

# THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES: A CONSIDERATION OF THE INFLUENCE AND CONTINUED IMPORTANCE OF THE HISTORICAL REGULATION OF (UN)FAIR LABOUR PRACTICES PRE-1977

**M Conradie\***

**Key words:** Constitutional right to fair labour practices; historical development; common law's influence on development; common law's continued importance on

\* Lecturer, Department of Mercantile Law, Faculty of Law, University of the Free State. Parts of this article are based on sections (especially from ch 2) of the author's LLM dissertation *A Critical Analysis of the Right to Fair Labour Practices* (University of the Free State, 2013). The author would like to thank Prof JV du Plessis for his valuable comments and guidance as the supervisor of this study. A special word of thanks to Ms Hesma van Tonder (UFS), Ms Lydia Creamer (Johannesburg Bar) and Mr Tom Schuman (Parliamentary Library) in assisting my acquisition of necessary materials.

interpretation and development of the right to work; right to associate; right to collective bargaining; right to withhold labour; right to be protected; right to develop

## 1 Introduction

It is safe to state that the right to work – to provide labour in return for remuneration – has its origin in a person’s right to existence. A person’s right to physical and emotional existence is probably the most fundamental of all human rights. In primitive times this right was subdivided into seven categories:<sup>1</sup> the right to fish, to hunt, to work land, to harvest, to associate, to be free from troubles and the right to loot. But an increase in the population on earth and a consequent decrease in natural resources led to the exchange of the first four rights (fishing, hunting, cultivation and harvesting) for a right where independent existence was lost forever: labour.<sup>2</sup>

Any relationship between two or more parties must be legally regulated in order to ensure that it is fair and that the parties’ interests are protected. The employment relationship between an employer and a worker is no different: In order to maintain a labour economy that provides conclusive proof of the prospering stability of labour relations and the enforcement of fair labour practices, measures to that effect need to be in place.<sup>3</sup> Section 23(1) of the Constitution, 1996<sup>4</sup> reads as follows: “Everyone has the right to fair labour practices.” Although this right is guaranteed in the Constitution, it remains a relatively novel concept. Until 1841<sup>5</sup> the general employment relationship was mainly regulated by principles relating to the Roman-Dutch commercial contract of letting and hiring.<sup>6</sup> These principles focussed on the commercial nature of the relationship and fair treatment of the worker was of little concern.<sup>7</sup> Although many attempts (both legislative and judicial) had been made

1 Singer 1895: 10-11. Renewed research on the primitive “right to existence” during the eighteenth century led Singer to this conclusion. Other writers who confirmed it included Charles Fourier, Walther Malachowski, Theodor Brauer, Arthur Nikisch & Johann Gottlieb Fichte (see Wiehahn 1982: par [2 1]).

2 Singer 1895: 11; Wiehahn 1982: par [2 1].

3 It is submitted that, due to the fact that the employment relationship is primarily based on an agreement between the employer and the worker, these measures mainly refer to (legislative) measures which should aim to balance the interests of both parties and which should prescribe the limitations applicable to such an agreement: “The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship” (see Davies & Freedland 1983: 18).

4 The Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

5 The first general enactment on the relationship between an employer and an employee was an Ordinance of 1 March 1841 (Cape Colony).

6 See *Ongevallekommissaris v Onderlinge Verskerings Genootskap AVBOB* 1976 (4) SA 446 (A) at 450B-C; *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A); Van Jaarsveld *et al* 2009: par [76]; Du Plessis & Fouche 2015: 9.

7 See discussion to follow in par 2 *infra*.

since 1841 to regulate the employment relationship, it was only in 1979 that the concept of “fair labour practices” officially surfaced in the South African labour sphere.<sup>8</sup>

In order to comprehend the true nature and meaning of the constitutional right to fair labour practices, it is imperative to consider the historical development of (un)fair labour practices. In this article I will first discuss the historical development of the regulation of the employment relationship in order to put this concept, which was transplanted into South African law, into perspective. This discussion will cover the respective roles and influences of Roman law, Roman-Dutch law and English law. It will be followed by a summary of examples of unfairness in the employment relationship necessitating legislative regulation.<sup>9</sup> Thereafter I will consider the relevant recommendations made by the Wiehahn Commission and I will also include an indication of the post-Constitutional (current) legal regulation. This will be followed by an evaluation of the current role of common law in the regulation of labour relations. These discussions will not only provide a better understanding of the constitutional right to fair labour practices, but will also illustrate the need for the continued reference to, and the continued development of, the common law in order to give effect to this constitutional right.

## 2 Historical development of the regulation of the employment relationship as transplanted into South Africa

### 2 1 Roman law<sup>10</sup>

Although services were mainly performed by slaves in the Roman Empire, Roman law comprised a “surprisingly sophisticated body of employment

8 A Commission of Inquiry into Labour Legislation (later known as the Wiehahn Commission) was established in 1977 in order to inquire into, report upon and make recommendations regarding existing labour legislation, with special reference for laying a foundation for sound labour relations. (See Notice 445 GG 5651 of 8 Jul 1977.) The Commission first reported on “fair labour practices” in 1979 and expressed the need to secure individual employees’ interests because of the fact that the principle of work-reservation was no longer adequate. It was proposed that the development of legislation pertaining to fair labour practices was one of the ways to achieve it (see Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1979: par [3.137.10]). Detailed recommendations on fair labour practices, which will be discussed in more detail in par 4 *infra*, were contained in a later report (see Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4.129.6]). Reference can also be made to Du Plessis & Fouche 2015: 225.

9 These examples will be limited to the period until 1977, when the Wiehahn Commission was appointed to report, *inter alia*, on legislation pertaining to fair labour practices.

10 It is necessary to briefly consider the relevant principles of Roman law. Although “our courts have to apply Justinian’s law as understood and interpreted by the Roman-Dutch lawyers of the

law”.<sup>11</sup> It was mainly regulated by principles relating to the contract of lease (*locatio conductio*).<sup>12</sup> Three contracts of lease could be distinguished:<sup>13</sup>

(a) *Locatio conductio operarum*: In terms of this contract a certain amount of a free man’s personal services (*operae suae*) could be let to someone else (*conductor operarum*) for a certain period of time and in return for the payment of money.<sup>14</sup> Payment was made for services so rendered and this payment was similar to the amount paid as rent by a lessee.<sup>15</sup> The most important duty of the employer was the payment of agreed wages.<sup>16</sup> Interest on wage arrears could also be imposed.<sup>17</sup> The most important duties of the workman were the proper execution of work<sup>18</sup> and to take care of the things entrusted to him.<sup>19</sup> Other

eighteenth century, and not classical Roman law ...”, Roman law is considered to be a living part of the Roman-Dutch law (see Hahlo & Kahn 1968: 581; Van Zyl 1979: 13). Roman law started infiltrating the Netherlands even before the twelfth century – with varied paces and to different degrees in the different provinces. An early reception of Roman law took place between the twelfth and the fifteenth century and the “actual reception” of Roman law in the Netherlands occurred from the middle of the fifteenth century (see Van Zyl 1979: 303, 315). The first official recognition of the reception in Holland occurred in 1462 (see Hahlo & Kahn 1968: 515-516).

- 11 Brassey 1998: [A1: 10]. This was despite the fact that labour was mostly provided by slaves and it was only on rare occasions that payment was rendered for services delivered (see *Smit v Workmen’s Compensation Commissioner* at 57; Grogan 2014b: 2; Van Jaarsveld & Van Eck 1996: 6).
- 12 Sandars 1874: 362-363; *Smit v Workmen’s Compensation Commissioner* at 56; Du Plessis & Fouche 2015: 3, 9. Although the employment relationship as such was never dealt with as an autonomous institution, the Roman contract of lease (*locatio conductio*) was regarded as the equivalent of the current contract of employment (see Jordaen 1996: 391; Van Jaarsveld *et al* 2001: par [1-8]; Van Jaarsveld & Van Eck 1996: 8).
- 13 Howes & Davis 1923: 196; Van Zyl 1977: 299. This distinction was based on the type of performance rendered in consideration for the payment of money (Du Plessis 1982: 2).
- 14 See Sohm 1907: 404; Du Plessis 1982: 2; Van Jaarsveld & Van Eck 1996: 6.
- 15 *Potchefstroom Municipal Council v Bouwer* 1958 (4) SA 382 (T); Van Jaarsveld & Van Eck 1996: 8-9. It is therefore interesting to note that the ordinary principles applicable to lease agreements also found application in the present instance (Du Plessis 1982: 2). This would then, for example, also imply that a workman could be held liable for incompetency to render the services he agreed to – based on the ordinary principles of lease agreements (*Smit v Workmen’s Compensation Commissioner* at 56).
- 16 “A man who has hired his services is entitled to compensation for the entire time for which he was employed, if he was not to blame for failing to do the work”: D 19 2 38 (tr Scott. All following translations of the *Digest* will be those of Scott.).
- 17 “The Governor of the province shall see that what is due as rent is paid without delay, and he is aware that as an action on leasing and hiring is one of good faith, it admits of the collection of legal interest when there is any delay”: C 4 65 17 (tr Scott. All following translations of the *Codex* will be that of Scott.).
- 18 “Therefore, an action on lease can be brought against him who performed the work badly ...”: D 19 2 51 1.
- 19 Although this duty was not explicitly stated as such, it can be deducted from various passages in the *Digest* addressing the liability of workmen for damages caused by negligence or unskillfulness (Hunter 1994: 339). See, eg, D 19 2 9 5: “Celsus also states in the Eighth Book of the Digest that want of skill should be classed with negligence. Where a party rents calves to be fed, or cloth to be repaired, or an article to be polished, he must be responsible for negligence, and whatever fault he commits through want of skill is negligence, because he rents the property in the character of an artisan.”

## THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

duties could be imposed upon the workman if specially agreed to by the employer and the workman.<sup>20</sup> If the services could not be rendered due to a reason falling within the sphere of the employer, the employer remained liable for the payment of remuneration.<sup>21</sup> The *locatio conductio operarum* applied only to menial workmen, for example painters and sculptors.<sup>22</sup> Professionals and mandataries could therefore not conclude contracts of this kind and could only claim an honorarium for their services.<sup>23</sup> The *locatio conductio operarum* may be equated with our modern contract of employment.<sup>24</sup>

(b) *Locatio conductio operis faciendi*: In terms of this contract one party (*conductor operis*) agreed to perform a specific task for another (*locator operis*) in consideration for a fixed amount of money.<sup>25</sup> “Specific task” refers to the supply of a specific result of labour and not to the labour itself.<sup>26</sup> The subject matter of this contract was the delivery of the actual promised result and not the labour spent to produce such a result.<sup>27</sup> The result of the workman’s services was compensated.<sup>28</sup> Note that the workman was not bound to follow the instructions of the employer but was only bound to produce the desired result.<sup>29</sup> This contract was utilised mainly in the building,<sup>30</sup> manufacturing<sup>31</sup> and craftsmen industries,<sup>32</sup>

20 Hunter 1994: 340-341.

21 “A man who has hired his services is entitled to compensation for the entire time for which he was employed, if he was not to blame for failing to do the work”: D 19 2 38. Impossible working conditions would suffice as an example of such a reason (Van Zyl 1977: 302). It follows that if the services could not be rendered due to a reason falling within the workman’s sphere (eg, illness of the employee), the employer was released from the duty to pay remuneration (*ibid*).

22 Grogan 2014b: 2. The subject-matter of this contract had to consist of unskilled services (Sohm 1907: 404).

23 *Ibid*.

24 Van Zyl 1977: 301. It is, however, submitted that this contract did not play an important role in Roman law. The reasons are twofold: a) the Romans preferred slave labour over free labour (*Smit v Workmen’s Compensation Commissioner* at 57); b) the majority of service-related agreements were classified under the *locatio conductio operis* (Van Jaarsveld *et al* 2001: pars [1] –[8]).

25 *Smit v Workmen’s Compensation Commissioner* at 57; Du Plessis 1982: 2.

26 Sohm 1907: 405. Joubert JA puts it as follows: “What the parties to the contract contemplated was not the supply of services or a certain amount of labour but the execution or performance of a certain specified work as a whole” (*Smit v Workmen’s Compensation Commissioner* at 57).

27 *Ibid*.

28 *Ibid*; see, also, Van Jaarsveld & Van Eck 1996: 8.

29 Sohm 1907: 405.

30 “Where I contract for the construction of a house, with the understanding that the person I employ is to be responsible for all of the expense, he transfers to me the ownership of all the material used, and still the transaction is a lease; for the artisan leases me his services, that is to say, the necessity for performing the labour”: D 19 2 22 2.

31 “It is also questioned whether, when Titius has agreed with a gold smith to make him rings of a certain weight and pattern ... If Titius gives the gold, and a sum is agreed on to be paid for the work, there is no doubt that the contract is then one of letting to hire”: *Inst* 3 24 4 (tr Sandars. All following translations of the *Institutiones* will be from Sandars).

32 “Where a precious stone has been given to an artisan for the purpose of being set or engraved ...”: D 19 2 13 5.

as well as with the transportation of goods<sup>33</sup> and training of slaves.<sup>34</sup> The *locatio conductio operis faciendi* may be equated with the modern contract of letting and hiring of work.<sup>35</sup>

(c) *Locatio conductio rerum*: This contract regulated the lease of things such as buildings, land, a horse and the like.<sup>36</sup> This type of lease agreement must be taken note of in the context of the lease of services as it was possible for a slave's owner to let the slave out to someone else.<sup>37</sup> The *locator* allowed the *conductor* to hire the use of an object in return for the payment of money.<sup>38</sup>

The Roman law contract of lease was regarded as a purely contractual relationship and was based on the individual contract between the parties.<sup>39</sup> Although the contract required the exercise of good faith<sup>40</sup> by both parties, it was based mainly on consent<sup>41</sup> and contractual freedom, and the employer could pressurise the employee into agreeing to almost anything.<sup>42</sup>

As mentioned above, money was required to be paid as consideration for the hiring of services, results of services or the use and enjoyment of a thing.<sup>43</sup> Although the consideration, in principle, consisted of money, it seems as if exceptions were

33 “Where a party hired his services for the transportation of wine from Campania ... he will be liable to an action on hiring ...”: D 19 2 11 3.

34 Sohm 1907: 405; *Smit v Workmen's Compensation Commissioner* at 57-58.

35 Du Plessis & Fouche 2015: 10.

36 Du Plessis 1982: 2.

37 Brassey 1998: [A1:1].

38 See Sohm 1907: 404. Where the object was a fruit-bearing object, the fruits formed part of the hirer's right of use and enjoyment.

39 Van Zyl 1977: 298; Grogan 2008: 6. It is therefore safe to state that, from the start, the employment relationship was contractual in nature. This was in sharp contrast with other jurisdictions where the employment relationship originated as a status relationship (master and servant).

40 See Sohm 1907: 405. He describes the contract as a *bonae fidei negotium* (agreement in good faith) in terms of which both parties were bound to exercise *omnis diligentia*. They had to exercise good faith according to the circumstances of each case.

