IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 450/99

In the matter between:

FEDLIFE ASSURANCE LIMITED Appellant

and

HENDRIK JOHANNES WOLFAARDT Respondent

Coram: Howie, Marais, Mpati, JJA, Nugent and Froneman, AJJA

Heard: 16 August 2001

Delivered: 18 September 2001

Damages for repudiation of fixed-term employment contract – if not whether such claim excluded by Labour Relations Act No 66 of 1995 – if not, whether Labour Court has exclusive jurisdiction in respect of such a claim.

J U D G M E N T

NUGENT, A J A:

[1] The Labour Relations Act No. 66 of 1995 has created an elaborate and in many respects innovative legal framework for the regulation of the relationship between employers and employees. In some respects, however, the Act retains and builds upon concepts and principles that were developed by the courts when interpreting the Labour Relations Act 28 of 1956 which it repealed.

[2] The 1956 Act (after its amendment in 1979) created a statutory remedy for the commission of what was referred to as an "unfair labour practice" which was soon interpreted by the courts to include the unfair dismissal of an employee (Brassey: *Employment Law* Vol. 1 A1:47). The effect of that interpretation was to recognise the existence of a right not to be unfairly dismissed and such a right is now expressly provided for in s 185 of the 1995 Act.

[3] The 1995 Act also establishes a Labour Court as a superior court with "authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the (High) Court has in relation to the matters under its jurisdiction" (s 151(2)). In some matters the jurisdiction of the Labour Court is exclusive while in others its jurisdiction is concurrent with that of the High Court. We are concerned only with the Labour Court's exclusive jurisdiction which is conferred upon it by s 157(1) in the following terms:

> "Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

[4] The issue in the present case purports to be whether the respondent's action against the appellant is a matter that falls within the exclusive jurisdiction of the Labour Court and is thus excluded from the jurisdiction of the

High Court. On closer examination, however, the question goes further and calls upon us to decide whether the respondent's claim is legally cognisable at all.

[5] The appeal arises from an action that was instituted by the respondent against the appellant in the Witwatersrand Local Division of the High Court in which he claimed damages for breach of contract. The claim is singular only in that the contract is one of employment. In his particulars of claim the respondent alleged that the contract was for a fixed term of five years commencing on 1 December 1996 and that the appellant repudiated the contract by purporting to terminate it with effect from 31 December 1998 on the grounds that the respondent's position had become redundant. The respondent alleged that he had elected to accept the appellant's repudiation (with the result that the contract came to an end) and he claimed damages in consequence of the breach.

[6] The appellant filed a special plea the material portions of which read as follows:

> "2. In terms of Section 157(1) of the Labour Relations Act No 66 of 1995, the Labour Court has exclusive jurisdiction in respect of all matters that must be determined by the Labour Court and all matters that in terms of any other law are to be determined by the Labour Court.
>
> 3. The Labour Court in the premises has exclusive jurisdiction to adjudicate dismissals occasioned by operational requirements in terms of Section 191(5) and Section 189 of the Labour Relations Act.
>
> 4. In the premises the above Honourable Court does not have jurisdiction to adjudicate the dispute between the parties by virtue of the fact that the Labour Court has exclusive jurisdiction to adjudicate same."

[7] The respondent excepted to the special plea on the grounds that it failed to disclose a defence. The exception was upheld and the special plea was set aside by Odendaal AJ who considered himself bound by the decision in *Jacot-Guillarmod v Provincial Government, Gauteng, and Another* 1999(3) SA 594

(T) which was on all fours with the present case. The appellant now appeals to this court with leave granted by the court *a quo*.

[8] The only question that was considered in *Jacot-Guillarmod's* case , and by the court *a quo*, was whether an action for contractual damages arising from the repudiation of a contract of employment was a matter that fell within the exclusive jurisdiction of the Labour Court as provided for in s 157(1) of the 1995 Act. However, the principal argument that was advanced before us went considerably further and was rather in the nature of an exception to the particulars of claim. The main submission on behalf of the appellant was that an action of that nature is no longer cognisable in our law and that the employee concerned (in this case the respondent) has no remedies other than those provided for in Chapter VIII of the 1995 Act. If that is indeed so then clearly those remedies are not enforceable in the High Court.

