck Amendment Act 1887 and the Truck Act 1896.
[15] Now embodied in section 32(1) of the Basic Conditions of Employment Act 75 of 1997. Hereafter the BCEA

Alternatively they may prohibit or regulate conduct that might otherwise be permissible such as the making of deductions from an employee's remuneration.[16] Rights to safe working conditions[17] and to compensation for injuries at work[18] are protective in nature. All of this has limited the extent to which employers and employees are free to determine the terms of their relationship.[19] In most instances the employee cannot waive such statutory rights because it would be contrary to public policy to permit such a waiver,[20] although the parties to the contract can stipulate for more favourable rights to vest in the employee.

[15] A relevant feature of some legislation of this type is that it not only confers rights but also provides a mechanism for the enforcement of those rights. Where that happens the question arises whether those means are exclusive and provide the sole means of enforcement or whether it is open to the beneficiary of the right to use the ordinary processes of the courts in order to enforce them. Another question that arises is whether the beneficiary of the right enjoys not only the benefit of the right itself but also a right to claim damages if the right is infringed.[21] Our courts have frequently grappled with these questions and the jurisprudence in that regard casts light upon the present problem.

[16] Where a statute creates both a right and a means for enforcing that right the position is that:

---

[16] Section 34 of the BCEA.
[17] Under the Occupational Health and Safety Act 85 of 1993.
[18] Under the Compensation for Occupational Injuries and Diseases Act 130 of 1993
[19] *R v Canqan and others* 1956 (3) SA 366 (E) at 367H-368A; *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd* 1994 (3) SA 15 (A) at 23B-D.
[20] *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734-5; *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and another* 1997 (3) SA 236 (SCA) at 242H-243D and 244D-E.
[21] The right to an interdict is generally recognised. *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718.

'We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.'[22]

If on a proper interpretation of the statute in question the legislature has confined a person harmed by a breach of the right conferred therein to the statutory remedy then resort to other means of enforcement is excluded.[23] Accordingly both the scope of the right itself and the means of enforcing that right are determined by the intention of the legislature as ascertained on a proper interpretation of the legislation. It follows from the authorities mentioned in paragraph 7 of this judgment that it is now clearly established that in order to enforce the statutory right not to be unfairly dismissed as embodied in section 185 of the LRA an injured party must have resort to the tribunals established under the LRA, being either the CCMA or in some instances the Labour Court.

[17] Similarly whether a breach of a statutory right or a failure to observe a statutory obligation gives rise to claim for damages is to a substantial measure determined by the intention of the legislature as it emerges from the statutory provision under consideration.[24] Whilst the interpretation of the statute may not be the only feature in the analysis it is the proper starting point.

[18] The jurisprudential approach to statutory interventions in the contract of employment differs in different jurisdictions. The distinction that Sir Otto Kahn-Freund[25] referred to between the 'imperative' norms ('normative

---

[22] *Coetzee v Fick and another* 1926 T.P.D. 213 at 216 approved in *Da Silva and another v Coutinho* 1971 (3) SA 123 (A) at 135.
[23] *Callinicos v Burman* 1963 (1) SA 489 (A) at 497H - 498A
[24] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) para 12.; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 40.
[25] Sir Otto Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 *Mod LR* 635 at 641. The note concerns the enforceability of collective agreements an issue dealt with in this country in section 23 of the LRA.

provisions') of the law of contract and the optional norms created by the parties' agreement provides a framework for considering the issue. In many European jurisdictions the normative provisions are treated as inderogable[26] and, if arising from a collective bargain, are made part of the contract of employment.[27] In jurisdictions with a common law heritage the more usual approach is to distinguish provisions imposed from outside the contract depending on whether they are imposed by statute as terms of the contract; are statutory rights having their origin in the statute but not the contract of employment; or are incorporated into the contract by the agreement of the parties. When dealing with legislative provisions that give rights to workers and have an impact upon the employment relationship it is appropriate to bear in mind that, whilst having normative effect, they do not necessarily alter the terms of the contract of employment. Thus Professor Mark Freedland[28] makes the point that:

'… legislative provisions may expressly affect the contractual rights and obligations arising under personal work or employment contracts… This can be thought of as the subject of an implied term in the personal work or employment contract. So also might we sometimes regard a legislative norm which, although not expressly declaring itself to do so, in fact shaped or altered the content of the personal work or employment contract. (*Note, however, that we are not asserting that every such legislative norm must be regarded as the subject of an implied term. Statutory rights and obligations may be associated with or attached to personal work or employment contracts without necessarily taking the form of implied terms of the contract.*)'[29] (My emphasis.)

