

"The Common Law is ... not what it used to be"*: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 2)



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Abstract

This piece, which is in three parts, will revisit the importation of fairness into the employment contract (outside and independent of the fairness-based provisions of our labour legislation) by a line of Supreme Court of Appeal (SCA) judgments during the 2000s. This process culminated in the recognition of an "implied duty of fair dealing" in the common-law employment contract. This piece will discuss such developments, will argue that such an implied duty still forms part of our law (despite the apparent consensus in the literature that the SCA turned its back on such earlier judgments), will critically examine some of the arguments for and against the recognition of such a duty, and will then consider the issue within the broader context of the role of good faith and fairness in our general law of contract.

Keywords

Common-law employment contract; labour legislation; good faith; fairness; implied duty of trust and confidence; implied duty of fair dealing; constitutional development of the common law; right to fair labour practices; breach of the employment contract.

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1 Introduction

Part 1 of this piece sketched the background to the debate regarding the importation of fairness into the common-law employment contract. It briefly considered the interaction between the common law and labour legislation within the "single system of law" of the *Constitution of the Republic of South Africa* (hereafter the *Constitution*) and then considered the development of the common law which occurred in a line of Supreme Court of Appeal (SCA) judgments, including *Fedlife Assurance Ltd v Wolfaardt*,¹ *Old Mutual Life Assurance Co. SA Ltd v Gumbi*,² *Boxer Superstores Mthatha v Mbenya*,³ and *Murray v Minister of Defence*.⁴ In this part I will ask whether that development of the common law, and particularly *Murray's* recognition of the implied duty of fair dealing, has survived the SCA judgment in *SA Maritime Safety Authority v McKenzie*⁵ in 2010, and where we are now, following that case.

2 What happened in *McKenzie*?

The above-mentioned line of cases (discussed in Part 1 of this piece), which came before the SCA and involved consideration of the continued role of the common law in employment disputes alongside the statutory rights and remedies generally, and the development of the common-law duty of mutual trust and confidence in order to recognise a generally-applicable implied duty of fair dealing more specifically, culminated in the judgment of the same court in *McKenzie*. It appears to be commonly accepted that Wallis AJA's judgment in this case brought an end to the SCA's dalliance with implied common-law terms regarding fairness in the employment contract in the earlier cases, and that the SCA here confirmed the supremacy of the statutory scheme of rights and remedies in unfair dismissal cases and expressly rejected the notion of an implied term against unfair dismissal in the common-law employment contract. I do not agree, and will argue as follows:

* Van Staden and Smit 2010 *TSAR* 712.

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¹ *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) (hereafter the *Fedlife* case).

² *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA) (hereafter the *Gumbi* case).

³ *Boxer Superstores Mthatha v Mbenya* 2007 5 SA 450 (SCA) (hereafter the *Boxer Superstores* case).

⁴ *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 5 (hereafter the *Murray* case).

⁵ *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) (hereafter the *McKenzie* case).

- that *McKenzie* did not, in fact, overturn *Murray* in respect of its recognition of the implied duty of fair dealing, generally; and
- even if the intention in *McKenzie* was to put a halt to the recognition of *Murray's* duty of fair dealing, the court in *McKenzie* did so only in respect of its application to the termination of the employment contract (dismissal), and that the correctness of even such a more limited outcome in *McKenzie* is questionable.

McKenzie involved a claim for damages for breach of contract by an employee who had earlier approached the Commission for Conciliation, Mediation and Arbitration (CCMA) with an unfair dismissal claim and had been awarded compensation. The respondent claimed that the appellant, by terminating his employment contract, had breached a term of the contract that it would not be terminated without just cause. Wallis AJA (writing for the majority)⁶ identified the claim before the court by observing that "[b]earing 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." After finding that the respondent could not prove the existence of such a term in the contract as either an express or a tacit term, the court considered whether the tacit existence of such a term in the contract should be implied. In respect of the source for such an implied term, the court held that such a term could either be said to flow from the provisions of section 185 of the *Labour Relations Act* 66 of 1995 (LRA) dealing with unfair dismissal or could lie in a development of the common law in accordance with section 39(2) of the *Constitution*. Wallis AJA held that the respondent's claim was based on the first of these propositions (the importation of the LRA's unfair dismissal provisions into the contract of employment).⁷ The court then continued to find that there was no merit in this claim, for a number of reasons. I will subsequently recount those reasons, along with my submissions of why they may not hold water.

The first reason for rejecting the existence of the alleged implied term (not to be unfairly dismissed) was the court's finding that there was no indication in the express wording of the legislative scheme regarding unfair dismissal (as contained in Chapter VIII of the LRA) that the legislature intended the provisions of the scheme to be imported by implication into the employment

⁶ Mpati P, Nugent and Mhlantla JJA and Leach AJA concurring.