41 “Leasing and hiring ... is contracted not by words but by consent ...” (D 19 2 1). “As the contract of sale is formed as soon as a price is fixed, so a contract of letting to hire is formed as soon as the amount to be paid for the hiring has been agreed on ...” (*Inst* 3 24). Agreement upon the thing to be let and the amount to be paid completed the contract (Howes & Davis 1923: 197).

42 See Van Niekerk & Smit 2015: 3-4, where the relationship between employer and employee is described as “inherently unequal”.

43 “[A]nd so also is leasing and hiring understood to be contracted where an agreement is made as to the rent” (D 19 2 2). “Where rent has been promised in general terms, to be decided by a third party, a lease is not held to have been made. But where it is stated that the amount of the rent shall be estimated by Titius, the lease will be valid subject to this condition; and if the party mentioned fixes the rent, it must, by all means, be paid in accordance with his estimate, and the lease will become operative. If, however, he refuses to do this, or is unable to fix the rent, the lease will be of no effect, just as if the amount of the rent had not been determined” (D 19 2 25).

allowed.<sup>44</sup> Payment was only due after services had been rendered, after a specified result had been delivered or after an object had been used.<sup>45</sup>

## 2 2 Roman-Dutch law<sup>46</sup>

### 2 2 1 The regulation of the employment relationship from 1652 to 1795

Jan van Riebeeck, an official of the *Vereenigde Oost-Indische Compagnie* (VOC),<sup>47</sup> arrived at the Cape of Good Hope on 6 April 1652, having been instructed to establish a refreshment station at Table Bay.<sup>48</sup> The arrival of the first Dutch settlers in 1652 did not only introduce Roman-Dutch law<sup>49</sup> into South Africa, but also earmarked the first fundamental demand for labour in South Africa.<sup>50</sup> During the time when the Cape was administered by the VOC, Roman-Dutch law was the common law in the Cape and applied in practice.<sup>51</sup> The most important sources of law in the Cape were legislation, Dutch law as portrayed in the works of Dutch writers and customary law.<sup>52</sup>

Roman law as applied to the relationship between employer (master) and employee (servant), was received in the Netherlands, and then gradually altered by legislation in the form of local ordinances and general *placaeten*.<sup>53</sup> Pertaining to the relationship of master and servant, three general *placaeten* need mention:<sup>54</sup>

44 “What we have said above of a sale in which the price is to be fixed by the decision of a third person, may be applied to the contract of letting to hire, if the amount to be paid for the hire is left to the decision of a third person ...” (*Inst* 3 24 1).

45 Sohm 1907: 406.

46 The Roman-Dutch law which applied to South Africa and which regulated the employment relationship, will be discussed with reference to four main time-frames: 1652-1795, 1795-1803, 1803-1806 and 1806-1910.

47 The VOC, in turn, acted upon the instruction of the States General of the Republic of the United Netherlands (Van Zyl 1979: 424-425).

48 Ploeger 1951: 58-59.

49 Brassey 1998: [A1:9]. Brassey, very aptly, describes Roman-Dutch law as a law “being rooted in Justinian’s *Corpus Iuris Civilis* but shaped by the statutory and customary law of Holland and the United provinces ...”

50 Finnemore 2006: 21.

51 Van Zyl 1979: 420.

52 *Idem* 433.

53 *Spencer v Gostelow* 1920 AD 617 at 627. The general principles laid down by the South African Appeal Court provided for the following: a) All general *placaeten* of the States General dated before 7 April 1652 applied to South Africa; b) *Placaeten* of Holland dated before 1652 were only valid insofar as those were expressly promulgated in South Africa; c) All *placaeten* of the States General and Holland dated after 1652 were valid in South Africa insofar as they were intended to be promulgated in South Africa in respect of those regulated general matters (Van Zyl 1979: 438). Van der Merwe & Du Plessis conclude that only some of the *placaeten* contained in the *Groot Placaet Boek* therefore applied to South Africa (Van der Merwe & Du Plessis 2004:48).

54 *Spencer v Gostelow* at 627-628, 638-639. Although all of these *placaeten* were supposed to apply to South Africa (if the principles of the Appeal Court set out *supra* are taken into consideration), Innes CJ stated that, mainly due to the existence of slavery in South Africa, these were never

(a) *Placaet* of 2 September 1597:<sup>55</sup> It only dealt with apprentices.<sup>56</sup> This *placaet* provided for duties of masters and apprentices: Masters were obliged to maintain apprentices with food, shelter and clothing and to provide training to servants; apprentices were obliged to complete their training and to conduct themselves in an appropriate manner.<sup>57</sup>

(b) *Placaet* of 1 May 1608:<sup>58</sup> The greater part of it was only applicable in The Hague.<sup>59</sup> These provisions did not only apply to servants but also to craftsmen; the few provisions which operated generally, however, only applied to domestic servants.<sup>60</sup> This *placaet* mainly regulated penalties that could be imposed on servants for incomplete and unsatisfactory services, for misconduct, for disrespect against masters or for the desertion of their services.<sup>61</sup>

(c) *Placaet* of 29 November 1679:<sup>62</sup> It was based on the *placaet* of 1608 and only applied to *dienstboden* – servants who either lived in the house or who were involved in an intimate relationship with the master/mistress.<sup>63</sup> Most of the provisions of the 1608 *placaet* were repeated.<sup>64</sup> Some of the provisions which were added included provisions regarding required notice by servants when terminating their services,<sup>65</sup> as well as provisions regarding the right of masters to terminate the services of servants: the servant’s services could be terminated without any valid reason, provided that outstanding wages were paid; if the termination was based on a servant’s intolerable inappropriate conduct, no outstanding wages had to be paid.<sup>66</sup>

Dutch writers, especially Johannes Voet, addressed the position regarding the rendering of services in return for remuneration.<sup>67</sup> A distinction, similar to that of Roman law, was made between two different “types” of contracts in terms of which services could be rendered:<sup>68</sup> A contract for the letting and hiring of personal services

recognised or enforced in South Africa (*Spencer v Gostelow* at 628). Mason AJA, however, stated that these *placaeten* were referred to by South African courts in cases which dealt with forfeiture of wages and, more importantly, anticipated “many of the provisions of South African Statutes ...” (*Spencer v Gostelow* 639).

55 Cau 1658: 514-515.

56 *Spencer v Gostelow* at 627, 638.

57 Cau 1658: 514-515.

58 Cau 1664: 2256-2259.

59 *Spencer v Gostelow* at 627.

60 *Ibid* 638-639.

61 Cau 1664: 2256-2259.

62 Van Leeuwen 1683: 527-530.

63 *Spencer v Gostelow* at 627, 639. Although two sections thereof only applied to The Hague, the remainder of the *placaet* found general application.

64 Refer to the contents of the 1608 *placaet* in par [b] *supra*.

65 Van Leeuwen 1683: 529.

66 *Ibid*. Examples of inappropriate conduct included rowdiness (*baldadigheyt*), wantonness (*moetwilligheyt*) and naughtiness (*stoutigheyt*).

67 Voet addressed this topic in his *Commentarius ad Pandectas* (refer to references later on). Hugo Grotius also addressed it, although to a lesser extent, in his *Inleiding tot de Hollandsche rechtsgeleerdheid* (refer to references later on).

68 Maasdorp 1907: 236. The opinion was also held that the principles of the hiring of services were substantially the same as those which applied to the letting and hiring of property (Voet 1827: 19 2 33; Maasdorp 1907: 236).

as well as a contract for the letting or giving out of work to be done by another. In Roman-Dutch law the contract for letting and hiring of personal services was commonly referred to as a *dienstcontract* or *huur en verhuur van diensten*.<sup>69</sup> The *dienstcontract*, similar to the Roman *locatio conductio operarum*, was based on consensus<sup>70</sup> pertaining to the rendering of services<sup>71</sup> in return for remuneration.<sup>72</sup> It covered a whole range of employees<sup>73</sup> and this *dienstcontract* regulated the rights

- 69 *Smit v Workmen's Compensation Commissioner* at 58. Unfortunately Roman-Dutch writers did not deal with the *locatio conductio operarum* in as much detail as they did with the *locatio conductio operis* – Voet, for instance, believed that the principles applicable to the *locatio conductio operis* could be applied fully to the *locatio conductio operarum*: “Besides the use of an article and the services of an individual, ... a piece of work also may be let out to be done, of course, by the labour of an artisan, who hires it or contracts to do it ... though this also is true, that he who hires a piece of work may at the same time be said to let his services ...” (Voet 1827: 19 2 33) and translated by Solomon (all following translations of Voet will be those of Solomon). It was also because of the fact that it was more common to make use of slave-labour than to make use of paid labour (Kunst 1968: 557-558). Also see Van Jaarsveld & Van Eck 1996: 7.
- 70 “[S]ince ‘letting and hiring’ is an equitable contract, depending upon consent, for the exchange of the use of an article or of labour for hire” (Voet 1827: 19 2 1). Grotius 3 19 2 noted that consensus could also be reached by words or even tacitly (all following translations of Grotius will be that of Herbert). It is furthermore important to take note of the fact that the consensual nature of the contract implied that both employers and employees could exercise a choice as to whom to work for or whom to hire, although exceptions also occurred. Voet, for example, refers to certain corn mills (and millers) which exercised a monopoly over the grinding of corn of inhabitants of their regions (Voet 1827: 19 2 6).
- 71 It seems as if services could be rendered to only one employer at a time. See Voet 1827: 19 2 15: “And though in the case of a man’s services being let to each of two persons, Ulpian was of opinion that it was proper that preference should be given to the one who had first hired the services ...”
- 72 “For the use of things or of the services of workmen a sum must be fixed as ‘hire’, and this must be certain either from the very beginning of the contract, or subsequently by relation to the award of a determinate third person” (Voet 1827: 19 2 7); “The ‘hire’ should properly consist of money, as the ‘price’ in the case of sale, not of other articles, nor one small coin, nor of part of the fruits; unless it has been agreed upon at the commencement of the lease that the lessor shall receive annually a certain quality of corn from the land at a fixed price” (Voet 1827: 19 2 8; Nathan 1913: 884). Grotius, however, disagreed: “[T]hat is, in money: and it is held that the consideration or payment of hire can consist in other things, which are capable of measure, number or weight ...” (1767: 19 2 6). See, also, Voet 1827: 19 2 6; Grotius 1767: 3 19 1.
- 73 These included domestic servants, workmen, labourers, apprentices, sailors and a number of other employees (*Smit v Workmen's Compensation Commissioner* at 59). Skilled services were therefore also included under the contract of employment although liberal services rendered by professional men were excluded (“Just as things may be let, so also the services, as well of free men as of slaves, may be let, at least of such of them as work for wages, but not the free services of advocates and such like men, who usually receive fees but not wages ...” (Voet 1827: 19 2 6). It is, however, very interesting that Grotius held the opinion that the services of a craftsman, eg a jeweller, did not constitute a *dienstcontract* but rather a contract of sale: “but if one party promises to another to make a ring and serve him in that respect, as in this case the sale and hiring come together, so will such a contract be characterized by what is most valuable, and is consequently deemed a sale ...” (Grotius 1767: 3 19 4).

between employer and employee. Similar to Roman law, the person rendering the services was considered the lessor and the person remunerating the services was considered the lessee.<sup>74</sup> The most important characteristic of the common law contract of employment was the duty of the employee to obey lawful commands and the instructions of his employer regarding the performance of the services agreed upon.<sup>75</sup> If services were not rendered according to the agreement, the employer could withhold a *pro rata* amount of remuneration or could compel the employee to deliver the services according to the agreement.<sup>76</sup> Employees could have been lawfully dismissed for the following reasons:<sup>77</sup> (1) lengthy absence on account of illness; (2) desertion or absenteeism without reasonable excuse; (3) refusal to obey lawful orders; (4) conducting business in competition with his master; and (5) dishonesty and general misconduct. Employees could even be held liable for neglect.<sup>78</sup> The *actio conducti* was available to the lessees to “compel them to grant the use of the property or the services hired ...”.<sup>79</sup> Similarly, the *actio locati* was available to the lessor to “proceed for the full amount due upon the lease ...”.<sup>80</sup> If the employer terminated the contract without just reason, the employee was entitled to full wages.<sup>81</sup>

As mentioned above,<sup>82</sup> the letting and hiring of a piece of work was also addressed.<sup>83</sup> This contract was referred to as “*aanbesteding van werk*”.<sup>84</sup> The remuneration was established with reference to either the nature of the job or the time needed for completion of the job.<sup>85</sup> In the absence of an agreement to the

74 Maasdorp 1907: 236.

75 *Smit v Workmen's Compensation Commissioner* at 60.

76 Voet 1827: 19 2 27.

77 Nathan 1913: 912-913.

78 “[T]here is no liability for very slight neglect in this contract, unless ... he has given himself out as a skilled workman ...” (Voet 1827: 19 2 30). However, some account was also taken of the blameworthiness of the employee: “[I]f an artisan has given a new form to the material of another person, a certain sum having been agreed upon to be paid for the work, but if before he has completed the alteration, or, if it has been completed, before he restored it to the owner of the material, who, we will suppose, has not been in default, it be lost while in his possession by fire or theft, or some similar casualty happening through no fault of his own, under such circumstances it appears equitable that the loss of the material should fall upon the owner, and the loss of the labour upon the artisan” (Voet 1827: 19 2 31).

79 Voet 1827: 19 2 14; Kunst 1968: 556.

80 Voet 1827: 19 2 21; Kunst 1968: 556.

81 Grotius 1767: 19 2 13. This, however, can be qualified as follows: Damages suffered by an employee due to wrongful dismissal should be approached according to the same rules applicable to damages. This implies that damages are represented by the loss which an employee has sustained, or the gain which the employee has missed; provided that damages should not exceed double the immediate value (Nathan 1913: 907).

82 Refer to n 70 *supra*.

83 Voet 1827: 19 2 33.

84 *Smit v Workmen's Compensation Commissioner* at 58. As will be proven during the course of the discussion, this contract was similar to the Roman *locatio conductio operis faciendi*.

85 Voet 1827: 19 2 34.

contrary, this remuneration was to be paid only upon the completion of the job.<sup>86</sup> If no agreement to the contrary existed, it was possible for the workman to appoint someone else to perform the job on his behalf.<sup>87</sup> The work and the quality<sup>88</sup> thereof needed to be according to the satisfaction and approval of the employer.<sup>89</sup> Similar to Roman law, the result of the labour constituted the subject-matter of this contract.<sup>90</sup> It was also important for the work to be finished within the time<sup>91</sup> and at the place<sup>92</sup> agreed upon.