[19] Hugh Collins makes the point that apart from the conceptually different underpinnings of such rights and, in the case of statutes, the conditions attaching to the rights, it makes little difference to the beneficiary of the right whether a

[26] As in South African law is the case with statutory rights that cannot be waived. See footnote 20 above.
[27] Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (1995) 212 *et seq*. This is the position achieved in South Africa by section 23(3) of the LRA.
[28] Professor of Employment Law in the University of Oxford and one of the world's foremost scholars in this field.
[29] Mark Freedland, *The Personal Employment Contract* (2003) 120.

right is incorporated in a statute or in the contract of employment by way of an implied term.[30] He writes:

'Mandatory obligations remove from the parties to a contract the freedom to choose some of the terms for their transaction. The most straightforward example comprises legislation which determines that every contract of a particular type is deemed to include a particular term, regardless of the express terms of the contract and overriding any contrary terms … The same effect can be achieved by granting a statutory right which cannot be excluded or qualified by contrary agreement as in the case of the right of an employee to claim unfair dismissal against an employer.'

However, to the obligee the origin of the right is of considerable importance as it defines the scope of the obligation undertaken in concluding the contract of employment. It also makes a substantial difference if, as is claimed to be the case here, a statute creates both a contractual right and a similar, but not entirely overlapping, contractual right, because it imposes greater obligations on the obligee.

[20] When it is argued that a statutory provision not only creates statutory rights and remedies but also impliedly introduces terms into certain types of contract, in accordance with the approach adopted by our courts in regard to the issues discussed above, the enquiry commences by examining the statutory provision in order to determine whether it was intended that its provisions or some part of them should be incorporated in contracts of that class. In the present context that involves asking whether the legislature, in enacting section 185 of the LRA and the sections that follow, intended not only to outlaw unfair dismissals and provide statutory remedies when they occur, but also intended to incorporate into all contracts of employment a term that they could not be terminated unfairly. That is necessarily the question inasmuch as Mr McKenzie's contract of employment does not contain any unusual features that

[30] Hugh Collins, *The Law of Contract*, 3ed, 233-235.

would serve to place it in an exceptional category insofar as implication of this term from the LRA is concerned.

[21] The LRA was enacted in order to give effect to the labour rights now guaranteed by section 24 of the Constitution[31] and in particular the right to fair labour practices. One of the most important rights flowing from that constitutional guarantee is the right not to be unfairly dismissed embodied in s185 of the LRA.[32] Where an employee claims that their dismissal is unfair, whether substantively or procedurally, or that they have been subjected to an unfair labour practice the LRA establishes the mechanism for resolving disputes arising from that claim.[33] In the case of an unfair dismissal it also specifies the remedies that are available to an aggrieved employee[34] and, where that remedy consists of compensation, establishes limits on the amount of such compensation.[35] The statutory mechanism for resolving disputes over unfair dismissals is by way of conciliation and if that fails arbitration before either the CCMA or the Labour Court.

[22] The arrangements in these sections constitute a legislative scheme for giving effect to the right not to be unfairly dismissed. The scheme is enacted as a package embodying the right itself together with sections that explain what is a dismissal (s186); identify automatically unfair dismissals (s187) and state the test for determining when other dismissals are unfair (s188); and prescribe the procedures to be followed in relation to dismissals for operational reasons (ss189 and 189A). It then stipulates the mechanism for dealing with disputes over unfair dismissals (s191); deals with the onus of proof in proceedings

[31] At the time of its enactment it was section 27 of the Interim Constitution.
[32] *Fedlife Assurance Limited v Wolfaardt* 2002 (1) SA 49 (SCA) para2.
[33] Section 191 of the LRA.
[34] Section 193 of the LRA.
[35] Section 194(1) of the LRA.

concerning such disputes (s192) and prescribes the remedies that flow from an unfair dismissal (ss193 and 194).

[23] In the statutory formulation of the scheme it is nowhere said that it has any contractual implications. That stands in sharp contrast to the provisions of section 23(3) of the LRA which provide that:

'Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.'

That section deliberately set out to address the problematic issue of the incorporation of the provisions of collective agreements into contracts of employment so as to give the employee and employer contractual remedies against one another, such as the right of the employee to be paid the agreed rate of remuneration, or the right of the employer to demand that the employee work agreed overtime. This was an issue that had given rise to much difficulty, both practically in cases where it was suggested, following the approach in England[36], that such a collective agreement was not legally binding at all[37] and conceptually in trying to suggest that collective bargaining agents had authority to conclude contracts on behalf of union members or that the collective agreements they concluded were enforceable as contracts for the benefit of a third party.[38] The legislature accordingly took the step of making express provision for incorporation of appropriate terms from the collective bargain into the individual contracts of employment of the workers.