⁷ *McKenzie* case para 13.

contract. Wallis AJA observed that a clear legislative indication of such an intention is required where a statute creates statutory rights which a claimant relies on to have provided additional (for example, common law) remedies outside of the relevant statutory remedies created to enforce the statutory right.⁸ After examining the provisions of Chapter VIII of the LRA, the court held that (unlike some other provisions of the labour legislation which expressly provide for the incorporation of terms into the employment contract, such as section 23(3) of the LRA and section 4 of the *Basic Conditions of Employment Act 75 of 1997* (BCEA)) 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."⁹ Accordingly, the respondent's argument would have to sink or swim not on the basis of the express legislative incorporation of such provisions into his contract, but rather on whether they were to be implied from the relevant provisions of the LRA as read with the *Constitution*.¹⁰

Wallis AJA continued to find that this could not be the case, on the grounds that, firstly, the exact duplication of the legislative provisions (for example, the unfair dismissal provisions of the LRA) would be pointless and could thus not have been the intention of the legislature; and secondly, if what was claimed to have been imported into the contract was something more than the provisions of the legislation (for example, an unqualified right not to be subjected to unfair labour practices, as opposed to the more limited, codified definition of an unfair labour practice as contained in section 186(2) of the LRA) it would be "logically impermissible when we are dealing with incorporation by implication."¹¹

By way of reply, I would suggest that the above reasoning, while seemingly cogent and convincing, may be of questionable relevance when one considers that the SCA in *McKenzie* was faced with the earlier authority of *Murray*.¹² The first point to note is what constitutes the fundamental difference between *Murray* and *McKenzie*, namely the claimed source for the respective implied terms that featured in these two cases. In *Murray*, Cameron JA clearly held that the basis for the implied term of fair dealing was the constitutional development of the common law (the duty of trust and confidence) in the light

⁸ *McKenzie* case para 20.

⁹ *McKenzie* case para 25.

¹⁰ *McKenzie* case para 25.

¹¹ *McKenzie* case paras 26-28.

¹² Noting, of course, that Wallis AJA in the *McKenzie* case ultimately expressly opted not to follow the reasoning of Cameron JA in the *Murray* case. See the discussion in the text below.

of the constitutional right to fair labour practices. The source of the term was the section 23 right. In *McKenzie*, Wallis AJA (as observed above) expressly indicated that the respondent's claim was based on the argument that the unfair dismissal provisions of the LRA were to be imported into his contract of employment, and this was the basis upon which the case was decided. The claimed source of the term was Chapter VIII of the LRA. This brings into question Wallis AJA's reliance on the intention of the legislature in respect of whether statutory provisions should be incorporated into employment contracts. While I would suggest that the above reasoning in this regard is convincing, it may have missed the point.

Wallis AJA referred to statutory provisions which take the form of a mandatory injunction or of prohibiting or regulating otherwise permissible conduct as examples of legislative limitations on the parties' freedom of contract which are of a protective nature.¹³ He continued:

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 ... 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. 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.¹⁴

He continued, then, to hold that "[i]t 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."¹⁵ The problem I have with this is that the authorities referred to in that paragraph of the judgment – *Fedlife* and *Tsika v Buffalo City Municipality*¹⁶ – were referred to as confirming that the civil courts retain their jurisdiction to hear claims arising from alleged breach of the contract of employment. These cases did not hold expressly that a dispute regarding dismissal cannot go to the civil courts (the majority in *Fedlife* held that the obverse is true), and it

¹³ *McKenzie* case para 14.

¹⁴ *McKenzie* case paras 15-16.

¹⁵ *McKenzie* case para 16.

¹⁶ *Tsika v Buffalo City Municipality* 2009 2 SA 628 (ECD).

appears Wallis AJA was simply confirming the judgment in *Makhanya v University of Zululand*¹⁷ to the effect that dismissal may give rise to more than one cause of action (depending on whether its fairness or its lawfulness is challenged).

What I find problematic is that this whole line of reasoning proceeds from the point of departure that the alleged source for an alleged additional cause of action (in the form of a breach of contract or of an implied contractual term) is the relevant legislative provision. The question Wallis AJA dealt with was whether the introduction of a legislative cause of action (for example, the right not to be unfairly dismissed) could be construed to provide an additional, extra-statutory cause of action (on the basis of an implied term). While this reasoning is, of course, in line with the respondent's claim in *McKenzie* as construed by Wallis AJA, it ignores the fact that, apart from the relevant legislative cause of action (for example, section 185 of the LRA), there may be another *already existing* cause of action – namely *Murray's* implied duty of fair dealing. The existence of this latter cause of action is not dependent on the intention of the legislature. In this sense, this first reason for rejecting the implication of an implied term not to be unfairly dismissed – as a species of unfair conduct which may offend against a duty of fair dealing – can relate only to the claimed implied term deriving from legislative provisions. It does not address the authority of *Murray* for recognising an existing implied term independent of legislation. This is one of the problems with Wallis AJA's judgment: in considering whether the employment contract contained an implied term of fairness upon dismissal, the learned judge never refers to *Murray* until at the very end of the judgment, where, as will be explained below, he then dismisses *Murray* as authority for such a term in a rather simplistic and terse manner.