Slavery was the dominant mode of service in the Cape.<sup>93</sup> The Cape Colony commenced taking part in East African and East Indian slave trade to such an extent that by the eighteenth century “slavery had become an integral part of the Cape Colony”.<sup>94</sup> These slave-practices were transferred to the interior by nomadic Boer farmers and this is believed to be the most influential factor that led to the idea of “channelling blacks into the unskilled and semi-skilled labour force”.<sup>95</sup> Initially the indigenous Khoisan were utilised as herdsmen. They were completely dispossessed and were largely dependent on the rural burghers for a livelihood.<sup>96</sup> From 1702 the Dutch also engaged the services of Xhosa men (as herders) and Xhosa women (as domestic workers).<sup>97</sup>

## 2 2 2 Regulation of the employment relationship from 1795 to 1803

The British era in South Africa commenced with the first occupation of the Cape in 1795.<sup>98</sup> In terms of a proclamation of 1795, the Court of Justice was re-established in order to administer justice “in the same manner as has been customary till now, and according to the Laws, Statutes and Ordinances which have been in force in this

86 Voet 1827: 19 2 40; Grotius 1767: 3 1911.

87 *Ibid.*

88 “[W]hen it is settled by the judgment of a good man whether the quality of the work answers to the terms of the agreement ...” (Voet 19 2 36).

89 Voet 1827: 19 2 35. Note however that, contrary to the Roman position, this provision required the employee to also follow the instruction of the employer. (The approval rests with the employer or his heir ... in which case the agreement is held to mean nothing more than that the workman, in performing the work, shall follow out the instructions of his employer to the satisfaction of any good man ...”).

90 Kunst 1968: 558.

91 Voet 1827: 19 2 38.

92 *Idem* 19 2 39.

93 Böeseken 1951: 156.

94 Finnemore 2006: 21.

95 *Ibid.*

96 Brassey 1998: [A1: 11]. The indigenous population was “subordinated to provide labour” for the settlers.

97 *Ibid.*

98 Articles of Capitulation, 16 Sep 1795, Rustenburg (see Eybers 1918: 3).

Colony ...”<sup>99</sup> The law as applied under the rule of the VOC therefore continued to be applied in an unaltered manner.<sup>100</sup>

### 2 2 3 Regulation of the employment relationship from 1803 to 1806

In 1803<sup>101</sup> the Cape was restored to the Dutch (Batavian Republic) in terms of the Treaty of Amiens.<sup>102</sup> Again, the law, unaltered, continued to be applied under the rule of the VOC.<sup>103</sup>

### 2 2 4 Regulation of the employment relationship from 1806 to 1910

The Second British occupation of the Cape in 1806, theoretically speaking,<sup>104</sup> did not affect the legal system in force at that time.<sup>105</sup> The Articles of Capitulation of 1806 guaranteed that Roman-Dutch law would remain in force in the Cape Colony.<sup>106</sup>

Originally the demand for labour was largely met by the availability of slave labour.<sup>107</sup> The abolition of slavery in England in 1807, however, caused an end to slave imports to the Cape which, in turn, caused a serious shortage of labour.<sup>108</sup> The

99 Proclamation of 11 Oct 1795 (Cape Colony) by General A Clarcke (see Theal 1897: 187-188).

100 Van Zyl 1979: 445. Although more emphasis was placed on writers of the late eighteenth century, continued reference was made to Voet and Grotius.

101 Proclamation of 21 Feb 1803 (Cape Colony) by Dundas (see Eybers 1918: 13-14).

102 Art 5 of the Treaty of Amiens of 27 Mar 1802 by Cornwallis, Bonaparte, De Azara and Schimmelpenninck (see Eybers 1918: 12-13).

103 Van Zyl 1979: 447-448.

104 Refer to par 2 2 5 *infra* for a discussion on the influence of the English law.

105 The Roman-Dutch law (and more specifically, the law of Holland) brought to South Africa by Jan van Riebeeck in 1652 remained the prevailing law of the Cape (Hahlo & Kahn 1968: 572).

106 Section 8 of the Articles of Capitulation of Cape Town, 10 Jan 1806, provided as follows: “The burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto ...” (Cape Colony 1862: 42). But this was only applicable to the burghers and inhabitants of Cape Town. Section 8 of the Articles of Capitulation, 19 Jan 1806, extended this provision to all of the inhabitants of the Cape Colony. The laws of the conquered country therefore continued in force until altered by the conqueror. The Roman-Dutch law was also taken over by the South African Republic in 1844 (see art 31 of The Thirty-Three Articles of 9 Apr 1844 (Eybers 1918: 356). Although the Thirty-Three Articles were adopted as the constitution in 1849 before the independence of this territory was acknowledged in 1852, the Thirty-Three Articles served as the constitution until 1858 (Van Zyl 1979: 460-461). A new constitution was adopted only in 1858 but did not make specific provision for the adoption of Roman-Dutch law. Article 31 was, however, confirmed by the Volksraad in 1859 in the Addenda to the Grondwet nos 1 & 2 of 19 Sep 1859 (South African Republic) (Eybers 1918: 416-418); the Republic of the Orange Free State in 1854 (see art 56 of the Constitution of the Republic of the Orange Free State of 10 Apr 1854) (Eybers 1918: 295); and by the District of Natal in 1845 (see Cape Ordinance 12 of 1845 (Eybers 1918: 227-229). Natal became the Colony of Natal in 1856.

107 Jordaan 1996: 396.

108 *Ibid.*

shortage was addressed by various measures, including the following: a) the Khoisan were “encouraged” to take up employment in the Cape Colony by a proclamation in 1809;<sup>109</sup> b) farmers were allowed to apprentice Khoisan-children over the age of eight for a period of not more than ten years;<sup>110</sup> c) the Khoisan were also relieved of the obligation to wear passes, and passes were issued to Xhosas who could never take up employment before;<sup>111</sup> d) hoping to encourage the Khoisan to an even greater extent to tender their services to the settlers, they were afforded the same protection<sup>112</sup> and freedoms enjoyed by the settlers in 1828;<sup>113</sup> and e) workers were imported from China, India and Mozambique.<sup>114</sup> Slavery was abolished in 1834,<sup>115</sup> although the continued working relationships of the Khoisan and Xhosa resembled much of the disrespect for workers that was so typical of the whole notion of slavery.

Formal regulation of employer/worker relations was necessitated by the natural increase in the country’s population, the large number of freed slaves and the expansion of the economy.<sup>116</sup> The first general and true enactment on masters and servants appeared only in 1841.<sup>117</sup> This 1841 Ordinance was repealed by Act 15

109 Proclamation of 1 Nov 1809 (Cape Colony) by Du Prè & Caledon (see Cape of Good Hope 1827: 119-121). Section 1 provided that the Khoisan were compelled to have a fixed and registered place of residence and were only allowed to travel between districts after a certificate to that effect had been issued. This measure was therefore intended to compel them to live and work on farms (Jordaan 1996: 396). It must, however, also be mentioned that increased protection, as opposed to the position of the slaves, was afforded by this proclamation regarding the conclusion of contracts of employment (s 2), the freedom to leave upon the expiry of the contract (s 4) and the payment of wages (s 5).

110 Proclamation of 23 Apr 1812 (Cape Colony) by Cradock (see Cape of Good Hope 1827: 189-190). Strict instructions, however, needed to be followed.

111 Proclamation 49 of 14 Jul 1828 (Cape Colony) by Bourke (see *idem* 462). This proclamation was repealed and the issuing of passes were extended to all natives in 1857 by Act 27 of 1857 (Cape Colony) (see Cape Colony 1858: 275-279).

112 This increased protection related to, *inter alia*, ownership of land (s 3), limited prescribed periods for contracts of employment (s 4), payment of wages (s 7) and so forth.

113 Proclamation 50 of 17 Jul 1828 (Cape Colony) by Bourke (see Harding 1838: 463-471).

114 Brassey 1998: [A1: 13] – [A1: 14].

115 Van Zyl 1979: 452. Although slavery was abolished there is one school of thought which regards a voluntary contract of employment as an alienation and transfer of a person’s right to self-determination – therefore similar to the concept of slavery. But the other view prevails, it seems, that a contract of employment should rather be regarded as an instrument to secure the inalienable right to self-determination (see “Rethinking the employment contract: what can today’s corporate reform movement learn from the old anti-slavery and democratic movements?” by Prof David Ellerman, University of California).

116 Nel 2012: 80.

117 Cape Ordinance of 1 Mar 1841 by Bell and Hamilton (see Harding 1845: 240-265). (Due to the fact that this Ordinance was repeated almost *verbatim* in Act 15 of 1856 (Cape Colony), the said provisions will not be discussed.) A few proclamations dated before 1841 have already been discussed. (Apart from the proclamations already mentioned, another proclamation may also be briefly mentioned: Proclamation of 26 Jun 1818 (Cape Colony) by Somerset (see Theal 1902: 14-18). This proclamation, however, applied only to workmen and apprentices introduced from overseas.) It is, however, submitted that none of these proclamations truly regulated the relationship between master and servant in general.

of 1856<sup>118</sup> in order to regulate the relationship between master and servant in the Cape Colony. The following laws – all based on the 1841 Ordinance – regulated the relationship between master and servant:<sup>119</sup> Natal: Ordinance 2 of 1850;<sup>120</sup> the South African Republic: Law No 13 of 1880;<sup>121</sup> and the Republic of the Orange Free State: Ordinance 1 of 1873.<sup>122</sup> These laws regulated bilateral individual relationships and no provision was made for collective bargaining, trade unions and the like.<sup>123</sup> Apart from containing general provisions on the repeal of previous laws,<sup>124</sup> definitions,<sup>125</sup> duration of contracts,<sup>126</sup> notice periods,<sup>127</sup> provision of food and lodging,<sup>128</sup> payment of wages,<sup>129</sup> apprenticeship of children<sup>130</sup> as well as the payment of wages and the termination of contracts in the event of death, insolvency, and relocation of a master,<sup>131</sup> special provisions were also included. The following may serve as examples: a) a servant was sometimes entitled to wages during periods of absence caused by illness;<sup>132</sup> b) the family of a servant did not have an automatic right of residence

118 Act 15 of 1856 (Cape Colony) (see Cape Colony 1858: 106-131).

119 These master and servant laws were repealed in 1974 by the Second General Law Amendment Act 94 of 1974.

120 Ordinance 2 of 1850 (District of Natal) by Boys on 21 Mar 1850 (see Cadiz & Lyon 1879: 133-147).

121 Law No 13 of 1880 (Republic of the ZAR) (see Jeppe & Gey van Pittius 1910: 56-83).

122 Ordinance 1 of 1873 (Republic of the OFS) by Visser on 21 May 1873 (see Oranje-Vrystaat 1880: 237-240). This Ordinance was applicable only to coloured servants. Although it is stated that an Ordinance of 1904 (Brassey 1998: [A1: 15]; Jordaan 1996: 396; <http://www.sahistory.org.za/archive/chapter-9-struggle-against-sweating>) was the first corresponding enactment to the 1856 Act, it is submitted that this Ordinance of 1873 – which was repeated almost *verbatim* – was indeed the first corresponding enactment (see *Spencer v Gostelow* at 629, 643).

123 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par 4 8.

124 Act 15 of 1856 (Cape Colony): s 1; Orange Free State Ordinance 1 of 1873: s 24; ZAR Law No 13 of 1880: s 1. The Natal Ordinance 2 of 1850 did not contain such a provision.

125 Act 15 of 1856 (Cape Colony): s 2; Natal Ordinance 2 of 1850: s 2; ZAR Law No 13 of 1880: s 2.

126 Act 15 of 1856 (Cape Colony): ch 2, ss 2-5; Natal Ordinance 2 of 1850: ch 1, ss 2-5; Orange Free State Ordinance 1 of 1873: s 3; ZAR Law No 13 of 1880: ch 2, ss 8-11. Increased protection was afforded to servants in the Cape Colony with the promulgation of Act 18 of 1873 (Cape Colony): s 1 (see Tennant & Jackson 1895: 1293).

127 Act 15 of 1856 (Cape Colony): ch 2, ss 7-8; Natal Ordinance 2 of 1850: ch 1, ss 7-8; ZAR. Law No 13 of 1880: ch 2, ss 13-14.

128 Act 15 of 1856 (Cape Colony): ch 2, s 9; Natal Ordinance 2 of 1850: ch 1, s 9; ZAR Law No 13 of 1880: ch 2, s 15.

129 Act 15 of 1856 (Cape Colony): ch 2, s 10 and ch 5, s 20; Natal Ordinance 2 of 1850: ch 1, ss 10-11 and ch 5, s 2; Orange Free State Ordinance 1 of 1873: s 10; ZAR Law No 13 of 1880: ch 2, s 16.

130 Act 15 of 1856 (Cape Colony): ch 3; Natal Ordinance 2 of 1850: ch 2; ZAR Law No 13 of 1880: ch 3.

131 Act 15 of 1856 (Cape Colony): ch 4; Natal Ordinance 2 of 1850: ch 3; ZAR Law No 13 of 1880: ch 4. The Orange Free State Ordinance 1 of 1873 s 16 provided that the contract continued in the event of relocation within the Orange Free State.

132 Act 15 of 1856 (Cape Colony): ch 2, s 11; Natal Ordinance 2 of 1850: ch 1, s 12; ZAR Law No 13 of 1880: ch 2, s 17.

with the servant's master;<sup>133</sup> c) different forms of misconduct were punishable with imprisonment, hard labour, solitary confinement, a spare diet and the requirement of payment of compensation (if damage had been caused);<sup>134</sup> and d) participation in meetings to host consultations on wages and working hours was allowed and consequently was not punishable with any penalties or prosecution.<sup>135</sup>

## 2 2 5 The influence of English law

Although the Articles of Capitulation of 1806<sup>136</sup> and the Charters of Justice<sup>137</sup> guaranteed that Roman-Dutch law would remain in force, English law and institutions did have a considerable influence on Roman-Dutch law.<sup>138</sup> Formal law was regularly amended by the British and later on, especially after the implementation of the Charters of Justice, material law was also changed.<sup>139</sup> Van Zyl provides an account of the factors which either evidenced or contributed towards this English influence in the legal system and the community at large. These included:<sup>140</sup>

(a) A general Anglicisation of the Colony and the community: i) the 1820 settlers chose to live according to their own customs, values and laws; ii) English schools were established and teachers with an English education were appointed in these schools; iii) Scottish ministers were imported to occupy the vacancies in the reformed churches; and iv) trade was ruled by English merchants and many English customs took root in the Colony.

133 Act 15 of 1856 (Cape Colony): ch 2, s 14; Natal Ordinance 2 of 1850: ch 1, s 15; ZAR Law No 13 of 1880: ch 2, s 20.

134 Act 15 of 1856 (Cape Colony): ch 5, ss 3-6 and s 13; Natal Ordinance 2 of 1850: ch 4, ss 3-6; Orange Free State Ordinance 1 of 1873: ss 6, 7 and 15; ZAR Law No 13 of 1880: ch 5, ss 3-13, 20-21 and 34. These types of punishment were somehow softened with the promulgation of Act 18 of 1873 (Cape Colony): ss 3-7 (see Tennant & Jackson 1895: 1293-1297). The moderated amendment provided for the imposition of a fine. Imprisonment (with accompanying hard labour and so forth) could only be imposed if the servant failed to pay the penalty. It was also stated that these provisions pertaining to criminal sanctions, could be equated with a modern-day disciplinary code (Jordaan 1996: 397).