[9] Before turning to that argument it is helpful to briefly summarise the rights and remedies that are provided for in Chapter VIII of the 1995 Act. The foundation of the chapter, which deals with "Unfair Dismissals", is s 185, which provides that "every employee has the right not to be unfairly dismissed". The remaining sections expand upon the content of that right and prescribe the procedures and remedies for its enforcement.

[10] An employee who claims to have been unfairly dismissed may refer the dispute to a statutory council or to the Commission for Conciliation Mediation and Arbitration (whichever is appropriate in the particular case) which must attempt to resolve the dispute through conciliation (s 191(1) and (4)). If the dispute is not resolved through conciliation it must be resolved by arbitration in some cases or it may be referred to the Labour Court for adjudication in other cases depending upon the nature of the dismissal (s 191(5)). If the Labour

Court or the arbitrator finds that the dismissal was unfair the employer may be ordered to reinstate or to re-employ the employee (such an order must be made in certain cases) or to pay compensation (s 193(1)). Section 194 places limits on the amount of compensation that may be awarded. Where the dismissal was automatically unfair, as that term is used in the 1995 Act, or it was based upon the employer's operational requirements and is found to be unfair, the Labour Court may in addition make any other order that it considers appropriate in the circumstances (s 193).

[11] The principal argument advanced on behalf of the appellant was that Chapter VIII of the 1995 Act codifies the rights and remedies that are available to all employees in our law arising from the termination of their employment. In other words, so it was submitted, the effect of the 1995 Act has been on the one hand to confer on employees the rights and remedies provided for in

Chapter VIII in the event of dismissal and on the other hand to deprive them of their common law remedies. The chapter is thus said to be not only comprehensive but also exhaustive insofar as it provides for remedies upon dismissal. Support for that construction of the Act was sought in what was referred to as its broad scheme rather than in any of its particular provisions. It was submitted that the material inroads made by the legislature upon the right of employers to terminate contracts of employment in accordance with their terms must necessarily have been intended to be balanced by the abrogation of employees' rights to enforce such contracts at common law either by way of claiming specific performance or by way of claiming damages.

[12] In effect, according to that submission, the common law right to enforce a fixed-term contract of employment has been abolished by the 1995 Act. Such a contract must then take its place alongside any other employment contract that

may be terminated at the employer's will provided the termination does not constitute an unfair dismissal as contemplated by Chapter VII of the 1995 Act.

[13] The clear purpose of the legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice or summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

[14] That position was perhaps ameliorated with the adoption of the Interim Constitution in 1994 which guaranteed to every person the right to fair labour practices in s 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). Thus it might be that an

implied right not to be unfairly dismissed was imported into the common law employment relationship by s 27(1) of the Interim Constitution (and now by s 23(1) of the present Constitution) even before the 1995 Act was enacted.

[**15**] However there can be no suggestion that the constitutional dispensation deprived employees of the common law right to enforce the terms of a fixed-term contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had their source in the Interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of their pre-existing common law right to enforce such contracts, thereby confining them to the remedies for "unlawful dismissal" as provided for in the 1995 Act.

[16] In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and *a fortiori,* not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication (*Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784 D-H). While the advent of the Constitution, and s 39(2) in particular, has not had the effect of prohibiting entirely the use of the presumption against legislative alteration of the existing law (whether common law or statute) when interpreting a statute which is less than clear, it nevertheless limits its field of application. The same is true of the presumption against the deprivation of existing rights. To illustrate: where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in harmony with "the spirit, purport and objects of the Bill of Rights" there would appear to

be no justification for invoking any such presumption. But where the existing law or right is not unharmonious the presumption will still find application. The continued existence of the common law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

[17] The 1995 Act does not expressly abrogate an employee's common law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.

