




# Dismissal for misconduct: the interplay between an employee's duty of good faith and insubordination

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## **LIST OF ABBREVIATIONS**

BCEA	Basic Condition of Employment
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
LC	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal
THRHR	Journal of Contemporary Roman-Dutch Law

## **ABSTRACT**

This mini-dissertation seeks to address the role that good faith plays in the employer-employee relationship within the South African context. It discusses the origin of good faith principle in labour relations towards its development within South African law and then deliberating the uniform application between the *Labour Relations Act* 66 of 1995, CCMA Rules, common law and case law. The judgement of the Labour Appeal Court in *Kaefer Energy Projects (Pty) Ltd v CCMA & Others [2022] 2 BLLR 166 (LAC)* is critically analysed to understand the position and applicability of good faith within the employment relationship. Methodologically, the study adopts a doctrinal legal studies approach, combining it with case analysis strategy. The research concludes by placing good faith in its current role within the realm of employment relationships and in South African labour law, as well as proposing a way forward.

## **KEYWORDS**

Dismissal, insubordination, duty of good faith, trust relationship.

## 1 Chapter 1: Introduction

Without a doubt, the Constitution has a direct influence on labour laws within South Africa.<sup>1</sup> The most relevant section to labour law which guarantees everyone the right to fair labour practices is ingrained in Section 23 of the Constitution<sup>2</sup> and further protects employees' organisational rights relating to strikes and trade union activities.<sup>3</sup>

Employment relationships in South Africa are regulated by labour legislation such as the Basic Conditions of Employment Act<sup>4</sup> (hereafter the BCEA) and the Labour Relations Act<sup>5</sup> (hereafter the LRA). These specific Acts have been enacted to foster the protection of the Constitutional right to fair labour practices through the promotion of fairness within the realm of labour relations.<sup>6</sup>

The purpose of the LRA is to improve economic development, social justice, labour peace and democratise the workplace by giving effect to the Constitution.<sup>7</sup> Pursuant to its purpose, the LRA was implemented in accordance with the Constitution to provide greater detail to Section 23 of the Constitution.<sup>8</sup> Apart from promoting collective bargaining processes and safeguarding employees against unfair dismissals<sup>9</sup>, the LRA offers a mechanism for dispute resolution.<sup>10</sup>

In every employment relationship, a duty of good faith between employers and their employees exists<sup>11</sup>. This implied duty of good faith places a commitment on an employer to act in such a manner that is not likely to seriously damage the trust relationship and confidence in the employment relationship.<sup>12</sup> This duty of good faith covers a variety of aspects including declaring any outside interest, such as a side business, to the

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<sup>1</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 10.

<sup>2</sup> Grogan *Workplace Law* 10<sup>th</sup> ed 309.

<sup>3</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 11.

<sup>4</sup> Act 77 of 1997.

<sup>5</sup> Act 66 of 1995.

<sup>6</sup> Louw 2018 PER 2. See also ss 10 and 23 *Constitution of the Republic of South Africa*, 1996.

<sup>7</sup> Section 1 of the *Labour Relations Act*.

<sup>8</sup> *Mahwanqa v South African Human Rights Commission* (11208/2014) [2019] ZAGPJHC 125 at par. 4.

<sup>9</sup> The LRA describes instances in which dismissal may be regarded as fair. See s 188(1)(a)(i) *Labour Relations Act*.

<sup>10</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 19.

<sup>11</sup> Claassen date unknown <https://labourguide.co.za/general/employee-a-employer-rights>.

<sup>12</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017).

employer<sup>13</sup> or sharing information when the employer is aware of other employees being involved in misconduct.<sup>14</sup> In the absence of any disclosure of information that could harm the employer, the sanction of dismissal may be regarded as fair.<sup>15</sup> This duty exists throughout the employment relationship. For an employer to rely on this duty of good faith during a labour dispute with an employee, the employer must similarly expect the same commitment from the employee through his employment to conduct himself or herself to prove loyalty and good faith to the employer needs to prove that its application extends to disputes at the CCMA.<sup>16</sup>

The Commission for Conciliation, Mediation and Arbitration ("CCMA") is an independent<sup>17</sup> body founded in terms of Section 112 of the LRA with its legislative mandate being primarily determined to give effect to Section 23 of the Constitution of the Republic of South Africa.<sup>18</sup>

The role of the CCMA is to resolve workplace disputes such as on dismissal, amongst others.<sup>19</sup> A Commissioner may direct an arbitration in a manner that the he/she considers appropriate in order to settle disputes fairly and promptly. However, the commissioner must address the substantive merits with the least possible formalities.<sup>20</sup>

The Constitution further obliges courts to develop the common law within the ambit of the Bill of Rights insofar that legislation does not give effect to a right.<sup>21</sup> Although this may seem simple, there are questions about how the ordinary law of contracts, specifically the duty of good faith, that is applied to employment contracts that are may

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<sup>13</sup> Jorge & Grobler 2022

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-alert-16-may-Moonlighting-What-is-the-scope-of-the-duty-of-good-faith-owed-to-an-employer.html>.

<sup>14</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 198 - 199.

<sup>15</sup> *National Transport Movement & Others v Passenger Rail Agency of SA Ltd* (2018) 39 ILJ 560 (LAC); *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation and Arbitration and Others* (unreported) case number (CA8/2020) [2022] ZALAC 4; [2022] 4 BLLR 319 (LAC); (2022) 43 ILJ 1272 (LAC).

<sup>16</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017).

<sup>17</sup> Section 113 of *Labour Relations Act*.

<sup>18</sup> Anon 2022 <https://www.ccma.org.za/about-us/>.

<sup>19</sup> CCMA date unknown <https://www.ccma.org.za/about-us/>. See also Section 115 of the *Labour Relations Act*.

<sup>20</sup> Section 138(1) *Labour Relations Act*.

<sup>21</sup> Section 8(3) of the *Constitution of the Republic of South Africa*, 1996. See also s 39(2) *Constitution of the Republic of South Africa*, 1996.

need further explanation.<sup>22</sup> The role of good faith within the employment relationship is the subject of this mini dissertation.

The CCMA Rules make provision for the attendance of witnesses during cases at the CCMA. Nonetheless, employers ought to be able to secure the attendance of their employees as witnesses without following such procedure based on the duty of good faith.

## **1.1 Problem statement**

The Constitution makes provision for fair labour practices in Section 23 and applies to both employers and employees.<sup>23</sup> To give effect to this right, the *Labour Relations Act* 66 of 1995 states that an employee may not be unfairly dismissed.<sup>24</sup> A dismissal may be fair if it is based on an employee's misconduct, capacity or operational requirements.<sup>25</sup> For the purposes of this research project, the focus is primarily on dismissal due to misconduct.

Although misconduct is not specifically defined in the LRA, misconduct is premised on the basis that an employee intentionally breached a clause in his or her employment contract, policy or disciplinary code in any way.<sup>26</sup> Consequently, due to the employee's conduct he or she, violated the employer-employee trust relationship.<sup>27</sup> This explanation opens the door to various types of conduct being interpreted as misconduct in the workplace. For the purposes of this mini-dissertation, the focus is placed on insubordination as a form of misconduct.

Insubordination is defined as any intended or intentional disregard of the employer's authority and/or failure to follow a reasonable instruction given by the employer.<sup>28</sup> In the matter of *Malamela v South African Local Government Bargaining Council & Others*,<sup>29</sup> the court indicated that insubordination constitutes misconduct in that it is a calculated,

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<sup>22</sup> Louw 2018 PER 2.

<sup>23</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>24</sup> Section 185 *Labour Relations Act*.

<sup>25</sup> Section 188 *Labour Relations Act*.

<sup>26</sup> Anon. 2012 <https://regsdienste.solidariteit.co.za/what-is-misconduct/>.

<sup>27</sup> Anon. 2012 <https://regsdienste.solidariteit.co.za/what-is-misconduct/>.

<sup>28</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 191.

<sup>29</sup> *Malamela v South African Government Bargaining Council & Others* (unreported) case number (2018) 39 ILJ 2454 (LAC) (hereafter the *Malamela* case) at par. 29.

deliberate challenge to the employer's authority. Insubordination is considered to be gross when an employee's conduct and/or refusal to obey an instruction, is of such a nature that it destroys the trust relationship between the employer and employee and prospects of rebuilding the relationship are not possible.<sup>30</sup> Dismissal is justified in instances of gross insubordination.<sup>31</sup>

In instances where employers base a dismissal for insubordination, the onus is on the employer to prove that an instruction was given and that the instruction was lawful.<sup>32</sup> Where it is found that an instruction was unlawful and/or unreasonable, the employee's refusal to execute the instruction will be seen as fair.<sup>33</sup> Once it has been established that a lawful instruction was given, it must further be proven that the employee failed and/or refused to follow the instruction, the refusal and/or failure was intentional and the employee had the capacity to execute the instruction.<sup>34</sup>

Once misconduct, and more specifically, failure to comply with an employment contract, policy or instruction is established as a ground for dismissal, the common law obligation of good faith must be taken into account between an employer and an employee.

In every working relationship, there is a duty of good faith. This implies that the duty of good faith places a commitment on the employer to act in such a manner that is not likely to seriously damage the trust relationship and confidence in the employment relationship.<sup>35</sup> For an employer to rely on this duty in a labour dispute with an employee, it must similarly expect the same commitment from the employee to conduct himself or herself to prove loyalty and good faith to his or her employer.<sup>36</sup> This duty of good faith covers a variety of aspects including declaring any outside interest, for example a side business, to the employer<sup>37</sup> or sharing information when the employer is aware of other

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<sup>30</sup> Smit 2011 De Jure 59. Also refer to *SAMWU obo Felicia v Commission for Conciliation, Mediation and Arbitration and Others* (unreported) [2016] ZALCJHB 338 at paragraphs 35 and 38.

<sup>31</sup> *Malamela* case at par. 29.

<sup>32</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 192.

<sup>33</sup> *City of Johannesburg v Swanepoel* (2016) 37 ILJ 1400 (CC).

<sup>34</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 192.

<sup>35</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017).

<sup>36</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017).

<sup>37</sup> Jorge & Grobler 2022

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-alert-16-may-Moonlighting-What-is-the-scope-of-the-duty-of-good-faith-owed-to-an-employer.html>.

employees being involved in misconduct.<sup>38</sup> In the absence of the employee's disclosure to the employer, the employee could be seen as acting outside the duty of good faith.

This common law duty within an employment relationship has been recognised by the Supreme Court of Appeal in the matter between *Council for Scientific & Industrial Research v Fijen*.<sup>39</sup> Although it may seem to employers that the scales, in the context of the LRA are more often than not tipped in favour of employees who are protected in terms of labour legislation on the grounds for dismissal, the duty of good faith can be seen as a tacit and implied term of an employment contract, alternatively as a fiduciary duty which employers may depend on when employees conduct themselves in a manner which is harmful to the interests of the employer and/or the business.<sup>40</sup>

The LRA encourages both employers and employees to utilise labour forums to resolve disputes which may arise. By taking part in the processes as set out in the LRA, the *audi alteram partem* principle<sup>41</sup> is given effect and the dispute is decided by a fair, independent party.

To give effect to this principle, when an employer needs an employee to testify on their behalf, the employer more often than not, expects the employee to testify as part of their common law duty of good faith<sup>42</sup> towards the employer, more specifically in matters where a fellow employee has been charged with misconduct. In these instances, employees who are witnesses to acts of misconduct may be hesitant to testify in processes against the guilty employee for fear of ridicule and victimisation from other employees.<sup>43</sup>

In the context of the above, one might be left with the question: Will failure to abide by this common law duty bring the breach in the realm of the LRA and leave an employee facing disciplinary proceedings on a charge of misconduct in the form of

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<sup>38</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 198 - 199.

<sup>39</sup> (1996) 17 ILJ 18 (A).

<sup>40</sup> Pilay *Derivative Misconduct and the Reciprocal Duty of Good Faith: Employee silence in identifying perpetrators of misconduct* 2.

<sup>41</sup> This principle affirms that no person may not be judged without having expressed his or her version of events. See Peach *The Application of the audi alteram partem rule to the proceedings of Commission of Inquiry* 3.

<sup>42</sup> Pilay *Derivative Misconduct and the Reciprocal Duty of Good Faith: Employee silence in identifying perpetrators of misconduct* iii.

<sup>43</sup> Olivier & Ngcamu (September 2019) <https://www.withoutprejudice.co.za/free/article/6654/view>.

insubordination?<sup>44</sup> This aspect is explored in this research project in order to determine if every refusal to testify demonstrates insubordination and constitutes a violation of this obligation.

Regardless of whether an employee is hesitant to testify either at a disciplinary hearing or arbitration, the testimony of all witnesses is crucial and it is extremely difficult, if not impossible, to win a case without witness testimonies.<sup>45</sup> Although witness testimonies are difficult to utilise due to their unpredictability, they remain a crucial element of the procedure at any hearing and a decisive factor in an arbitrator's decision.<sup>46</sup>

The importance of witness testimony can be seen in the matter of *Ntoyakhe vs Open Arms Home for Children*<sup>47</sup> where the employee was charged with drunken driving and assault and was found guilty of the offence he was charged with, the arbitrator found that the dismissal was unfair as the employee was dismissed at a hearing where the guilty verdict was based on the evidence of individuals who were not called as witnesses.

To secure a witness at an arbitration hearing, the witness may be subpoenaed to be present on a relevant day.<sup>48</sup> A subpoena can be briefly described as a formal request requiring the attendance of a specific individual at legal proceedings in order to provide testimony.<sup>49</sup>

The CCMA Rules regulates the attendance of witnesses at the CCMA as well as the procedure for issuing and servicing the subpoena.<sup>50</sup> Any party to CCMA proceedings who wishes to secure a witness at the CCMA may utilise the subpoena to secure witnesses.<sup>51</sup>

Considering the above information, a hypothesis can be made that when an employee refuses to testify for their employer when instructed to do so by such employer, the employer may utilise the CCMA rules and request that a subpoena be issued to that

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<sup>44</sup> Insubordination can be briefly described as the deliberate refusal to obey a direct instruction from a superior. Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> 191.