135 Act 15 of 1856 (Cape Colony): ch 7, s 2; Natal Ordinance 2 of 1850: ch 5, s 3; ZAR Law No 13 of 1880: ch 7, s 3.

136 Refer to par 2 2 4 *supra*.

137 "And we do further give and grant to the said Supreme Court of the Colony of the Cape of Good Hope, full power, authority, and jurisdiction, to apply, judge and determine upon matters according to the laws now in force in our said Colony ...": Second Charter of Justice 1832: s 31 (Tennant & Jackson 1906: 100). The First Charter of Justice was issued on 24 Aug 1827 and the Second Charter of Justice on 4 May 1832 (Erasmus 1996: 146).

138 Hahlo & Kahn 1968: 576. This influence was especially significant from 1860-1910.

139 Van Zyl 1979: 448.

140 Van Zyl 1979: 453-458. A summary of this account is provided here. This account corresponds with that of Hahlo & Kahn 1968: 575-578.

(b) The English language was to be used in all judicial acts and proceedings and all official acts and documents had to be drawn up and promulgated in English.<sup>141</sup>

(c) Not only was the *Raad van Justitie* replaced with the Supreme Court,<sup>142</sup> but judges presiding in the Supreme Court had to be barristers in England and Ireland or advocates admitted in English courts.<sup>143</sup> Conversely, an advocate could only be admitted if such a person had been admitted as a barrister in England or Ireland, an advocate in Scotland or to the degree of Doctor of Laws at the Universities of Oxford, Cambridge or Dublin.<sup>144</sup>

(d) The principle of *stare decisis*<sup>145</sup> became an established principle in the Colony's courts. The final court of appeal was the Privy Council in England.

(e) Much of the new legislation enacted during the British occupation was modelled on English legislation. Examples include the law of evidence and company law. Other English legal principles including "time of the essence", "restraint of trade" and "vicarious liability" also took root in the Colony's courts.

The Roman-Dutch legal position regarding the employment relationship was minimally influenced by English law<sup>146</sup> and only in respect of vicarious liability, forfeiture of wages, specific performance, payment of wages during periods of illness and implied terms of the contract of employment.<sup>147</sup>

## 2 2 6 The extent to which fairness was addressed by the common law

It seems safe to state that the common law did not specifically make provision for fair labour practices in the employment relationship.<sup>148</sup> Recently, however, it appeared as if the courts were willing to develop the common law in order to import into contracts of employment generally, rights flowing from the constitutional right to fair labour practices.<sup>149</sup>

141 Proclamation of 5 Jul 1822 (Cape Colony) by Somerset (Eybers 1918: 23-24).

142 Second Charter of Justice 1832: s 1 (Tennant & Jackson 1906: 93-94).

143 Second Charter of Justice 1832: s 3 (Tennant & Jackson 1906: 94). Due to the fact that judges were much more comfortable and familiar with English law, many decisions were based on English law (based on their argument that there was no real difference between English law and Roman-Dutch law in such an instance).

144 Second Charter of Justice 1832: s 17 (Tennant & Jackson 1906: 97).

145 In terms of this principle, previous decisions of a concurrent or higher court had to be followed by another court, unless the previous facts differed from the present facts or unless the previous decision was based on an error.

146 Hahlo & Kahn 1968: 578.

147 Jordaan 1996: 397-415.

148 See the discussion *supra*. Also refer to Grogan 2010: 5; Grogan 2008: 2. This general conclusion stands despite the fact that, since the beginning of time, the general concept of fairness prevailed as an ideal and ideology.

149 These decisions reflected the notion that the common law should be developed to address the fairness concept in order to promote the spirit, purport and objects of the Bill of Rights. See the discussion in the following text.

In both *Boxer Superstores Mthatha v Mbenya*<sup>150</sup> and *Murray v Minister of Defence*<sup>151</sup> it was held that all contracts of employment contain an implied term that employers must treat employees fairly. Consequently it was found in the *Jonker* case<sup>152</sup> that an ordinary breach of contract may constitute an infringement of the employee's wider constitutional right to fair labour practices. In *Tsika v Buffalo City Municipality*<sup>153</sup> as well as *Mogothle v Premier of the Northwest Province*<sup>154</sup> it was also held that employers owe a general duty of fairness to employees in terms of the contract of employment. Another example is that of *Globindlal v Minister of Defence*<sup>155</sup> where it was decided that, in a situation where an employee is not covered by labour legislation, "it could be argued that it was an implied term of the contract that the rights enshrined in section 23 of the Constitution, 1996, form an integral part of the contractual relationship".

The abovementioned position was, however, overturned by the decision in *SA Maritime Safety Authority v McKenzie*<sup>156</sup> where it was held that the development of the common law, "to import into contracts of employment generally rights flowing from the constitutional right to fair labour practices ...", can only be possible where there is no existing statutory provision which already gives effect to the Constitution and which already regulates the matter in dispute.<sup>157</sup> The court therefore acknowledged the possibility that the common law could be developed to import rights flowing from the constitutional provision, but only where legislation does not provide protection or does not apply to an employee.<sup>158</sup>

### 3 Summary of examples of unfairness in the employment relationship necessitating legislative regulation

As already mentioned in the introduction to this article, the Wiehahn Commission in 1979 recommended the adoption of legislation pertaining to fair labour practices.<sup>159</sup> From the preceding discussion it may be observed that the general nature of the law<sup>160</sup> which regulated the employment relationship did not bear much evidence of fairness.<sup>161</sup> A general imbalance in the relationship between the employer and the

150 (2007) 28 ILJ 2209 (SCA).

151 (2008) 29 ILJ 1369 (SCA).

152 *Jonker v Okhahlamba Municipality* (2005) 26 ILJ 782 (LC) at 568-569.

153 (2009) 30 ILJ 105 (E).

154 (2009) 30 ILJ 605 (LC).

155 (2010) 31 ILJ 1099 (NGP).

156 (2010) 31 ILJ 529 (SCA).

157 Par [55].

158 Par [54].

159 Refer to n 8 as well as to par 4 *infra* for a detailed discussion of these recommendations.

160 That is the law until, at least, the nineteenth century.

161 At least not of a standard of fairness that we currently require.

employee as well as inadequate protection of the majority of people (mainly based on political policy considerations) was endorsed by the general prevailing law and the legal system of that time.<sup>162</sup> Although the preceding discussion might already have served as an explanation of the rationale for the Wiehahn Commission's recommendation, it is necessary also to highlight other examples<sup>163</sup> of unfairness during the twentieth century which have not only perpetuated this unfairness, but basically characterised the entire sphere of labour in South Africa.<sup>164</sup>

### 3 1 The right to work

From the preceding discussion it may be seen how a person's right to work was often negatively influenced in that: a) only free men could tender their services in return for remuneration;<sup>165</sup> b) the Khoisan were initially "encouraged" to live and work on farms (no matter whether they wanted to or not) as they were compelled to have a fixed and registered place of residence, and were only allowed to travel if certified to do so;<sup>166</sup> c) people were explicitly prohibited from performing certain kinds of work;<sup>167</sup> and d) work could be performed only if a non-white worker was allowed to be present at a particular place. The non-white worker's right to work consequently depended on whether the law allowed for the application of a pass, and, if so, also on the success of such an application.<sup>168</sup> Apart from these examples, a person's right to work was also directly and indirectly curtailed in various other ways.

The so-called system of pass laws was an example of an indirect manner of limiting a person's right to work:<sup>169</sup> In terms of these laws people needed consent,

162 When discussing other instances of unfairness, brief reference will be made to the relevant instances of unfairness which were reflected in the general laws and prevailing legal system, as discussed in par 2 *supra*.

163 These examples will be discussed under similar categories of unfair labour practices as portrayed in the recommendations of the Wiehahn Commission (of which a more detailed discussion will follow in par 4 *infra*).

164 The highlights will be categorised according to the categories of unfairness which were contained in the 1979-recommendation of the Commission.

165 Refer to par 2 1 *supra*.

166 Refer to par 2 2 4 *supra*.

167 One such example can be found in a proclamation issued by the Cape Colony in 1848 to regulate the provisional government in the Orange River Sovereignty. This proclamation, *inter alia*, provided that "(n)o person of colour is ever to be employed in conveying summonses, or in the execution of any point of law, nor are any of the military at present stationed at Bloemfontein to be employed in matters of a civil nature" (Proclamation 8 March 1848 by Smith (Cape Colony) in Eybers 1918: 273-275). Another example was the prohibition of black people performing skilled work on buildings in urban areas, except in the segregated townships (Native Building Workers Act 27 of 1951 in GG 4601, 4 May 1951).

168 Refer to par 2 2 4 *supra*.

169 A few examples of the specific part of the pass law system that influenced the right to work, will be referred to. The general system will therefore not be discussed. The pass law system applicable to coloured persons, other than some coloured persons residing in the Orange Free State, was repealed in 1923 (Natives (Urban Areas) Act 21 of 1923: s 28 in GG 1326 of 19 Jun 1923). The pass law system applicable to black people was repealed only in 1986.

evidenced by a pass, to be present at a certain place (at a certain time) – which might of course have included the workplace – or to work at a certain place (at a certain time). One of the earliest examples in this regard dates back to 1872. In terms of a proclamation,<sup>170</sup> “uncivilised” black servants<sup>171</sup> needed to obtain a daily pass to be present at the diamond fields in Kimberley.<sup>172</sup> If such a servant managed to secure employment, another pass was issued by the master to signify the servant’s right to be present at the workplace.<sup>173</sup> The servant also had to obtain a third pass on leaving the field, certifying that he had carried out his employment satisfactorily.<sup>174</sup> Another example is the pass law that became effective in 1896.<sup>175</sup> This law required male servants of the coloured races to acquire district passes and metal badges, in addition to their travel passes, in order to work on the gold-fields.<sup>176</sup> Surprisingly, the government implemented a labour tax in the same year in terms of which all Africans, who could not prove that they had been in *bona fide* wage employment for at least three months in a year, had to pay ten shillings.<sup>177</sup> The system of pass laws therefore had an enormous impact on a person’s right to work. Similar provisions pertaining to the regulation of black people’s right to residence also limited a black person’s right to work: the Natives (Urban Areas) Act of 1923 not only made provision for the urban residence of black people in “registered” areas, but also provided that employers were prohibited from employing black people if they did not reside in

170 Proclamation 14 of Aug 1872 (Cape Colony) (Davenport (2010)).

171 It is noteworthy to make mention of South Africa’s “civilised labour policy” at that time. “Civilised labour” was defined as “labour ... rendered by persons, whose standard of living conforms to the standard ... tolerable from the usual European standpoint ...”. “Uncivilised labour” was defined as labour performed by labourers who “enjoyed a standard of living restricted to the bare requirement of the necessities of life as understood among underdeveloped people ...”. In terms of the civilised labour policy state departments not only received an instruction to give preference to civilised labour but the Board of Trade and Industries was empowered to withhold import rebates from firms that employed too few white workers in terms of the Customs Tariff and Excise Duties Amendment Act 36 of 1925 (Brassey 1998: [A1: 29]).

172 Meredith 2007: 45. Due to the fact that white workers were to some extent relieved of this restriction, it soon led to differences between the different races, which in turn led to the first recorded strike by black workers in 1883 (McGregor 2012: 82).

173 *Ibid.* This meant that a person was not able to apply for work or to work if such a pass was not issued.

174 Davenport 2010.

175 Witwatersrand Chamber of Mines 1896: 59.

176 Law No 23 of 1895 (Republic of the ZAR) (Witwatersrand Chamber of Mines 1896: 60-68). The Master and Servants Act 49 of 1901 (Cape Colony) also required all workers working and living in urban areas to be issued with passes that had to be carried at all times.

177 This tax was implemented in terms of the Glen Grey Act 25 of 1894 (Cape Colony). One of the reasons for introducing this measure was to remove “natives from that life of sloth and laziness, teaching them the dignity of labour, and [make] them contribute to the prosperity of the state and ... give some return for our wise and good government ...” (the words of Cecil Rhodes during his speech of 27 Jul 1894 available at <http://www.sahistory.org.za/people/cecil-john-rhodes> (accessed 7 Feb 2016)).

such registered areas.<sup>178</sup> Later restrictions confirmed extended control to all urban areas and to black women.<sup>179</sup>

Another system which had a direct influence on a person's right to work was the system of "work reservation". Work reservation entailed the reservation of work for persons of a specified race or for persons belonging to a specified class.<sup>180</sup> The consequences of work reservation for black and coloured people were that<sup>181</sup> black and coloured people, including highly skillful and semi-skilled people: a) were forced into the "cheap labour" category; b) were only allowed to undertake "unskilled labour"; and c) could only earn low wages.<sup>182</sup> This system was, for the first time, endorsed by legislation in 1926 – but only for the mining industry.<sup>183</sup> The Mines and Works Amendment Act provided that certificates for competency required to perform skilled work on mines could not be issued to black and coloured people.<sup>184</sup> The Industrial Conciliation Act of 1956 officially endorsed work reservation (as seen on the mines) to be applied in the entire industry in full force.<sup>185</sup> It was also provided that employers who gave work to a person, where the work was not reserved for a person of that race, were guilty of an offence.<sup>186</sup> In 1964, after the owners of twelve gold mines applied for an applicable concession, black people were, however, allowed to perform some work reserved for whites only.<sup>187</sup> In 1967 black miners were

178 Natives (Urban Areas) Act 21 of 1923: s 18. The position was worsened in 1930 when the Governor-General could proclaim that no natives were to enter any urban area for the purpose of seeking employment or residing in such area (Natives (Urban Areas) Amendment Act 25 of 1930: s 3(d) in *GG* 1875 of 30 May 1930). Also refer to s 28 of the Native Administration Act 38 of 1927 (*GG* 1645 of 5 Jul 1927).

179 Natives Laws Amendment Act 54 of 1952 (*GG* 4873 of 27 Jun 1952).

180 Industrial Conciliation Act 28 of 1956: s 77(6)(a) (*GG* 5679 of 11 May 1956). It may also be defined as the setting aside, by law, of certain skilled grades of employment for certain ethnic groups: see <http://www.oxforddictionaries.com/definition/english/job-reservation> (accessed 7 Feb 2016). The alternative definition is evidence of the fact that the system of job reservation was also supported by regulations prescribing the type and quality of education which were to be given to black and coloured people. Further regulations enabled the government to require certain levels of education – which were not available to persons in certain race groups – for allowing the development of skills (see also the discussion in par 3 4 *infra*).