---

[36] The progenitor of the approach was Sir Otto Kahn-Freund in *The System of Industrial Relations in Great Britain* (1954) ed Flanders and Clegg. It was accepted as correct by the Donovan Commission in its report (Cmd 3623) and was held to be a correct reflection of the law in *Ford Motor Company v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 All ER 481. Halsbury's Laws of England, 5th ed (Mackay), Vol 39, para 91footnotes 3 and 4.

[37] *Consolidated Frame Cotton Corporation Limited v Minster of Manpower* 1985 (1) SA 191 (D) at 198H-I and (on appeal) 1985 (1) SA 200 (N) at 205G-H.

[38] Halsbury, *op cit*, para 91, Lord Wedderburn, *The Worker and the Law*, 3 ed, 329-343; M J D Wallis, *Labour and Employment* Law, (loose-leaf, Issue 5) para 44.

[24] A similar approach to the incorporation of provisions in a statute into a contract of employment is to be found in section 4 of the Basic Conditions of Employment Act,[39] which provides that:

'**4. Inclusion of provisions in contracts of employment.**

A basic condition of employment constitutes a term of any contract of employment except to the extent that—

(a) any other law provides a term that is more favourable to the employee;

(b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or

(c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.'

The same approach can be found in statutes in England that expressly embody provisions to be incorporated into contracts of various types such as the provisions of sections 12 to 15 of the Sale of Goods Act, 1979 or sections 8 to 11 of the Supply of Goods (Implied Terms) Act 1973.[40]

[25] Such instances are quintessential examples of cases where a term is implied into a contract by operation of law by virtue of the terms of a statute as indicated by Corbett AJA. However Mr McKenzie cannot rely upon that approach because section 185 of the LRA and the remaining sections that deal with unfair dismissals do not contain any such express provision incorporating them into contracts of employment. The argument on his behalf is therefore that the incorporation is to be implied from the terms of the relevant provisions of the LRA read in the light of the Constitution.

[26] The immediate difficulty facing Mr McKenzie in advancing this argument is that where the LRA intends to alter the terms of a contract it says so as it does in section 23(3). Its silence in the context of section 185 is a factor

[39] Act 75 of 1997.

[40] Examples of such statutorily imposed terms in the context of employment are given in Halsbury's Laws of England, 5th ed (Mackay), Vol 39, para 89,fn1.

that counts strongly against his contention. An even greater difficulty emerges when the attempt is made to identify what is to be incorporated into the contract of employment and what part of the statutory scheme is to be excluded. The manner in which Mr McKenzie's case has been pleaded suggests that the only provision from the statute that has been incorporated in the contract is the provision in section 185 that establishes the right not to be unfairly dismissed. Although not an issue in this case the same logic would result in the incorporation from the same section of the right not to be subjected to unfair labour practices. However in the provisions that follow both of these rights are hedged about with qualifications and the impact of these qualifications must be addressed. I have already referred to those in relation to unfair dismissal. It is helpful however to have regard also to the situation in respect of unfair labour practices.

[27] The concept of an unfair labour practice is defined and limited in section 186(2). This stands in sharp contrast to the position under the 1956 LRA where the concept was originally undefined. Then the Industrial Court was vested with jurisdiction over,[41] and responsibility for giving content to, the unfair labour practice. When constitutional protection against being subjected to unfair labour practices was introduced the LRA was enacted to give content to that constitutional right and did so by providing a definition of an unfair labour practice. The Constitutional Court has several times held that one cannot in those circumstances have direct resort to the constitutional guarantee without an attack on the constitutionality of the legislation in question.[42] But that confronts the whole notion of the incorporation into a contract of employment of the

[41] Arising from sections 43 and 46 of the Labour Relations Act 28 of 1956.

[42] *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and another* 2003 (4) SA 584 (CC); *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 433 to 437; *SA National Defence Union v Minister of Defence and others* [2007] ZACC 10; 2007 (5) SA 400 (CC) paras 51 and 52; *MEC for Education, KwaZulu-Natal, and others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) para 40.

statutory right not to be subjected to unfair labour practices with a fundamental and intractable dilemma. It is this. If what is incorporated is simply a general right not to be subjected to unfair labour practices, without the incorporation of the accompanying statutory provisions, of which the definition is the most important, then the incorporation goes further than the statute from which it is derived. That is logically impermissible when we are dealing with incorporation by implication. If what is incorporated is limited to the statutory notion of an unfair labour practice, with all its limitations, then incorporation serves no purpose as the employee will gain no advantage from it. That is a powerful indication that no such incorporation is intended.