[18] The clearest indication that it had no such intention is s 186(b) which extends the meaning of "dismissal" to include the following circumstances:

> "(A)n employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

It is significant that although the legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: The common law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed-term contracts makes it clear that the legislature recognized their continued enforceability and any other construction would render the definition absurd. By enacting s 186(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full

performance of the employer's contractual obligations, compensation (albeit of an arbitrary amount) if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur. That being so, it would be strange indeed, and bereft of any rationality, for the legislature to deny to the employee whose fixed term contract of five years has been unlawfully terminated within days of appointment the benefit of either specific performance of the contract or damages for its premature termination and to confine the employee to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194 of the 1995 Act. It is manifest that the result would be that the former employee, although in far less need than the latter of a remedy, will have received more than is due at common law, but that the latter may not recover as of right even that which was payable at common law and instead must rest content with "compensation" which may be ludicrously small in comparison with the true loss. The absurdity does not end

there. If it were so that a plaintiff such as this is confined to a claim for "compensation" in terms of s 194, where the employer proves that "the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements" and "that the dismissal was effected in accordance with a fair procedure" the plaintiff would not be entitled to any compensation. That would be the combined effect of s 188(1)(a) and (b); s 192; s 193 and s 194. Such a result could never have been the intention of the legislature.

[19] Moreover, s 195 makes it clear that an order or award of compensation in consequence of an unfair dismissal is "in addition to and not a substitute for any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment". It was submitted on behalf of the appellant that the "other amounts" referred to in that section are those amounts

that might have accrued to an employee at the time of the dismissal, such as accrued wages, leave pay and the like, and do not include damages for breach. I can see no reason to restrict the plain words of the section in that manner.

[20] I can see no reason why the legislature should have sought to produce that result. A right not to be unfairly dismissed finds its application pre-eminently in circumstances in which the employee has no contractual security of employment. While it is understandable that the legislature wished to enhance the security of that class of employees I can see no reason why it should have exacted a prejudicial *quid pro quo* from another class of employees entirely in order to do so. In my view there is simply no logical or conceptual connection between the rights that have been afforded on the one hand and those that are said to have been abolished on the other.

[21] We were much pressed with the contention that, although the respondent plainly intended to plead a common law claim for damages arising from the unlawful premature repudiation of the fixed term contract and studiously abstained from reliance upon an "unfair labour practice" and making a claim for "compensation" within the meaning of the 1995 Act, but also pleaded the employer's professed reason for the repudiation as being its operational requirements, he was confined to the remedies set forth in s 194 of the Act. Counsel for appellant submitted that whether or not respondent intended that was irrelevant; he could not escape being confined to s 194 by the manner in which he chose to plead his claim. *Khumalo v Potgieter* 2001 (3) SA 63 (SCA) was said to be authority for the submission. In my view it is not. It appears plainly from the judgment in that case that it was common cause that "the appellant's claimed entitlement to continued occupation of a portion of the

farm in question is based **solely** [my emphasis] on the Act". (At 66 B.)

There was no other basis in law for the claim. As the Court said at 67E:

> "In order to succeed with prayer 1, the appellant had to found her case on the provisions of the Act. This is what she in fact did, even though she did not expressly refer to the terms of the Act."

In the present case a clearly identifiable and recognisable common law claim for damages has been pleaded. The disclosure of the employer's professed reason for repudiating the contract was mere surplusage and did not signal a resort to a claim under Chapter VIII.

[22] In my view Chapter VIII of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the 1995

Act itself I do not think the respondent has been deprived of the common law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.

[23] There remains the question whether the respondent's action for contractual damages is nevertheless a matter that falls within the exclusive jurisdiction of the Labour Court in terms of s 157(1). The appellant's counsel submitted in the alternative that it does.

[24] If an employee, as here, accepts repudiation and cancels, the Labour Court would not order reinstatement or re-employment (see s 193 (2)). That would leave compensation under s 194. S 194(1) allows punitive compensation only and s 194 (2) is limited to a year's remuneration. Having deliberately set

those restrictions, it seems difficult, if not impossible, to infer that the legislation intended (notwithstanding the apparently limitless scope of s 158 (1)(a)(vi) and s 193 (3)) that the 1995 Act itself should nevertheless provide the employee with the full balance of the common law damages as well. Absent such intention, s 195 must surely contemplate that for such balance (recovery of which it, in terms, allows) an employee is free to sue in the civil courts. No doubt s 77 (3) of the Basic Conditions of Employment Act 75 of 1997 subsequently conferred concurrent jurisdiction on the Labour Court but that is not what is in issue in the present case.

[25] Furthermore s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. Some of the implications were recently discussed by Zondo, JP in *Langeveldt v Vryburg Transitional Local*

Council and Others [2001] 5 BLLR 501 (LAC). Its exclusive jurisdiction arises only in respect of "matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court". Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed (see for example sections 9, 24(7), 26, 59, 63(4), 66(3), 68(1), 69 etc). In my view those are the "matters" that are contemplated by s 157(1) and to which the Labour Court's exclusive jurisdiction is confined (though there may be some debate in particular cases as to their ambit: See for example *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood & Allied Workers' Union & Others* (1997) 11 ILJ 84 (D); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers & Others* 1998 (1) SA 685 (C)).

[26] The only provisions relied upon in the present case in support of the submission that the respondent's action is such a "matter" were the provisions of Chapter VIII. Section 191 provides that "a dispute about the fairness of a dismissal" may be referred to the appropriate body for conciliation. If it is not resolved it may thereafter be referred to the Labour Court for adjudication if the dismissal was based on the employer's operational requirements.

[27] Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the

employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a "dismissal" as defined in Chapter VIII). In those circumstances the respondent's action is not a "matter" that is required to be adjudicated by the Labour Court as contemplated by s 167 (1) and the special plea was correctly set aside.

[28] The appeal is dismissed with costs which are to include the costs occasioned by the employment of two counsel.

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R W Nugent, AJA

Howie JA)
Marais JA)
Mpati JA) concur

FRONEMAN AJA

[1] I have read the judgment of Nugent AJA. To my regret I am unable to agree with some of the reasoning and its eventual result. I shall attempt to set out my reasons for coming to that conclusion as succinctly as I am able to.

[2] One of the primary objects of the Labour Relations Act 66 of 1995 (the Act) is to give effect to and regulate the fundamental labour rights conferred by the Constitution (section 1(a)). Another is to promote the effective resolution of labour disputes (section 1(d)(iv)). The Act's provisions must be interpreted to give effect to its primary objects and in compliance with the Constitution (sections 3(a) and 3(b)). The Constitution is thus a good place to start any enquiry on the interpretation and application of the Act. The Constitution is also a good place to start when one looks at the common law contract of employment. The general reason for this is that we have only one system of law and, in the final analysis, the Constitution always determines the nature and

ambit of that law (*Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000(2) SA 674 (CC) para [44] at 696B-C). This remains the case even when it is found that the common law is not affected by our new constitutional dispensation: such a conclusion derives its validity from the very fact that the Constitution allows that kind of autonomy. Perhaps that is stating the obvious, but it is still relatively early on in our attempt at a constitutional democracy and lest we too easily assume that kind of autonomy without constitutional sanction, I think it may help to reiterate the central importance of the Constitution in that regard. Once it becomes the common understanding of our law it may no longer be necessary to do so.

[3] Prior to the acceptance and enactment of the Constitution, our law maintained a rigid distinction between a common law contract of employment, which was said to have nothing to do with fairness, and a statutory labour

dispensation, which had much to do with fairness. In commenting on the inquiry under the unfair labour practice jurisdiction of the old industrial court under the provisions of the previous Labour Relations Act 28 of 1956 (the old Act), Nienaber JA stated the following in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996(4) SA 577 (AD) at 592F-H :

"The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them – and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair – and that would depend on the facts of the case. There is no sure correspondence between unlawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair…."

[4] In my view the Constitution has a material impact on that particular conceptual distinction between the proper domain of contract and that of the

statute, namely that the former has little to do with fairness, whilst only the latter has (I must emphasize that I am dealing only with the contract of employment and labour legislation – what effect the Constitution may have on the law of contract generally, or other legislation, is not relevant for present purposes). Section 23(1) of the Constitution[1] provides that everyone has the right to fair labour practices. It seems to me almost uncontestable that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the constitutional right to fair labour practices (amongst others), the courts would have been obliged, in my view, to develop the common law to give expression to this constitutional right in terms of section 39(2) of the Constitution. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remains (compare

[1] Section 27(1) of the interim Constitution Act 200 of 1993 had similar provisions.

Grogan, *Workplace Law*, 6th ed, at 13-15; *Key Delta v Mariner* [1998] 6 BLLR 647 (E) at 651G-J*; Naptosa v Minister of Education, Western Cape Government* 2001(4) BCLR 388 (C) at 396B-C). It is my view of the effect of the Constitution on our common law of employment that compels me to a different conclusion than that of Nugent AJA in this matter.

[5] The facts that one has to accept for the purposes of determining the exception to the special plea are these:

The respondent entered into a contract of employment with the appellant for a fixed period of five years. Prior to the expiry of the five-year period the appellant purported to terminate the contract on the basis that the respondent's position had become redundant. The respondent construed this as a fundamental breach of contract, in the form of an unlawful anticipatory repudiation, and purported to accept the repudiation, thereby bringing the contract to an end. He

contends that his claim, as formulated in the particulars of claim, has nothing to do with, and does not rely on, any unfair dismissal, and that therefore the provisions of the Act relating to dismissals in general and unfair dismissals in particular are inapplicable. In this I think he errs.

[6] At this stage it may be appropriate to refer to the provisions of the Act that are material and relevant, apart from those general provisions concerning the Act's primary objects and how it should be interpreted that I have already referred to.

[7] Section 185 provides that every employee has the right not to be unfairly dismissed. Section 186(a) of the Act defines a dismissal for the purposes of the Act's application. Dismissal includes the fact that "an employer has terminated a contract of employment with or without notice"(section 186(a)), as well as

when "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee" (section 186(e)). An employee is defined in section 213 as "any person, excluding an independent contractor, who works for another person or for the State and who receives, or who is entitled to receive, any remuneration". Sections 187 to 189 make provision for, respectively, automatically unfair dismissals, other unfair dismissals, and dismissals based on operational requirements. Section 190 makes specific provision for the date when a dismissal is considered to come into effect. Of particular importance is section 191(1) which prescribes the procedure *"[i]f there is a dispute about the unfairness of a dismissal…"* . Section 192 deals with the onus in such procedures whilst sections 193 and 194 prescribe the remedies for unfair dismissals and the limits on the compensation that may be awarded in regard thereto. Finally, section 195 provides that *"[a]n order or award of*

compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which an employee is entitled in terms of any law, collective agreement or contract of employment".

[8] In my view there can be little doubt that the facts set out in para. 5 above clearly bring the respondent within the definition of "employee" in section 213 of the Act, and the termination of his employment within the definition of "dismissal" in section 186. The crucial initial question is thus whether the dispute about the termination of his contract is a dispute "about the fairness of a dismissal" under section 191(1) or not. If it is not, the appeal must fail. If it is, further issues need to be considered, namely whether the fact of his fixed-term contract entitles him to "any other amount" under section 195, besides the statutory compensation he may be entitled to, and, if so, which is the correct forum to determine that issue.

[9] It is important, at this stage, to emphasize that what is in issue here is narrow and very particular: namely whether the dispute resulting in the dismissal of an employee, following upon an unlawful repudiation of the employment contract by his employer, is a "dispute about the fairness of a dismissal" under section 191 of the Act. The Act does not purport to confer jurisdiction on the dispute resolution agencies created by it in general terms. Its structure "is rather to identify particular disputes, or issues, which may arise, and to provide for those particular disputes or issues…" (per Nugent J in *Eskom Ltd v NUM* (2000) 22 ILJ 618 (W) at 621 C-D. Both the Labour Court and the High Courts have grappled with the jurisdictional problems relating to these issues and the result is not harmonious (an exhaustive reference to the cases is to be found in *Langeveldt v Vryburg Transitional Local Council & Others* [2001] 5 BLLR 501 (LAC) at 510-522)).

[10] Is the present dispute a dispute about an unfair dismissal? It certainly appears to me to be the case. In ordinary terms, untrammelled by legal interpretation, it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract of employment arrives. Nienaber JA gave expression to that underlying sentiment when, in *NUMSA v Vetsak Co-operative Ltd*, above [3], he noted that it is difficult to conceive of circumstances where an unlawful dismissal would not also be unfair. I have already indicated that in my view the right not to be unfairly dismissed is a particular concretized form of the constitutional right to fair labour practices. If that premise is correct then one can only argue that the present dispute is not one about an unfair dismissal if the provisions of the Act do not comprehensively deal with this constitutional right *and* if the right not to be unfairly dismissed does not form part, in any way, of

the common law contract of employment. In my view that is not the case in either instance.

[11] The express provisions of the Act relating to dismissals are wide-ranging and comprehensive in nature. The scheme of the Act in relation thereto starts with the primary objects already referred to, namely to give effect to and regulate the constitutional labour rights and to promote the effective resolution of labour disputes. The first section of chapter 8 of the Act gives expression to one of these fundamental rights by providing that every employee has the right not to be unfairly dismissed (section 185). The definition of "dismissal" of an employee goes beyond the mere termination of employment to include those instances where a reasonable expectation of further employment exists (section 186(b)) and instances of constructive dismissal(section 186(e)), of which the acceptance by an employee of an unlawful repudiation of the contract by the

employer is but an example (*Jooste v Transnet Ltd* (1995) 16 ILJ 629 (LAC) at 636-638). The further sections then regulate how dismissal disputes are to be resolved and set out the remedies available in those disputes. Included amongst them is the right to enforce a bargain which entitles an employee to any amount greater than the statutory compensation allowed for under the Act (section 195).

[12] It is true that the Act does not define what an "unfair" dismissal is, but that is understandable given the many forms that unfairness can take and the jurisprudence that has already crystallized on this issue under the unfair labour practice provisions of the old Act. It is also true that the Act has drastically interfered with a number of aspects of the common law contract of employment – a fact readily acknowledged by Mr. Gauntlett, who, together with Mr. Halgryn, appeared for the appellant. The result, he argued, is that in some

instances the position of employees is enhanced and in others the position of employers. There may be a debate about who, on balance, is better off in the end, but if there is complaint in that regard the constitutionality of the restrictions must be tested under section 36 of the Constitution (compare *Naptosa v Minister of Education,* above, [4], at 395 E-F). Generally speaking, however, employees have gained much that they did not previously have. Their primary remedy now is reinstatement, which must be ordered unless specified conditions exist (sections 193(1)(c) and 193(2)). It is in this context, so Mr. Gauntlett submitted, that the statutory remedies, including the limits set to the amount of compensation in section 194 of the Act, must be viewed.

[13] Neither side, however, referred to the provisions of section 195 in their written heads of argument. Its terms offer further support, in my view, of the Act's purpose to deal comprehensively in Chapter 8 with all dismissals from

employment of employees under the Act (but it does not help the appellant's contention that compensation under section 194 is all that the respondent is entitled to). It may be an objectionable feature of the statute if it deprives employees, on dismissal, of the right to enforce bargained terms in their contracts of employment that would put them in a better financial position than that which the statute itself provides for. Section 195 ensures that this may not occur (compare the similar approach in section 4 of the Basic Conditions of Employment Act 75 of 1997 (the BCE Act)).

[14] The judge in the court below characterized the issue to be decided in broad and general terms as "whether or not the ordinary civil courts, having regard to the LRA, retained their jurisdiction to adjudicate common law contractual breaches of agreements of employment". From what I have already stated it should be clear that I consider the issue to be much narrower and more

specific. He also set store by the fact that there was no express exclusion in the Act of the common law claim to damages and that the presumption against taking away existing rights operated against an interpretation that the Act impliedly did so. In my view these considerations are misplaced. The Act does not purport to change the pre-constitutional common law by expressly mentioning each and every aspect of it that it wishes to change. It deals with specific issues and states expressly what the law now is in regard to those issues. To determine to what extent the common law was changed by that one has to compare these express provisions with what the common law was and determine the extent of the changes wrought by the Act. The presumption against taking away existing rights also presupposes a common law contract of employment free of the spirit and values underlying constitutionalised labour rights (The use of common law presumptions in such a context may prove problematical – compare J R de Ville, *Constitutional & Statutory Interpretation*,

Cape Town, 2000, at 62-69). . I would imagine that our law of employment, infused with these values, would make provision both for a system that guarantees that employees may be entitled to claim as their financial due that which they bargained for, over and above basic statutory entitlements, as well as for a right not to be unfairly dismissed. I happen to think that this is what the Act (and the BCE Act in a different context) achieves, albeit perhaps not to the fullest extent possible. However, even if I am wrong in viewing the Act as dealing comprehensively with these issues, I am of the view that the common law contract of employment must then give some form of expression to that fundamental right not to be unfairly dismissed. As soon as the common law does give some expression to that right, I have the same kind of difficulty as Nienaber JA had in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd*, above [3], namely to conceive how an unlawful dismissal would not also be an unfair dismissal. And if such a dismissal is unfair any dispute

about it falls squarely within the opening words of section 191(1) of the Act. In short, one of the demands of the Constitution on our common law of employment is that it includes a right to a fair dismissal. Dismissal upon an unlawful breach of contract by an employer is an unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal.

[15] The respondent's claim is capable of being seen as a claim for a monetary benefit that he bargained for and is entitled to under section 195 of the Act in addition to the compensation that may be awarded under section 194, namely as damages in lieu of specific performance (compare De Wet and Van Wyk, *Kontraktereg en Handelsreg,* 5th ed, 208-212). For present purposes it is not necessary to decide whether his claim comfortably fits within the traditional formulation of that kind of claim under the common law of contract, or whether

some adaptation will be necessary to enable it to be so accommodated, but only to determine which forum is competent to determine that issue.

[16] Once it is accepted that this particular dispute is one about the fairness of a dismissal it follows that it must be dealt with in accordance with the procedure set out in section 191 of the Act, a procedure which in one way or another ends up with the Labour Court (and on appeal, the Labour Appeal Court) having the final say. The Labour Court has the competence to award damages (section 158(1)(a)(vi)), if that is what is called for under section 195 of the Act. The present case thus becomes a matter to be determined by the Labour Court in terms of the Act and also, by virtue of the provisions of section 157(1) of the Act, a matter to be determined exclusively by that court.

[17] Mr. Pretorius, who appeared for the respondent with Mr. Antonie sought to avoid this conclusion by relying on section 77(3) of the BCE Act . That section provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of an agreement. This, he submitted, gives the High Court concurrent jurisdiction with the Labour Court to determine this matter. In my view the submission is unsound. The High Court does not need the BCE Act to give it jurisdiction in a matter concerning a contract of employment. It has that residual competence in any event, although it may be attenuated by statutory provisions such as section 157(1) of the Act. What section 77(3) does is to give the same residual concurrent competence to the Labour Court, something that court does not enjoy without specific statutory authority.

[18] In my view, therefore, the exception to the special plea should have been dismissed. I would allow the appeal with costs, including the costs of two counsel, and substitute the order in the court below with the following:

"The exception is dismissed. The defendant's special plea is upheld, and the plaintiff's claim dismissed, with costs".

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FRONEMAN AJA