181 Apart from the fact that no work was ever reserved for non-white people (Alexander & Simmons 1959: 20).

182 See [http://www.southendmuseum.co.za/index.php?option=com\\_content&view=article&id=28&Itemid=30](http://www.southendmuseum.co.za/index.php?option=com_content&view=article&id=28&Itemid=30) (accessed 7 Feb 2016).

183 Mines and Works Amendment Act 25 of 1926 (*GG* 1555 of 25 May 1926).

184 Section 1.

185 Section 77. A few examples can be provided: In 1958 the positions of ambulance drivers, firemen and traffic police in Cape Town were reserved for whites. In 1959 the operation of lifts (other than for the conveyance of non-Europeans or for goods only) in Bloemfontein, Johannesburg and Pretoria, was reserved for whites. The distribution of races within the clothing industry was frozen in 1960. Section 77 was only repealed in 1979 (Industrial Conciliation Act 94 of 1979: sec 17).

186 Section 77(13)(a).

187 Brassey 1998: [A1: 40]. This was necessitated by an expansion of South Africa's economy. Although this proved to increase productivity, government put an end to it.

again permitted to participate in “reserved work” but only under certain conditions, namely that white miners should not be retrenched as a result of this and that whites were to receive the majority share of the increase in productivity.<sup>188</sup>

A person’s right to work was also affected by the limitation to engage in work of a person’s choice. A second example of this limitation was the Native Laws Amendment Act<sup>189</sup> which restricted the movement of “native labour” from farms to urban areas.<sup>190</sup> Local municipal officers and native commissioners also had to control the influx of blacks into urban areas.<sup>191</sup> Apart from restricting racial groups to certain occupations, other groups of people were also directly or indirectly restricted from occupying an employment position of choice: women, for example, were mostly prevented from occupying professional or other formal positions of employment due to conservative, patriarchal ideas.<sup>192</sup>

## 3 2 The rights to associate, to bargain collectively and to strike

We have already noticed, from the preceding discussion, that no provision was made for the registration of trade unions, the right to belong to trade unions, the right to bargain collectively or the right to strike.<sup>193</sup> Apart from this, these rights were directly and indirectly curtailed in various other ways as well.

### 3 2 1 The right to form a trade union and to belong to a trade union

European tradesmen introduced South African workers to British trade unionism and principles thereof such as protective labour legislation, safe working conditions and basic worker protection.<sup>194</sup> The arrival of employees from abroad resulted in the establishment of the first trade union on 22 December 1881.<sup>195</sup> The main objective of this union was to protect the status of their members.<sup>196</sup> The first locally based union, the Durban Typographical Society, was established in 1886 and it combined forces with similar trade unions in 1898 in order to form the first true South African

188 *Ibid.*

189 54 of 1952.

190 Sections 27, 28.

191 Brassey 1998: [A1: 39].

192 Shephard 2008: 5-6.

193 Refer to par 2 2 4 *supra*.

194 McGregor 2012: 3.

195 The so-called “Carpenters’ and Joiners’ Union” (Nel 2012: 81; see <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm> (accessed 3 Mar 2011). It was, however, a mere branch of the English trade union called the “Amalgamated Society of Carpenters and Joiners of Great Britain”.

196 Finnemore 2006: 21-22. Interestingly, it was not only black workers who were initially excluded from the benefits of these unions, but also Afrikaans-speaking workers.

trade union, namely the South African Typographical Union.<sup>197</sup> This union served the printing, newspaper and packaging industries and concentrated on organising the technical employees in these sectors.<sup>198</sup> The first trade union to organise black employees was the Industrial Workers of Africa, formed in September 1917.<sup>199</sup> After merging with the Industrial and Commercial Workers' Union of Africa in 1920, its membership comprised of workers from harbours, farms, domestic services, factories, education and retail.<sup>200</sup>

The Industrial Conciliation Act of 1924<sup>201</sup> provided for the registration of employers' organisations and trade unions.<sup>202</sup> But it seems as if these trade unions and employers' organisations could only be registered for the benefit of white, coloured and Indian people: black people were not included in the definition of an employee as an employee was defined as any person, excluding a person whose contract of service or labour was regulated by any black pass laws<sup>203</sup> or regulations or by the Native Labour Regulation Act 15 of 1911.

Although black employees were not allowed union membership in terms of the 1924 Industrial Conciliation Act, unregistered industrial unions were emerging and in 1928 the South African Federation of Non-European Trade Unions (SAFNETU) was formed.<sup>204</sup> The non-racial South African Trade and Labour Council (SATLC) was formed in 1930 and called for legal recognition of African trade unions.<sup>205</sup> The 1937 Industrial Conciliation Act<sup>206</sup> was enacted to promote and attain industrial peace between employers and employees, but major strikes characterised this period and Africans were still excluded from joining unions.<sup>207</sup> Trade union registration and membership, to the contrary, increased with rapid strides.<sup>208</sup>

197 Nel 2012: 81. By now, however, Afrikaans-speaking workers were no longer excluded: only black workers were excluded.

198 See <http://www.satu.co.za/> (accessed on 12 Feb 2016).

199 Van der Walt 2004: 68.

200 Gioliomee & Mbenga 2007: 248.

201 Industrial Conciliation Act 11 of 1924 (*GG* 1380 of 31 Mar 1924).

202 Chapter 3 of the Act. Unions were defined as "any number of persons associated together ... for the purpose of regulating relations between themselves and their employers or for protecting the interests of employees ...": s 24.

203 According to Nel 2012: 85, black females were not compelled to carry passes. A Supreme Court decision in 1944 confirmed this and held that black women could gain membership of registered trade unions. Later, the Industrial Conciliation Act 28 of 1956, however, explicitly excluded all black people.

204 Brassey 1998: [A1: 31-32].

205 Godfrey *et al* 2010: 46.

206 36 of 1937.

207 Du Toit 2006: 8.

208 In 1941, a conference of forty-one organisations convened by the Transvaal branch of the African National Congress (ANC), established the African Mine Workers Union. By 1945 the Council of Non-European Trade Unions stood at 119 affiliates representing 158 000 workers on the Witwatersrand. The SATLC, the SAFNETU and the Western Province Federation of Labour Unions collaborated in 1954. In 1955, fourteen erstwhile affiliates of the South African Trade Union Council and nineteen members of the Council of Non-European Trade Unions formed the

With the promulgation of the 1956 Industrial Conciliation Act, much of the 1924 Act remained intact.<sup>209</sup> White and coloured employees were guaranteed the right to freedom of association.<sup>210</sup> The weaker position of the black employees remained since this Act was applicable to whites and coloureds in the private sector only.<sup>211</sup> Provision was made for the registration of trade unions, employers' organisations and industrial councils.<sup>212</sup> Much more use was made of this Act than its predecessor insofar as more employees, especially black employees, belonged to internal work committees.<sup>213</sup> Although this might have seemed more favourable than previously, it must be borne in mind that these committees were not totally independent and also did not possess the same degree of collective bargaining powers as unions did.<sup>214</sup> Moreover, certain limitations were placed on mixed unions<sup>215</sup> and African workers were still prohibited from joining unions. It is therefore accurate to state that the interests of black employees were not adequately promoted in this regard.

In 1961, the 1956 Industrial Conciliation Act was amended to provide that no objections by mixed unions, pertaining to the registration of white unions, would be entertained if the mixed union's membership of coloured people exceeded one half of the number of white persons employed in that workplace.<sup>216</sup>

Revolt in reaction to the racially segregated system and the absence of promotion of certain workers' interests<sup>217</sup> resulted in strikes by unorganised black workers in Durban in 1973.<sup>218</sup> The strikes were followed by the establishment of numerous unorganised unions for black workers. As Du Toit *et al* put it: "[T]he new unions grew rapidly and increasingly won recognition."<sup>219</sup> In reaction to this the 1953

South African Congress of Trade Unions (SACTU) in order to mobilise the black working class for securing political liberation. In the same year, SACTU entered into an alliance, the Congress Alliance, with the ANC. (See, also, Brassey 1998: [A1: 34, 35 and 39]).

209 Du Toit 2006: 9.

210 Industrial Conciliation Act 28 of 1956: s 78.

211 Industrial Conciliation Act 28 of 1956: s 1(1)(xi); Nel 2012: 87. An employee was defined as "any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive, any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer".

212 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 16].

213 Refer to par 3 2 2 *infra*.

214 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 17 4].

215 Examples of limitations included that these unions had to establish separate branches for white and coloured members, had to hold separate meetings and had to ensure that such a union's executive body consisted only of white persons: s 8(3) of the Industrial Conciliation Act 28 of 1956. Mixed unions referred to unions with both white and coloured members. The registration of any more multi-racial unions was, in fact, prohibited (s 5(6)).

216 Industrial Conciliation Amendment Act 18 of 1961 (GG 6661 of 30 Mar 1961).

217 Du Toit 2006: 10.

218 *Ibid*.

219 *Ibid*. Also see Van Jaarsveld & Van Eck 1996: 14. At the end of 1975 more than 608 000 Africans belonged to these committees.

Native Labour (Settlement of Disputes) Act<sup>220</sup> was drastically amended in 1973 to make provision, *inter alia*, for a Central Black Labour Council. This Council played an important role in representing black employees' interests pertaining to conditions of employment and wage determinations at meetings of industrial councils and the Wage Board.<sup>221</sup>

### 3 2 2 The right to participate in collective bargaining

The 1924 Industrial Conciliation Act was intended to serve as a vehicle to ensure labour peace and to provide machinery for bargaining over conditions of employment and resolving disputes. Prominent features of this Act included features including, but not limited to, the registration of industrial councils<sup>222</sup> (and *ad hoc* conciliation boards) promoting voluntary collective bargaining and a dispute resolution mechanism with the emphasis on the settlement of collective disputes.<sup>223</sup> These benefits of collective bargaining and dispute resolution were, however, not available to pass-bearing African employees.<sup>224</sup>

The Native Labour (Settlement of Disputes) Act<sup>225</sup> was initially enacted as a measure to serve as an alternative for the acknowledgement of black unions. Employees were not really encouraged to participate directly in the determination of their conditions of employment. Provision was made for the establishment of internal works committees in industrial establishments employing twenty or more black workers.<sup>226</sup> The main purpose of these committees was to serve as a vehicle through which white employers could communicate with black workers. These committees were therefore only consulted in the event of a dispute in a workplace.<sup>227</sup> The Act also made provision for regional native labour committees, chaired by a white official, to regulate labour within communities.<sup>228</sup> These committees were overseen by a whites-only Central Native Labour Board.<sup>229</sup> After problems were experienced with the control over bargaining by unregistered unions,<sup>230</sup> the Native Labour (Settlement

220 Native Labour (Settlement of Disputes) Act 48 of 1953 (*GG* 5162 of 9 Oct 1953).

221 Kommissie van Ondersoek na Arbeidswetgewing 1981: pars [4 15 1], [4 152].

222 This can be compared with our current bargaining council (Brassey 1998: [A1: 28]).

223 Industrial Conciliation Act 11 of 1924: ch 3. Dispute resolution could occur in respect of wages, work hours, and other general conditions of employments (s 10). Similar to our current position, strikes and lock-outs were not permissible during the conciliation process (s 12). Municipal and other essential service employees were also prohibited from striking (s 11).

224 It only applied to white, coloured and Indian workers (Godfrey *et al* 2010: 43-44).

225 48 of 1953.

226 Section 7.

227 *Ibid.* These committees consisted of representatives of black employees who were intended to serve as spokespersons in negotiations on matters of mutual interest with employers (Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 15 1]).

228 Section 4.

229 Brassey 1998: [A1: 38].

230 Du Toit 2006: 10.

of Disputes) Act was renamed the Bantu Labour Relations Regulations Act<sup>231</sup> and expanded the internal works committees' powers, made provision for liaison committees representing employers and employees and introduced new mechanisms for regulating of wages – and especially black wages.<sup>232</sup>

### 3 2 3 The right to strike and to participate in other forms of industrial action

It may be concluded that, from as early as 1911,<sup>233</sup> non-white employees were not permitted to strike as they could be punished for desertion from employment.<sup>234</sup> Despite the prohibition of desertion, 13 000 black mineworkers went on strike in 1913 with a resultant intervention by the army.<sup>235</sup> This was followed by a strike of both white and black miners during July 1913.<sup>236</sup> After Ghandi called for a general strike by all Indian workers in the Natal Colony in 1914, the government followed with the Riotous Assemblies Act.<sup>237</sup> Protest action reoccurred in 1918 with a strike by sanitary workers and mineworkers boycotting mine stores in protest against high prices and also in 1919 with a strike by 71 000 black mineworkers.<sup>238</sup> In January 1922 as many as 22 000 mineworkers went on strike which eventually developed into a revolt,<sup>239</sup> later referred to as the Rand Rebellion.<sup>240</sup>

231 70 of 1973.

232 Brassey 1998: [A1: 41].

233 The Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony), which applied only to employers and white workers in the Transvaal Colony, prohibited strikes and lock-outs over disputes which had not served before a Conciliation and Investigation Board (Jeppe & Gey van Pittius 1910: 2377-2393).

234 Native Labour Regulation Act 15 of 1911: s 14(1) (*GG* 112, 2 May 1911). This punishment included a fine of £10 or, in default of payment, imprisonment with or without hard labour for two months.

235 Giliomee & Mbenga 2007: 245.

236 *Ibid.* The strike involved strikers setting fire to the Johannesburg railway station, The Star offices as well as the Rand Club. Hundreds of people were shot dead by the army.

237 27 of 1914 (*GG* 536 of 20 Jul 1914). This Act permitted the government to disperse public gatherings and to close public places in the event of any likelihood of a breach of peace. A public gathering was defined as a “gathering, concourse or procession in, through, or along any public place, of twelve or more persons having a common purpose ...” (s 22). Breach of a contract of employment by participating in riotous behaviour, constituted an offence (s 12(3)). A person who induced persons to cease work was also guilty of an offence (s 10). The prohibition of gatherings or assemblies of black people was confirmed in s 27 of the Native Administration Act 38 of 1927.

238 Brassey 1998: [A1: 25]; M Finnemore 2006: 25. It is believed that this strike was largely organised by the Industrial and Commercial Union (hereafter ICU), which was established in 1919.

239 Giliomee & Mbenga 2007: 247. Jan Smuts fought this revolt with the use of aircraft bombing, field guns, tanks and trench warfare.