The second reason provided by Wallis AJA for rejecting the importation of an implied term into the employment contract, which mirrors the statutory unfair dismissal provisions, related to the policy considerations behind the legislative formulation of the statutory unfair dismissal scheme. After referring to the Australian and United Kingdom (UK) case law which relied on the legislative intention behind a statutory unfair dismissal scheme to reject the application of the duty of trust and confidence to dismissal cases,¹⁸ Wallis AJA held that there was a further obstacle in the South African context for the recognition of an implied term not to be unfairly dismissed. The learned judge

¹⁷ *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA) (hereafter the *Makhanya* case).

¹⁸ *Makhanya* case paras 29-33.

was of the opinion that, in the light of the statutory scheme, the development of the common law to provide protection to employees covered by the LRA is unnecessary:

[W]here, 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 into individual contracts of employment by way of an implied term. 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.¹⁹

In reply, I would suggest that there are two issues here with the reasoning in *McKenzie*. The first is the reliance on the legislative intention behind the establishment of a statutory unfair dismissal scheme being deemed to exclude reliance on a common-law duty of fair dealing which might provide a separate cause of action in cases of dismissal. I believe that Wallis AJA dealt with this rather superficially in two respects. Firstly, the reliance on *dicta* from foreign judgments seems to ignore the specific (and unique) South African context of the constitutional entrenchment of the right to fair labour practices. While Wallis AJA relied on the role of this right to bolster his argument that an extra-statutory cause of action in this context is not necessary, he ignored the fact that the *Constitution* calls on development of the common law where needed. One could question whether this reasoning regarding the supremacy of the statutory scheme seeks to raise the legislative intention above the *Constitution* and the single system of law principle. Secondly, even though the argument based on the wording of section 8(3) seems convincing, its application is predicated upon an assumption that the legislative rights and scheme do in fact give sufficient effect to a claimant's right to fair labour practices in a given case. As I will argue below, there are instances where employees may fall through the cracks of the labour legislation and may not be sufficiently protected, which may call for either the constitutional development of the common law (as in *Murray*) or for a constitutional challenge to the relevant legislative provisions.²⁰ Also, I believe that Wallis AJA did not sufficiently interrogate the legislative intention behind Chapter VIII of the LRA, being apparently happy to accept that the legislature opted to establish a legislative unfair dismissal scheme without asking why, exactly, this scheme was established. This seems to smack of a measure of judicial deference to the legislature, and will be examined in more detail in section 2.3 in Part 3.

¹⁹ *Makhanya* case para 37.

²⁰ See discussion in section 2.1 in Part 3.

The third and final reason for Wallis AJA's rejection of the recognition of an implied term not to be unfairly dismissed rested on the consideration of the earlier authority of cases (mainly from the SCA²¹) which dealt with the importation of fairness into the employment contract. Here, at last, Wallis AJA also purported to deal with *Murray*.

In essence, Wallis AJA considered the preceding case law and held that the recognition of an implied right to a pre-dismissal hearing in the employment contract in *Gumbi* was *obiter*, and that subsequent judgments which relied on this did nothing to strengthen the weight of that finding and to make it law.²² I will not deal in detail with the analysis of these cases, mainly because the court in *Murray* did not rely on those judgments in formulating its view on the existence of the implied duty of fair dealing, and also because it has little bearing on Wallis AJA's subsequent dismissal of the authority of *Murray* in respect of the recognition of the implied duty of fair dealing.²³

In dealing with *Murray*, Wallis AJA observed that he was not convinced that the common law required development in order to reach the conclusion in that case, and then proceeded to dismiss *Murray* by distinguishing the case as dealing with an employee claimant who was excluded from the protection of the labour legislation:

The constitutional rights that were drawn upon in [*Murray*] for importing into the contract a term protecting the employee against constructive dismissal are given full effect in relation to employees falling under the LRA by the definition of 'dismissal' in s 186(1). *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

²¹ *Gumbi* and *Boxer Superstores* cases.

²² *Gumbi* case paras 39-51.