[28] The same logic applies in relation to the incorporation of a prohibition on unfair dismissals from the LRA into contracts of employment. If, as was ultimately suggested in argument on behalf of Mr McKenzie, the whole statutory scheme is to be imported lock, stock and barrel into the contract of employment it would not only add nothing to the rights that are possessed by all employees under the LRA, but would exclude the possibility of an action such as the present being pursued, both because the amount being claimed and the basis upon which it is calculated lies beyond the statutory cap on compensation in section 194 of the LRA and because the claim could only be pursued before the CCMA. Such an incorporation is entirely pointless.

[29] Brennan CJ made this point in *Byrne v Australian Airlines Ltd*[43], a case that raised precisely the same issue as the present one, namely an endeavour by two dismissed employees to claim compensation under the statutory scheme embodied in an award under the Industrial Relations Act as well as damages based on the contention that their unreasonable dismissal was in breach of an

[43] 185 CLR 410.

implied term of their contracts of employment derived from the provisions of the statutory scheme. In rejecting the contractual claim he said:

'In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations. There is, therefore, an insuperable obstacle in the way of the appellants' second argument that the terms of an award such as cl 11(a) are implied terms of the contract of employment.'[44]

[30] The same conclusion was reached in the United Kingdom in *Johnson v Unisys Ltd*[45]when confronted with the same problem. That case involved an employee who was summarily dismissed at the age of 52 years from a company that, with a gap of three years, he had served for 23 years. An employment tribunal, applying the English equivalent of the LRA provisions governing unfair dismissals, held that the dismissal was unfair and awarded him compensation in terms of the statute. Dissatisfied with the amount of the award he sought to pursue a claim for damages based on his unfair dismissal contending that apart from the statutory regime and pursuant to the implied contractual term of trust and confidence attaching to all contracts of employment it was not open to his employer to dismiss him in an unfair manner. Hence so he contended he was entitled to damages for breach of contract in addition to the statutory compensation.

[44] Para 11 at 421.
[45] [2001] UKHL 13; [2001] 2 All ER 801 (HL). Lord Steyn dissented in that case and suggested that it should be reconsidered in *Eastwood v Magnox Electrical plc* [2004] UKHL 35; [2004] 3 All ER 991 (HL), but his appears to be a lone voice.

[31] The fundamental reason for the claim failing was that recognising such an implied term in the contract of employment[46] would be inconsistent with and render redundant the statutory scheme in regard to unfair dismissals. Lord Nicholls of Birkenhead put it in this way:

'But there is an insuperable obstacle: the intervention of Parliament in the unfair dismissal legislation. Having heard full argument on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law.'

Those remarks are equally apposite to Mr McKenzie's claim in the present case.

[32] In giving the leading opinion Lord Hoffmann recognised that, in the absence of any other provision in law that governed questions of unfairness in regard to dismissal, it would have been open to the courts to formulate rules by way of implied terms governing the issue of fairness in dismissal, in the light of changes in understanding the employment relationship and recognition of the role that employment plays, not only in people being able to support themselves and their families, but also in giving them a sense of self-worth and enabling them to play a proper role in society.[47] However he regarded the comprehensive statutory scheme in the United Kingdom as posing an insuperable obstacle to such a development and said the following:

---

[46] It must be born in mind that in English law the approach of courts to the implication of terms in contracts of employment may not proceed in quite the same way as with the implication of terms in other contracts. Halsbury, *supra*, para 90

[47] In para [43] relying on the minority judgment of McLachlin J (as she then was) in *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1 paras 135 to 146; [1997] 3 S.C.R. 701; 1997 CanLII 332 (S.C.C.). However in that case Iacobucci J, speaking for the majority rejected such an implied term and said: 'In the context of the accepted theories on the employment relationship, such a law would, in my opinion, be overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement.'

‘54. My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of *Malloch v Aberdeen Corporation* [1971] 1 WLR 1581. The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount.

55. …

56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.

57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:

> "there is not one hint in the authorities that the...tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? .... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."

58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.'

[33] I find myself in respectful agreement with this reasoning. I would add to it that there is the further bar in South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment. I am also fortified in that conclusion by the fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to imply such provisions into contracts of employment because the LRA already includes the protection that is necessary. The passage I have in mind is the following:

[42] The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.'[48]

[34] Two recent articles – by Tamara Cohen[49] and John Grogan[50] respectively – nonetheless suggest that, under the influence of constitutional norms, recent

[48] Per Skweyiya J in *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC). See also *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) paras16 to 18.
[49] Tamara Cohen 'Implying Fairness into the Employment Contract' (2009) 30 *ILJ* 2271.
[50] John Grogan 'Re-interpreting Chirwa: New Twist in the jurisdictional debate' *Employment Law* Vol 25(5) 4.

decisions of the courts have gone a long way towards implying in all employment contracts, a general criterion of fairness, which, taken to its conclusion, is capable of including a contractual right not to be unfairly dismissed. As Tamara Cohen puts it in her conclusion:[51]

'No longer is the employment contract the unfettered domain of the employer but, thanks to the constitutional promise of fair labour practices, has evolved to import considerations of fairness and equity.'