240 Nel 2012: 84; Twyman 2001: 319.

The revolt of white mineworkers during the Rand Rebellion in 1922 resulted not only in the bloodiest civil revolt, with almost 250 deaths,<sup>241</sup> 687 injuries, 4 750 arrests, eighteen condemnations to death and four hangings, but also in the 1924 Industrial Conciliation Act.<sup>242</sup> As mentioned above, this Act, apart from providing machinery for bargaining over conditions of employment and the resolution of disputes, also recognised the right to strike by white employees not engaged in essential services. White employees, except those employed to perform essential services,<sup>243</sup> could lawfully engage in a strike: (1) after the dispute was considered and reported on by an industrial council or a conciliation board; (2) if there was no existing agreement to settle the dispute; and (3) if it was not in contravention of the Riotous Assemblies Act of 1914.<sup>244</sup> In 1928 the Pact Government proposed amendments to the 1924 Industrial Conciliation Act.<sup>245</sup> However, only slight improvements in the form of widened functions of councils and conciliation boards occurred.<sup>246</sup>

In 1942 the Council of Non-European Trade Unions' members went on a series of strikes over minimum wages. These strikes were very violent and a War Measure<sup>247</sup> was promulgated to penalise black employees who went on strike. In 1944 another War Measure<sup>248</sup> also prohibited gatherings of more than twenty persons on proclaimed mining ground. But, despite this, the largest strike ever in South African history broke out in 1946.<sup>249</sup> Much labour was lost due to prevailing strikes during these times.<sup>250</sup> As a result of this, in 1953 strikes by all black people were prohibited by the Native Labour (Settlement of Disputes) Act,<sup>251</sup> any contravention of which was punishable by imprisonment.<sup>252</sup>

241 Van Jaarsveld & Van Eck 1996: 11. Brassey 1998: [A1: 26] refers to 153 deaths.

242 Du Toit *et al* 2006: 6.

243 The reference to essential services included "work connected with the supply of light, power, water, sanitary, transportation or fire extinguishing services ...": see the Industrial Conciliation Act 11 of 1924 s 11. This can be compared with our current description of "maintenance services".

244 Industrial Conciliation Act 11 of 1924: s 12.

245 Brassey 1998: [A1: 28]. These proposed amendments were that: industrial council agreements should remain in force until the expiry-time was arrived at or those were replaced by new agreements; industrial councils should have the power to solve both individual and collective disputes; membership of conciliation boards should be open to persons other than employers, employees and collective bargaining representatives; there should be no need for the formal declaration of a strike; special arrangements should be in place for the recovery of unpaid wages; industrial council agreements should be open to be suspended in native areas; and industrial council agreements should be capable of covering blacks excluded from the Industrial Conciliation Act 11 of 1924.

246 These amendments were effected only in 1930 with the coming into operation of the Industrial Conciliation (Amendment) Act 24 of 1930 (*GG* 1875 of 30 May 1930). See Du Toit 2006: 7.

247 145 of Dec 1942. In the next two years, however, almost 60 breaches of this Measure occurred.

248 War Measure Proclamation 1425 of 1944.

249 Godfrey *et al* 2010: 49-50.

250 Brassey 1998: [A1: 40-41]. 160 000 black and Indian workers took part in strikes in Natal in 1973. In 1974, 189 strikes occurred and in 1975 there were a number of 119 strikes taking place.

251 Native Labour (Settlement of Disputes) Act 48 of 1953: s 18. This included the support of such a strike.

252 *Ibid.*

The 1956 Industrial Conciliation Act regulated white and coloured employees' right to strike.<sup>253</sup> This right was limited by agreements which already regulated the dispute, by wage determinations and by the delivery of essential services.<sup>254</sup> Surprisingly, prohibitions on strikes by black employees were amended so as to place black employees in the same position as white employees under the 1956 Act.<sup>255</sup>

### 3 3 The right to protection

We have already noticed, from the preceding discussion, how a person's right to protection was negatively influenced in many instances. These include that: a) slaves were not entitled to remuneration for the rendering of services;<sup>256</sup> b) the contract of employment was based on, and equated with, the ordinary commercial contract of lease and, consequently, as long as the agreement was based on consensus, the worker could be pressurised into agreeing to almost anything;<sup>257</sup> c) although the employer was obliged to pay remuneration, such remuneration could easily be withheld if the employer was, for example, not satisfied with the services or due to the illness of the worker;<sup>258</sup> d) the worker did not have any say in management decisions affecting working conditions and legitimate interests;<sup>259</sup> e) workers were subject to inhumane forms of punishment, such as imprisonment, hard labour and a spare diet;<sup>260</sup> f) a worker's services could be terminated without any valid reason (or at least for any trivial reason) and it was also possible to withhold wages upon such termination;<sup>261</sup> g) farmers were allowed to apprentice children over the age of eight;<sup>262</sup> h) much of the disrespect embedded in slavery-practices continued even after the abolishment of slavery;<sup>263</sup> and i) the families of workers did not enjoy an automatic right of residence with the worker.<sup>264</sup> Apart from these, this right to protection was directly and indirectly curtailed in various other ways.

Many employees did not enjoy adequate protection with regard to working conditions, punishment and fair wages.<sup>265</sup> Regulation became more "civilized", in

253 Industrial Conciliation Act 28 of 1956: s 65.

254 *Ibid.*

255 Compare this with the previous prohibition/ban on strikes. For an example of such a previous prohibition, refer to the Industrial Conciliation Further Amendment Act 61 of 1966: s 1(a) (*GG* 1585, 4 Nov 1966).

256 Refer to pars 2 1 and 2 2 1 *supra*.

257 Refer to par 2 1 *supra*.

258 Refer to pars 2 1, 2 2 1 and 2 2 4 *supra*.

259 Refer to par 2 1 *supra*.

260 Refer to pars 2 2 1 and 2 2 4 *supra*.

261 Refer to par 2 2 1 *supra*.

262 Refer to par 2 2 4 *supra*.

263 *Ibid.*

264 *Ibid.*

265 Interestingly, from as early as 1914, all workers (including black workers) were guaranteed compensation for injuries sustained within the scope of the employment relationship (Workmen Protection Act 25 of 1914 in *GG* 527 of 2 Jul 1914).

this regard, with the promulgation of the Industrial Conciliation Act of 1924.<sup>266</sup> But the protection remained limited and was initially only afforded to an exclusive group of employees.<sup>267</sup>

Many workers were subjected to unfair and almost inhumane conditions of employment. The first example in this regard was the practice on mines that African workers had to be strip-searched when going off shift.<sup>268</sup> The government of the South African Republic was called in to regulate conditions of service on the mines in 1894 and the Chamber of Mines formed the Rand Native Labour Association.<sup>269</sup> The first legislation truly regulating employment conditions was the Factories Act<sup>270</sup> as well as the Regulation of Wages, Apprentices and Improvers Act.<sup>271</sup> The Natives (Urban Areas) Act required employers of black people to provide or to hire accommodation for their black employees working in urban areas.<sup>272</sup> This Act also enabled the Governor-General to make regulations for contracts of employment of black people residing in registered urban areas.<sup>273</sup> The Shops and Offices Act was enacted in 1939.<sup>274</sup> Although it applied to all shops and offices, it did not apply to watchmen, deliverers and cleaners.<sup>275</sup> In 1941, the 1918 Factories Act (as amended by the 1931 Factories Amendment Act) was replaced by the Factories, Machinery and Building Work Act<sup>276</sup> which made provision for the regulation of working conditions in factories, the supervision of machinery and for general safety and the taking of precautions against accidents. This Act also enabled the Minister to prescribe special

266 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [410]. The most important trendsetting principle of this Act was that of self-regulation in the employer-employee relationship.

267 Black persons were not recognised as employees in terms of the Industrial Conciliation Act 11 of 1924.

268 McGregor 2012: 82; Finnemore 2006: 23.

269 Brassey 1998: [A1: 17].

270 28 of 1918 (*GG* 899 of 4 Jun 1918). It included protective provisions pertaining to working hours, protection of pregnant women, overtime, etc. Although it could be considered as a huge improvement, it applied only to factories.

271 29 of 1918 (*GG* 899 of 4 Jun 1918). This Act made provision for the determination of minimum wages of women and young persons, but it applied only to the industries in which hardly any non-white persons were employed.

272 Natives (Urban Areas) Act 21 of 1923: s 1(1)(e). It is submitted that this regulation, pertaining to the provision of accommodation, was not only intended to ensure the improvement of working conditions (by providing accommodation), but also to ensure that all black people were restricted to living in areas reserved for native occupation.

273 Section 23. Regulations could be made to regulate matters such as conditions of service, conduct between employers and employees, restrictions on the periods of contracts, as well as allowable deductions from wages.

274 41 of 1939 (*GG* 2654 of 23 Jun 1939). It regulated, *inter alia*, hours of work (forty-six hours per week), overtime, paid annual leave, maternity leave and adequate seating for female employees. This Act was later repealed and replaced by the Shops and Offices Act 75 of 1964.

275 Section 1.

276 22 of 1941 (*GG* 2893 of 17 Apr 1941).

conditions of work for employees where such special provision was necessary to safeguard the physical, moral or social welfare of employees.<sup>277</sup>

Black employees were subjected to punishment if they neglected to perform their duties, worked under the influence of alcohol, refused to obey lawful commands, and used abusive language.<sup>278</sup> More severe punishment could be imposed for desertion from employment or for causing injury to property or persons.<sup>279</sup>

Although the Workmen Wages Protection Act<sup>280</sup> secured the payment of wages, it did not provide any regulation of minimum wages. The Wage Act of 1925<sup>281</sup> was promulgated with the purpose of fixing minimum wages and working conditions for certain employees and, although it did not provide any warrant for racial discrimination, authorities found many ways to mainly benefit white workers by this Act.<sup>282</sup> Another Act which worsened the position of black workers was the Mines and Works Amendment Act,<sup>283</sup> which made express provision for discrimination on the mines. The position of African workers was slightly improved in 1930 when the Minister was particularly authorised to specify minimum wages and maximum working hours for persons not defined as an employee.<sup>284</sup> The United South African National Party came to power in 1933. Although the Industrial Conciliation Act of 1924 was replaced by a new consolidated Industrial Conciliation Act in 1937,<sup>285</sup> it “did not solve the major problems inherent in the dual industrial relations system”.<sup>286</sup>

In 1974 the South African government came to realise that much-needed changes in the labour market should take place.<sup>287</sup> A Wage Board was appointed to investigate the wage rates of the lower paid workers in Natal.<sup>288</sup> The Unemployment Insurance Act,<sup>289</sup> which previously only operated to the benefit of white employees, was amended to include black workers as well.<sup>290</sup>

277 Section 51(1)(h). The Minister could therefore require an employer to segregate employees by race or sex on the factory floor, in rest rooms and toilets; see <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01797.htm> (accessed 5 Feb 2016).

278 Native Labour Regulation Act 15 of 1911: s 19(2). This punishment included a fine of forty shillings.

279 *Idem* s 14(1). This punishment included a fine of £10 or, in default of payment, imprisonment with or without hard labour for two months.

280 15 of 1914 (*GG* 522 of 22 Jun 1914).

281 27 of 1925 (*GG* 1494 of 30 Jul 1925).

282 Brassey 1998: [A1: 29], [A1: 30]. Wage Boards were manipulated, determinations were made only for certain grades of workers and a ceiling was put on the number of unskilled workers who might be employed.

283 25 of 1926.

284 Wage Amendment Act 23 of 1930 (*GG* 1875 of 30 May 1930). This was not principally intended to protect African workers but to benefit white workers from being undercut by cheaper African labour (Du Toit 2006: 7; Godfrey *et al* 2010: 46).

285 36 of 1937.

286 Du Toit 2006: 8; Brassey 1998: [A1: 32].

287 Weissman 1985: 169. One of the final factors leading to this realisation was probably the threatening African Mineworkers Union coal boycott of 1974.

288 Brassey 1998: [A1: 41].

289 30 of 1966.

290 Unemployment Insurance Amendment Act 12 of 1974.

### 3 4 The right to develop

It has emerged from the preceding discussion that provision was made for apprenticeship contracts and for the provision of food, shelter and clothing to apprentices, and it was possible to apprentice Khoisan children from the age of eight years.<sup>291</sup> Apprentices were also compelled to complete their training.<sup>292</sup> The right to development was directly and indirectly curtailed in various other ways.

With the discovery of diamonds and gold<sup>293</sup> South Africa experienced an influx of artisans and skilled workers from Europe.<sup>294</sup> This led to the industrialisation of the country. Although natural resources were readily available at that stage and although the growth in the labour force was enormous,<sup>295</sup> South Africa could not provide adequate skilled and unskilled labour to work the resources.<sup>296</sup> Scarce-skilled employees were recruited mainly from Europe and Australia and these, mainly white employees, occupied elite positions that required skills which could not be provided by white or black South Africans at that stage.<sup>297</sup> In an attempt to reduce labour costs, unskilled workers were furthermore required to perform skilled work. This posed a threat to white miners and after a strike in 1902, these miners formed the Transvaal Miners' Association.<sup>298</sup> Another strike by white miners at the Knights Deep Mine took place in 1907 due to their dissatisfaction after employers proposed to extend skilled work to black workers as well. The shortage of skilled workers, however, continued and even worsened. The government replied to this problem by declaring "dilution" as permissible.<sup>299</sup> In essence, dilution was a relaxation of the "civilized labour policy". It allowed unqualified black workers outside the mines permission to perform skilled work under white supervision.<sup>300</sup> Ironically, it was found that the performance of skilled labour by unskilled black employees had no detrimental effect on the quality of production.<sup>301</sup>

291 Refer to par 2 2 4 *supra*.

292 Refer to par 2 2 1 *supra*.

293 Diamonds were discovered at the Orange River valley in 1867 and gold was discovered at the Witwatersrand in 1886 (Giliomee & Mbenga 2007: 158 & 199).

294 Employment opportunities did not only exist on the mines but labour was also needed on the roads, the railway services and on the farms supplying those areas.

295 Brassey 1998: [A1: 15]. By 1874 there were 10 000 black workers employed on the Kimberley mines.

296 Finnemore 2006: 21.

297 *Ibid*. Despite the import of scarce-skilled employees, South Africa experienced a shortage of unskilled labour. Most black peasants were subsisting on the land although a small number resorted to working on the mines. The reasons for this included: earning a livelihood; earning money to buy guns in order to protect themselves against the deprivation of their land; for those who were already deprived of their land (eg the Sotho and Griqua), having to find an alternative means of income; and simply hoping to find fortunes.

298 Brassey 1998: [A1: 20].

299 *Idem* [A1: 34].

300 The discrimination on mines, although, continued under the auspices of the Mines and Works Amendment Act.

301 Brassey 1998: [A1: 34]. The Board of Trade and Industries actually made the following remark: "Blacks, it was able to report, were better at performing skilled and semi-skilled work than was generally thought."

The development of skills of black and coloured people was controlled (and limited) by the government. The Apprenticeship Act of 1922<sup>302</sup> only applied to skilled trades and, therefore, excluded black people. The Apprenticeship Act of 1944<sup>303</sup> contained similar restrictions. The Bantu Education Act<sup>304</sup> was promulgated to prevent black and coloured people from receiving an education that would pose a threat to whites and lead them to aspire to positions that they were not allowed to hold.<sup>305</sup> Black and coloured people were only allowed to attend special native (Bantu) schools established by the government,<sup>306</sup> which was then in a position to prescribe the courses of training or instruction in these schools.<sup>307</sup> Furthermore, a person was only allowed to enter into an apprenticeship having passed standard 6:<sup>308</sup> this requirement was beyond the reach of the vast majority of coloured youths as it was an educational entry level that only a handful of coloured schools met.<sup>309</sup>

#### 4 The recommendation (by the Wiehahn Commission) to develop legislation pertaining to fair labour practices

A Commission of Inquiry into Labour Legislation<sup>310</sup> was established in 1977 in order to inquire into, report upon and make recommendations regarding existing labour legislation, with special reference to laying a foundation for sound labour relations.<sup>311</sup> The Commission first reported on “fair labour practices” (as a crucial element ensuring sound labour relations) in 1979 and expressed the need to secure individual employees’ interests.