<sup>45</sup> Ivan Israelstam (date unknown) <https://labourguide.co.za/misconduct/witnesses-are-key-at-hearings/>.

<sup>46</sup> Ivan Israelstam (date unknown) <https://labourguide.co.za/misconduct/witnesses-are-key-at-hearings/>. (2007, 10 BALR 946).

<sup>48</sup> Section 142(1) *Labour Relations Act*. See also Rule 37 of the CCMA Rules.

<sup>49</sup> Lesego Mabilo (2019) <https://ceosa.org.za/ccma-rule-37-subpoena/>.

<sup>50</sup> Rules for the Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG* 26279 of 30 April 2004); GN R380 in *GG* 27490 of 22 April 2005

<sup>51</sup> Rule 37 of the Rules for Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG* 26279 of 30 April 2004); GN R380 in *GG* 27490 of 22 April 2005.

employee. By using this method, the employer has followed proper procedure and has the security of a key witness at proceedings. Moreover, the employee will be protected against facing any disciplinary action of his or her own. This procedure becomes an issue when the employer does not opt to follow this route but solely depends on the duty of good faith of the said employee when requesting and/or instructing the said employee to testify, but who refuses to testify at a disciplinary and/or arbitration against a fellow employee.

This specific issue was at the crux of the dispute in the case of *Kaefer Energy Projects (Pty) Ltd v CCMA & Others*<sup>52</sup> in which an employee undertook to testify to the misconduct of another employee who was dismissed, but, changed her mind prior to the arbitration and did not attend the proceedings.<sup>53</sup> The employee concerned was ultimately charged and dismissed for insubordination and referred a dispute of unfair dismissal to the CCMA.

While the CCMA and the Labour Court were *ad idem* in their ruling/judgment<sup>54</sup>, the Labour Appeal Court contentiously held that the dismissal of an employee for a charge of misconduct (insubordination) where she refused to testify at the CCMA arbitration hearing of a former employee, was substantively fair on the basis of the common law duty of good faith in the employment relationship.<sup>55</sup>

The judgement of the *Kaefer*-case<sup>56</sup> will be analysed to determine the interchange between the common law duty and the CCMA Rules when dismissing an employee for insubordination. This judgment creates an impression that renders the CCMA Rules redundant with respect to employers. It begs the further question: Does refusing to testify at CCMA hearings amount to such gross insubordination that it warrants dismissal?

## **1.2 Research question**

Can an employer dismiss an employee who refuses to testify at disciplinary processes and/or the CCMA when a subpoena has not been issued?

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<sup>52</sup> *Kaefer Energy Projects (Pty) Ltd v CCMA & Others* [2022] 2 BLLR 166 (LAC), (hereafter the *Kaefer Energy case*).

<sup>53</sup> *Kaefer Energy case* par. 14.

<sup>54</sup> *Kaefer Energy case* par. 3 – 9.

<sup>55</sup> *Kaefer Energy case* par. 28 and 34.

<sup>56</sup> *Kaefer Energy case*.

### **1.3 Research aim**

This study aims to analyse securing witnesses at either CCMA proceedings, more specifically, the presence of employees expected to testify on behalf of the employer at such proceedings and whether they may be dismissed for non-compliance. Explicitly, the focus is on whether the refusal to testify amounts to gross insubordination that warrants the ultimate sanction of dismissal.

## 2 Chapter 2: The law of contract

A contract is a juristic act and entails commitments between parties.<sup>57</sup> It can be defined as an agreement among two or more parties with the goal of establishing a reciprocal and binding legal duty.<sup>58</sup>

A distinction must be made between a formal contract and an informal agreement. The former refers to a specific agreement, that is reduced to writing, which establishes enforceable legal duties between parties that can be enforced in court upon meeting the requirements.<sup>59</sup> The latter is commonly classified as a 'gentleman's agreement' and refers to a mere oral agreement between parties with no formalities which regulates the terms that are primarily based on honesty.<sup>60</sup>

For an agreement to be considered enforceable, it must meet certain requirements, namely that there must be a consensus between parties, the parties must have the capability to enter into a contract, the agreement must be legal, possible of performance and the content of the agreement must be determinable.<sup>61</sup> The legality of an agreement signifies that the terms of the agreement are not against the law.<sup>62</sup> Furthermore, parties should be competent to enter into an agreement<sup>63</sup> and the commitments made between the parties must be able to be fulfilled.<sup>64</sup>

Apart from the above requirements there are further important essential underlying concepts to consider such as the freedom to contract, the sanctity of contract<sup>65</sup>, privity of contract<sup>66</sup> and good faith.<sup>67</sup> The sanctity of a contract provides certainty between parties

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<sup>57</sup> Hutchinson *et al The Law of Contract in South Africa* 7.

<sup>58</sup> Hutchinson *et al The Law of Contract in South Africa* 6.

<sup>59</sup> Lankford 2016 <https://www.lankfordlawfirm.com/blog/informal-agreements-vs-formal-contracts/>.

<sup>60</sup> Dooge 2022 <https://mlvlaw.co.za/Resources/Gentlemens-Agreements.pdf>.

<sup>61</sup> Hutchinson *et al The Law of Contract in South Africa* 6.

<sup>62</sup> Hutchinson *et al The Law of Contract in South Africa* 6.

<sup>63</sup> A person is considered to be a major at the age of 18 years in terms of s 17 of the *Children's Act* 35 of 2005. A contracting party should have the capacity to act and a person has to therefore be above the age of 18 years old to enter into a contract on their own behalf. See Vermeulen Attorney's date unknown <https://www.vermeulenlaw.co.za/who-can-enter-into-a-contract>.

<sup>64</sup> Hutchinson *et al The Law of Contract in South Africa* 6.

<sup>65</sup> All contracts entered freely must be honoured. See Hutchinson *et al The Law of Contract in South Africa* 21.

<sup>66</sup> The duties and obligations which are created from a contract are only binding to the contracting parties and not to any third party. See Hutchinson *et al The Law of Contract in South Africa* 21.

<sup>67</sup> Hutchinson *et al The Law of Contract in South Africa* 21.

as it offers a clear and consistent legal framework that allows contracting parties to confidently control their behaviour within their obligations.<sup>68</sup>

The freedom to contract entails that a party is free to contract as they wish<sup>69</sup> and to decide the terms of the contract.<sup>70</sup> The freedom of contract is a Constitutional principle which is inclusive of the principle of freedom and dignity<sup>71</sup> and because of these principles, courts must approach nullifying contracts with caution.<sup>72</sup>

The concept of freedom of contract goes hand in hand with the sanctity and privity of contracts.<sup>73</sup> In the matter of *Structra Group (Pty) Ltd v Van Niekerk and Others*<sup>74</sup> The court reaffirmed that a contract's sanctity and privity should be upheld and that parties must abide by their agreement and carry out their obligations as specified. The court went further to state that parties may only deviate from their obligations if there is evidence of fraud or if any of the provisions are damaging to a party in that it is contrary to public policy.<sup>75</sup> This statement was confirmed in the matter of *Fengen Insurance Ltd. v Leyds*<sup>76</sup> where the court agreed that any clause in an agreement that is not expressed plainly and clearly has to be read against the intentions of the person who proposed it as imposed by the *contra proferentum*<sup>77</sup> rule. The author deems this principle to be the correct approach in dealing with fraudulent or improper terms of a contract as it compels parties to enter contracts with true intentions and discourages parties from entering contracts to only benefit themselves at the expense of the other party.

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<sup>68</sup> Rossini date unknown <https://jutacomplines.co.za/diary/complines/story/contractual-certainty-vs-good-faith-and-fairness-2/pdf/>.

<sup>69</sup> Parties are free to contract as they wish and conclude their own agreement. The law will enforce the agreement if the agreement is legal and not against public policy. See *Van Rooyen v Hillendale Homeowners Association* (1603/2014) [2014] ZAFSHC 226 (11 December 2014) at par. 39.

<sup>70</sup> *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 at par. 23.

<sup>71</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par. 22 – 32.

<sup>72</sup> *Brisley v Drotsky* (432/2000) [2002] ZASCA 35 (28 March 2002) at par. 7.

<sup>73</sup> *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 par. 23

<sup>74</sup> (06923/2019) [2022] ZAGPJHC 219 (11 April 2022), (Hereafter referred to as the *Structra Group* case) par. 11.

<sup>75</sup> *Structra Group* case par. 11.

<sup>76</sup> (475/93) [1995] ZASCA 20; 1995 (3) SA 33 (AD); [1995] 2 All SA 357 (A) at par. 10. See also *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573.

<sup>77</sup> A rule which dictates that ambiguous terms of a contract should be interpreted against the proposing party. See Hutchinson *et al The Law of Contract in South Africa* 493.

Public policy refers to the moral values of society<sup>78</sup> and can be explained as unwritten values which are ingrained in both the common law and legislation.<sup>79</sup> Hence, any agreement entered into between parties is subject to the consideration of these values.<sup>80</sup> Generally, public policy is an effective means to ensure that contracting parties act in good faith.<sup>81</sup> Writers such as Pretorius<sup>82</sup> suggests that personal autonomy should not take precedence over the interests of societal ideals.

Good faith refers to the ideology that parties will deal honestly and fairly towards one another<sup>83</sup> and embrace values of reasonableness, equity and justice.<sup>84</sup> The idea of good faith contributes to keeping the law attentive to societal demands.<sup>85</sup>

Good faith in contract law should develop through concepts of justice, equality, and dignity.<sup>86</sup> The development of good faith and the movement to incorporate contract law with constitutional values, such as justice, equality, dignity and *ubuntu*<sup>87</sup> was highlighted in the matter of *Everfresh Market Virginia v Shoprite Checkers*<sup>88</sup> where it was held that negotiating in good faith is currently more valuable to the majority of people in our society than in the past.<sup>89</sup> For this reason, contract law cannot be limited to strict legal practices anymore.<sup>90</sup> With this undertaking the way is paved for a more prominent role of good faith within the law of contract in a constitutional age.<sup>91</sup> Drawing from the *Shoprite*<sup>92</sup> matter, the concepts of freedom of and to contract have been progressively changing in favour of social consciousness and social responsibility.<sup>93</sup>

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<sup>78</sup> Hutchinson *et al The Law of Contract in South Africa* 501.

<sup>79</sup> The common law is an unwritten body of law which is developed by previous ruling by a court on the same issues. See Mupangavahu 2015 *DEJURE* 118.

<sup>80</sup> Du Toit 2023 <https://www.derebus.org.za/how-to-use-public-policy-to-remedy-trust-law-disputes/>.

<sup>81</sup> Du Toit 2023 <https://www.derebus.org.za/how-to-use-public-policy-to-remedy-trust-law-disputes/>.

<sup>82</sup> (2003) THRHR 638 at 640 – 642.

<sup>83</sup> Hutchinson *et al The Law of Contract in South Africa* 21.

<sup>84</sup> Louw 2013 PELJ 52.

<sup>85</sup> Mupangavahu 2015 *DEJURE* 123.

<sup>86</sup> Van der Sijde *The role of good faith in South African law of contract* 18.

<sup>87</sup> Ubuntu is a concept that represents humanity, morality and togetherness. See Mokgoro 1998 PER/PELJ 2.

<sup>88</sup> *Everfresh Market Virginia v Shoprite Checkers* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC), (hereafter referred to as the *Everfresh* case).

<sup>89</sup> *Everfresh* case par. 23.

<sup>90</sup> *Everfresh* case par. 23.

<sup>91</sup> *Everfresh* case par. 23.

<sup>92</sup> [2011] ZAC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR (CC).

<sup>93</sup> Van der Sijde *The role of good faith in South African law of contract* 18.

The scope of this study does not include conducting a thorough analysis of the law of contract. The reason for this is that expanding beyond this scope would result in a study area that is too vast, thereby obstructing a comprehensive examination and assessment of good faith within the common law.

Before proceeding to the next chapter of this mini-dissertation, it is necessary to have regard to the development of good faith within common law to understand its applicability in our law today.

## **2.1 A brief historical overview of the concept of good faith in common law of contract**

When any discussion is related to common law, the first point of departure is always Roman-Dutch law.<sup>94</sup> To appreciate and understand the Roman-Dutch law, its development from the Roman law should be considered. Roman-Dutch law originated from the Netherlands during the early 19<sup>th</sup> century and was introduced by Dutch settlers in the Cape of Good Hope.<sup>95</sup> Dissatisfied with the laws in the Cape, the settlers adopted the laws of the Netherlands which laid the basis of modern law in South Africa.<sup>96</sup>

The common law is derived from the *locatio conductio*, more specifically, the *locatio conductio operarum* in Roman law which pertains to the hiring of personal services in exchange for remuneration.<sup>97</sup> Roman law was administered in terms of the *ius civile*<sup>98</sup> and followed a strict approach to contracts within the principle of *ex nudo pacto non arbitur actio*<sup>99</sup> as well as the *negotia stricti iuris*<sup>100</sup> and had a generalised concept of a contract.<sup>101</sup>

Roman law followed a strict approach and a contract had specific requirements which had to be met in order to declare a contract as enforceable.<sup>102</sup> Should any contract not

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<sup>94</sup> Govender *The Role of Good Faith in South African Contract Law* 5.

<sup>95</sup> Lee and Cowen (date unknown) <https://www.britannica.com/topic/Roman-Dutch-law>.

<sup>96</sup> Govender *The Role of Good Faith in South African Contract Law* 6.

<sup>97</sup> Grogan *Workplace Law* 10<sup>th</sup> ed 2.

<sup>98</sup> Du Plessis 2002 THRHR 398.

<sup>99</sup> This principle means that a bare agreement with no value cannot be implemented. See Hutchison *et al The Law of Contract in South Africa* 495. See also

<sup>100</sup> This principle is a legal principle which requires an exact interpretation of the law. See Anon. date unknown <https://www.merriam-webster.com/legal/stricti%20juris>.

<sup>101</sup> Hutchinson *et al The Law of Contract in South Africa* 11. See also Govender *The Role of Good Faith in South African Contract Law* 5.