²³ Also, I am not convinced that the relevant statement in *Gumbi* was, in fact, *obiter dictum*. The court considered whether the claimant in that matter had a right to a fair pre-dismissal hearing. In the process of recognising that the claimant indeed possessed such a right, Jafta JA stated that this right is recognised under the constitutionally-developed common law (*Gumbi* case paras 4-8, and specifically in para 5). In the *McKenzie* case Wallis JA views this as stated in passing, for the reason that the employment contract in the *Gumbi* case contained an actual express term to that effect. Jafta JA stated the following in the *Gumbi* case para 4: "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 ... In cases such as the present, the parties may opt for certainty and incorporate the right in the employment agreement." To my mind, the fact that there was an express term to that effect in the contract at issue does not make the court's statements regarding the implied common law term *obiter dicta*. The court was considering the central question of whether the claimant could rely on such a term, and the fact that the parties had opted for certainty in confirming the right by including an express term to that effect does not mean that the court's confirmation of the right (even in the presence of an express term confirming its application) means that these statements were simply made in passing.

right as other employees not to be constructively dismissed, whatever else might have been said *en passant*.²⁴

In reply to Wallis AJA's reasoning in this regard, I would suggest that this is dismissive of the clear authority of *Murray* regarding the existence of the duty of fair dealing and of the clear wording of Cameron JA.²⁵ By observing that "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", Cameron JA was clearly not reserving recognition of the implied duty of fair dealing only to those employer/employee relationships which are excluded from the application of the LRA. His intention was clearly not to exclude, but rather to be inclusive in respect of the protection provided by this implied duty, in order to protect also those who find themselves outside the tent when it comes to the application of the labour legislation. I would suggest, in distinguishing *Murray* and *McKenzie*, that the claimant's SANDF-based exclusion from the application of the LRA was important only in providing a clear opportunity for Cameron JA to rely on his constitutionally-mandated duty to develop the common law where legislation does not provide protection for an affected claimant. Construing, as Wallis AJA did, the importance and application of *Murray* as being specific only to the extension of protection to those not covered by the LRA, and this only in respect of constructive dismissals, is to my mind a rather simplistic and dismissive²⁶ manner of dealing with the clear authority of *Murray* in respect of the recognition of a significant development of the common-law contract to include a far-reaching implied duty regulating the conduct of the parties. The view expressed by Grant and Whitear-Nel, that Cameron J's statement in *Murray* on the existence of the common-law duty of fair dealing was *obiter* cannot be supported.²⁷

²⁴ *Gumbi* case para 54

²⁵ I would suggest that the wording of Cameron JA is unequivocal (*Murray* case paras 5-6): "This contract has *always* imposed mutual obligations of confidence and trust between employer and employee ... 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*."

²⁶ I share Cohen's concerns in this regard: "[I]t is of concern that a plethora of preceding decisions were singularly swept aside by the court [in *McKenzie*] with little justification. Aside from dismissing the dictum of the court in *Gumbi* as *obiter* and incorrect, the judgment failed to address the many judicial decisions that subsequently canvassed this issue. Instead Wallis JA disposed of these cases with the sweeping generalization that in most of these decisions the proper issues have been obscured by erroneously characterizing the issue as one of jurisdiction when in truth it has been something else entirely." Cohen 2010 *SA Merc LJ* 428.

²⁷ The authors remark as follows: "[Wallis AJA in *McKenzie*] concluded further that the *Murray* case was 'authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same rights as other employees not to be

Furthermore, it should be noted that in dismissing the authority of *Murray* as he did, Wallis AJA did not unequivocally reject the existence of an implied duty of fair dealing. In the very same paragraph in which he dismisses *Murray*, as quoted above, and observes that the common law may not have required development in that case, he also said the following (which related to the dictum quoted in the text to note 24 above):

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 ... It is possible that there is some need to develop the common law by importing into the contract of [employees not covered by the labour legislation] terms that give effect to their right to fair labour practices but that is not a matter that need now concern us.²⁸

At best, *McKenzie* can stand as authority only for the denial of the recognition of an implied term not to be unfairly dismissed (which term derives from a reading the LRA's dismissal provisions into the employment contract). It does not purport to deny the existence of an implied duty of fair dealing, generally, in the employment contract. And, as I will argue below, even that more limited consequence of *McKenzie* is problematic.

3 Where are we now, after *McKenzie*?

The consensus of academic writers seems to be that *McKenzie* has overturned *Murray* in respect of the recognition of an implied duty of fair dealing in the employment contract.²⁹ This is also the view expressed in a

constructively dismissed' (*McKenzie* para 54). This is correct, because Cameron JA was only deciding the claim of the appellant who was a naval officer who was excluded from the ambit of the Labour Relations Act, and therefore his comments about the effect of the Constitution on ordinary contracts of employment were obiter." Grant and Whitear-Nel 2013 *SALJ* 315. I cannot agree with this opinion. The *ratio* for Cameron JA's judgment was that all employment contracts contain the implied duty of fair dealing, including those contracts of employees not covered by the LRA, and he then proceeded to examine the facts of the case and to find that the employer had breached that implied duty through its conduct. It is unclear how the judge's recognition and application of the duty can be considered to have been *obiter* just because the case involved an employee not covered by the legislation.