[35] I do not think the decisions they refer to go as far as the writers suggest. While the Constitution guarantees to everyone 'the right to fair labour practices',[52] and also calls upon courts, when developing the common law, to 'promote the spirit, purport and objects of the Bill of Rights',[53] it does not follow that courts are thereby enjoined to develop the common law contract of employment by simply incorporating in it the constitutional guarantee. Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed. Indeed, to duplicate rights that exist by statute does no more than to create the 'jurisdictional quagmire' that is referred to by Tamara Cohen. As she rightly points out, the consequence is that the carefully crafted structure within which those rights were legislatively created becomes superfluous. John Grogan makes the same point:

'[T]he distinction between the causes of action in claims for enforcement of rights emanating from the contract of employment and rights emanating from the [Labour Relations Act] becomes very difficult, perhaps in some cases impossible, to distinguish.'

In similar vein Pretorius and Myburgh[54] say that such an approach would have as its consequence that:

---

[51] Page 2294.
[52] Section 23.
[53] Section 39.
[54] Paul Pretorius SC and Anton Myburgh 'A Dual System of Dismissal Law: Comment on Boxer Superstores Mthatha & another v Mbenya (2007) 28 *ILJ* 2209 (SCA)' (2007) 28 *ILJ* 2172 at 2174 and 2176.

'most (if not all) unfair dismissals can now be dressed up as a contractual claim and played out in the H[igh] C[ourt]'

with the result that,

'the jurisdictional divide will surely be eroded to the point of collapse'.

Professor Darcy du Toit sums it up as follows:

'To infer the existence of a common law right duplicating the statutory right is to call into question the purpose of enacting the statutory right.'[55]

[36] In *Mohlaka v Minister of Finance*[56] Pillay J reminds us that when applying a provision of the Bill of Rights a court is called upon to apply or 'if necessary' develop the common law only 'to the extent that legislation does not give effect to that right'. The employment relationship is governed both by rights that are created by agreement, and by rights that are statutorily conferred, each of which has its proper place and falls to be vindicated in its appropriate sphere. In by far the majority of cases the rights and obligations that are created by contract will play the lesser role and the statutory rights of employees will come to the fore. In some instances the converse will be true. In either case I can see no justification for mechanically duplicating statutory rights by importing them into the contract with the unfortunate consequences adverted to by the writers to whom I have referred. I can see even less justification for importing them in part only with a view to procuring advantages not contemplated by the statute.

[37] I share the view of Professor Halton Cheadle, whose role in the drafting of the LRA is well documented, that where, as here, the employees are protected by the LRA, section 8(3) of the Constitution does not warrant or require an importation from the realm of constitutionally protected labour rights

[55] Darcy du Toit 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law' (2008) 125 *SALJ* 95 at 96-7.
[56] (2009) 30 *ILJ* 622 (LC).

into individual contracts of employment by way of an implied term.[57] The LRA specifically gives effect to the constitutional right to fair labour practices and the consequent right not to be unfairly dismissed. Accordingly the constitutional basis for developing the common law of employment and thereby altering the contractual relationships is absent.

[38] The two decisions that are said to have had the effect of imputing into contracts of employment a right to fairness, and in particular a right to a fair hearing prior to dismissal, are *Old Mutual Life Assurance Co. SA Ltd v Gumbi*[58] and *Boxer Superstores Mthatha v Mbenya.*[59] It is as well to consider precisely what was decided in those cases.

[39] In *Gumbi* it was said that the focus of the appeal was 'the employee's right to a pre-dismissal hearing under the common law'. The court went on to say:

'An employee's entitlement to a pre-dismissal hearing is well recognised in our law. Such right may have, as its source, the common law or a statute which applies to the employment relationship between the parties (*Modise and Others v Steve's Spar, Blackheath* 2001 (2) SA 406 (LAC) ((2000) 21 ILJ 519; [2000] 5 BLLR 496) in para [21] and the authorities collected there). In cases such as the present, the parties may opt for certainty and incorporate the right in the employment agreement (*Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) (1994) 15 ILJ 998; [1994] 11 BLLR 1) at 668 (SA)).'

[40] It is apparent that there was no intention in that passage to lay down any new principle of law, but only to reiterate what had been said in the cases referred to. However I do not think that where it refers to the common law it is an altogether accurate reflection of what was said in those cases.

---

[57] *Current Labour Law 2008* at 181. Ms Cohen correctly says that this is a valid criticism. Professor du Toit, op cit fn 6 echoes it.