The Commission stated the obvious: legislation did not adequately address the parameters of fairness and unfairness.<sup>312</sup> As early as in 1979, the South African

302 Apprenticeship Act 26 of 1922 (*GG* 1252 of 19 Jul 1922).

303 Apprenticeship Act 37 of 1944 (*GG* 3353 of 8 Jun 1944).

304 47 of 1953 (*GG* 5162 of 9 Oct 1953).

305 Dr HF Verwoerd explained the policy as follows: “There is no place for the Bantu in the European community above the level of certain forms of labour. Until now he has been subjected to a school system which drew him away from his own community and misled him by showing him green pastures of European society in which he was not allowed to graze” (see <http://webcache.googleusercontent.com/search?q=cache:L7i5iselt3MJ:www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s+&cd=2&hl=en&ct=clnk&gl=za> (accessed 15 Feb 2016)).

306 Section 7.

307 Section 15(d).

308 Apprenticeship Act 26 of 1922: s 8(1) (*GG* 1252 of 19 Jul 1922).

309 See [http://www.southendmuseum.co.za/index.php?option=com\\_content&view=article&id=28&Itemid=30](http://www.southendmuseum.co.za/index.php?option=com_content&view=article&id=28&Itemid=30) (accessed on 15 Feb 2016).

310 Later known as the “Wiehahn Commission”.

311 See n 8 *supra*.

312 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 1271].

labour market was heterogeneous in terms of race, colour and culture and it was this heterogeneous nature which necessitated regulation in terms of fair<sup>313</sup> principles.<sup>314</sup> It was stated that the content of such fair principles was to be guided by a consideration of existing laws and common law principles in the context of freedom, legislative justice, equality and equal participation.<sup>315</sup> The recommendation was consequently made to adopt and implement legislation, based on non-discrimination, equality and justice, on fair labour practices.<sup>316</sup> The Commission also identified the following as six basic elements of such legislation:<sup>317</sup>

(a) **The right to work** This right originated in the right to existence as well as in religious-ethical values.<sup>318</sup> This right is regarded as a manifestation of a person's right to the ultimate actualisation of his personality.<sup>319</sup> This right is, however, subject to economic factors and the availability of work and should, at the very least, be interpreted to guarantee a right to have equal access to employment opportunities.<sup>320</sup> (This element of fair labour practices is currently regulated, mainly, in the Employment Equity Act of 1998.<sup>321</sup>)

(b) **The right to associate** It is necessary for an employee to be able to associate with a trade union<sup>322</sup> because of the fact that a trade union is defined as "an association of employees whose principal purpose is to regulate relations between employees and employers ...".<sup>323</sup> A trade union should, therefore, act as the guardian of its members' interests. The employee should be able to associate freely with a trade union without prior authorisation and without distinction on grounds such as race, colour, religion or sex.<sup>324</sup> (This element of fair labour practices is currently regulated, mainly, in the Labour Relations Act 66 of 1995.)

(c) **The right to bargain collectively** Collective bargaining was regarded as a process of decision-making between employers and trade unions with the purpose of establishing rules to regulate the substantive and procedural conditions of their relationship.<sup>325</sup> It covers both the individual and the collective relationship and is aimed at reaching agreement.<sup>326</sup> (This

313 The Commission identified fairness as a concept, relevant to practices, in accordance with the principles of natural justice (*idem* par [4 127 3]).

314 *Idem* par [4 127 13]. Such a heterogeneous nature required the special protection of anti-discrimination and equality.

315 *Idem* par [4 127 17].

316 *Idem* par [4 129 1].

317 *Idem* par [4 129 6]. These six elements have developed a normative character in accordance with the increasing social conscience and growing concern with the employee and the workplace.

318 *Idem* par [2 4].

319 *Ibid.*

320 *Idem* pars [2 4 1] – [2 4 2].

321 Employment Equity Act 55 of 1998.

322 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 5 1].

323 Labour Relations Act 66 of 1995: s 213.

324 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 5 3].

325 Labour Relations Act 66 of 1995: par [2 6].

326 *Ibid.*

## THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

element of fair labour practices is currently regulated, mainly, in the Labour Relations Act of 1995.<sup>327</sup>)

(d) **The right to withhold labour** This right was considered to be available to both the employer (lock-out) and the employee (strike).<sup>328</sup> This right, properly regulated, is an essential component of collective bargaining: without this element, collective bargaining may result in nothing else than collective begging.<sup>329</sup> (This element of fair labour practices is currently regulated, mainly, in the Labour Relations Act of 1995.<sup>330</sup>)

(e) **The right to be protected** This right received more attention with the increased concern over employees' physical and emotional well-being.<sup>331</sup> Accessible, healthy and safe working conditions form the backbone of this right.<sup>332</sup> Due to the connection between a person's work and his social life, this right may be extended to his family and *lewensfeer* outside the workplace.<sup>333</sup> The safeguarding of an employee's right to work can be equated with the "humanisation of the workplace".<sup>334</sup> (This element of fair labour practices is currently regulated, mainly, in the Basic Conditions of Employment Act of 1997,<sup>335</sup> the Occupational Health and Safety Act of 1993<sup>336</sup> and the Compensation for Occupational Injuries and Diseases Act of 1993.<sup>337</sup>)

(f) **The right to develop** In order to truly exist, a person must be able to assert himself in his natural environment.<sup>338</sup> The development of the environment, however, necessitates the development of the person.<sup>339</sup> Such development can only take place with the necessary education and training. (This element of fair labour practices is currently regulated, mainly, in the Skills Development Act of 1998.<sup>340</sup>)

This recommendation of the Wiehahn Commission may be viewed as a reaction to historically unfair labour practices. It may also be regarded as the first official recognition of the need to protect fair labour practices. If our current labour legislation, giving effect to the constitutional right to fair labour practices, is considered, it is not by accident that the same six elements identified by the Wiehahn Commission, remain the guiding elements of our current constitutional right.

327 Labour Relations Act 66 of 1995.

328 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 7].

329 Du Plessis & Fouche 2015: 277.

330 Labour Relations Act 66 of 1995.

331 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 8].

332 *Idem* par [2 8 1].

333 *Ibid.*

334 *Ibid.*

335 Basic Conditions of Employment Act 75 of 1997.

336 Occupational Health and Safety Act 85 of 1993.

337 Compensation for Occupational Injuries and Diseases Act 130 of 1993.

338 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 9].

339 *Ibid.*

340 Skills Development Act 97 of 1998.

## 5 The continued relevance and importance of common law

In 1968, Hahlo and Kahn stated that “Roman-Dutch law is our ‘common-law’ system”.<sup>341</sup> For a long time the common law contract of employment was of considerable importance because it was accepted that all employment relationships involved a contractual component and were based on and established by the common law contract of employment.<sup>342</sup> As indicated above,<sup>343</sup> the common law was also required to be referred to by courts in the absence of governing legislation or judicial precedent. It was also stated that the courts could not only turn to the common law in the absence of legislative or constitutive regulation, but even in spite of it, especially, for example, where the common law contract provided more beneficial terms than the legislation<sup>344</sup> (and as long as it was not in conflict with the Constitution or other legislation).<sup>345</sup> Where an employee was entitled to a right in terms of the common law, legislation as well as the Constitution, nothing prevented the employee from utilising the common law if that would secure a more favourable position.<sup>346</sup> The courts were indeed unafraid to apply the common law where it overlapped with legislation.<sup>347</sup>

It is, however, suggested that the importance of the common law contract of employment, as the basis of the employment relationship, is slowly but surely fading.<sup>348</sup> This is for two reasons. The first reason is to be found in the changing circumstances of modern-time working relationships and also because of the fact that common law is “largely blind to the unequal status and bargaining power of employers and their employees”.<sup>349</sup> The unequal status and bargaining power have consequently been addressed<sup>350</sup> in various instruments. The common law principles may therefore be overridden by the provisions of the contract itself,<sup>351</sup> legislative

341 Hahlo & Kahn 1968: 303.

342 Van Jaarsveld & Van Eck 2006: 36; Brassey 1998: [C1: 6]. Without such a valid and legal contract of employment, no employment relationship was acknowledged.

343 Refer to the introductory quotation of this paragraph.

344 Le Roux & Jordaan 2009: E1-2.

345 *Idem* E1-1.

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

347 *Ibid*; *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA); *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA).

348 Van Niekerk *et al* 2012: 5. The essentials of the employment relationship itself should be relied on, rather than the contract of employment.

349 Van Eck *et al* 2004: 904.

350 Unequal and unfair common law principles are usually addressed in agreements, legislative measures and the Constitution.

351 Contracts of employment, although based on the principles of the common law contract of employment, may contain (and regularly do) agreed provisions that are much more beneficial than the common law itself: the agreed provision in the contract will, in such an instance, override the specific principle of common law (Du Plessis & Fouche 2015: 5).

measures,<sup>352</sup> provisions of collective agreements<sup>353</sup> as well as the Constitution.<sup>354</sup> Secondly, it must be acknowledged that the common law contract of employment is no longer regarded as the only basis upon which an employment relationship will be established: An employment relationship can be established even in the absence of such a contract of employment.<sup>355</sup>

It is therefore submitted that, although the common law contract of employment has become “less relevant” and “less important”, its relevance and the importance have not entirely disappeared from the scene. The *SA Maritime*-decision limits the relevance of the contract of employment in so far as it concerns employees who do not enjoy legislative protection and in so far as it concerns the implication of provisions into contracts of employment. It follows that the principles of the common law contract of employment remain extremely relevant and important to employees who are not protected by legislation.<sup>356</sup> It also remains relevant and important to

352 Legislative measures, in this sense, include legislation, ministerial determinations as well as sectoral determinations. Legislation takes precedence over common law and a contract of employment (unless it provides for more favourable conditions of employment); ministerial determinations and sectoral agreements take precedence over the common law, contracts of employment and legislation (Du Plessis & Fouche 2015: 5).

353 Despite the fact that this topic requires an in-depth discussion, only the basic principles will be set out here. A collective agreement varies any individual contract of employment between an employer and an employee if they are both bound by the collective agreement. The Labour Relations Act 66 of 1995 provides, in s 23, that collective agreements bind parties to the agreement, members of such parties, as well as non-member employees (if the necessary requirements have been met). Sections 31 and 32 provide for the binding effect of collective agreements concluded by bargaining councils (Van Niekerk & Smit 2015: 402; Grogan 2014a: 165-174). Collective agreements take precedence over the common law, individual contracts of employment and legislation; bargaining council agreements take precedence over the common law, individual contracts of employment, legislation and other collective agreements (Du Plessis & Fouche 2015: 5-6).

354 The Constitution takes precedence over everything else as it is the supreme law of South Africa. However, where an employee is protected by legislation which was promulgated to give effect to the Constitution, eg the Labour Relations Act, such an employee may not invoke the Constitution to benefit from implied terms (*SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) 56).

355 Until recently the common law contract of employment was regarded as the only basis to establish an employer-employee relationship. In *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC), however, it was found that a prostitute, engaged in an illegal employment contract, could be regarded as an employee on the basis of her participation in an employment relationship – she delivered services in return for remuneration and under the authority of her employer. The same approach was also followed in *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC), where the court found that, even where a contract of employment of an illegal immigrant is invalid because of the provisions of the Immigration Act, such a person is nonetheless an employee because of the fact that the definition of an employee, contained in the Labour Relations Act of 1995, is not dependent on a valid and enforceable contract of employment, but rather on an employment relationship.

356 Also refer to Bosch 2006: 29, who stated that the common law “permeates ... labour legislation, remaining available where it has not been statutorily superseded”.

employees who are protected by legislation if they choose to approach a court on the basis of the law of contract instead of on the basis of labour law.<sup>357</sup> And it also remains relevant and important because, although no longer the only basis for constituting an employment relationship, the common law contract of employment remains one of the most important sources for the legal basis of the employment relationship.<sup>358</sup>

## 6 Conclusion

The regulation of labour matters in South Africa has long been characterised by an absence of fairness. In 1979, the Wiehahn Commission recommended the adoption of legislation pertaining to fair labour practices. The right to fair labour practices was addressed in legislation and was also consequently entrenched in the South African Constitution. The remaining importance of the common law and the common law contract of employment has been questioned in many instances.

A brief outline of the history of labour regulation up until 1977 has been provided and significant aspects that impacted on and necessitated the right to fair labour practices, were discussed. It may be concluded that the history of labour regulation, or more specifically, that of fair labour practices, has indeed impacted on the current regulation of the right to fair labour practices: The Wiehahn Commission's recommendation was based upon the history of unfairness and the subsequent regulation of labour has in fact, whether intentionally or not, addressed the former recommendation of the Wiehahn Commission. The consideration of the historical development of (un)fair labour practices, therefore, provides insight into the meaning of section 23(1) of the Constitution.

It is also concluded that the common law and the common law contract of employment, despite improvements in the regulation of fair labour practices, remain relevant and important. Not only do they provide insight into the meaning of the current right to fair labour practices, but they remain crucial for ensuring that employees, who are not protected and covered by labour legislation, also enjoy the right to fair labour practices. It also remains pivotal with respect to issues dealing with the lawfulness of the contract of employment and the lawfulness of actions in terms of the contract.

## ABSTRACT

The gradual increase in the earth's population and the consequent decrease in natural resources necessitated the exchange of the right to an independent existence for the

357 Refer to *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC). The law of contract (including the principles of the common law contract of employment) regulates the lawfulness of the contract and of the contractual relationship; labour law regulates the fairness of the contract and of the contractual relationship (par [34]). Depending on whether the party challenges the lawfulness or the fairness of the dispute in question, such a party may approach the court on the basis of either common law principles or labour law principles (par [34]-[36]).

358 Le Roux & Jordaan 2009: E1-3.

right to labour. Parties to the employment relationship, especially the employee, have been subject to unfair labour practices since primitive times. The common law contract of employment and subsequent legislation enacted since 1911, might have regulated the relationship between the employer and the employee to a certain extent, but did not specifically address fairness or fair labour practices, at least not until 1979. It is necessary to take note of an overview of the history of labour law until 1979, as such an overview emphasises the need for the regulation and protection of fair labour practices. It also provides insight into the current regulation of labour relations as well as the constitutional guarantee of fair labour practices. But it is not only important for the value which it provides in terms of the meaning of the current regulation; it also remains important to ensure the lawfulness of the contract of employment and actions in terms of the contract, and to ensure fairness of labour practices for employees not protected by existing labour legislation.