²⁸ *McKenzie* case para 54.

²⁹ Conradie 2016 *Fundamina* 179 declares that the *McKenzie* case overturned the position regarding the implication of fairness in the *Murray* case. Grogan declares, with reference to the *Murray* case, that "every employer now has a general implied duty to treat its employees fairly during the existence of the employment relationship. However, the SCA has since backtracked on this approach [in *McKenzie*]." Grogan *Workplace Law* 5. The *McKenzie* case has also been described as constituting "what appears to be an about-turn in the Supreme Court of Appeal's previous stance" in respect of the implication of fairness into the common-law contract (with specific reference to an implied term that gives an employee the right to a disciplinary enquiry

number of judgments.³⁰ In *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province*,³¹ the judgment of Snyman AJ (regarding a claim related to the alleged unfair suspension of an employee) provides a good illustration of such a reading of *McKenzie* as definitive and finally dispositive of the issue of an implied duty of fair dealing (which was also followed in subsequent cases):

[T]he Court in *McKenzie* has made it clear that the right of employees to fairness in the employment relationship is fully determined by the provisions of the LRA, and is subject to all the limitations in the LRA, and cannot be implied into the contract of employment, and of specific relevance to the current matter in any regulatory provisions dealing with suspension ... Therefore, the current state of the law, as I see it, is now clear. There is no general right of fairness to be implied into a contract of employment of an employee or in any other employment provisions at an employer, regulating the employment relationship ... If an employee wants to challenge the fairness of his or her suspension, based on any general right of fairness, this can only be done in terms of the unfair labour practice provisions of the LRA, and with it, the dispute resolution provisions prescribed by the LRA.³²

I will argue, however, that this is reading too much into *McKenzie*. I have pointed out that Wallis AJA dealt rather dismissively and simplistically with the clear authority of *Murray*. And even in dismissing *Murray*, by attempting to distinguish the case as having dealt with the claim of an employee not covered by the LRA, Wallis AJA was somewhat ambiguous, stating 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.³³ This, apparently, does not reflect a general intention to put paid to the duty of fair dealing in all its forms of potential application to the employment relationship. Wallis AJA's finding should probably be reduced to little more than his statement that "insofar as employees who are subject to and protected by the LRA are concerned, their

prior to termination of the contract) – Van Niekerk and Smit *Law@Work* 98. Also see Currie and De Waal *Bill of Rights Handbook* 481.

³⁰ Subsequent case law has construed the *McKenzie* case to have rejected the notion of an implied duty of fairness in the common-law contract of employment. See *Moloto v City of Cape Town* 2011 32 ILJ 1153 (LC); *Goussard v Impala Platinum Ltd* 2012 33 ILJ 2898 (LC) (hereafter the *Goussard* case); *Gxolo v Harmony Gold Mine (Pty) Ltd* (LC) unreported case number J1124/2017 of 27 October 2017 (hereafter the *Gxolo* case).

³¹ *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province* (CJHB) unreported case number 1886/2013 of 5 September 2013 (hereafter the *Manamela* case).

³² *Manamela* case paras 35-36.

³³ *McKenzie* case para 54.

contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices."³⁴

More fundamentally, as discussed above, Wallis AJA's reasoning in *McKenzie*, while appearing cogent, was premised significantly on a different basis than that of Cameron JA in *Murray*. The ratios of these two judgments were very different. In *McKenzie* the claimant averred that his employer, in breach of an express, alternatively tacit, alternatively implied term that he would not be unfairly dismissed, had terminated his contract. After finding that there was no express or tacit term to this effect, Wallis AJA continued to extrapolate the claimant's case as being the following:

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.³⁵

Accordingly, the *ratio decidendi* of the judgment in *McKenzie* was based on the fact that the source of the alleged implied duty of fairness which underpinned the claim was the unfair dismissal provisions contained in Chapter VIII of the LRA. And Wallis AJA's reasons for rejecting such an averment are sound (for example, the fact that implying a term which simply reiterated the provisions of the Act would constitute unnecessary duplication).³⁶ But this loses sight of the fact that Cameron JA's recognition

³⁴ *McKenzie* case para 56. Grant and Whitear-Nel are also of the opinion that this is the crux of what was held in *McKenzie*: "As to whether there is an implied term of fairness in the employment contract, the battle lines have been drawn between the line of cases starting with *Fedlife* ... on the one hand, and the approach adopted in the *Mohlaka* case ... and now the *McKenzie* case. The *ratio decidendi* of the *McKenzie* case is that the contract of employment of an employee to whom the Labour Relations Act applies does not contain an implied term that he will not be unfairly dismissed." Grant and Whitear-Nel 2013 SALJ 315.