[58] 2007 (5) SA 552 (SCA).

[59] 2007 (5) SA 450 (SCA).

[41] The issue in *Modise* was whether the dismissal of the employees constituted an 'unfair labour practice' as contemplated by the now repealed Labour Relations Act 28 of 1956. One of the contentions advanced was that it was an unfair labour practice to dismiss an employee without first giving the employee a hearing.[60] In a careful analysis Zondo AJP explained that the right to a hearing before dismissal was an incident of the statutory right not to be subjected to an unfair labour practice, and that, as a general rule, it 'has no application to private contracts'.[61] The acting Judge President admitted of one exception to that general rule when he said the following:

'However, there is one exception to the general rule that the *audi* rule does not apply to private contracts. That is where a private contract contains a provision which either expressly or by necessary implication incorporates the right to be heard'.

[42] In saying that the acting Judge President relied upon *Lamprecht*, where an employee sought to review a decision to dismiss him on the ground that the principles of fundamental or natural justice (which include the right to a hearing) had not been complied with. Harms JA said that in order for the employee to succeed

'[i]t was accepted on his behalf that he had to prove a contract (express or tacit) containing a provision (also either express or tacit) incorporating the rules of natural justice'.

The learned judge went on to cite as being apposite the following dictum of Trollip J in *Grundling v Beyers*:[62]

'In a statute empowering an official or body to give a decision adversely affecting the rights of liberty or property of an individual, a legal presumption usually operates that the *audi alterem partem* rule has to be observed. There is no such presumption in a contract. The

[60] Para 12.
[61] Para 15.
[62] 1967 (2) SA 131 (W).

obligation to afford a hearing according to natural justice must therefore be either an expressed or necessarily implied term of the contract.'[63]

[43] A more accurate summary of the law as it was articulated in those cases would be that an employee is entitled to a pre-dismissal hearing where that right is conferred by a statute or by an employment contract. The right arises contractually where the contract provides for it either expressly or tacitly. If the passage I have referred to in *Gumbi* had been expressed in those terms, reflecting what was said in the cases relied on, it would have said nothing that was novel or controversial.

[44] Of even more practical importance in *Gumbi* is that, as expressly stated in the passage quoted, a right to a pre-dismissal hearing was indeed incorporated in the contract, as envisaged by *Lamprecht*.[64] (A perusal of the record suggests that it was expressly incorporated by the incorporation of a disciplinary code, as in *Denel (Edms) Bpk*,[65] but whether the incorporation was express or tacit is not important.) The court was not called upon in that case to decide in what circumstances an employee had such a right. The sole dispute was the ambit of that right, and in particular, whether the failure by the employee to take the opportunity to be heard had the result that the employer had failed to fulfil its contractual obligation.[66] The entitlement to such a hearing was not in dispute nor were any of the points considered in this case raised.

[45] In the course of his judgment, however, and after referring to a case dealing with the requirements for a fair hearing under the old unfair labour

---

[63] I think it is clear that when referring to an implied term of the contract the learned judge was referring to a tacit term as explained in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* , above.
[64] '*In cases such as the present,* [my emphasis] the parties may opt for certainty and incorporate the right in the employment agreement.'
[65] 2004 (4) SA 481 (SCA).
[66] Para 9.

practice jurisdiction,[67] the learned judge added the following observation, without elaboration and without citing authority to support it:

'It is clear however that co-ordinate rights [co-ordinate with the contractual right] are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2)) to harmonise the common law into the Bill of Rights (which itself includes the right to fair labour practices (s 23(1)).'

For the reasons I have given that observation was not necessary for the decision in that case and was clearly obiter.

[46] *Boxer Superstores* followed shortly after *Gumbi*. It concerned the jurisdiction of the high court to consider a claim for declaratory relief arising from what was alleged to have been a breach of an employment contract. For the reasons that I have given the question whether the high court has jurisdiction to consider a claim for breach of contract is not controversial. What was said to be the novel question in that case was 'whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal was 'unlawful', without alleging any loss apart from salary'. Not surprisingly the court answered that question in the affirmative, saying, amongst other things:[68]

'It would moreover be illogical to hold that an employee can claim damages for breach of the common law contract of employment in the High Court – as in *Fedlife* and *Denel* – but cannot claim (as is *inter alia* here sought) a *declarator*.'

[47] Cameron JA nonetheless took the opportunity to refer to *Gumbi* and said the following:[69]

'This Court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. ... This means that every employee now has a common-law contractual claim – not merely a

---

[67] *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others* 1995 (1) SA 742 (A).
[68] Para 8.
[69] Para 6.

statutory unfair labour practice right – to a pre-dismissal hearing. Contractual claims are cognisable in the High Court. The fact that they may also be cognisable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction.'