<sup>102</sup> Hutchinson *et al The Law of Contract in South Africa* 11-12.

comply with these requirements, the contract was unenforceable regardless of the parties' intention.<sup>103</sup> Consequently, informal agreements had no place in Roman law and did not endorse any action between parties.<sup>104</sup> Over time and as a result of the expanding commercial needs of the Romans<sup>105</sup>, the strict interpretation of contracts was altered to a more flexible, informal approach.<sup>106</sup>

The terms "fides" had a religious connotation that involved principles which demanded loyalty and commitment.<sup>107</sup> Originally, the term "*bona fide*" in Roman law referred to the behaviour expected between contracting parties and served as the standard by which their actions could be judged against and that a reasonable man would have expected in similar circumstances.<sup>108</sup> It also functioned as a benchmark for integrity and faithfulness between parties and their contractual duties towards each other.<sup>109</sup>

The Romans had a comprehensive understanding of the term "bona fides," and accepted that the incorporation of liability based on good faith did not disrupt or cause ambiguity in their legal system nor did it lead to unpredictable judgments.<sup>110</sup>

Ultimately, the development within Roman law was substantial enough to lead to the acceptance of the *iudicia bonae fidei* principle, which permitted actions based on good faith to be recognized and enforced.<sup>111</sup>

To assist in the enforcement of this new approach and to correct any breach of a contract, the pre-existing doctrine of *exceptio doli* was used to invalidate contracts made in bad faith.<sup>112</sup> The *exceptio doli specialis* was utilised in instances where a contract was made deceptively,<sup>113</sup> whereas in situations where the other party's action was brought in bad faith, a party may invoke the *exceptio doli generalis* rule.<sup>114</sup> In this instance a judge could

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<sup>103</sup> Hutchinson *et al* *The Law of Contract in South Africa* 11-12.

<sup>104</sup> Hutchinson *et al* *The Law of Contract in South Africa* 11.

<sup>105</sup> Hutchinson *et al* *The Law of Contract in South Africa* 12.

<sup>106</sup> Govender *The Role of Good Faith in South African Contract Law* 6.

<sup>107</sup> Du Plessis 2002 THRHR 399.

<sup>108</sup> Du Plessis 2002 THRHR 399.

<sup>109</sup> Du Plessis 2002 THRHR 399.

<sup>110</sup> Du Plessis 2002 THRHR 398 – 399.

<sup>111</sup> Du Plessis 2002 THRHR 398.

<sup>112</sup> Govender *The Role of Good Faith in South African Contract Law* 8.

<sup>113</sup> Hutchinson *et al* *The Law of Contract in South Africa* 27.

<sup>114</sup> Gould *Bringing the exceptio doli generalis back from the grave* (ii).

consider a party's sincere and honest intention – i.e. the concept of good faith, and be able to decide on the matter on the basis of fairness.<sup>115</sup>

Roman-Dutch law writers recognised informal contracts and accepted that when agreements were made with an *animus contrahendi*<sup>116</sup>, it ought to be enforced as a matter of good faith with only the requirement being that the contract must have a rational cause for existence.<sup>117</sup> Thus, as long as parties were *ad idem*<sup>118</sup> with the terms of a contract, the contract was valid and enforceable – i.e. the concept of good faith.<sup>119</sup> Therefore, the basis for the notion of *bona fide* contracts resulted from the principle of *pacta sunt servanda* – i.e. agreements must be honoured.<sup>120</sup>

In contrast to the Roman law approach, all contracts entered in Roman-Dutch law were deemed to have been made in good faith and with the consent of both parties.<sup>121</sup> There was essentially no differentiation between *stricti iuris* contracts and contracts entered into by mere good faith.<sup>122</sup>

This new approach pertaining to contract made it compulsory for all parties entering an agreement, to do so in accordance with the standard of good faith.<sup>123</sup>

## **2.2 Development of the duty of good faith in South African Law**

As indicated previously, the basis of the South African law of contract originated from the Roman-Dutch law of contract.<sup>124</sup> While the roots of South African law of contract are in Roman law, it is a modernised version thereof and varies in certain aspects.<sup>125</sup>

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<sup>115</sup> Govender *The Role of Good Faith in South African Contract Law* 6.

<sup>116</sup> A serious intention to enter a contract and accept its legal obligations. See Hutchinson *et al* *The Law of Contract in South Africa* 491.

<sup>117</sup> Hutchinson *et al* *The Law of Contract in South Africa* 12.

<sup>118</sup> Of one mind. See Hutchinson *et al* *The Law of Contract in South Africa* 505.

<sup>119</sup> Govender *The Role of Good Faith in South African Contract Law* 8.

<sup>120</sup> Hutchinson *et al* *The Law of Contract in South Africa* 11.

<sup>121</sup> Govender *The Role of Good Faith in South African Contract Law* 8.

<sup>122</sup> Govender *The Role of Good Faith in South African Contract Law* 8.

<sup>123</sup> Govender *The Role of Good Faith in South African Contract Law* 8.

<sup>124</sup> Hutchinson *et al* *The Law of Contract in South Africa* 11.

<sup>125</sup> Hutchinson *et al* *The Law of Contract in South Africa* 11.

The Constitution<sup>126</sup> is the cornerstone of all legislation in South Africa and is the supreme law of the Republic, thus any law or conduct inconsistent with it is invalid.<sup>127</sup> When applying any provision of the Bill of Rights, the Constitution compels the courts to apply, alternatively, develop the common law to give effect to the Bill of Rights if legislation does not give effect to the right.<sup>128</sup> Moreover, the Constitution also compels the courts to develop the common law within the spirit, purport and objectives of the Bill of Rights.<sup>129</sup>

The Constitution further acknowledges the existence of any other rights recognised in the common law insofar as they are consistent with the Bill of Rights.<sup>130</sup> Similar to any legislative provision, courts should also develop rules of the common law to limit the right if it is within the ambit of Section 36 of the Constitution.<sup>131</sup>

The interpretation of contracts in South Africa must encompass a standard of good faith.<sup>132</sup> Despite courts being hesitant in defining the role of good faith in South African law of contract due to the possibility of its interference with the freedom of contract of parties,<sup>133</sup> the role of good faith continued to evolve.<sup>134</sup> Considering the requirements of the Constitution, the common law principle of good faith is brought into the modern day. In the matter of *Conradie v Rossouw*<sup>135</sup> the court confirmed that any agreement entered with honest intention is enforceable and stated that the only legal requirements required for enforcement are that the agreement be legal, the parties have contractual capacity and that there is a possibility of performance.

This was also evident in the matter of *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others*.<sup>136</sup> It was established that South African law upholds agreements made honestly and with the goal of establishing a

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<sup>126</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>127</sup> Section 2 *Constitution of the Republic of South Africa*, 1996.

<sup>128</sup> Section 8(3)(a) *Constitution of the Republic of South Africa*, 1996.

<sup>129</sup> Section 39(2) *Constitution of the Republic of South Africa*, 1996.

<sup>130</sup> Section 39(3) *Constitution of the Republic of South Africa*, 1996.

<sup>131</sup> Section 8(3)(b) *Constitution of the Republic of South Africa*, 1996.

<sup>132</sup> *Meskin v Anglo-American Corporation of SA Ltd* 1986 (4) SA 793 (W) 804.

<sup>133</sup> Du Plessis 2002 THRHR 407.

<sup>134</sup> Van der Sijde *The role of good faith in South African law of contract* 18.

<sup>135</sup> *Conradie v Rossouw* 1919 AD 279.

<sup>136</sup> *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013), (hereafter the *KZN Joint Liaison case*).

legitimate obligation.<sup>137</sup> In agreement with the submissions made in the *Conradie*<sup>138</sup> case, the court further held that the South African legal system is sensible enough to acknowledge that it should, in general, focus on the outward expressions of a contract rather than the parties' internal thoughts.<sup>139</sup> The author agrees with this judgement in that a contract should be considered as a whole. The author is also of the view that each party contracts with the intention of gaining an advantage, therefore, if the contract is analysed in its entirety, it will show the true purpose of the contract.

Regardless of its recognition in the Constitution, the development of the common law principle of good faith by the courts has been stunted. This is evident from the multitude of cases pertaining to the law of contracts in which the courts concluded that the concept of good faith is merely a basic value<sup>140</sup> and banned the idea that the court has the discretion to determine matters based on principles of good faith as this would create uncertainty and biases.<sup>141</sup>

The courts have also taken the approach that good faith is an abstract idea and is not a binding legal rule in itself but rather the foundation for rules when it comes to the enforcement of contractual terms. Therefore, the court is not inclined and will not proceed on the basis of abstract ideas<sup>142</sup>, but only on the basis of recognised legal rules.<sup>143</sup> In *Brisley v Drotzky*<sup>144</sup> the court reiterated that its function is to weigh fundamental principles against one another and to adjust them if needed, thus if courts are given free rein to disregard contractual principles when they are deemed against public policy, this would disregard the function of the courts. The court further argued against the recognition of good faith as it will result in the sanctity of a contract being ignored and the enforceability of the provisions will ultimately be replaced by what judges consider to be fair and possibly lead to uncertainty.<sup>145</sup> Although the author takes cognisance of the reasoning of

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<sup>137</sup> *KZN Joint Liaison* case par. 94.

<sup>138</sup> *Conradie v Rossouw* 1919 AD at 324.

<sup>139</sup> *KZN Joint Liaison* case par. 94.

<sup>140</sup> *Brisley v Drotzky* 2002 (4) SA 1 (SCA), (hereafter the *Brisley* case) par 22. The Court continues to state that although good faith is an underlying principle of contract law, it is not the only one and not even considered the most important value.

<sup>141</sup> *Brisley* case par 24.

<sup>142</sup> A contract should not be considered against public policy merely because some of the terms offend a person's sense of fairness. See *Brisley* case par. 31.

<sup>143</sup> *Brisley* case par. 22. See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) par 32.

<sup>144</sup> *Brisley* case par. 24.

<sup>145</sup> *Brisley* case par. 24.

the court, the author disagrees that the sanctity of the contract will be ignored. It would rather strengthen the sanctity of a contract as the contracting parties will be assured that the other is contracting with honest intentions.

Conversely, in the matter of *Barkhuizen v Napier*<sup>146</sup> the Constitutional Court encouraged the recognition of the duty of good faith and was able to reassure the common law principle within the South African law. The court acknowledged that the concept is not an autonomous requirement, yet further indicated that a contract should not be enforced in circumstances where such enforcement would be unfair to insist on its compliance if it would be against public policy.<sup>147</sup>

Considering that all relevant aspects pertaining to good faith in the common law of contracts have been discussed, the focus of this mini-dissertation shifts to the common law duty of good faith within South African labour law.

### **3 Chapter 3: Labour law**

Labour law can be defined as a system of rules regulating aspects concerning the rights and duties of employees as well as the regulation between employers and employees as well as relationships between fellow employees.<sup>148</sup>

The contract of employment was developed during the Roman times and found its origin in the *locatio conductio operis* and *locatio conductio operarum*.<sup>149</sup> The former laid the foundation for an independent contractor and involves the hiring of services for specific labour and a specific period whereas the latter was used for the payment of remuneration in return for personal services of an individual on a more permanent basis.<sup>150</sup>

An employee is defined in the BCEA<sup>151</sup> as any person<sup>152</sup> who works for another person and receives or is entitled to remuneration and any other person who assists in carrying out or conducting the business of an employer. Every employer-employee relationship is

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<sup>146</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC).

<sup>147</sup> *Brisley* case par. 70 and 73.

<sup>148</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 3.

<sup>149</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 27.

<sup>150</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 27.

<sup>151</sup> Section 213(a) and (b) *Basic Condition of Employment Act*.

<sup>152</sup> An independent contractor does not fall within the definition of an employee. See s 213(1) *Basic Conditions of Employment Act*.

established through the formation of an employment contract<sup>153</sup> which sets out the terms of employment<sup>154</sup> along with the duties and responsibilities of both the employer and employee.<sup>155</sup>

Although an employment contract is subject to the general rules of contract law pertaining to its requirements,<sup>156</sup> granted that the employment contract is entered into voluntarily<sup>157</sup> and there is an acceptance of the employer's terms<sup>158</sup>, the employment contract does not have to be reduced to writing to be valid<sup>159</sup> and the employment relationship comes into existence.<sup>160</sup>

### 3.1 Labour Legislation and the CCMA Rules

Formerly, workplace regulations were solely based on the ethical behaviour of employers and the bargaining power of employees which caused exploitation and unfair treatment of employees.<sup>161</sup> Due to the implementation of labour legislation, those times have passed.<sup>162</sup>

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<sup>153</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 27.

<sup>154</sup> This information includes personal details of the employee, ordinary working hours, rate of remuneration, date remuneration will be paid, leave, etc. See ss 29 and 33 of the *Basic Conditions of Employment Act*.

<sup>155</sup> Siza date unknown <https://siza.co.za/why-are-employment-contracts-so-important/#:~:text=The%20employment%20contract%20serves%20as,p%20in%20a%20working%20relationship>.

<sup>156</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 28 – 29.

<sup>157</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 29. See also s 13 *Constitution of the Republic of South Africa*, 1996 and s 48 of the *Basic Conditions of Employment Act* which forbids forced labour.

<sup>158</sup> The terms of the contract must be compliant with the provisions of the *Basic Conditions of the Employment Act*. Also refer to Van Blerk 2021 <https://ceosa.org.za/the-contract-of-employment-and-written-particulars/>. An employee is considered to be an employee of the employer the moment he accepts the terms of employment, even if he has not commenced with formal employment. See *Wyeth SA (Pty) Ltd v Manqele and Others* [2005] 6 BLLR 523 (LAC) par. 41 – 52.

<sup>159</sup> A written contract should only be furnished when there are more than five employees within the employers' service. Also refer to Van Blerk 2021 <https://ceosa.org.za/the-contract-of-employment-and-written-particulars/>. In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) par. 532H – 533A* it was held that the court does not readily accept tacit terms and will have to be satisfied that the parties meant to enter into a contract based on the proposed term.

<sup>160</sup> Van Blerk 2021 <https://ceosa.org.za/the-contract-of-employment-and-written-particulars/>. Also refer to *Rumbles vs Kwabat Marketing (Pty) Ltd* [2003] ZALC 57. Once the working relationship has been established, the application of labour law regulations comes into effect. See Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 27.

<sup>161</sup> Allardyce & Partners Attorneys date unknown <https://www.allardyce.co.za/labour-law-necessary/>.

<sup>162</sup> Allardyce & Partners Attorneys date unknown <https://www.allardyce.co.za/labour-law-necessary/>.

In South Africa there is labour legislative framework that is applicable to the workplace which include the BCEA and the LRA.<sup>163</sup> For the purposes of this mini-dissertation emphasis is placed on the LRA and its provisions relating to dismissals for insubordinations.

### 3.1.1 The Labour Relations Act 66 of 1995

Since the adoption of the 1996 Constitution,<sup>164</sup> labour rights are safeguarded resulting in South African employees having the best protection worldwide.<sup>165</sup>

The purpose of the LRA is to regulate labour relations in the workplace<sup>166</sup>, recognise organisational rights and give effect to Section 23 of the Constitution.<sup>167</sup> The LRA defines a dismissal<sup>168</sup> and requires a dismissal to be both procedurally and substantively fair.<sup>169</sup> Furthermore, the LRA determines procedures for the resolution of labour disputes through conciliation, mediation and arbitration at the CCMA should an employee be aggrieved by his dismissal.<sup>170</sup>

Although an employer retains the right to dismiss an employee<sup>171</sup>, Section 185 of the LRA<sup>172</sup> gives employees protection against unfair dismissals. A dismissal can, amongst others<sup>173</sup>, be defined as the termination of the employment contract by the employer with or without notice.<sup>174</sup>

The LRA identifies three grounds when termination of an employee may be substantively fair, namely the conduct, capacity of an employee or the employer's operational

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<sup>163</sup> Allardyce & Partners Attorneys date unknown <https://www.allardyce.co.za/labour-law-necessary/>.

<sup>164</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>165</sup> Israelstam 2023 <https://www.labourlawadvice.co.za/articles/labour-law-provides-few-protections-for-employers/>.

<sup>166</sup> The *Labour Relations Act*.

<sup>167</sup> The *Labour Relations Act*.

<sup>168</sup> Section 186 *Labour Relations Act*.

<sup>169</sup> PWC date unknown <https://www.pwc.com/jp/en/japan-desk/south-africa/assets/labour-legislation-in-south-africa-en.pdf>.

<sup>170</sup> *Labour Relations Act*.

<sup>171</sup> Newaj 2020 [https://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532020000300011#:~:text=The%20dismissal%20of%20an%20employee,depicts%20he%2Fshe%20has%20done](https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000300011#:~:text=The%20dismissal%20of%20an%20employee,depicts%20he%2Fshe%20has%20done). Also refer to Schedule 8(3) of the LRA.

<sup>172</sup> *Labour Relations Act*.

<sup>173</sup> A dismissal can take place where an expectation is created by an employee to renew a fixed-term contract or an employer's refusal to allow an employee to resume work due to maternity leave, a transfer of business in terms of s 197 of the *Labour Relations Act* or due to constructive dismissal.

<sup>174</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 144.

requirements.<sup>175</sup> A core principle in South African labour legislation is that the employer's grounds for the dismissal, at the time of the dismissal, must be taken into consideration when evaluating whether the decision to dismiss someone was fair.<sup>176</sup>

In determining the fairness of a dismissal, the goal should be to find a middle ground between fairness to both the employee and the employer.<sup>177</sup> If an employee is dissatisfied with the manner and/or reason for his/her dismissal, a dispute may be referred to the relevant forum where a commissioner will determine the fairness of the dismissal. In addition, it is required to consider all the relevant factors and circumstances surrounding the dismissal.<sup>178</sup> The commissioner must determine the fairness of the dismissal based on the real cause for dismissal if it becomes apparent, during the arbitration, that the real reason for the dismissal varies from what the employer had declared.<sup>179</sup>

The test that is applied to determine substantive fairness is to prove whether the employee violated a rule or standard regulating conduct in the workplace; and if a rule or standard was violated, whether the rule is reasonable; whether the employee was aware of the rule; was the rule consistently applied and whether the sanction of dismissal is appropriate.<sup>180</sup>

The right to not be unfairly dismissed<sup>181</sup> includes that a dismissal be in accordance with a fair procedure.<sup>182</sup> The minimum requirement for compliance with procedural fairness is merely that an employer has an obligation to carry out an investigation, provide the employee or his representative with a fair amount of time to prepare and address any claims, make a decision, and notify the worker of that decision.<sup>183</sup> In the matter of

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<sup>175</sup> Section 188(1)(a) *Labour Relations Act*. See also Code of Good Practice: Dismissals Schedule 8(2)(3).

<sup>176</sup> *Fidelity Cash Management Services v CCMA and others* [2008] 3 BLLR 197 (LAC) at par. 32.

<sup>177</sup> *National Union of Metalworkers of South Africa v Vetsak Co-Operative Ltd and others* 1996 (4) SA577 (A); 1996 17 ILJ 455 (A) par. 25.

<sup>178</sup> In the matter of *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) par. 1.

<sup>179</sup> *Fidelity Cash Management Services v CCMA and others* [2008] 3 BLLR 197 (LAC) at par. 32.

<sup>180</sup> Schedule 8(7)(a) – (b) *Labour Relations Act*.

<sup>181</sup> Section 185 *Labour Relations Act*.

<sup>182</sup> Section 188(1)(b) *Labour Relations Act*. Consequences of an unfair dismissal can be found in s 193 *Labour Relations Act*.

<sup>183</sup> *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC) at p. 11. See also *Moloantoa v CCMA and Another* (JR 1281/19) [2021] ZALC 10 (31 May 2021) at par. 45 where the court held that an employer may not be bound by a decision of its employee who may have chosen to ignore the binding practices and procedures of an employer.

*Branford v Metrorail Services (Durban) and Others*,<sup>184</sup> Jafta AJA held that denying an employer the chance to show that a dismissal was proper and fair violates section 34 of the Constitution.<sup>185</sup> Relying on *Hillside Aluminium (Pty) Ltd v Moses Mathuse and Others*,<sup>186</sup> it is the author's view that in considering the ambit of the Constitution and the LRA, the same must be applied to an employee to show that his or her dismissal was unfair thereby ensuring that both parties have an opportunity to have his or her version heard and to argue the points of his or her contention.

To ensure compliance with a substantive and procedurally fair dismissal, the legislature included the Code of Good Practice: Dismissal ("the Code") in Schedule 8 of the LRA as a guideline to employers on fair dismissals<sup>187</sup> and affords employees protection from arbitrary action by employers.<sup>188</sup> The Code stipulates that each matter of dismissal should be determined on its own merits and is purposefully formulated to be general.<sup>189</sup>

The Code is drafted on the assumption that an employer will apply progressive discipline on the understanding that it should be corrective rather than punitive.<sup>190</sup> Therefore, the sanction of dismissal should not be imposed if a lesser penalty would serve the purpose.<sup>191</sup>

### 3.1.1.1 Misconduct Defined

An employer is allowed to set standards and rules in the form of a disciplinary code within the workplace.<sup>192</sup> It is not a formal prerequisite that a disciplinary code must be written in order for the disciplinary code to be effective, however, it is advisable to reduce it to writing to ensure awareness thereof by employees.<sup>193</sup>

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<sup>184</sup> [2004] 3 BLLR 199 (LAC).

<sup>185</sup> *Constitution of the Republic of South Africa*, 1996. S 34 ensures that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent and impartial tribunal or forum.

<sup>186</sup> [2016] 10 BLLR 1041 (LC) at par 7.

<sup>187</sup> Schedule 8(1) *Labour Relations Act*.

<sup>188</sup> Schedule 8(1)(3) *Labour Relations Act*.

<sup>189</sup> Item 1 of the Code of Good Practice: Dismissals.

<sup>190</sup> Schedule 8(3)(2) *Labour Relations Act*.

<sup>191</sup> Schedule (8)(3)(3) *Labour Relations Act*.

<sup>192</sup> *AMCU obo Mabale v CCMA and Others* (unreported case) JR1474/19 [2021] ZALCJHB 227 (hereafter the *Mabale* case) par. 7.

<sup>193</sup> *Mabale* case par 7.

A disciplinary code's main goal is to manage the standards and/or behaviour of an employee within the workplace and to provide clear and uniform procedures for dealing with a breach of standards when discipline is applied.<sup>194</sup>

The disciplinary code also links an employee's duty to carry out his/her functions earnestly and with the necessary skill expected from an employer<sup>195</sup> and can be viewed as the 'unwritten' rules within a disciplinary code.<sup>196</sup>

Where an employee displays behaviour that is contrary to an employer's disciplinary code and which behaviour an employee can be held accountable for is commonly referred to as misconduct.<sup>197</sup> Dishonesty is a blanket term which encompasses all forms of conduct which entails misrepresentation, fraud, lack of integrity<sup>198</sup> and being deceitful.<sup>199</sup> Deceitfulness in turn describes conduct relating to providing misinformation, hiding information and stealing.<sup>200</sup>

For an act to qualify as misconduct, it must be demonstrated that an employee's actions will either negatively impact their ability to execute their work, the employer's best interests, or the employee-employer relationship.<sup>201</sup> The impact of the misconduct by the employee on the working relationship is one factor in determining whether the dismissal was justified.<sup>202</sup>

In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others*,<sup>203</sup> an employee's dismissal was found to be fair for being dishonest and not disclosing a previous criminal record. The employee was dismissed<sup>204</sup> after 14 years' of service as a security guard after

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<sup>194</sup> Anon. (date unknown) <https://www.ccma.org.za/disciplinary-procedures/#:~:text=The%20purpose%20of%20a%20disciplinary,in%20the%20application%20of%20discipline.>

<sup>195</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 185.

<sup>196</sup> *Mabale* case par. 7.

<sup>197</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 166.

<sup>198</sup> *Nedcor Bank Ltd v Frank & others* (2002) 23 ILJ 1243 (LAC) at par. 15.

<sup>199</sup> Tshoose and Letseky (2020) 32 *SA MERC LJ* 162.

<sup>200</sup> Tshoose and Letseky (2020) 32 *SA MERC LJ* 162.

<sup>201</sup> Anon date unknown

[https://jurisprudence.service.canada.ca/eng/board/favourable\\_jurisprudence/misconduct.shtml#:~:text=For%20an%20act%20to%20be,harm%20the%20employee%20%2D%20employer%20relationship.](https://jurisprudence.service.canada.ca/eng/board/favourable_jurisprudence/misconduct.shtml#:~:text=For%20an%20act%20to%20be,harm%20the%20employee%20%2D%20employer%20relationship.)

<sup>202</sup> Grogan *Dismissal* 4<sup>th</sup> ed p.189.

<sup>203</sup> *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero and Others* [2016] ZALAC 55, (hereafter the *G4S* case).

<sup>204</sup> In its judgement, it is not fully disclosed what the precise offence is with which he was charged with. However, the merits of the case one can presume that he was dismissed for dishonesty.

it was discovered that he failed to disclose his prior criminal convictions for rape and assault when applying for employment in 1996.<sup>205</sup> At arbitration his dismissal was found substantively unfair and retrospective reinstatement was awarded.<sup>206</sup> On review the Labour Court found that although the employee had committed misconduct, the dismissal was unfair and retrospective reinstatement was ordered.<sup>207</sup> On appeal, the LAC held that the employment relationship compels an employee to act honestly, and in good faith and protect the employer's interests.<sup>208</sup> Additionally, the LAC confirmed that any other sanction short of dismissal in situations where the employer has the right to depend on the truthfulness and complete disclosure of its potential employees as a matter of operational necessity, would only be to reward dishonest behaviour.<sup>209</sup> In its judgement, *Savage AJA* held that even if the employee's dishonesty was concealed for a substantial period, it does not undo the seriousness of the misconduct for which the employee did not have any remorse.<sup>210</sup> Having considered the merits of the case, the LAC found the dismissal of the employee substantively fair.<sup>211</sup>

This clearly indicates that if there is a duty on an employee, the duty should be complied with. Furthermore, the courts have placed a high standard on honesty in the workplace which confirms that the presence of dishonesty makes the restoration of trust in the employment relationship unlikely.<sup>212</sup>

The court ultimately maintained that in situations when the employer is entitled to rely on honesty and complete disclosure by potential employees as an operational need, the employee's misrepresentation was wilfully dishonest.<sup>213</sup>

Courts are prepared to acknowledge that substantial misconduct is sufficient as evidence of irreparable harm to the trust relationship and serves as justification for dismissal.<sup>214</sup> This understanding was supported by the LAC in *Autozone v Dispute Resolution Centre*

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<sup>205</sup> *G4S* case par. 3 and 4.

<sup>206</sup> *G4S* case par. 15.

<sup>207</sup> *G4S* case par. 16-17.

<sup>208</sup> *G4S* case par. 26.

<sup>209</sup> *G4S* case par. 26.

<sup>210</sup> *G4S case* par 30.

<sup>211</sup> *G4S* case par. 30 – 32.

<sup>212</sup> *G4S* case par. 16.

<sup>213</sup> *G4S* case par. 30.

<sup>214</sup> *Grogan Dismissal 4<sup>th</sup> ed* p. 189. Also refer to *Edcon Limited v Pillemer N.O.* [2010] 1 BLLR 1 (SCA) at par.

of *Motor Industry & others*,<sup>215</sup> where it held that it can be accepted that the employer will likely lose trust in the employee if the offence in question is based on dishonesty or deception because the employee would have shown enough unreliability through the misconduct to make the relationship intolerable.<sup>216</sup>

From the above discussion, it can be deduced that misconduct can likely render the employment relationship irreparable.<sup>217</sup> As affirmed in *Shoprite Checkers (Pty) Ltd v CCMA & others*,<sup>218</sup> an employer should be able to trust an employee as trust is the foundation of an employment relationship and a breach of this trust in the form of misconduct results in its destruction.