³⁵ *McKenzie* case para 13

³⁶ As Du Toit explains: "To infer the existence of a common-law right duplicating a statutory right is to call into question the purpose of enacting that statutory right. Likewise, the reason for creating statutory rules where common-law rules already exist becomes unclear, since the promulgation of the former seemingly does not necessarily, as might have been thought, signify any intention of the legislature to replace the latter. Indeed, even the fact that the enactment of a statutory right (for example, an employer's right to dismiss an employee for a fair reason based on its operational requirements) is at odds with a common-law right (such as an employee's right to remain in employment until the expiry of a fixed-term contract) is not considered enough to overrule the latter right 'by necessary implication' in circumstances where the employer's operational requirements justify dismissal. This comes close to asserting the supremacy of common law over statute." *Du Toit* 2008 SALJ 97.

of the implied duty of fair dealing in *Murray* was based very clearly on the constitutional development of the common-law obligations of trust and confidence inherent in the employment contract. For Cameron JA, the source of the implied term of fair dealing was the section 23 right to fair labour practices. In *McKenzie* it was correctly observed that the LRA is silent on the question of whether the dismissal provisions of the Act should be imported into the employment contract (and that the LRA and BCEA contain express provisions which stipulate that some of its provisions are to be read into contracts). So Mr. McKenzie could not show a statutory source for the reading-in of the dismissal provisions into his contract.³⁷ But Commander Murray was more happily placed, in the sense that the *Constitution* itself, in section 39(2), provides the imprimatur for developing the law regulating his contract in the light of the section 23 right and the absence of legislative protection of this right for the claimant. Accordingly, I would submit that *McKenzie* should not be construed as constituting any "about-turn" or "backtracking" in the SCA's stance on an implied duty of fair dealing, or that it shows that the SCA has closed the door on the recognition of the importation of fairness into the contract of employment through the constitutional development of the common law.³⁸ The case was simply decided on a different basis, and the clear and unequivocal statement in *Murray* which reflects the recognition of an implied duty of fair dealing must stand until such time as it may be overturned by the Labour Appeal Court³⁹ or the Constitutional Court.

Apart from the fact that these two judgments were based on different premises (as explained earlier) and the fact that Wallis AJA in *McKenzie* seemed to misconstrue the clear wording of Cameron J's important dictum in *Murray*, it should be noted that the rationale of the *McKenzie* judgment is also more limited than it might seem at first glance. It is important to understand this, as the effect of *McKenzie* may otherwise be construed to be much broader than it really was. (For example, one commentator believes that this judgment has shut the door completely on common-law claims for breach of contract arising from dismissal, unless the employment contract contained an

³⁷ The Labour Court in the *Goussard* case similarly held that it would be inappropriate to import the unfair dismissal provisions of the *Labour Relations Act* 66 of 1995 (the LRA) into an employment contract, basing its judgment on *McKenzie*.

³⁸ Others have also expressed the opinion that the *McKenzie* case may not be the last word on the subject of the importation of fairness into the common-law contract outside the realm of the labour legislation – see Van Eck and Mathiba 2014 *ILJ* 870.

³⁹ As the apex court in labour law matters, following the abolition of the SCA's jurisdiction in labour law matters by means of the *Constitution Seventeenth Amendment Act* of 2012.

express provision to that effect.⁴⁰ Of course, this would be contrary to *Fedlife* and *Makhanya*). What Wallis AJA held in *McKenzie* was simply that the common-law employment contract does not include an implied term not to be unfairly dismissed. This does not constitute a wholesale rejection of the judicially recognised implied duty of mutual trust and confidence or of *Murray's* constitutionally developed implied duty of fair dealing. Accordingly, the ruling in *McKenzie* would purport to have the same effect as the so-called "Johnson exclusion zone"⁴¹ fashioned by the House of Lords in *Johnson v Unisys Limited*,⁴² which has subsequently been taken to exclude only unfair dismissals from the reach of the implied duty of trust and confidence in that jurisdiction,⁴³ and to leave unfair conduct by the employer short of dismissal (and during the employment relationship prior to a dismissal) untouched and actionable under the implied term.⁴⁴ As Bosch observes with reference to the subsequent (to *Johnson*) decision of the House of Lords in *Eastwood v Magnox Electric Plc*.⁴⁵

Lord Nicholls held that where an employee acquires a cause of action (like breach of contract) prior to dismissal, that cause of action remains unimpaired by the subsequent dismissal and the statutory rights flowing from it. Financial loss may flow from the employer's acting unfairly when taking steps leading to the dismissal (such as suspension) or causing an employee to suffer financial loss from psychiatric or other illness caused by the employer's pre-dismissal

⁴⁰ Geldenhuys 2016 *PELJ* 19-20.

⁴¹ See Wahlstrom-Schatt *Dismissal of the Implied Term of Mutual Trust* 13.

⁴² *Johnson v Unisys Limited* 2001 UKHL 13 (hereafter the *Johnson* case).

⁴³ In Australia it seems that the implied duty of trust and confidence has been completely excluded from the employment contract, following the judgment of the High Court of Australia in *Commonwealth Bank of Australia v Barker* 2014 HCA 32 (hereafter the *Barker* case).

⁴⁴ Wahlstrom-Schatt, writing on Australian law in this context, explains: "In *Johnson v Unisys Ltd*, it was held that common law compensation cannot be granted for a breach of the implied term for any harm consequential to the fact or manner of dismissal. This was because compensation was already regulated by statutory unfair dismissal schemes. Australian authorities have since adopted this approach. The rule still allows for damages to be awarded for a breach of the implied term outside of unfair dismissal. For example, where the employer provides an unfair reference and the employee suffers resultant loss. However, a strict construction of the exclusion zone may be said to exclude mutual trust and confidence from applying to constructive dismissal. In response to this difficulty, the House of Lords drew a distinction, ruling that loss flowing from conduct before constructive dismissal is unaffected by the *Johnson* exclusion zone. In practice, this has meant that the implied term and unfair dismissal scheme have been able to coexist in the UK. Rather than regarding trust and confidence as imposing a norm of behaviour and therefore intruding on the legislature's domain, its implication would better reflect the mutual expectations of the parties involved in employment relationships." Wahlstrom-Schatt *Dismissal of the Implied Term of Mutual Trust* 13.

⁴⁵ *Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council* 2004 UK HL 35.

treatment of the employee. In those cases the employee may bring a common-law claim which precedes and is independent of the subsequent dismissal.⁴⁶

Accordingly, even if the judgment in *McKenzie* is correct in having dismissed the notion of an implied duty on the employer not to unfairly dismiss the employee⁴⁷ (which I am not convinced is the case, as I will explain below), it is submitted that this judgment does not constitute the wholesale rejection of the application of the implied duty of fair dealing in multiple facets of the employment relationship, as formulated in *Murray*. In fact, Wallis AJA seemed to say as much.⁴⁸

And this raises the spectre of a rather paradoxical and problematic result, if it has created a "*McKenzie* exclusion zone" where *Murray's* implied duty of fair dealing applies to employer conduct short of dismissal or prior to dismissal but not to dismissal itself. The paradox was referred to in argument in the Australian High Court case of *Commonwealth Bank of Australia v*

⁴⁶ Bosch 2006 *ILJ* 40. As one Canadian commentator observes, considering the impact of the *Johnson* case, this judgment has limited the application of the duty of trust and confidence in respect of the manner of dismissal of an employee, but this duty "continues to apply to conduct during the performance or 'subsistence' of the contract" – Doorey 2005 *Queen's LJ* 541.

⁴⁷ The *McKenzie* case has been interpreted as having quite far-reaching consequences in cases of unfair dismissal, beyond only the question of its impact on the existence or not of an implied term. Geldenhuys, referring to the *McKenzie* case, views the judgment as closing the door on any civil claim based on breach of contract, unless the contract contains an express provision allowing the employee to approach the civil courts: "Although it is in principle possible to claim additional civil damages, the statutory restriction in section 194 of the LRA extends beyond the doors of the Labour Courts in the absence of a specific provision allowing for further claims in the contract of employment. In other words, if the employer and the employee did not include a stipulation in the contract of employment which specifically provides access to the civil courts in a case of a breach of contract which would also be a dismissal, the remedies provided in the LRA would be such an employee's only recourse." Geldenhuys 2016 *PELJ* 19-20. It is doubtful whether this view of the effect of the *McKenzie* case is correct, as it would fly in the face of both the *Fedlife* and *Makhanya* cases (and s 77(3) of the *Basic Conditions of Employment Act* 75 of 1997 (the BCEA)) regarding the continued concurrent jurisdiction of the civil courts for breach of contract claims and the fact that the event of the termination of employment by the employer may constitute both a(n) (unfair) dismissal and a(n) (unlawful) breach of contract. As Van Eck and Mathiba point out (with reference to the *McKenzie* case para 58): "[T]he court was at pains to explain that it retained the jurisdiction to entertain disputes such as the one before it [namely a breach of contract claim arising from dismissal]. It held that "[i]n 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".

⁴⁸ *McKenzie* case para 54: "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."

*Barker*⁴⁹ (which rejected the notion of the recognition of the implied duty of trust and confidence in Australian employment contracts). The claimant (the respondent) in that case argued that the area left for the operation of the implied term of trust and confidence as formulated in the UK House of Lords case of *Malik and Mahmud v Bank of Credit and Commerce International SA*⁵⁰ is therefore with respect to "trust-destroying conduct" on the part of an employer which does not have the consequence of ending the employment relationship. Writing his minority judgment, Kiefel J summarised the parties' arguments as follows:

The respondent suggests that a term by which damages are awarded for "trust-destroying conduct" would promote the maintenance of the employment relationship. The appellant submits to the contrary and that *the effect of implying the term of trust and confidence is not likely to be the maintenance of employment relationships, but the greater likelihood of their termination. For instance, an employer, faced with the possibility of a claim for common law damages for wrongfully suspending an employee, or a claim for unfair dismissal for which compensation would be limited, may be inclined to choose dismissal.*⁵¹

Excluding dismissal from the area of application of the implied duty of fair dealing (if the existence of this duty was not rejected *in toto* in *McKenzie* by overturning *Murray*, as I argue is the case) may very well leave employers with the potential to forum-shop, *in anticipando*, in order to bring any potential fall-out of its unfair conduct within the strictures of a CCMA claim where compensation is capped, rather than before the civil courts where large awards for damages may be incurred.⁵² This, surely, would fly in the face of the intention of the legislature in fashioning the LRA's unfair dismissal scheme in order to protect employees, and foster employment and the maintenance of the employment relationship.

⁴⁹ The *Barker* case.

⁵⁰ *Malik and Mahmud v Bank of Credit and Commerce International SA* 1997 UKHL 23.

⁵¹ *Barker* case para 97. Emphasis added.

⁵² Du Toit 2008 SALJ note 166 at 130, also recognises this paradoxical situation in respect of excluding recourse to the common-law right only in cases of dismissal (quoting Hepple *Rights at work*): "An important 'leak', in the case of the UK, is the fact that the rule in *Johnson v Unisys* precludes a common-law right of action only where a statutory remedy exists (e.g., in the event of dismissal) but leaves it intact where no such right of action exists (e.g., in the event of suspension). As a result, employers must dismiss rather than suspend employees to avoid the risk of claims for uncapped damages." Lady Hale also referred to this anomalous result of the "*Johnson* exclusion zone" in *Gogay v Hertfordshire County Council* 2000 IRLR 703 para 69.

Writing in 2008 Du Toit referred to Hepple's⁵³ explanation of the interaction between statutory and common-law rights in the employment sphere (in the UK context):

The common law of employment and statutory rights [Hepple] argued, "are imbricated, like overhanging roof-tiles, and keep each other in place. Their separation in *Johnson v Unisys* and other cases means there is a leaky roof." In South Africa the approach in *Johnson [v Unisys]* has been rejected.

These views were expressed prior to the *McKenzie* judgment. If *McKenzie* is indeed to be read as having mimicked the creation of a "*Johnson* exclusion zone" in South African law, which has rejected the application of a duty of fair dealing only in dismissal (and, possibly, unfair labour practice) cases while leaving its application to all other aspects of the employment relationship intact, this would similarly constitute a "leaky roof" scenario. I believe such an interpretation of *McKenzie* is untenable. While, as I have argued above, I do not believe that *McKenzie* has overturned *Murray* on the recognition of the implied duty of fair dealing, I believe that even such a more restricted interpretation (excluding recourse to such a duty only in unfair dismissal and unfair labour practice claims) is just as objectionable. And I will argue in Part 3 of this piece that popular arguments in favour of such an exclusion (the overlap between unlawfulness and unfairness, and the policy reasons behind the establishment of a discrete statutory unfair dismissal and unfair labour practice dispute resolution scheme) are not as convincing as they may appear at first glance.

4 Conclusion

Having considered the judgments of the SCA which sought to develop the common law in order to import fairness into the employment contract, as well as having argued that *McKenzie's* purported rejection of *Murray's* implied duty of fair dealing is an erroneous interpretation of the effects of *McKenzie*, I will in Part 3 of this piece consider the main arguments for and against the continued recognition of such a duty.

⁵³ Hepple *Rights at Work* 20.

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Old Mutual Life Assurance Co SA Ltd v Gumbi 2007 5 SA 552 (SCA)

SA Maritime Safety Authority v McKenzie 2010 3 SA 601 (SCA)

Tsika v Buffalo City Municipality 2009 2 SA 628 (ECD)

Legislation

Basic Conditions of Employment Act 75 of 1997

Constitution Seventeenth Amendment Act of 2012

Labour Relations Act 66 of 1995

List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
LRA	Labour Relations Act 66 of 1995
PELJ	Potchefstroom Electronic Law Journal
Queen's LJ	Queen's Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UK	United Kingdom