[48] I have already pointed out that what was said to be the finding in *Gumbi* was obiter and I do not think that its repetition in *Boxer Superstores* takes the matter further. Moreover, the question whether the court had jurisdiction was dependant on the pleaded claim, as the learned judge correctly said,[70] and not upon the merit or otherwise of the claim. Whether the contract relied upon by the employee indeed entitled her to a hearing was accordingly not an issue before the court, and was not necessary for its decision.

[49] It would be incomplete not to deal with two further decisions of this court in the present context. One is *Transman (Pty) Ltd v Dick*.[71] In that case an employee sought to review, on administrative law principles, a decision to dismiss him. In asking whether the review application was competent Jafta JA (writing for the majority) posed the question before him as being 'whether the chairperson's verdict [the chairperson of the disciplinary enquiry] and the termination of employment constitute decisions which are reviewable in administrative law'[72] and concluded that they were not. The learned judge went on to ask whether the employee had 'made out a case for a contractual pre-dismissal hearing' and concluded as follows:[73]

'In the present case the duty was on the employee not only to plead a contractual claim but also to prove the facts from which the contended tacit term could be inferred. This the employee has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated

---

[70] Paras 9 and 10.
[71] 2009 (4) SA 22 (SCA).
[72] Para 19.
[73] Para 31.

his employment. In fact he has failed to plead the terms of the employment agreement between himself and the employer, Therefore he has not satisfied the requirements of the test for importing terms into a contract. Accordingly the court below erred in assuming that his employment contract was 'subject to an implied term that he would be afforded a fair hearing before he was dismissed'. It follows that the appeal must succeed.'

The minority similarly found that the employee had not established the terms of the contract, let alone a term in the contract entitling him to a hearing.

[50] Over and above this however Jafta JA also referred to *Gumbi* and said the following:

'Before the decision of this court in *Gumbi* the right to a pre-dismissal hearing was not implied at common law and this necessitated the development of the common law in terms of section 39(2) of the Constitution. As from the date of the delivery of the judgment in *Gumbi* the right of every employee to a pre-dismissal hearing is implied at common law. Since that judgment was delivered after the cause of action had arisen in the present matter reliance [by the court below] on *Gumbi* was misplaced.'

[51] I have already pointed out that what was said in *Gumbi* in that regard was obiter and not an authoritative finding by this court. Clearly it also played no role in the decision that was arrived at in *Transman* and its repetition in that case takes the matter no further.

[52] Finally there is *Murray v Minister of Defence*,[74] in which an officer in the South African Navy claimed damages for his alleged constructive dismissal. It is important to bear in mind that employees in his position are expressly excluded from the operation of the LRA.[75] He relied in support of his claim upon his right to 'fair labour practices' accorded to him by s 23(1) of the Constitution. In that regard the judgment records that 'the parties agreed that the

[74] 2009 (3) SA 130 SCA).
[75] Section 2 of the LRA provides that it does not apply to members of the National Defence Force.

plaintiff was entitled to rely directly on this right, as also the right to dignity,[76] which is a close associate of the right to fair labour practices'. The approach that Cameron JA took to the matter was expressed as follows:

'However, it is in my view best to understand the impact of these rights through the constitutional development of the common-law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover.'

[53] I do not think it is necessary to elaborate upon the implications for that case of that 'obligation of confidence and trust' which is well-established in our law.[77] It is sufficient to say that it was held to import into the contract of employment a term that

'the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.'

[54] I am not sure that the common law required development in order to reach that conclusion,[78] but that is by the by. What is important to bear in mind is that the effect of any extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices. The constitutional rights that were drawn upon in that case for importing into the contract a term protecting the employee against constructive dismissal are given full effect in relation to

---

[76] Section 10 of the Constitution.
[77] *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A) at 9H-J; Wallis, *Labour and Employment Law*, *supra*, paras 20 and 25.
[78] See for example, *Groenewald v Cradock Munisipaliteit* 1980 (4) SA 217 (E), cited by Cameron JA in para 10.

employees falling under the LRA by the definition of 'dismissal' in s 186(1).[79] *Murray* seems to me to be authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said en passant. It is possible that there is some need to develop the common law by importing into the contract of such employees terms that give effect to their right to fair labour practices but that is not a matter that need now concern us.

[55] I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act). The obiter dictum in *Gumbi*, which has been reiterated without elaboration, and without apparent consideration of the matters that have been dealt with in this judgment, cannot be considered to be authoritative.

[56] In my view the interpretation given to the cases mentioned goes further than the judgments warrant and they provide no obstacle to the correctness of the analysis set out above. That analysis concludes that, insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for

[79] 'Dismissal' is defined to mean, amongst other things, 'that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'.

resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer. It is precisely similar attempts that in my view occasioned the recent jurisdictional debate in cases such as *Chirwa*, *Makhanya and Gcaba*.[80]

[57] In both Constitutional Court decisions concerns are expressed that the cases before the Court involved attempts to circumvent the LRA.[81] That seems to me to have been a correct perspective but the problem is resolved once it is recognised that we are not concerned with jurisdictional issues but with the substantive rights of the parties. Thus in *Wolfaardt* the issue was the plaintiff's entitlement to the benefit of the full fixed term for which he had contracted. In *Chirwa* and *Gcaba* it was whether the conduct complained of constituted administrative action. All three claims were advanced on a basis that placed them within the jurisdiction of the High Court, but in the latter two the claims were without merit because they did not involve administrative action.

[58] In the present case the issue is whether Mr McKenzie's contract contains a term implied by law as pleaded by him. That is a question within this Court's jurisdiction and in my view the answer is that it does not. What creates difficulties is when the merits of a claim are confused with the jurisdiction to deal with it. Once it is shown that claims such as the present one or those in *Chirwa* and *Gcaba* are without merit they will no longer be pursued in any court and one suspects that the jurisdictional quagmire will prove to be nothing more than a muddy puddle that should have been avoided had the parties focussed on the merits of the claims rather than trying to avoid them by way of jurisdictional challenges. In the present case there was nothing wrong in Mr McKenzie

[80] Footnotes 48 and 5 above.
[81] Paras 41 (per Skweyiya J) and 104-112 and 124 (per Ngcobo J) in *Chirwa* and paras 32 and 56 of *Gcaba*.

pursuing his claim in the High Court. However, it is not a good claim and the only viable claim he could have brought based on those allegations had to be pursued, as indeed it was, before the CCMA.

[59] That conclusion suffices to justify a finding that the second of the special pleas should have been upheld on the basis, not that it raised a question of jurisdiction, but on the footing that it placed in dispute and required a decision on the merits of Mr McKenzie's contention that his contract of employment was subject to a term that it would not be terminated without just cause. That contention is without merit.

[60] For the sake of completeness I should say that I do not find it necessary to refer to all of the cases in the High Court and Labour Court where the issues canvassed at length in this judgment have been considered. Some are in my view wrong for the reasons I have given.[82] Others correctly recognise the difficulties that are identified in this judgment in holding that contracts of employment are subject to implied terms derived from and embodying some, but not all, of the provisions of the LRA.[83] It would cause an already lengthy judgment to assume unmanageable proportions were I to deal with all of them. The extent to which they are in my view either correct or in error will I trust be apparent from what appears above. In most of them the proper issues have been obscured by erroneously characterising the issue as one of jurisdiction when in truth it has been something else entirely.

[61] I conclude therefore that the claim ought to have been dismissed, on the basis set out in paragraph 47 above, and that the appeal must succeed. The only remaining question is then that of the costs of this litigation. It is true that the

---

[82] For example *Key Delta v Marriner* [1998] 6 BLLR 647 (E).

[83] *Mohlaka v Minister of Finance & others* (2009) 30 ILJ 622 (LC); [2009] 4 BLLR 348 (LC) although the remark in para 17 is incorrect and inconsistent with my conclusion in this case.

claim was unduly ambitious and has failed. Indeed in the course of argument Mr McKenzie's attorney had grave difficulty in defending it on the merits. However it is plain that there are those in the labour law community who might have regarded it as sound and it found some superficial support in authority. The case is one falling in the employment arena and also raises points of constitutional significance. In both areas our courts are reluctant to penalise an individual who unsuccessfully seeks to vindicate rights having their foundation in the Constitution and employment laws giving effect to constitutional rights. SAMSA is, if not an organ of state, at least a public body fulfilling public functions. In my view the fair order to make is that both parties should be responsible for their own costs both in this Court and below. Mr McKenzie's lack of success is then reflected in his having to pay his own costs in the condonation applications.

[62] Accordingly the following order is made:

1. The late lodging of the application for leave to appeal is condoned.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the court below is altered to read:

'The plaintiff's claim is dismissed and both parties are to pay their own costs.'

4. The parties will pay their own costs in this appeal including the costs of the applications for condonation.

_____

M J D WALLIS

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	B MALAN (attorney) Instructed by MALAN INC, PRETORIA; WEBBERS ATTORNEYS, BLOEMFONTEIN
FOR RESPONDENT:	M. G. KHOZA SC (with M.J. RAMAEPADI) Instructed by DYASON INC, PRETORIA; BOKWA ATTORNEYS, BLOEMFONTEIN.