### 3.1.1.2 Insubordination as a form of misconduct

Respect and obedience have historically been considered implied obligations of an employee under the terms of the employment contract with the archaic dependence on obedience meant to refer to the employee's obligation to obey the employer's legitimate and reasonable directions.<sup>219</sup> Any disregard of these obligations amounts to a serious and deliberate violation of the employer's legal authority.<sup>220</sup>

Insubordination can be defined as a refusal or failure to obey a reasonable and lawful instruction and is regarded as a defiance of the employer's authority.<sup>221</sup> Although it was previously held that insubordination must be persistent,<sup>222</sup> more recent judgments on the subject indicates that insubordination does not have to be a repetitive occurrence and

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<sup>215</sup> *Autozone v Dispute Resolution Centre of Motor Industry & others* 2019 (6) BLLR 551 (LAC), (hereafter the *Autozone* case).

<sup>216</sup> *Autozone* case par. 12.

<sup>217</sup> Tshoose and Letseky (2020) 32 SA MERC LJ 164.

<sup>218</sup> *Shoprite Checkers (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2581 (LAC), (hereafter the *Shoprite* case) par. 16.

<sup>219</sup> *Sylvania Metals (Pty) Ltd v Mello and Others* (unreported) (JA83/2015) [2016] ZALAC 52, (hereafter the *Sylvania Metals* case) par. 16.

<sup>220</sup> *Sylvania Metals* par. 16.

<sup>221</sup> Anon. date unknown <https://labourguide.co.za/general/insubordination>. See also *Mamlala v SA Local Government Bargaining Council & Others* (unreported) [2018] ZALAC 25 at par. 29, in which the court described insubordination as a calculated challenge to the employer's authority.

<sup>222</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 218. Also refer to *Chemical Workers Industrial Union & Another v AECI Paints Natal (Pty) Ltd* (1998) 9 ILJ 1046 (IC).

can be established by a single incident as the employer's authority to instruct its subordinates is a principle protected by this concept.<sup>223</sup>

Certain criteria that must be met in order to rely on a dismissal based on insubordination, namely the employee's awareness of the lawful instruction and cognisance of its significance by the person in authority, the reasonableness and possibility of performance of the instruction, and finally, whether there was an intentional refusal to obey the instruction.<sup>224</sup> These requirements are evaluated respectively.

As indicated, the first criterion is two-tiered and proves that the employee was aware of the instruction, recognised its significance, and was aware that the person giving the instruction had the necessary authority to do so.<sup>225</sup> In *SAMWU obo Felicia v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>226</sup> an employee was requested by her manager to attend a meeting regarding the outcome of the audit performed on the employee's performance.<sup>227</sup> The employee indicated that she was not refusing to attend the meeting, but requested a postponement of the meeting in person and by email in order to duly prepare for the meeting. However, her request fell on deaf ears.<sup>228</sup> The manager allegedly sent an SMS and email at 04:38 to the employee on the morning of the meeting informing her that the meeting was going to continue as planned and instructed the employee to attend.<sup>229</sup> Upon arrival at the office, the manager contacted the employee enquiring about her whereabouts as she was absent from the meeting.<sup>230</sup> In response she advised her manager that she did not receive any communication from her and only gained access to her emails when she arrived at the office that morning.<sup>231</sup> Dissatisfied with the employee's response, the manager approached the human resources director for intervention who ultimately re-arranged the meeting, which was consequently

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<sup>223</sup> *TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2019) 40 ILJ 150 (LAC) at par. 19.

<sup>224</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 192. Also refer to Grogan *Workplace Law* 10<sup>th</sup> ed. 219.

<sup>225</sup> Grogan *Dismissal* 4<sup>th</sup> ed p. 225.

<sup>226</sup> *SAMWU obo Felicia v Commission for Conciliation, Mediation and Arbitration and Others* (unreported) (JR2195/14) [2016] ZALCJHB 338 (26 August 2016), (hereafter the *Felicia* case).

<sup>227</sup> *Felicia* case par. 5 and 6.

<sup>228</sup> *Felicia* case par. 6 and 7.

<sup>229</sup> *Felicia* case par. 7.

<sup>230</sup> *Felicia* case par. 9.

<sup>231</sup> *Felicia* case par. 8.

done.<sup>232</sup> After the meeting was held, the employee was given a notice to attend a disciplinary hearing for gross insubordination and was ultimately dismissed.<sup>233</sup> The employee referred an unfair dismissal matter to the CCMA where the commissioner found in favour of the employer and held her dismissal to be fair.<sup>234</sup> The commissioner based his ruling on the basis that the employee's reasoning for not attending the meeting was unreasonable and held that it was improbable that she did not see the SMS or email before leaving for work.<sup>235</sup> The commissioner held that the employee's conduct amounted to gross insubordination and the sanction of dismissal was fair as the employee showed no remorse for her disobedience.<sup>236</sup>

On review to the LC, the court found the commissioner's award to be unreasonable as there was no evidence to indicate that the employee's conduct was gross insubordination.<sup>237</sup> In its judgement, the court considered the fact that the employee merely requested that the meeting be postponed and held that this does not constitute a deliberate and serious challenge to the manager's authority.<sup>238</sup> The court further held that in the event that the employee did receive the communication at 04:38, given the employee's request and the reasons submitted it would have been unreasonable for the employer to have continued with the meeting.<sup>239</sup> The court found that the employee's conduct was not persistent and, therefore, found the employee's dismissal unfair and subsequently set aside the commissioner's award.<sup>240</sup>

The second stage of the first criterion is that it must also be proven that the instruction was lawful.<sup>241</sup> In this instance, should an employee refuse to obey an illegal instruction, the employee's conduct cannot amount to insubordination.<sup>242</sup> However, if an employee is given an unlawful instruction and being aware of its unlawfulness, obeys the instruction,

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<sup>232</sup> *Felicia* case par. 9 and 10.

<sup>233</sup> *Felicia* case par. 4 and 10.

<sup>234</sup> *Felicia* case par. 10 – 13.

<sup>235</sup> *Felicia* case par. 14, 17 and 18.

<sup>236</sup> *Felicia* case par. 18.

<sup>237</sup> *Felicia* case par. 41 and 42.

<sup>238</sup> *Felicia* case par. 42 and 43.

<sup>239</sup> *Felicia* case par. 47.

<sup>240</sup> *Felicia* case par. 45 and 50.

<sup>241</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 192.

<sup>242</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 219.

the employee does so at his or her own risk.<sup>243</sup> In *Mlaba v Masonite (Africa) Limited*,<sup>244</sup> the employer requested that some of his employees, including the Mlaba in this matter, to work during the year-end shutdown. The normal working hours during the shut-down would be that they would start at 06:00, have a tea break between 09:30 to 09:40, lunch break 12:00 to 12:30, an afternoon tea break from 15:15 to 15:25, and knock-off time at 17:00.<sup>245</sup> During the shutdown, the employer amended the working hours by way of a notice and indicated that there would only be one tea break in the morning, but extended the period from ten to twenty minutes and that the lunch break would be moved to 13:00 until 13:30.<sup>246</sup> Despite the employer's instructions that the employees should work in accordance with the amended working hours, Mlaba continued working as per the working hours originally stipulated prior to the shutdown.<sup>247</sup> The applicant was charged with misconduct (insubordination) and despite receiving a final written warning for his transgression, he continued working on the originally stipulated hours and was ultimately dismissed for insubordination.<sup>248</sup> Mlaba referred an unfair dismissal dispute to the CCMA where it was found that his dismissal was fair as the instruction was lawful and reasonable.<sup>249</sup> Mlaba took the matter on review where the LC found that his dismissal was substantively unfair<sup>250</sup> on the basis that the amended working hours were in contravention of the provisions of Section 7 of the BCEA<sup>251</sup> thus rendering the instruction unlawful.<sup>252</sup>

A similar approach was used by the LC in rendering a dismissal substantively unfair in the matter of *AMCU obo Mkhonto and Others v Commission For Conciliation, Mediation And Arbitration and Others*.<sup>253</sup> In this matter, two employees were dismissed for insubordination after they refused to work overtime as instructed by their employer.<sup>254</sup> AMCU referred a dispute to the CCMA and at arbitration the CCMA found that the

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<sup>243</sup> *Ellerines Holdings v Commission For Conciliation, Mediation And Arbitration* [1999] ZALC 68 at par. 45.

<sup>244</sup> *Mlaba v Masonite (Africa) Limited* [1998] ZALC 129, (hereafter the *Mlaba* case) par. 3.

<sup>245</sup> *Mlaba* case par. 3 and 4.

<sup>246</sup> *Mlaba* case par. 4.

<sup>247</sup> *Mlaba* case par. 5.

<sup>248</sup> *Mlaba* case par. 6.

<sup>249</sup> *Mlaba* case par. 6 and 11.

<sup>250</sup> *Mlaba* case par. 33.

<sup>251</sup> At the time of this matter, s 7 regulated Meal Intervals of employees. It is currently regulated by s 14 *Basic Conditions of Employment Act*.

<sup>252</sup> *Mlaba* case at par. 9, 14, 15, and 16.

<sup>253</sup> *AMCU obo Mkhonto and Others v Commission for Conciliation, Mediation and Arbitration and Others* [2023] ZALCJHB 23; (2023) 44 ILJ 1046 (LC); [2023] 5 BLLR 403 (LC), (hereafter the *Mkhonto* case).

<sup>254</sup> *Mkhonto* case par. 4.

employees' dismissal was fair as they tacitly agreed to work overtime. Alternatively, they agreed to work overtime in their employment contracts.<sup>255</sup> Upon taking the matter on review, the LC considered Section 10 of the BCEA<sup>256</sup> and found that the specific employees entered into their employment contracts between July 2008 and January 2011 when the instruction was given in May 2017.<sup>257</sup> The LC considered that given the time period that lapsed between entering into the employment contract and the issuing of the instruction, the overtime clause in the employment contract had lapsed in terms of Section 10(5) of the BCEA<sup>258</sup> thus rendering the instruction unlawful.<sup>259</sup> The LC considered the sanction of dismissal to be inappropriate and subsequently rendered the dismissal to be substantively unfair and ordered reinstatement of the employees.<sup>260</sup>

The second criterion to consider is whether the instruction was reasonable,<sup>261</sup> whether it is capable of performance<sup>262</sup> and whether the instruction is within the employee's scope of employment and during their normal working hours.<sup>263</sup> There are occasions in which an employer gives instructions which does not normally fall within an employee's job description if there is a link between performing the instruction and the continuance of the employer's business interests.<sup>264</sup> In such instances, where the instruction changes the terms of employment unilaterally, an employee may refuse to perform the instruction.<sup>265</sup>

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<sup>255</sup> *Mkhonto* case par. 9.

<sup>256</sup> Section 10 *Basic Conditions of Employment Act* regulates employee's overtime.

<sup>257</sup> *Mkhonto* case par. 14.

<sup>258</sup> This section specifically stipulates that if an agreement is concluded with the commencement of employment with employee pertaining to overtime work, the agreement lapses after one year.

<sup>259</sup> *Mkhonto* case par. 14.

<sup>260</sup> *Mkhonto* case par. 29 – 31.

<sup>261</sup> If an instruction is unreasonable, an employee is allowed to disobey the instruction. See Grogan *Dismissal 4<sup>th</sup> ed* p.225. Also refer to *Rustenburg Platinum Mines v CCMA* [2004] 1 BLLR 34 (LAC) and *County Fair Foods v CCMA* (1999) 20 ILJ 1701 (LAC). In *Msunduzi Municipality v Hoskins* (DA14/15 (2017) 38 ILJ 582 (LAC) the court held that the employer's instruction to stop representing co-employee's at disciplinary hearing was a reasonable instruction and the disobedience on the employee not to obey rendered his dismissal as fair.

<sup>262</sup> Anon. date unknown <https://labourguide.co.za/general/insubordination>.

<sup>263</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 219. Also refer to *Kahn v Rainbow Chicken Farms (Pty) Ltd* (1985) 6 ILJ 60 (IC). In *Noosi v Exxaro Malta Coal* (JA 62/2015) (2017) ZALAC 3 at par. 42, the court held that if an instruction is within the scope of the employee's duties, there is an expectation that the employee will comply.

<sup>264</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 219 – 220.

<sup>265</sup> Grogan *Workplace Law* 10<sup>th</sup> ed. 219 – 220. The onus will be on the employee to prove that the instruction was not part of his job description.

In deciding the fairness of the refusal, a distinction has to be made for 'once off' instructions and whether the change will be permanent.<sup>266</sup>

In *MISA v Silverton Spray Painters & Panelbeaters*,<sup>267</sup> an employer, faced with financial difficulties, requested that all employees be involved in marketing to promote the business.<sup>268</sup> One employee, employed as a panel beater, was specifically requested to approach various assessors and fleet companies to promote the business.<sup>269</sup> The employee refused to obey the instruction and stated that it was outside the scope of his job description.<sup>270</sup> Further, the employee claimed that this request constituted a unilateral change to the terms of his employment.<sup>271</sup> Following his refusal, the employee was charged with misconduct for insubordination and was subsequently dismissed.<sup>272</sup> At the arbitration proceedings, the arbitrator found that the employers instruction to the employee was reasonable and lawful and due to the employee's continuous refusal to comply with the instruction, constituted persistent and deliberate insubordination.<sup>273</sup> The arbitrator further held that the trust relationship between the employer and employee could not continue in such circumstances and held the dismissal to be substantively and procedurally fair.<sup>274</sup> The LC dismissed the employee's review application on the basis that the employee did not satisfy the test for a review application and did not make a proper case for the review of the arbitrator's decision.<sup>275</sup> The LAC upheld the fairness of the dismissal on the basis that when an employee was requested to do work that was outside the scope of his job description but necessary for the employer's legitimate operational requirements, dismissal was warranted.<sup>276</sup>

The third criterion that must be proven is that there was a refusal to execute the instruction and that the refusal was intentional.<sup>277</sup> In *SAMWU and another v Rand Water*

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<sup>266</sup> Labour Guide South Africa date unknown <https://labourguide.co.za/general/insubordination>.

<sup>267</sup> *MISA v Silverton Spray Painters & Panelbeaters* (2013) 34 ILJ 1440 (LAC), (hereafter the *MISA* case).

<sup>268</sup> *MISA* case par. 4.

<sup>269</sup> *MISA* case par. 5.

<sup>270</sup> *MISA* case par. 5.

<sup>271</sup> *MISA* case par. 7.

<sup>272</sup> *MISA* case par. 9 – 11.

<sup>273</sup> *MISA* case par. 14 and 15.

<sup>274</sup> *MISA* case par. 15.

<sup>275</sup> *MISA* case at par. 19 – 22.

<sup>276</sup> *MISA* case par. 38 and 39.

<sup>277</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 192. In *Masscash t/a Jumbo Cash & Carry v Mtsotsoyi* (2023) 44 ILJ 162 (LAC) found the employee's

*and others*,<sup>278</sup> the court stated that factors such as lack of acceptance by an employee of disobeying an instruction, absence of remorsefulness for disobeying the employer and expressions of distrust toward an employer are indicating factors of intentional refusal.

In *Malamlela v South African Local Government Bargaining Council*,<sup>279</sup> the employee was employed as an Informal Housing Officer by the employer.<sup>280</sup> The employee was dismissed for insubordination after refusing to accept a transfer to a position within the same directorate consequent to the breakdown in the relationship with two superiors.<sup>281</sup> The employee referred a dispute to the Bargaining Council accordingly.<sup>282</sup> From the evidence presented, the employee obstructed service delivery by delegating sit-ins in the office of the executive director and would create chaos after meetings by furnishing misinformation to other staff members.<sup>283</sup> A meeting was held with the employee, in the presence of her union representative and was informed of the transfer.<sup>284</sup> On multiple occasions, the employee failed to report for duty.<sup>285</sup> The commissioner found that the employee deliberately failed to accept a reasonable and lawful instruction and found her dismissal to be fair.<sup>286</sup>

On review, the LC set aside the arbitration award and found the dismissal to be substantively unfair because the arbitrator erred in not considering the employee's clean disciplinary record and correspondingly erred by ignoring the council member's involvement given the evidence that council members would regularly interfere in similar issues.<sup>287</sup> The LC further found that the insubordination could not be considered to be

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insubordination intentional as he was instructed to submit a travel report by a certain deadline (at par. 5). The deadline was extended two times and the employee was given a paid day off to finalise his report. Upon failing to submit the report, he was charged with gross insubordination and ultimately dismissed (at par. 12 and 13). In particular, because the same instructions were repeatedly explained to him and he was afforded ample time to comply, yet he wilfully defied the instruction, his dismissal was held to be substantively fair (at par. 45).

<sup>278</sup> *SAMWU and another v Rand Water and others* (unreported) case ZALCJHB 138.

<sup>279</sup> *Malamlela v South African Local Government Bargaining Council* (unreported) case [2018] ZALAC 25, (hereafter the *Malamlela* case).

<sup>280</sup> *Malamlela* case par. 5.

<sup>281</sup> *Malamlela* case par. 5.

<sup>282</sup> *Malamlela* case par. 5 and 6.

<sup>283</sup> *Malamlela* par. 7.

<sup>284</sup> *Malamlela* case par. 10.

<sup>285</sup> *Malamlela* case par. 11.

<sup>286</sup> *Malamlela* case par. 14-17.

<sup>287</sup> *Malamlela* case par. 21.

gross<sup>288</sup> considering how the employee was transferred. Therefore, for these reasons reinstatement was ordered.<sup>289</sup>

The LAC held that South African courts view respect and obedience as implied duties of an employee in an employment relationship, with reliance on the common law duty to act in good faith and obey lawful and reasonable instructions.<sup>290</sup> The LAC further reiterated that insubordination is an intentional, persistent, wilful defiance of an employer's authority and refusal to obey or accept a lawful and reasonable instruction, poses a deliberate challenge to the employer's authority with the sanction of dismissal being reserved for instances of gross insubordination.<sup>291</sup>

In its evaluation the LAC found that the LC overlooked the evidence before the arbitrator which clearly showed, and was confirmed by the employee's version, that there was a breakdown in the employment relationship.<sup>292</sup> The LAC held the refusal to obey the employer's instruction to be gross insubordination as the evidence supported the fact that the employee refused to respect the employer's authority over her superiors for an extended period. In addition; despite failed attempts to resolve any personal complications, the employee refused to accept a transfer as a final attempt to resolve these complications.<sup>293</sup> Finally, the LAC held that the purposeful refusal of the employee challenged the employer's authority and its capacity to improve service delivery in the public interest, striking at the core of the employment relationship.<sup>294</sup> For these reasons, the cross-appeal succeeded as the commissioner's award was found to be reasonable.<sup>295</sup>

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<sup>288</sup> In determining whether insubordination is considered to be gross or not, reference is made to *Wasteman Group v South African Municipality Workers' Union* [2012] 8 BLLR 778 (LAC) where the court affirmed that the difference between gross and not gross insubordination is a question of degree and that a distinction should be drawn between an employee partially defying an instruction but completes it at a later stage and an employee who outright refuses to obey an instruction and dissenting the employer's authority.

<sup>289</sup> *Malamlela* case par. 21.

<sup>290</sup> *Malamlela* case par. 28.

<sup>291</sup> *Malamlela* case par. 29. See the Code of Good Practice: Dismissal. Also refer to Grogan *Workplace Law 13<sup>th</sup> ed.* 198.

<sup>292</sup> *Malamlela* case par. 32.

<sup>293</sup> *Malamlela* case par. 34 and 36. In *NUM obo Selemela v Northam Platinum Ltd* (JA 25/11) [2013] ZALAC 10; (2013) 34 ILJ 3118 (LAC); [2014] 9 BLLR 870 (LAC) at par. 39 the court stated that an employer is not obliged to tolerate persistent insubordination by an employee.

<sup>294</sup> *Malamlela* case par. 34.

<sup>295</sup> *Malamlela* case par. 37 and 38.

Considering the above discussion on insubordination, this mini-dissertation seeks to answer the question of whether the refusal of an employee to testify on behalf of an employer is a form of insubordination. If the answer is in the affirmative, the further question is how this form of insubordination may lead to dismissal.

In answering these questions, reference is made to whether there are rules for testimony and/or obtaining witnesses at the CCMA.

### 3.1.2 The CCMA Rules

The Rules for the conduct of proceedings before the CCMA (hereinafter referred to as the 'CCMA Rules') are published in the LRA<sup>296</sup> and have been formulated to assist participants in using the CCMA fairly and effectively, thus adherence thereto is expected of every participant at the CCMA.<sup>297</sup> In addition, the court provided further explanation regarding the purpose of the CCMA Rules in *Weltevrede Kwekery (Pty) Ltd v CCMA and others*,<sup>298</sup> and held that the CCMA Rules are there to assist the CCMA in dealing with disputes as well.

Rule 37 of the CCMA Rules gives effect to Section 142 of the LRA<sup>299</sup> and regulates the attendance of witnesses at the CCMA as well as the procedure for issuing and servicing of the subpoena.<sup>300</sup> Any party to CCMA proceedings who wishes to secure a witness at the CCMA may utilise the subpoena to secure witnesses.<sup>301</sup> It is required that the requesting party must submit a duly completed LRA 7.16 form with a written motivation setting out why the evidence of the relevant witness is necessary, pay the relevant witness fees and expenses unless this requirement is waived, and the subpoena must be

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<sup>296</sup> *Labour Relations Act*.

<sup>297</sup> Anon. 2010 <https://www.capelabour.co.za/ccma-rules>.

<sup>298</sup> *Weltevrede Kwekery (Pty) Ltd v CCMA and others* (2006) 27 ILJ 182 (LC).

<sup>299</sup> *Labour Relations Act*.

<sup>300</sup> Rules for the Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG* 26279 of 30 April 2004); GN R380 in *GG* 27490 of 22 April 2005.

<sup>301</sup> Rule 37 of the Rules for Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG* 26279 of 30 April 2004); GN R380 in *GG* 27490 of 22 April 2005.

served at least seven (7) days prior to the scheduled hearing date.<sup>302</sup> The issuing of the subpoena may be refused if the requirements are not sufficiently met.<sup>303</sup>

In the matter of *South African Broadcasting Corporation (SOC) Limited and Others v Mkhize and Another*,<sup>304</sup> certain members of the South African Broadcasting Corporation ("SABC") were subpoenaed to testify at an erstwhile employee's arbitration relating to her dismissal. However, the SABC was aggrieved with the issuing of the subpoenas by the CCMA and referred an application to the LC to have the subpoenas set aside.<sup>305</sup> As there was no contention that all procedural requirements stipulated in Rule 37 of the Rules were met,<sup>306</sup> the basis of their respective applications was that the issuing of the subpoenas was an abuse of the process. Therefore, it was unfair rendering them invalid.<sup>307</sup> They submitted in their applications that there would be no purpose for them to testify at the arbitration. Furthermore, since they hold senior positions within the SABC, it would be prejudicial for them to spend two days at the CCMA under a subpoena.<sup>308</sup>

The LC dismissed the applications and held that there are no provisions within the LRA which entitles the LC to intervene with interlocutory applications within the CCMA, therefore, the LC lacked the necessary jurisdiction to hear this matter.<sup>309</sup> The LC further confirmed that should any subpoenaed party have an objection to the issuing of a subpoena against him/her, the issue should be directly taken up with the presiding commissioner either prior to or during the arbitration.<sup>310</sup> After hearing the objections of the subpoenaed party, the presiding arbitrator would then be within his right to vary any of the terms on which the subpoena was issued.<sup>311</sup> Should the relevant party still agree,

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<sup>302</sup> Rule 37(1); 37(2) and 37(5) of the Rules for Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG 26279* of 30 April 2004); GN R380 in *GG 27490* of 22 April 2005.

<sup>303</sup> Rule 37(4)(a), (b) and (c) of the Rules for Conduct of Proceedings before the CCMA; GNs R530, R531 and R532 in *GG 26279* of 30 April 2004); GN R380 in *GG 27490* of 22 April 2005.

<sup>304</sup> *South African Broadcasting Corporation (SOC) Limited and Others v Mkhize and Another* [2019] ZALCJHB 223; (2019) 40 ILJ 2845 (LC), (hereafter the *Mkhize* case) par. 1.

<sup>305</sup> *Mkhize* case par. 3.

<sup>306</sup> *Mkhize* case par. 7.

<sup>307</sup> *Mkhize* case par. 3.

<sup>308</sup> *Mkhize* case par. 3.

<sup>309</sup> *Mkhize* case par. 4, 5, 6 and 8.

<sup>310</sup> *Mkhize* case par. 9.

<sup>311</sup> *Mkhize* case par. 9.

the party may only refer a matter to the LC for an appeal or a review after the internal process was followed.<sup>312</sup>

The applicants' contention that there is no purpose for them to testify at the arbitration is moot. Should the relevance of a witness's testimony be a valid reason to object against a party being subpoenaed, witnesses would never be subpoenaed if this defence was applied in every circumstance. In addition, the SABC should have not made the application, alternatively, opposed the subpoenaed parties' application based on the duty of good faith they had to further the employer's interest during the arbitration.

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<sup>312</sup> *Mkhize* case par. 8 and 9.

#### 4 Chapter 4: The role of common law duty of good faith in employment relationships

Labour law places emphasis on the importance of honesty. Consequently, any behaviour contrary thereto undermines the trust upon which the employment relationship is based.<sup>313</sup> The enactment of labour legislation has not eliminated the common law within employment law and the same remains relevant today<sup>314</sup> where it has not been replaced by statute.<sup>315</sup>

While common law obligations of good faith are not universally accepted by courts as a legitimate premise in contract law, this is not the case in labour law. This is because trust is the foundation for the employment relationship and a breach of this trust will in all probability lead to an irretrievable breakdown of the trust relationship between the employee and employer.<sup>316</sup> The Honourable Judge McLachlin held in the matter of *Wallace v United Grain Growers Ltd*<sup>317</sup> that an employment contract is more personal in nature and therefore involves greater dependence and trust since there is a greater opportunity for abuse thereof. He further stated that therefore, it is reasonable to assume that the parties to such a contract would mutually agree to take realistic steps to safeguard one another from such harm or at least would not purposefully avail themselves of an opportunity to cause it.<sup>318</sup>

The implied duty of good faith and protection of an employer's interest places a responsibility on the employer to act in a way that will not compromise the employee's confidence in the relationship.<sup>319</sup> This responsibility is also reciprocal to the employee.<sup>320</sup> An employee's implied duties are inferred by South African common law<sup>321</sup> and includes carrying out lawful instructions from an employer and acting with good intentions – i.e.

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<sup>313</sup> Tshoose and Letseky (2020) 32 *SA MERC LJ* 162.

<sup>314</sup> Bosch 2006 ILJ 29.

<sup>315</sup> Bosch 2006 ILJ 29.

<sup>316</sup> Ralgilla and Bokaba 2021 *Obiter* 714.

<sup>317</sup> 1997 CanLII 332 at paragraph 139.

<sup>318</sup> *Wallace v United Grain Growers Ltd* 1997 CanLII 332 at paragraph 139. See also *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC).

<sup>319</sup> Ralgilla and Bokaba 2021 *Obiter* 714.

<sup>320</sup> *National Union of Metalworkers of South Africa obo Nganezi & Others v Dunlop Mixing and Technical Services (Pty) Ltd & Others* (2019) 40 ILJ 1957 (CC) at paragraph 63.

<sup>321</sup> Basson *et al The New Essential Labour Law Handbook* 7<sup>th</sup> ed 34 and 36.

in good faith.<sup>322</sup> An employee's duty to act in good faith compels the employee to assume a fiduciary duty, i.e. to prioritise the employer's interest above all else<sup>323</sup> and further places a commitment on the employer to act in such a manner that is not likely to seriously damage the trust relationship and confidence in the employment relationship.<sup>324</sup> Accordingly, an employee's two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits an employee from obtaining any unauthorised profit for themselves.<sup>325</sup> It is similarly expected that an employee conducts himself or herself to prove loyalty and good faith to his or her employer<sup>326</sup> which includes declaring any outside interest to the employer.<sup>327</sup> This notion was confirmed in the matter of *Prinsloo v Harmony Furnishers (Pty) Ltd*<sup>328</sup> in which the court further held that an employee should not hold him/herself in competition with an employer. This applies not just to the individual employee but also to the spouse of an employee.<sup>329</sup>

The matter of *Impala Platinum Ltd v Jansen and Others*,<sup>330</sup> elucidates the understanding of the author in relation to the duty of good faith in employment relationships pertaining

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<sup>322</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 36. Both of these duties are natural consequences flowing from the employment contract.

<sup>323</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 36. The employee is, therefore, in a subordinate role in the employment relationship. See Bosch 2006 ILJ 31.

<sup>324</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017). See also *Autozone v Dispute Resolution Centre of Motor Industry & others* 2019 (6) BLLR 551 (LAC) at par. 13 the court affirmed that an employer is entitled to have an employee that acts in good faith.

<sup>325</sup> *National Union of Metalworkers of South Africa obo Nganezi & Others v Dunlop Mixing and Technical Services (Pty) Ltd & Others* (2019) 40 ILJ 1957 (CC) at paragraph 55. Also refer to *Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA); (2004) 25 ILJ 1005 (SCA)* where an employee breached his fiduciary duty by purchasing shares from his employer's client and reselling the shares for a profit.

<sup>326</sup> Raligilia & Bokaba 2021 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000300017](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000300017). This duty to disclose information that could have a damaging effect on the employer is included in cases of derivative misconduct. See Sibaya, Calvina an Iyer 2023. [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58320230001000007](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58320230001000007); *National Transport Movement & Others v Passenger Rail Agency of SA Ltd* (2018) 39 ILJ 560 (LAC); *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation and Arbitration and Others* (unreported) case number (CA8/2020) [2022] ZALAC 4; [2022] 4 BLLR 319 (LAC); (2022) 43 ILJ 1272 (LAC).

<sup>327</sup> Jorge & Grobler 2022.

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-alert-16-may-Moonlighting-What-is-the-scope-of-the-duty-of-good-faith-owed-to-an-employer.html>.

<sup>328</sup> *Prinsloo v Harmony Furnishers (Pty) Ltd* (1992) 13 ILJ 1593 par 5.

<sup>329</sup> An employee is not guilty of misconduct if he seeks employment of his/her spouse by submitting his/her CV to the employer. See *Mabale* case par. 10.

<sup>330</sup> *Impala Platinum Ltd v Jansen and Others* [2017] 4 BLLR 325 325 (LAC), (hereafter the *Impala Platinum* case).

to employees' spouses. Jansen was employed as a Training Manager and part of his duties was to ensure that the mine workers were sufficiently trained and certified to work underground.<sup>331</sup> In contrast to his instructions to ensure mine workers were trained and certified to work underground, he ordered his subordinates to allow workers from service providers, namely Vuselela, who had only theoretical training in the certification, to both work and train underground.<sup>332</sup> It was later discovered that Vuselela was a business co-owned by Jansen's wife and his stepdaughter and that Jansen unduly influenced service providers to use their company for competency training.<sup>333</sup> Further the workers who were allowed to work underground and/or provide training on behalf of Vuselela were former employees of the employer, Impala Platinum Ltd.<sup>334</sup>

Further, Jansen was aware of the company's rule that an employee dismissed by the employer was not allowed to be employed at the employer's site even on behalf of another agency.<sup>335</sup> Jansen was charged with misconduct for gross negligence in having allowed workers to work without being declared competent as well as non-compliance with company policy and procedure and he was dismissed accordingly.<sup>336</sup> The CCMA and the LC found the dismissal to be fair on the basis that Jansen was grossly negligent by allowing uncertified workers of Vuselela to work onsite and that his conduct was intentional and aimed at promoting his wife's business, which was in clear breach of the interest of the employer.<sup>337</sup> The LAC found the commissioner's ruling fair as Jansen's conduct went to the root of the employment relationship deserving the severest sanction in that Jansen contravened the duty to act in good faith by promoting his wife's business.<sup>338</sup>

It would not constitute a breach of good faith if a spouse was coincidentally in competition with an employer. However, working in conflict with your employer is a breach of the duty of good faith as it not only goes against the employee's duty to serve the employer

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<sup>331</sup> *Impala Platinum* case par. 3 and 5.

<sup>332</sup> *Impala Platinum* case par. 5.

<sup>333</sup> *Impala Platinum* case par. 5.

<sup>334</sup> *Impala Platinum* case par. 18.

<sup>335</sup> *Impala Platinum* case par. 18.

<sup>336</sup> *Impala Platinum* case par. 6.

<sup>337</sup> *Impala Platinum* case par. 7 and 18.

<sup>338</sup> *Impala Platinum* case par. 20.

but also violates the trust between the parties, which is the root of any working relationship.

This duty of good faith has become the criterion and/or standard used by employers to challenge disputes within the workplace.<sup>339</sup> Conversely, for an employer to rely on this standard of implied duty, there must be a belief that the employee would have to act towards implicating his loyalty and good faith.<sup>340</sup>

As indicated earlier, an employer is entitled to dismiss<sup>341</sup> an employee for misconduct as a serious breach of the duty of good faith albeit with or without notice, on the condition that the dismissal must be fair.<sup>342</sup>

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<sup>339</sup> Ralgilla and Bokaba 2021 *Obiter* 714.

<sup>340</sup> Ralgilla and Bokaba 2021 *Obiter* 714.

<sup>341</sup> Poppesqou 2018 *ILJ* 50.

<sup>342</sup> Basson *et al* *The New Essential Labour Law Handbook* 7<sup>th</sup> ed 39. See also *Council for the Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) par. 26D – E. Also refer to *Mamlala* case par 34.

## 5 Chapter 5: Analysis of the *Kaefer Energy*-case

Owing to the high volume of referred dismissal issues to the CCMA, it is common for employers to ask employees to testify during disciplinary matters in the workplace.<sup>343</sup> More often than not, employees oblige. However, some employees may be wary to comply with this request as they are not comfortable doing so, or simply because they do not want to get involved in litigation.<sup>344</sup> Employers may excuse employees from testifying if the employees submit a legitimate reason for their refusal to testify for their noncompliance, for example, they may be under threat from fellow employees and/or the community not to testify.<sup>345</sup> In such instances, the employer may have to utilise the subpoena process to secure the employee's attendance.<sup>346</sup>

The question remains whether an employer may proceed with disciplinary action against an employee for their refusal to testify. This issue was at the crux of the dispute in the case of *Kaefer Energy Projects (Pty) Ltd v CCMA & Others*.<sup>347</sup> In this matter, the court had to determine whether an employer can rightfully take disciplinary action against an employee who unreasonably declined to testify during arbitration procedures. In addition, the court had to address whether an employer may rely on a breach of the duty of good faith from an employee to warrant any possible disciplinary action and for not utilising the subpoena process as stipulated in the CCMA Rules.

### 5.1 Background

In this matter, the employee was employed as a human resources admin clerk when an incident occurred between two other co-employees.<sup>348</sup> An argument occurred between a manager, Govender, and a fellow employee, Maili, in Govender's office which escalated to such a degree that their voices could be heard by other co-workers within the vicinity.<sup>349</sup> The employee noticed the loud argument and rushed to Govender's office and ushered Maili out of Govender's office before the situation could worsen.<sup>350</sup> Maili faced disciplinary

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<sup>343</sup> Coetzer 2021 <https://www.chmlegal.co.za/leave-me-out-dealing-employees-who-dont-want-testify>.

<sup>344</sup> Coetzer 2021 <https://www.chmlegal.co.za/leave-me-out-dealing-employees-who-dont-want-testify>.

<sup>345</sup> Arikum 2021 <https://ceosa.org.za/my-employee-is-not-willing-to-testify-at-arbitration-what-do-i-do/>.

<sup>346</sup> Arikum 2021 <https://ceosa.org.za/my-employee-is-not-willing-to-testify-at-arbitration-what-do-i-do/>.

<sup>347</sup> *Kaefer Energy* case.

<sup>348</sup> *Kaefer Energy* case par. 3.

<sup>349</sup> *Kaefer Energy* case par. 3.

<sup>350</sup> *Kaefer Energy* case par. 3.

action as a result of this occurrence and was dismissed, which she challenged and referred a dispute to the CCMA.<sup>351</sup> The employer sought the employee to testify at the arbitration of Maili. However, after confirming that she will testify, the employee later refused.<sup>352</sup>

The first charge levelled against the employee related to her refusal to testify against Maili on behalf of the employer and the second to a breach of her employment regarding disclosing confidential information.<sup>353</sup> For the purposes of this mini-dissertation, reference is only made to the first charge.

The employee was dismissed during her disciplinary hearing and being aggrieved by the sanction imposed, referred an unfair dismissal dispute to the CCMA.<sup>354</sup>

### 5.1.1 Arbitration

At arbitration, the Commissioner had to decide whether an employer can dismiss an employee for refusing to testify.<sup>355</sup> The evidence that the arbitrator was presented with was that the employer, through Govender, approached the employee and instructed her to be a witness for the employer at Maili's arbitration.<sup>356</sup> The employee indicated to Govender that she could not recall every detail of what happened on the day of the incident.<sup>357</sup> On the Thursday or Friday<sup>358</sup> preceding the arbitration, Govender again approached the employee and again pointed out the importance of her testimony but the employee maintained her disposition not to testify.<sup>359</sup> Govender afforded the employee an opportunity to reconsider her testimony and to revert to her once she made her final decision.<sup>360</sup> After consideration, the employee approached Govender and informed her she was willing to testify since she in fact remembered what happened, thereby

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<sup>351</sup> *Kaefer Energy* case par. 3.

<sup>352</sup> *Kaefer Energy* case par. 3.

<sup>353</sup> *Kaefer Energy* case par. 3 and 4.

<sup>354</sup> *Kaefer Energy* case par. 5.

<sup>355</sup> *Kaefer Energy* case par. 5.

<sup>356</sup> *Kaefer Energy* case par. 14.

<sup>357</sup> *Kaefer Energy* case par. 14.

<sup>358</sup> In his judgement, Wagley JP does not state the specific date on which Govender approached the employee again. A presumption can be made that it was the Thursday or Friday preceding the arbitration.

<sup>359</sup> *Kaefer Energy* case par. 14.

<sup>360</sup> *Kaefer Energy* case par. 14.

acknowledging she was in a position to assist the employer.<sup>361</sup> Later that evening, the employee sent Govender a message informing her she no longer intended to testify and that they should proceed without her.<sup>362</sup>

The Commissioner held in his award that there was no bad faith on the part of the employee as no evidence was led that she deliberately refused to testify in an attempt to protect Maili or to conceal evidence.<sup>363</sup> The Commissioner stated that if the employee was indeed an important witness, the employer should have followed proper procedure and have the employee subpoenaed to testify.<sup>364</sup>

### 5.1.2 Labour Court

Disgruntled by the Arbitrator's finding that there was no misconduct on the part of the employee in failing to comply with an instruction to testify, the employer sought to set the award aside on review and have it replaced with an order that the dismissal was fair.<sup>365</sup> Although different reasons were furnished, the Labour Court reached the same decision that the Arbitrator did and referred to section 5(3) of the LRA.<sup>366</sup> In accordance with the Arbitrator, the Labour Court further stated that the only way to compel an employee to testify is by means of a subpoena and that it would be incorrect to infer that an employer's contractual authority includes the ability to force a worker to testify against her will.<sup>367</sup>

### 5.1.3 Labour Appeal Court

Dissatisfied with the Labour Court's judgement, the employer took the matter on appeal. On appeal, the employer argued that not only was the employee a crucial witness to the incident, but that the employee owed a duty of good faith, which forms part of her common law duties, toward the employer and submitted that her refusal to do so was a breach of her duties, and thus amounted to insubordination.<sup>368</sup> The employer further

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<sup>361</sup> *Kaefer Energy* case par. 15.

<sup>362</sup> *Kaefer Energy* case par. 18.

<sup>363</sup> *Kaefer Energy* case par. 6.

<sup>364</sup> *Kaefer Energy* case par. 6.

<sup>365</sup> *Kaefer Energy* case par. 8.

<sup>366</sup> *Labour Relations Act*.

<sup>367</sup> *Kaefer Energy* case par. 9.

<sup>368</sup> *Kaefer Energy* case par. 10.

submitted that the employee was instructed to make herself available to testify on behalf of the employer as to her recollection of events and that it was not required that she perjure herself in doing so, hence there was no harm or threat.<sup>369</sup>

Conversely, the employee argued that her refusal was based on the notion that she did not consider her evidence as relevant and did not want to embarrass herself during testimony as she could not remember what was said between Maili and Govender.<sup>370</sup> Furthermore, she submitted that the arbitrator's finding was correct as there was no basis for a misconduct finding against her for her refusal because her refusal was not deliberate or in bad faith.<sup>371</sup> Ultimately, the employee stated that the employer could have and ought to have subpoenaed her to ensure her attendance if it believed her attendance was significant.<sup>372</sup>

The Labour Appeal Court (LAC) held that the Arbitrator completely misunderstood what was expected of him and that the employee was given a clear instruction that was fair and reasonable.<sup>373</sup> The employee's explanation was twofold: she could not remember what transpired on the day of the incident and she considered her testimony immaterial, however, the LAC disregarded the employee's reason and stated that it was not for the employee to decide on the relevance of her evidence.<sup>374</sup>

The Labour Appeal Court stated that although the employee might furnish an excuse as to why she did not want to testify, she had been instructed to testify. Therefore, she had a duty to obey the instruction especially since there was no evidence of any threat made against her.<sup>375</sup>

The ruse of a subpoena relied on by the CCMA and the Labour Court is unfounded; the fact that the tool of a subpoena is available does not mean the availability thereof justifies the disregard of an employer's instruction by an employee simply because it is not used.<sup>376</sup>

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<sup>369</sup> *Kaefer Energy* case par. 11.

<sup>370</sup> *Kaefer Energy* case par. 12.

<sup>371</sup> *Kaefer Energy* case par. 12.

<sup>372</sup> *Kaefer Energy* case par. 12.

<sup>373</sup> *Kaefer Energy* case par. 21 and 22.

<sup>374</sup> *Kaefer Energy* case par. 23.

<sup>375</sup> *Kaefer Energy* case par. 23.

<sup>376</sup> *Kaefer Energy* case par. 26.

The LAC found that although the dismissal of Maili was found to be fair without the employee's evidence, it was reiterated that insubordination is a serious offence as an employer's authority is challenged by an employee which may have a negative result on the execution of discipline in the workplace.<sup>377</sup>

Finally, it was put that imposing a final written warning would not be suitable as it would convey the admissibility of disobeying an employer's authority which cannot be tolerated.<sup>378</sup> For the reasons stated the LAC upheld the appeal and replaced the order to state that the dismissal was fair.<sup>379</sup>

## 5.2 Analysis

Before continuing to a thorough analysis of the *Kaefer Energy* case, brief reference is made to the matter of *NUMSA and Another v Metal And Engineering Industries Bargaining Council (MEIBC) and Others*<sup>380</sup> where an employee, Mthethwa, was similarly dismissed for refusing, even after being subpoenaed, to testify at the arbitration of another employee who was dismissed for serious misconduct pertaining to a strike.<sup>381</sup> The Commissioner found that despite gunshots being fired at another employee, Gumede's, property, this did not justify his refusal to testify as there was no imminent harm directed at him.<sup>382</sup> After considering Mthethwa's evidence surrounding his refusal to testify, the Commissioner formed the impression that he was more concerned about being unpopular with his fellow employees than being truly fearful.<sup>383</sup> On this basis, the Commissioner found that his refusal to testify represented disloyalty that damages trust in a working relationship and held that these factors do not surpass his obligation to follow legal instructions.<sup>384</sup> The Commissioner found his dismissal to be fair and upon review to the LC, the LC held that the Commissioner's decision was reasonable and dismissed the review application.<sup>385</sup>

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<sup>377</sup> *Kaefer Energy* case par. 30 and 31.

<sup>378</sup> *Kaefer Energy* case par. 32.

<sup>379</sup> *Kaefer Energy* case par. 34.

<sup>380</sup> *NUMSA and Another v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* (unreported) [2016] ZALCD 16, (hereafter the *NUMSA* case).

<sup>381</sup> *NUMSA* case par. 2.

<sup>382</sup> *NUMSA* case par. 4.

<sup>383</sup> *NUMSA* case par. 5.

<sup>384</sup> *NUMSA* case par. 7.

<sup>385</sup> *NUMSA* case par. 8 and 9.

This matter is relevant to the *Kaefer Energy* case as it addresses the same issue in dispute - can an employer dismiss an employee for refusing to testify at disciplinary and/or arbitration hearings?

In comparing the two matters, notwithstanding the fact that the employer followed the subpoena procedure to secure the attendance of an employee in the *NUMSA* case, the employee still refused to testify on behalf of the employer and was dismissed. Whereas in the *Kaefer Energy* case, the employer solely relied on the duty of good faith in assuring the employee's attendance at the arbitration. The significance hereof is further discussed later on.

In the *Kaefer Energy* case, in reaching its decision, the LAC applied the criteria formerly discussed to determine whether the employee committed misconduct in the form of insubordination. In applying the criteria, the LAC accordingly found that (1) an instruction was given and consequently, there was a refusal to carry out the instruction by the employee; (2) the instruction was lawful and reasonable and (3) the employee was capable of carrying out the instruction.

The LAC also considered whether there was a valid reason for refusing to obey the instruction and found that there was no evidence of any threat and/or possible harm had she testified. Only in the event that there was any evidence of harm and/or unlawful conduct on the part of the employer, would it be considered an unreasonable instruction. However, this was not the case and the instruction to the employee was reasonable and valid. Judge Waglay correctly stated that an employee cannot merely disregard an employer's instruction without a proper explanation or simply because he did not follow a formal procedure in securing a witness.

The LAC based its decision on the common law principle of the duty of good faith and not on the application of the CCMA Rules pertaining to subpoenas. The position would have been the same in the event that a subpoena was issued as was the case in *NUMSA*, therefore, the LAC correctly utilised the criteria in order to reach its decision.

For the reasons above, the essence of the LAC's judgement in the *Kaefer Energy* case does not develop the common law but rather recognises the rights conferred by the common law, which includes the rights of employers in the employment relationship.

Therefore, this is in line with the Constitution.<sup>386</sup> This judgement is also within the confines of the Code of Good Practice: Dismissal confirming that employers are entitled to expect satisfactory conduct and work from their employees,<sup>387</sup> which in this instance relates to an expectation to comply with an instruction and protect the employer's business interest. It can conversely be argued that this judgement is relevant to the development of the common law in terms of defining or providing context for the employee's obligations towards the employer.

### 5.2.1 Arguments against a general defence based on the duty of good faith

Considering the employee's arguments throughout the *Kaefer Energy* case, it is clear that the employee was of the opinion that the duty of good faith does not have a basis in this matter and consequently, she did not breach the duty of good faith since testifying on behalf the employer was not specifically within her scope of employment.

In agreement with the employee, Benjamin<sup>388</sup> is against the idea of embracing the implied term of good faith and argues that judges are left to decide on critical matter based on their personal interpretation of the rights and duties of employees.<sup>389</sup>

Benjamin<sup>390</sup> doubts that all facets of the employment relationship were meant to be covered by such a broad definition of the duty of good faith and contends that it would deny the reality that the legislature only decided to include protection against specific types of unfair conduct by the employer in the legislation, obscuring the distinction between rights, interests and disputes.

In *SA Maritime Safety Authority v McKenzie*<sup>391</sup> (*McKenzie*), the learned Wallis AJA is of the view that in consideration of South African labour legislation, the LRA's common law protections are unnecessary because they indicate that incorporating constitutionally

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<sup>386</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>387</sup> Schedule 8(1)(3) *Labour Relations Act*.

<sup>388</sup> 2009 ILJ 759.

<sup>389</sup> 2010 ILJ 41.

<sup>390</sup> 2009 ILJ 759-760.

<sup>391</sup> *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA), (hereafter the *McKenzie* case).

protected labour rights into individual employment contracts by implying a term is neither necessary nor warranted under section 8(3) of the Constitution.<sup>392</sup>

### 5.2.2 Arguments for a general defence based on the duty of good faith

Regardless of whether an employee is hesitant to testify either at a disciplinary hearing or arbitration, it is crucial to have witness testimony in order to establish the employer's case.<sup>393</sup> In *Kaefer Energy*, Maili's dismissal was found to be fair without the evidence of the employee, but it could have easily been found to be unfair without the employee's testimony since a witness's testimony remains a crucial element as it forms part of the procedure at any hearing and is a decisive factor in an arbitrator's decision.<sup>394</sup>

The recognition of a common law duty of good faith within the labour law has caused disagreement among academic writers<sup>395</sup> as well as the courts. Referring to the rationality of the employment contract and the broad application of the implied term of trust and confidence, writers such as Bosch<sup>396</sup> and Cohen,<sup>397</sup> argues in favour of the recognition of the duty of good faith.<sup>398</sup> Their arguments are based on the fact that the implied term of trust and confidence is already accepted by the courts thus conceding that the implied duty should not be too unfamiliar.<sup>399</sup>

Bosch<sup>400</sup> argues that the implication of the duty of good faith and good dealing is synonymous and with its inclusion, both parties can pursue alternative remedies instead of the ones offered in the LRA for improper conduct from the other party.

Cohen<sup>401</sup> notes that the implied duty of good faith has been used to merge constitutional values within the employment relationship to ensure fair labour practices. He further notes that the nature of this common law duty allows the courts to give meaning to these

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<sup>392</sup> *McKenzie* case par. 37. See also Louw 2018 *PER/PELJ* 6-7.

<sup>393</sup> Ivan Israelstam (date unknown) <https://labourguide.co.za/misconduct/witnesses-are-key-at-hearings/>.

<sup>394</sup> Ivan Israelstam (date unknown) <https://labourguide.co.za/misconduct/witnesses-are-key-at-hearings/>.

<sup>395</sup> Louw 2018 *PER/PELJ*.

<sup>396</sup> See Bosch 2006 *ILJ* 28.

<sup>397</sup> See Cohen 2009 *ILJ* 2271.

<sup>398</sup> Louw 2018 *PER/PELJ*.

<sup>399</sup> Louw 2019 *PER/PELJ*.

<sup>400</sup> 2006 *ILJ* 52.

<sup>401</sup> 2009 *ILJ* 2295.

duties and, in doing so, to have an impact on the formulation of public policy which ultimately leads to the development of the common law.<sup>402</sup>

The *Kaefer Energy* case, in essence, not only acknowledges an employer's authority in the employment relationship but also defends an employer's rights with regards to discipline in the employment relationship in a country where labour legislation is heavily tilted in favour of employees.<sup>403</sup>

In defending his support for the recognition of the duty of good faith, Louw<sup>404</sup> opposes Wallis AJA's reasoning in the *McKenzie* case and argues that his view is based on the assumption that the South African labour legislation give sufficient protection to employees in any given case, yet this is not always the case as there are occasions in which legislation does not offer adequate protection. This in turn, may possibly lead to the legislative provisions being constitutionally challenged, or alternatively, further development of the common law.<sup>405</sup>

Hawthorne<sup>406</sup> agrees with Louw in this regard and asserts that South African legislation has already developed the common law in accordance with Section 39(2) of the Constitution<sup>407</sup> and doubts that the application of Section 39(2) of the Constitution<sup>408</sup> limits development of the common law because if this was the case, the law would still operate within pre-democratic apartheid-era values.<sup>409</sup>

According to Flemming DJP<sup>410</sup> the concept of good faith remains undefined and that it holds no content. Hawthorne<sup>411</sup> argues that although this might be true, it is because the courts have omitted to give content to the concept as is expected of our courts in terms of Section 39 of the Constitution.<sup>412</sup>

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<sup>402</sup> Cohen 2009 ILJ 2295.

<sup>403</sup> Israelstam date unknown <https://www.cofesa.co.za/the-labour-relations-act-dangerous-dozen/>.

<sup>404</sup> Louw 2018 *PER/PELJ* 7.

<sup>405</sup> Louw 2018 *PER/PELJ* 7.

<sup>406</sup> Hawthorne 2005 *SA Merc LJ* 220.

<sup>407</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>408</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>409</sup> Hawthorne 2005 *SA Merc LJ* 220.

<sup>410</sup> *Harper v Morgan Guarantee Trust Co of New York, Johannesburg & Another* 2004 (3) SA 253 (W) at 261G.

<sup>411</sup> Hawthorne 2005 *SA Merc LJ* 218 – 219.

<sup>412</sup> *Constitution of the Republic of South Africa*, 1996.

Consequently, and in agreement with Louw<sup>413</sup>, Hawthorne maintains that the continuation of the old tradition of authority would have occurred when there was a need for a shift to a culture of justification, implying that this shift should be continuous as the society and law develops.<sup>414</sup>

Based on the discussion of various South African case laws regarding the duty of good faith within this mini-dissertation, it is clear that since courts have an obligation to develop the common law to align it with constitutional principles, good faith has a more active role to play in the contract law<sup>415</sup> and more specifically, in the employment law. Any deviation and/or inconsistencies within the duty of good faith will delay the development of the common law.<sup>416</sup>

It is the author's view that it would be impossible to regulate every single duty of an employee within an employment contract; it is also improbable that an employer will do so. For this reason, the common law duty of good faith plays a crucial role and essentially bridges this gap.

## **6 Conclusion**

It cannot be denied that Bosch has elegantly put an argument forward that the recognition of the duty of good faith is beneficial to an employee and to an employer, which is in line with the reciprocal duty expected in South African common law.

The common law duty of good faith cannot simply be marginalised as it is the root of the legal system in South Africa today. Thus, its disregard will not be ideal, especially within the realm of employment law with the interpersonal relationships between employers and employees.

This mini-dissertation demonstrates that it is best to exercise caution when employees decide to disregard the duty of good faith owed to an employer as an employer may be justified in dismissing an employee for breaching the duty.

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<sup>413</sup> Louw 2018 *PER/PELJ*.

<sup>414</sup> Hawthorne 2005 *SA Merc LJ* 220.

<sup>415</sup> Van der Sijde *The role of good faith in the South African law of contract*.

<sup>416</sup> Govender *The Role of Good Faith in South African Contract Law* 27.

It is clear that South African labour legislation has, without a doubt, come a long way since the enactment of the Constitution, in 1996. The constitutional right to fair labour practices is prevalent in all labour legislation and provides employees with sufficient protection against possible unfair conduct of employers.

Although the concept of good faith is developed as a common law duty, it is clear that it remains an important component within the South African law, the employment relationship and is not necessarily essential to be enacted in legislation. This is because the courts, especially in respect of labour law, have accepted the term unequivocally. The court regards the duty of good faith with high regard and respect while still respecting constitutional values and labour legislation. This is evident in both the *NUMSA* case as well as the *Kaefer Energy* case.

Since the development of the common law is an important aspect of the law, the judgement in the *Kaefer Energy*<sup>417</sup> case is a positive step in the right direction as it validates the employer as an authoritative figure within the employment relationship and that any conduct against its instruction cannot be tolerated regardless. Additionally, it assures employers that employees are employed for the promotion of their business interest and that any conduct in defiance thereof, will similarly, not be tolerated by our courts.

The judgement in *Kaefer Energy*<sup>418</sup> is definitive in setting a standard for the behaviour of employees and what is expected of them within their common law duties which in turn will ensure consistency. The judgement is further pertinent considering the duty of courts by the Constitution to develop the common law.

It is, therefore, appropriate that a notion which the Constitution so firmly emphasises be accorded the respect and prominence it deserves.<sup>419</sup>

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<sup>417</sup> *Kaefer Energy* case.

<sup>418</sup> *Kaefer Energy* case.

<sup>419</sup> Govender *The Role of Good Faith in South African Contract Law* 35.

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