## BIBLIOGRAPHY

- Alexander, R & Simons HJ (1959) *Job Reservation and the Trade Unions* (Cape Town)
- Böeseken, AJ (1951) “Die Kompanjie aan die Kaap (1652-1795)” in AJH van der Walt, JA Widd & AL Geyer (reds) *Geskiedenis van Suid-Afrika* Deel 2 (Kaapstad) 151-181
- Bosch, C (2006) “The implied terms of trust and confidence in South African labour law” 27(2) *ILJ* 28-52
- Brassey, M (1998) *Employment Law* vol I (Kenwyn)
- Cadiz, CF & Lyon, R (1879) *Natal Ordinances, Laws and Proclamations* vol 1 (Pietermaritzburg)
- Cape of Good Hope (1827) *Proclamations, Advertisements and other Official Notices, Published by the Government of the Cape of Good Hope: From the 10<sup>th</sup> January, 1806, to the 2<sup>nd</sup> May, 1825* (Cape Town)
- Cape Colony. Legislation and Statutes (1858) *Statutes of the Cape of Good Hope Passed by the First Parliament during the Sessions 1854-1858, to which are Prefixed the Letters Patent and Order in Council Constituting a Parliament for the Colony* (Cape Town)
- Cape Colony. Legislation and Statutes (1862) *Statute Law of the Cape of Good Hope – Comprising the Placaats, Proclamations and Ordinances Enacted Before the Establishment of the Colonial Parliament and Still Wholly or in Part in Force* (Cape Town)
- Cau, C (ed) (1658) *Groot Placaet-Boeck, vervattende de Plactaten, Ordonnantien ende Edicten van de doorluchtige, hoogh mog. Heeren Staten Generael der Vereenighde Nederlanden ende vande ed: groot-mog: Heeren Staten van Hollandt ten West-Vrieslandt, mitsgader vande ed: mog: Heeren Staten van Zeelandt. Het eerste deel* (‘s Graven-Hage)
- Cau, C (ed) (1664) *Groot Placaet-Boeck, vervattende de Plactaten, Ordonnantien ende Edicten van de doorluchtige, hoogh mog. Heeren Staten Generael der Vereenighde Nederlanden ende vande ed: groot-mog: Heeren Staten van Hollandt ten West-Vrieslandt, mitsgader vande ed: mog: Heeren Staten van Zeelandt. Het tweede deel* (‘s Graven-Hage)
- Davenport, J (2010) “South Africa’s first pass laws for migrant workers” (available for download at: <http://www.miningweekly.com/article/the-introduction-of-south-africas-first-pass-laws-on-migrant-labour-2010-09-17>)

- Davies, Paul & Freedland, Mark (1983) *Kahn-Freund's Labour and the Law* (London)
- De Groot, H (1767) *Inleiding tot de Hollandsche rechtsgeleerdheid* (Middelburg)
- Du Plessis, JV (1982) *Diktaat vir Arbeids- en Nywerheidsreg* (Bloemfontein)
- Du Plessis, JV & Fouche, MA (2015) *A Practical Guide to Labour Law* (Durban)
- Du Toit, D *et al* (2006) *Labour Relations Law – A Comprehensive Guide* (Durban)
- Erasmus, HJ (1996) “The interaction of substantive law and procedure” in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Oxford) 141-164
- Eybers, GW (1918) *Select Constitutional Documents Illustrating South African History* (London)
- Finnemore, M (2006) *Introduction to Labour Relations in South Africa* (Durban)
- Giliomee H & Mbenga B (2007) *Nuwe Geskiedenis van Suid-Afrika* (Kaapstad)
- Godfrey, S *et al* (2010) *Collective Bargaining in South Africa* (Claremont)
- Grogan, J (2008) *Dismissal, Discrimination & Unfair Labour Practices* (Cape Town)
- Grogan, J (2010) *Employment Rights* (Cape Town)
- Grogan, J (2014a) *Collective Labour Law* (Cape Town)
- Grogan, J (2014b) *Workplace Law* (Cape Town)
- Hahlo, HR & Kahn E (1968) *The South African Legal System and Its Background* (Wynberg)
- Harding, W (1838) *Government Proclamations from 1806 to 1825, as now in Force and Unrepealed; and the Ordinances Passed in Council from 1825 to 1838: With Notes of Reference to Each, and a Copious Index – vol 1* (Cape Town)
- Harding, W (1845) *Government Proclamations from 1806 to 1825, as now in Force and Unrepealed; and the Ordinances Passed in Council from 1825 to 1838: With Notes of Reference to each, and a Copious Index – vol 3* (Cape Town)
- Herbert, C (1845) *Introduction to Dutch Jurisprudence of Hugo Grotius* (London)
- Howes, RB & Davis RPB (eds) (1923) *The Elements of Roman Law: Being Selections from the Institutes of Justinian, with Explanatory Notes, for the Use of Students* (Cape Town)
- Hunter, WA (1994) *A Systematic and Historical Exposition of Roman Law in the Order of a Code* (Holmes Beach, Florida)
- Jeppe, C & Gey van Pittius, JH (1910) *Statute Law of the Transvaal, 1839-1910 (in force on 31<sup>st</sup> May, 1910) – vol 1, South African Republic* (Pretoria)
- Jordaan, B (1996) “Employment relations” in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Oxford) 389-416
- Kunst, AJM (1968) *Historische ontwikkeling van het recht* Deel 2 (Zwolle)
- Le Roux, R & Jordaan B (2009) “Contract of employment” in Thompson, C & Benjamin P *South African Labour Law* vol 2 (Claremont) E1-1 – E1-49
- Maasdorp, AFS (1907) *The Institutes of Cape Law. Book III The Law of Obligations. Part I Contracts* (London)
- McGregor, M (ed) (2012) *Labour Law Rules!* (Cape Town)
- Meredith, M (2007) *Diamonds, Gold, and War – The British, the Boers and the Making of South Africa* (New York)
- Nathan, M (1913) *The Common Law of South Africa: A Treatise Based on Voet's Commentaries on the Pandects, with References to the Leading Roman-Dutch Authorities, South African Decisions, and Statutory Enactments in South Africa* vol 2 (Johannesburg)

## THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

- Nel, PS *et al* (2012) *South African Employment Relations – Theory and Practice* (Pretoria)
- Oranje-Vrystaat (Republiek) (1880) *Traktate, constitutie en wetten 1854-1880*
- Ploeger, J (1951) “Jan van Riebeeck en sy stigtingswerk” in AJH van der Walt, JA Widd & AL Geyer (reds) *Geskiedenis van Suid-Afrika* Deel 1 (Kaapstad) 48-81
- Sandars, TC (1874) *The Institutes of Justinian with an English Introduction, Translation and Notes* (London)
- Scott, SP (1932) *The Civil Law V & XIII* (Cincinnati, Ky)
- Shephard, D (2008) “Post-apartheid trends in gender discrimination in South Africa: Analysis through decomposition techniques” *Stellenbosch Economic Working Papers* (Stellenbosch) 6: 1-51
- Singer, Rudolf (1895) *Das Recht auf Arbeit in geschichtlicher Darstellung* (Jena)
- Sohm, R (1907) *The Institutes: A Textbook of the History and System of Roman Private Law / by Rudolph Sohm; tr by James Crawford Ledlie; with an introduction by Erwin Grueber* (Oxford)
- Solomon, W (1879) *Voet Commentarius ad Pandectas. Translated into English. The Contract of Letting and Hiring* (Book XIX Tit 2) (London)
- Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing (1979) *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing Deel I, RP 47 van 1979* (Pretoria)
- Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing (1981) *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing Deel V, RP 27 van 1981* (Pretoria)
- Tennant, H & Jackson, EM (1906) *Statutes of the Cape of Good Hope 1652-1905* vol 1 (Cape Town)
- Tennant, H & Jackson, EM (1895) *Statutes of the Cape of Good Hope 1652-1895* vol 2 (Cape Town)
- Theal, GM (1897) *Records of the Cape Colony from February 1793 to December 1796* (London)
- Theal, GM (1902) *Records of the Cape Colony from May 1818 to January 1820* vol 12 (London)
- Twyman, CM (2001) “Finding justice in South African labor law: The use of arbitration to evaluate affirmative action” *Case Western Reserve J of International Law* 33(3): 307-342
- Van der Merwe, CG & Du Plessis, JE (eds) (2004) *Introduction to the Law of South Africa* (The Hague)
- Van der Walt, L (2004) “Bakunin’s heirs in South Africa: Race and revolutionary syndicalism from the IWV to the International Socialist League, 1910-1921” *Politikon* 31(1): 67-89
- Van Eck, BPS *et al* (2004) “Fair labour practices in South African insolvency law” *SALJ* 121(4): 902-925
- Van Jaarsveld, SR *et al* (2001) *Principles and Practice of Labour Law Service Issue 22* (Durban)
- Van Jaarsveld, SR *et al* (2009) “Labour law” *LAWSA* 13(1): 74-273
- Van Jaarsveld, SR & Van Eck, BPS (1996) *Kompendium van Suid-Afrikaanse Arbeidsreg* (Johannesburg)
- Van Leeuwen, S (ed) (1683) *Groot Placaet-Boeck, vervattende de Plactaten, Ordonnantien ende Edicten van de doorluchtige, hooogh mog. Heeren Staten Generael der Vereenighde Nederlanden ende vande ed: groot-mog: Heeren Staten van Hollandt ten West-Vrieslandt, mitsgader vande ed: mog: Heeren Staten van Zeelandt. Het derde deel* (‘s Graven-Hage)
- Van Niekerk, A (ed) (2012) *Law@work* (Durban)

- Van Niekerk, A & Smit, N (eds) (2015) *Law@work* (Durban)
- Van Zyl, DH (1977) *Geskiedenis en Beginsels van die Romeinse Privaatreg* (Durban)
- Van Zyl, DH (1979) *Geskiedenis van die Romeins-Hollandse Reg* (Durban)
- Voet, J (1827) *Commentarium ad Pandectas libri quinquaginta, in quibus, praetor romani juris principia ac controversias illustriores jus etiam hodiernum, et praecipuae fori quaestiones excutiuntur* (Venetiis)
- Weissman, S (1985) "Dateline South Africa: The opposition speaks" *Foreign Policy* 58: 151-170
- Wiehahn, Nicholas Everhardus (1982) *Die Volledige Wiehahn-Verslag* (Johannesburg)
- Witwatersrand Chamber of Mines (1896) *Witwatersrand Chamber of Mines, South African Republic, Seventh Annual Report for the Year Ending 31st December, 1895* (Johannesburg)

## Legislation

- Placaet* of 2 September 1597
- Placaet* of 1 May 1608
- Placaet* of 29 November 1679
- Cape Colony Proclamation of 11 October 1795
- Treaty of Amiens of 27 March 1802
- Cape Colony Proclamation of 21 February 1803
- Articles of Capitulation of 1806
- Cape Colony Proclamation of 1 November 1809
- Cape Colony Proclamation of 23 April 1812
- Cape Colony Proclamation of 26 June 1818
- The First Charter of Justice 24 August 1827
- Cape Colony Proclamation 49 of 14 July 1828
- Second Charter of Justice 4 May 1832
- Cape Colony Ordinance of 1 March 1841
- Thirty-Three Articles of 9 April 1844
- Cape Ordinance 12 of 1845
- Cape Colony Proclamation 8 March 1848
- District of Natal Ordinance 2 of 1850
- Native Building Workers Act 27 of 1951
- Cape Colony Legislation and Statutes of 1854-1858
- Constitution of the Republic of the Orange Free State of 10 Apr 1854, 1866
- Cape Colony Act 15 of 1856
- Cape Colony Act 27 of 1857
- Cape Colony Legislation and Statutes of 1862
- Cape Colony Proclamation 14 of August 1872
- The Republic of the Orange Free State Ordinance 1 of 1873

## THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

The Republic of the Orange Free State *Traktate, Constitutie en Wetten* 1854-1880

Republic of the ZAR Law 13 of 1880

Glen Grey Act 25 of 1894 (Cape Colony)

Republic of the ZAR Law 23 of 1895

The Master and Servants Act 49 of 1901 (Cape Colony)

The Republic of the Orange Free State Ordinance of 1904

Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony)

Native Labour Regulation Act 15 of 1911

Workmen Wages Protection Act 15 of 1914

Riotous Assemblies Act 27 of 1914

Regulation of Wages, Apprentices and Improvers Act 29 of 1918

Factories Act of 28 of 1918

Apprenticeship Act 26 of 1922

Natives Urban Areas Act 21 of 1923

Industrial Conciliation Act of 1924

Customs Tariff and Excise Duties Amendment Act 36 of 1925

The Wage Act of 1925

Mines and Works Amendment Act 25 of 1926

Native Administration Act 38 of 1927

Wage Amendment Act 23 of 1930

Industrial Conciliation Amendment Act 24 of 1930

Natives Urban Areas Amendment Act 25 of 1930

Factories Amendment Act of 1931

Industrial Conciliation Act 36 of 1937

The Shops and Offices Act 41 of 1939

Factories, Machinery and Building Work Act 22 of 1941

War Measure Proclamation 1425 of 1944

Natives Laws Amendment Act 54 of 1952

Native Labour (Settlement of Disputes) Act 48 of 1953

Bantu Education Act 47 of 1953

Industrial Conciliation Act 28 of 1956

Bantu Labour Relations Regulations Act 70 of 1973

Unemployment Insurance Amendment Act 12 of 1974

Industrial Conciliation Amendment Act 18 of 1961

Shops and Offices Act 75 of 1964

Unemployment Insurance Act 30 of 1966

Unemployment Insurance Amendment Act 12 of 1974

Industrial Conciliation Act 94 of 1979

Labour Relations Act 66 of 1995

The Constitution of the Republic of South Africa of 1996

Employment Equity Act 55 of 1998

## Case law

*Spencer v Gostelow* 1920 AD 617

*Potchefstroom Municipal Council v Bouwer* 1958 (4) SA 382 (T)

*Ongevallekommissaris v Onderlinge Verskerings Genootskap AVBOB* 1976 (4) SA 446 (A)

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

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

*Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA)

*Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA)

*Jonker v Okhahlamba Municipality* (2005) 26 ILJ 782 (LC)

*Boxer Superstores Mthatha v Mbenya* (2007) 28 ILJ 2209 (SCA)

*Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA)

*Discovery Health Ltd v CCMA* (2008) 7 BLLR 633 (LC)

*Tsika v Buffalo City Municipality* (2009) 30 ILJ 105 (E)

*Mogothle v Premier of the Northwest Province* (2009) 30 ILJ 605 (LC)

*Globindlal v Minister of Defence* (2010) 31 ILJ 1099 (NGP)

*Kylie v CCMA* (2010) 31 ILJ 1600 (LAC)

*SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA)

*Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC)