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What is (And What Isn't) a 'Constitutional Matter' in the Context of Labour Law? (2009) 30 ILJ 772

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Introduction

Section 23 of the Constitution[1] establishes the right to fair labour practices. It is a right which forms part of the Bill of Rights in our Constitution. Every right (including the right to fair labour practices) binds the legislature, executive and judiciary, and to the extent applicable, natural and juristic persons (the right has both vertical and horizontal application).[2] All persons, companies, institutions and organs of state must comply with the rights therein. The right to fair labour practices is expressed through legislation, most notably the Labour Relations Act 1995 (LRA).[3] Section 1*(a)* of the LRA sets out as its first purpose the regulation of that constitutional right.[4]

The LRA creates an enabling statutory framework for engagement between employers and employees and their respective organizations. The LRA establishes specialist institutions - the Commission for Conciliation, Mediation & Arbitration (CCMA), Labour Court (LC) and Labour Appeal Court (LAC) - with their own prescribed roles, responsibilities and jurisdiction to process disputes about organizational rights, collective bargaining, industrial action, unfair dismissals and unfair labour practices.

The Constitutional Court (CC) is the apex court in our judicial system and is the highest court in all constitutional matters. According to s 167(2) of the Constitution, the CC -

> 'may decide only constitutional matters, and issues connected with decisions on constitutional matters; and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter'.

The CC may decide only 'constitutional matters' - conversely it may not decide matters which are not 'constitutional matters'.

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The CC has had opportunity to decide some key labour disputes,[5] considered to be 'constitutional matters', and has thereby given meaning and content to the right to fair labour practices.

Hypothetically and arguably though, most if not all employment disputes could be framed as 'constitutional matters' as employment disputes inevitably engage the right to fair labour practices. Again hypothetically most litigants in labour disputes could then claim that their dispute raises a constitutional matter and could arrive at the CC's door clambering for determination. Justice Ngcobo in *Nehawu v University of Cape Town*[6] recognizes as much and says:

> 'What must be stressed here ... (is) that we are dealing with a statute which was enacted to give effect to s 23 of the Constitution, and as such, it must be purposively construed. If the effect of this requirement is that this court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy.'[7]

Professor Halton Cheadle has cautioned that such an extensive interpretation of the CC's jurisdiction potentially undermines the specialist structures to determine labour disputes established by parliament through the LRA. He says:

> 'The argument is that, although the Constitutional Court is the ultimate arbiter of the right to fair labour practices, it should consider carefully before "second guessing" a system designed to balance the contending views of fairness through a system that encourages agreement within the confines of protective legislation. Where the legislature has itself created machinery to determine the fairness of a

fair labour practice - whether in the form of the CCMA, the Labour Courts or the Employment Standards Commission - the Constitutional Court ought to defer to that forum's determination.'8

The objection proceeds further and deeper - and that is to argue that non-specialist courts hearing labour matters potentially upset the carefully negotiated balance between the interests of employers and employees.9

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In fairness to the CC, it must be mentioned that in numerous cases that court has recognized the role of those structures established by the LRA and has instructed litigants to process their disputes accordingly. Recently, for example, in *Chirwa v Transnet Ltd & others*10 Justice Skweyiya writing for the majority commented:

'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters.... Where an alternative cause of action can be sustained in terms of matters arising out of an employment relationship ... it is in the first instance through the mechanisms established by the LRA that the employee should pursue his or her claims.'11

The issue though of the extensive jurisdiction assumed by the CC to hear employment disputes on the basis that the dispute gives rise to a 'constitutional matter', is very much alive. Just late last year Justice O'Regan in *CUSA v Tao Ying Metal Industries & others*12 in a minority decision cautioned (when the majority in the CC decided that the enforcement of a collective agreement constituted a 'constitutional matter' on the basis that the right to participate in collective bargaining had been triggered) that the CC -

'should recognize that this Constitution establishes it as a court that has jurisdiction in constitutional matters only; not as a general court of appeal in all matters. This court must respectfully observe those limits placed on its jurisdiction'.13

The opinions expressed above (particularly those of Cheadle and Ngcobo) were chosen to exemplify the polarities of the debate about the role and jurisdiction of the CC and the nature of constitutional matters. On the one end of the spectrum is the majority view in the CC which advocates an extensive jurisdiction to itself to hear potentially all labour disputes on the basis that the right to fair labour practices (or the other constitutional labour disputes) effected through the provisions of the LRA has been engaged. (Expressed simply - potentially all labour disputes are ultimately constitutional matters to be decided by the Constitutional Court.) On the other end of the spectrum is the view that such extensive jurisdiction is misconceived and will result in the CC becoming a final court of appeal in all labour matters (regardless of whether or not the dispute raises a genuine constitutional matter) to the detriment of the specialist fora established by the LRA, resulting in unsatisfactory pronouncements in the industrial relations arena.

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This article will explore the meaning of a 'constitutional matter' and will consider the relevant provisions in the Constitution and the nature of issues decided by the CC. The paper will finally extrapolate some general principles from the cases which may help indicate the boundaries between constitutional and non-constitutional matters.

Constitutional Matters in Theory

In order to approach the CC a litigant must, apart from complying with procedural aspects envisaged in the rules of that court,14 convince the court that it is in the interests of justice to bring a dispute to the court's attention, must obtain leave from the court to consider the dispute,15 and must satisfy the court that the dispute constitutes a constitutional matter.

The Constitution sets out a range of concerns which would qualify as 'constitutional matters', for instance: disputes between organs of state concerning their constitutional status, powers or functions; disputes about the constitutionality of any bill; applications from the National Assembly on whether an Act or part of an Act is unconstitutional; applications from a provincial legislature on whether a provincial Act or part of a

provincial Act is unconstitutional; disputes on the constitutionality of any amendment to the Constitution; disputes on whether or not parliament or the president has failed to fulfil a constitutional obligation; submissions and certification of provincial constitutions;16 confirmation of an order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status;17 and any issue involving the interpretation, protection or enforcement of the Constitution.18

In *Fredericks & others v MEC for Education & Training, Eastern Cape & others*19 Justice O'Regan recalling the CC's observations in *S v Boesak*20 notes that:

> 'The Constitution provides no definition of "constitutional matter". What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of s 172(1)*(a)* and s 167(4)*(a)* of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the

> development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.'21

In practice disputes which typically engage the CC are those in which a lower court has pronounced on the constitutional invalidity of legislation, or those concerned with the interpretation, protection or enforcement of the Constitution.

It is worth noting that in order for a matter to qualify as a 'constitutional matter' the CC is not necessarily concerned with whether or not the litigant raising the constitutional matter is likely to be successful. Justice Langa in *Minister of Safety & Security v Luiters*22 comments:

> 'When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful ... the question is whether the argument forces us to consider constitutional rights or values....'23

Constitutional Matters in Employment Law

The CC has regarded the following types of issues in the context of employment law as ones constituting constitutional matters: The constitutionality of provisions within an Act of parliament, the interpretation of legislation, and the application of legislation.24 At the heart of the cases within each type or classification is an analysis of the same thing - the constitutionally entrenched right to fair labour practices. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools around which to organize an analysis of the nature of constitutional matters arising from the cases before the CC.

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1Act 108 of 1996.

2 s 8(1) and 8(2) of the Constitution.

3Act 66 of 1995. The right is also given expression in the Basic Conditions of Employment Act 75 of 1997. Refer to s 2*(a)* of that Act.

4 The section refers to s 27 of the interim Constitution, as the LRA came into effect before the final Constitution, but the rights set out in s 27 are substantively similar to those set out in s 23 of the final Constitution.

5*SA National Defence Union v Minister of Defence & another*(1999) 20 ILJ 225 (CC), *Fredericks & others v MEC for Education & Training, Eastern Cape & others*(2002) 23 ILJ 81 (CC); *NEHAWU v UCT*(2003) 24

ILJ 95 (CC), *NUMSA & others v Bader Bop (Pty) Ltd & another*(2003) 24 ILJ 305 (CC), *SA National Defence Union v Minister of Defence & another*(2007) 8 ILJ 1909 (CC), *Sidumo v Rustenburg Platinum Mines Ltd & others*(2007) 28 ILJ 2405 (CC); *Chirwa v Transnet Ltd & others*(2008) 29 ILJ 73 (CC); *CUSA v Tao Ying Metal Industries & others*(2008) 29 ILJ 2461 (CC).

6(2003) 24 ILJ 95 (CC).

7 at para 16.

8 Ch 18, 'Labour Relations' Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2006) at 18-15.

9 Cheadle at 18-15 above comments that the observations made by McIntyre J with respect to Canadian labour law apply equally in South Africa: 'Labour law ... is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour - a very powerful socio-economic force - on the one hand and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate .... Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time .... Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.'

10(2008) 29 ILJ 73 (CC).

11 at 41.

12(2008) 29 ILJ 2461 (CC).

13 at para 128.

14 Promulgated under Government Notice R1675 in *Government Gazette* 25726 of 31 October 2003.

15 s 167(6) of the Constitution.

16 s 167(4) of the Constitution.

17 s 167(5) of the Constitution.

18 s 167(7) of the Constitution.

19(2002) 23 ILJ 81 (CC).

20 2001 (1) SA 912 (CC).

21 at para 10.

22(2007) 28 ILJ 133 (CC).

23 at para 23.

24 This conceptualization resonates with Cheadle's analysis referred to in A van Niekerk's (ed) *Law @ Work* (LexisNexis 2008) at 34.

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The constitutionality of provisions within an Act of parliament

It is trite law that an Act of parliament must comply with the Constitution. If an Act does not, then that legislation falls to be reviewed by the HC (or a court of similar status), the Supreme Court of Appeal (SCA) and ultimately by the CC. According to

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s 167(5)25 read with s 172(2)*(a)*26 of the Constitution, the CC must confirm an order of constitutional invalidity of an Act of parliament made by the SCA, a HC or a court of similar status.

In *SA National Defence Union v Minister of Defence & another*27 the CC confirmed the order from the Transvaal Provincial Division that s 126B(1) (which prohibited members of the armed forces from forming and joining trade unions) and s 126B(4) (which prohibited acts of public protest) of the Defence Act 195728 were unconstitutional and invalid and could not be justified under the limitation clause29 in the Bill of Rights. The court was of the view that those provisions were sweeping and whilst s 199(7) of the Constitution prohibits members of the armed forces from carrying out their functions in a party political partisan manner, the Defence Act had, according to the court, gone beyond what was reasonable and justifiable to achieve this objective.

On the issue of membership to trade unions, O'Regan found that soldiers were in a relationship similar ('akin') to that of a conventional employment relationship and thus they fell within the definition of 'worker' thereby enjoying the protection of s 23(2) of the Constitution which permits every worker to join a trade union.

In *SA National Defence Union v Minister of Defence & another*30 the constitutional

matters raised were whether the SA National Defence Force (SANDF) had a duty to bargain with SA National Defence Union (SANDU); whether SANDU was entitled to rely directly on s 23(5) of the Constitution when regulations[31] promulgated under the Defence Act 1957 had been enacted to regulate the right to engage in collective bargaining; and whether various regulations in chapter XX of the regulations were invalid. The contested regulations were concerned with peaceful demonstrations and pickets,[32] affiliations with other trade unions or political parties,[33] assistance by military shop stewards,[34] trade union activities during military operations,[35] and

the power of the Minister of Defence to appoint members to the Military Arbitration Board.[36]

The court did not decide the question whether or not the right to engage in collective bargaining gave rise to a correlative duty to bargain by the employer.[37] The court held that in circumstances in which legislation is enacted to give effect to a constitutional right a litigant may not bypass the legislation and rely directly on the right.[38] O'Regan said:

> '[A] litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting in its protection of the s 23(5) right in the litigant's view, then the legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.'[39]

The reason advanced by the CC (for the court's view that a litigant could not bypass legislation and instead rely directly on the right) was that such an approach would result in an undesirable dual system of jurisprudence developing, one arising from the Constitution and one arising from legislation.

The CC struck down various provisions in chapter XX of the regulations dealing with peaceful demonstrations and pickets in relation to employment matters of soldiers out of uniform, assistance (not 'representation') by military shop stewards in disciplinary and grievance procedures involving members, and the provision entitling the Minister of Defence to make appointments to the Military Arbitration Board as unconstitutional and invalid. The reasons for striking down those regulations was that the regulations unreasonably violated the right to freedom of expression, fair labour practices, and the right to have a disputed resolved by an impartial tribunal.

25 Section 167(5) reads: 'The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.'

26 Section 172(1)*(a)* reads: 'When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

27(1999) 20 ILJ 2265 (CC).

28 Act 44 of 1957.

29 s 36 of the Constitution.

30(2007) 28 ILJ 1909 (CC).

31 General Regulations of the South African National Defence Force in *Government Gazette* 20376 of 20 August 1999.

32 regulation 8.

33 regulation 13*(a)*.

34 regulations 25 and 29.

35 regulation 37.

36 regulation 73.

37 at para 56.

38 at para 51.

39 at para 52.

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The interpretation of legislation

As already mention s 23 of the Constitution grants a right to fair labour practices. That section also entrenches the right to freedom of association for employees and employers and their respective organizations and the right to engage in collective bargaining. One of the purposes of the LRA is to give effect to the labour relations provisions in the Constitution. According to s 340 of the LRA the interpretation

of the LRA must accord with the Constitution and the country's public international law obligations. The interpretation of the LRA thus constitutes a 'constitutional matter'. Various issues ('constitutional matters') raised in the key employment law cases before the CC will now be discussed.

40 '3 Interpretation of this Act Any person applying this Act must interpret its provisions -
(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
(c) ƒin compliance with the public international law obligations of the Republic.'

Any person applying this Act must interpret its provisions -
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(c) ƒin compliance with the public international law obligations of the Republic.'

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Jurisdiction of the labour courts: Section 157(1) and (2) and s 167(2) and (3) of the LRA

A repeated theme in the cases before the CC concern the role, purpose and jurisdiction of the labour and civil courts tasked with determining labour disputes. At the heart of the jurisdiction debate lies s 157 (called 'Jurisdiction of Labour Court') of the LRA. Section 157(1) reads:

'Subject to the Constitution and section 173,41 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.'

Section 157(2) reads:

'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996 and arising from -

(a) employment and from labour relations;

(b) any dispute about the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.'

The general thrust of s 157(1) is to grant exclusive jurisdiction to the LC to determine any matter dealt with in the LRA, subject to exclusions where the matter must be determined by the Labour Appeal Court (LAC), or where the Constitution contemplates a different forum (such as the CC). The general thrust of s 157(2) is to grant concurrent jurisdiction to the LC and the HC to deal with matters the subject of which concerns a violation of the Bill of Rights and arises from labour disputes in which the state is the employer.

Understandably the potential for jurisdiction conflict/uncertainty is compounded by s 169*(a)* of the Constitution in that the HC may entertain constitutional matters except those matters which only the CC may decide or those matters assigned by an Act of parliament to another court of similar status to the HC. Section 169*(a)* reads:

> 'A High Court may decide - *(a)* any constitutional matter except a matter that only the Constitutional Court may decide; or is assigned by an Act of Parliament to another court of a similar status to a High Court.'

The HC therefore has no jurisdiction to hear constitutional matters which belong exclusively to the forum of the CC or that has been assigned by legislation to a court of similar status to the HC, such as the LC. (Section 151(2) of the LRA establishes the LC as a superior court of comparable status to the HC.)

The debate to which those sections give rise most often concerns the nature of matters which may or may not be heard exclusively by the LC. In general the following seems to apply: If the matter is allocated to the LC by the LRA the LC has exclusive jurisdiction to the exclusion of the HC as contemplated in s 157(1). If the matter is a constitutional matter then the LC and the HC have concurrent jurisdiction as contemplated in s 157(2) of the LRA read with s 169*(a)* of the Constitution. If the matter does not fall within the exclusive jurisdiction of the LC, and the matter is not a constitutional matter then the HC has jurisdiction to hear the matter. This last submission is strengthened by s 169*(b)* of the Constitution which empowers the HC to decide a matter not assigned to another court.

The first case before the CC in which the issue of dual jurisdiction arose was *Fredericks* in 2001. In this matter the CC had to decide whether s 24 of the LRA which confers the power on the CCMA to determine a dispute about the interpretation or application of a collective agreement ousted the jurisdiction of the HC to hear the matter. (That had been the position of the High Court when seised with the matter.) The CC found that the HC had erred in its assessment of the dispute as the HC's jurisdiction to hear constitutional matter could only be restricted if the constitutional matter was one that only the CC could decide, or the constitutional matter had been assigned by an Act of parliament to another court of a similar status to the HC. The CCMA was not a 'court', least of all a 'court of similar status'.

The CC held furthermore that the HC had jurisdiction to consider the dispute in terms of s 157(2) of the LRA which confers concurrent jurisdiction on the HC and the LC in respect of a violation of a fundamental right arising from the conduct of the state as employer. The CC sent the applicants back to the HC for a determination on the merits of the matter.

In *Chirwa*, heard some six years later in 2007, the CC, contrary to the decision in *Fredericks*, discouraged a dual system of jurisprudence, one developing through the labour courts and another through the civil courts. The case had similar features to *Fredericks* in that it involved an employee in the public service approaching the civil courts, the HC, for relief in an employment dispute. The court considered both s 157(1) and (2) of the LRA and found that the intention of s 157(2) was not to accord jurisdiction to the HC to entertain labour matters, the intention was rather to confer jurisdiction on the LC to hear disputes founded on the Bill of Rights. Furthermore, in circumstances in which there is concurrent jurisdiction, the litigant should

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proceed in terms of the LRA and the specialist institutions of the CCMA, LC and LAC, rather than proceed in terms of the general, non-specialist civil courts (Magistrates' Court, HC and the SCA).

In *Chirwa* the CC was at pains to point out that the LRA covered employees in both the private and public sector (which was not the case prior to the enactment of the LRA in

which different legislation and forums applied to public and private sector employees) and that the legislature did not intend to privilege public sector employees vis-È-vis private sector employees by permitting them a choice of procedure and a choice of forum. Ngcobo said:

> 'When enacting the LRA, parliament did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply the law. It went on to entrust the primary interpretation and application of its rules to specific and specially constructed tribunals and forum and prescribed a particular procedure for resolving disputes arising under the LRA. Parliament evidently considered that centralized administration and adjudication by specialised tribunals and forums was necessary to achieve uniform application of its substantive rules and to avoid incompatible and conflicting decisions that are likely to arise from a multiplicity of tribunals and diversity of rules of substantive law. When a proposed interpretation of the jurisdiction of the Labour Court and the High Court threatens to interfere with the clearly indicated policy of the LRA to set up specialised tribunals and forums to deal with labour and employment relations disputes, such a construction ought not to be preferred. Rather the one that gives full effect to the policy and the objectives of the LRA must be preferred.'42

The recourse previously available to public servants prior to the advent of the 1995 LRA to pursue a claim for unfair dismissal through the civil courts was no longer necessary (as the LRA had established specialist forums for that purpose), available or desirable. The development of a dual stream of jurisprudence which gave public servants an option of pursuing a genuine labour dispute through the civil courts on the back of the Promotion of Administrative Justice Act 200043 (PAJA) or of pursuing the matter through the labour courts in terms of the LRA came to an end with *Chirwa*.

In *NEHAWU v UCT*44 the procedural and jurisdictional issue which arose from the case was the status of the LAC. Section 167(2) of the LRA reads:

> 'The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.'

Section 167(3) reads:

> 'The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.'

According to the LRA therefore the LAC is a final court of appeal with the status of the SCA. Ngcobo in *NEHAWU v UCT* qualified (alternatively challenged) those provisions by stating that the SCA and LAC do not have similar status when the issue concerns a constitutional matter. In those circumstances an appeal from the LAC lies to the SCA. He said:

> 'It must be stressed at the outset that we are concerned here with a constitutional matter, a matter which is not within the exclusive jurisdiction of the Labour Court. The provisions of the LRA which give the LAC a status equal to that of the SCA and constitute it as the final court of appeal can have no application in constitutional matters. Those provisions can apply only to matters that are within the exclusive jurisdiction of the LAC and the Labour Court.'45

He held though that an appeal may lie directly from the LAC to the CC, but that the court would be slow to hear such appeals unless they raised important issues of principle.

41 The jurisdiction of the LAC.
42 at para 111 and 112.
43Act 3 of 2000.
44(2003) 24 ILJ 95 (CC).
45 at para 20.

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The right to strike by minority unions: Chapter III: Collective bargaining and ss 64 and 65 of the LRA

In *NUMSA & others v Bader Bop (Pty) Ltd & another*46 the CC considered whether the LRA (in particular chapter III part A 'Organizational Rights') should be interpreted to preclude minority unions from acquiring organisational rights through industrial action, and, if so, whether the LRA unjustifiably limited the constitutionally entrenched right to strike in s 23(2)*(c)* of the Constitution.

Ordinarily a sufficiently representative union seeking organizational rights (access to the workplace, stop-order facilities, time off for union activities) may do so either through arbitration or industrial action.47 The LRA is silent about how unrepresentative trade unions (ie minority unions) may obtain organizational rights if an employer refuses to grant those rights. The court after analysing chapter III and after considering ILO Conventions 87 (the Freedom of Association and Protection of the Right to Organise Convention) and 98 (the Right to Organise and Collective Bargaining Convention) held that the LRA could be read and interpreted to avoid such a limitation of a fundamental right. The court reasoned:

> 'Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that right.'48

46(2003) 24 ILJ 305 (CC); [2003] 2 BLLR 103 (CC).
47 See s 21 read with s 65(2) of the LRA.
48 at para 43.

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The test of review of CCMA arbitration awards: Section 145 of the LRA

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*49 the question the CC had to grapple with was whether commissioners in the CCMA should show a 'measure of deference' to an employer's decision when deciding whether the sanction imposed by an employer was fair. The court also had to decide whether the arbitrations conducted by CCMA commissioners constituted administrative action and were therefore subject to the standard of review set out in the PAJA or whether the standard of review is that standard contemplated in s 145 of the LRA. The SCA's view was that parties at CCMA arbitrations were subject to the form of review in PAJA.

On the first issue the CC was unanimous in its finding that a commissioner is not required to approach the matter of the fairness of the sanction from the perspective of the employer. Navsa AJ says:

> 'All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator ... Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained.'50

Later on Navsa AJ comments:

> 'The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.'51

On the second issue the CC found that the CCMA performed an administrative act when

arbitrating disputes, but that PAJA did not apply.52 Importantly, the CC established a new test of review - that of 'reasonableness' which is to infuse the review grounds set out in s 145 of the LRA. That test may be expressed as follows: Is the decision reached by the commissioner one that a reasonable decision maker could not reach?

49(2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

50 at para 61.

51 at para 75.

52 The reason PAJA was held not to apply to the review of awards was that the LRA was a specialist Act with specialist forums which 'trumped' the general legislation of PAJA. This was reinforced by s 210 of the LRA which provides that if there is a conflict between two laws the LRA applies.

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The position of employees in the transfer of a business as a going concern: Section 197 of the LRA

In *NEHAWU v UCT* the CC was tasked with interpreting s 197 of the LRA to ascertain whether or not workers are automatically transferred from their old employer to a new employer upon a transfer of a

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business as a going concern. The case arose from a decision by the university to outsource its non-core services to contractors.

The University of Cape Town (UCT) (as respondent) argued that the CC had no jurisdiction to hear the matter because the dispute did not raise a constitutional issue and that the LAC had in any event properly interpreted s 197. (The LAC had decided that employees are transferred from an old to a new employer if there has been prior agreement to that effect by the employers.) UCT was of the view that when interpreting a statute that gives effect to a fundamental right, the only constitutional matter that arises relates to the constitutionality of its provisions (in other words whether or not a provision in a statute complies with or contravenes the Constitution). UCT argued that if the CC delved into the application of a statute enacted to give effect to a constitutional right, and did not confine its gaze to the interpretation of the statute then the court would 'have jurisdiction in all labour matters'.53

Ngcobo disagreed and said:

> 'In relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the constitutionality of the statue itself is in issue. A challenge to the manner in which the statute has been interpreted or applied does not require the litigant to challenge the constitutionality of the provision the construction of which is in issue. Moreover in the case of a statute such as the one in issue in this application which has been enacted to give content to a constitutional right, the proper interpretation of the statute itself is a constitutional matter.'

The CC held that the main purpose of s 197 is to protect workers from unemployment in circumstances in which there is a sale or a transfer of a business. It held, after carefully analysing the section as well as relevant international law, that upon the transfer of a business workers are automatically transferred by operation of law (there is no need for such agreement between the employers).

53 at para 15.

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The extent of backpay upon reinstatement: Section 193(1)(a) of the LRA

In *Equity Aviation Services (Pty) Ltd v CCMA & others*54 the CC considered whether an order of reinstatement with retrospective effect contemplated in s 193(1)*(a)*55 of the LRA should be capped in a similar way to that of compensation for an unfair dismissal (ie capped to a maximum of 12 months for an 'ordinary' unfair dismissal or a maximum of 24 months for an automatically unfair dismissal as contemplated in s 194 of the LRA).

The CC referring to the decision in *NEHAWU v UCT* granted leave to hear the matter as according to Nkabinde J:

> 'The constitutional issue raised in this case relates to the interpretation of s 193(1)*(a)* which gives content to the right to fair labour practices that is underpinned by s 23(1) of the Constitution.'56

The CC held that there was no limitation to the backpay upon reinstatement - that remedy can take effect to the date of dismissal, even if the date of dismissal was longer than two years (and in this particular case the order, and backpay operated retrospectively to 2001 - some seven years).

The court reasoned that there was a distinction between the remedies of reinstatement and compensation with reinstatement as the primary remedy to restore the employment relationship and that the limitations applicable to compensation did not apply to reinstatement orders. The court commented that the CCMA and labour courts did though have a discretion about how far back the reinstatement order may apply taking into account the period between the dismissal and the trial, any income earned during that time and the financial means of the employer.57

54(2008) 29 ILJ 2507 (CC).

55 That section reads: 'If the Labour Court or an arbitrator appointed in terms of this Act finds that a dispute is unfair, the Court or the arbitrator may order the employer to reinstate the employee from any date not earlier than the date of dismissal.'

56 at para 31.

57 at para 43.

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Discretion when advertising posts in the SAPS: Regulation 24(6) of the South African Police Service Regulations

In *SA Police Service v Public Servants Association*58 the CC considered the proper interpretation of regulation 24(6) of the SA Police Service Regulations dealing with the extent to which (if at all) the National Police Commissioner had a discretion to advertise an upgraded post if the incumbent in that post was performing satisfactorily. Regulation 24(6) reads as follows:

> '(6)If the National Commissioner raises the salary of a post as provided under subregulation (5) she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent -

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range.'

The commissioner on the one hand, and the Public Servants Association (PSA) on the other hand, disagreed on how that provision should be interpreted and applied. The commissioner argued that he had a discretion when upgrading a post to advertise for a new person despite the fact that the current incumbent may be performing satisfactorily. The union's view was that the commissioner did not have

such a discretion when the incumbent employee was working satisfactorily.

The commissioner approached the HC for a declarator on the meaning of that regulation explaining that there were numerous disputes on the matter arising from 1,333 posts for the position of superintendent and 3,356 for the post of captain. The HC granted the declarator favouring his exercise of a full discretion to make appointments regardless of the performance of incumbents in the posts at the time. The PSA then approached the SCA on appeal. The SCA found that the commissioner had no such discretion. The commissioner then appealed to the CC.

The CC regarded the matter as a constitutional one as the right not to be unfairly dismissed was broadly contemplated within the right to fair labour practices. The CC interpreted the regulation in a manner which gave the commissioner discretion to advertise on condition that the incumbent already in the post was guaranteed employment in another post in the SAPS. O'Regan dissented arguing that such a condition unduly hampered the exercise of the commissioner's discretion and was an interpretation which the language of the section could not reasonably bear.

58(2006) 27 ILJ 2241 (CC).

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The application of legislation

The validity and enforcement of an exemption in a collective agreement: Sections 32 and 33 of the LRA

In *CUSA v Tao Ying Metal Industries & others*[59] the issue before the CC was whether an exemption from minimum wages and other provisions granted to Tao Ying Metal in April 1997 in terms of a collective agreement concluded in 1980 under the 1956 LRA in an industrial council continued to operate despite a new agreement concluded in the Metal & Engineering Industries Bargaining Council in 1998 under the 1995 LRA. The union, the Commercial Workers Union of SA (CUSA), declared a dispute, arguing that the exemption no longer applied and that Tao Ying should be compelled to pay the minimum entitlements agreed to in the industrial council. The dispute proceeded to the CCMA and the CCMA found in favour of the union. Eventually the case wound its way through the LC, the LAC and the SCA. The SCA raised the question whether the CCMA had jurisdiction to hear the dispute, and concluded that the CCMA did not and set aside the award. CUSA then appealed to the CC, the employer objected arguing (amongst other arguments) that the proper construction of an exemption does not raise a 'constitutional issue'. The CC disagreed and Ngcobo reasoned that the issue concerned the role of commissioners in resolving disputes and the role of the courts in overseeing the

arbitration process and furthermore that the issues raised in the case were of public interest.60

The court found that the employer's exemption had terminated with the industrial council agreement and that the employer was to pay the minimum wages and conditions of employment applicable in the bargaining council agreement. O'Regan disagreed with the court's decision to hear the matter and expressed the view that the CC should only hear a dispute if it materially concerned the right to engage in collective bargaining. The dispute before the court, according to O'Regan J did not. O'Regan J stated that for leave to appeal to be granted, the first question that arises is whether the case raises a constitutional issue.61 She said:

> 'It seems to me that only two issues can be said directly to raise constitutional issues. The first is whether a reviewing court is entitled of its own accord to raise a question regarding the jurisdiction of a CCMA commissioner to determine a particular dispute; and the second is whether the award falls to be set aside because the commissioner failed to apply her mind to the terms of the exemption.'62

Importantly though, despite this finding, O'Regan qualifies her view by stating that -

> 'although a review of a decision of the CCMA will always need to be undertaken in the light of the right entrenched in s 33, and will therefore generally involve a constitutional matter, it will often not be in the interests of justice for this court to entertain such an appeal. This court must take congnizance that one of the primary purpose of the 1995 Labour Relations Act is to provide for the expeditious resolution of labour disputes. In doing so, this court will refuse to entertain a matter concerning the review of a CCMA decision unless it raises a matter of particular constitutional importance'.

O'Regan raises as a material point of disagreement with Ngcobo J the nature of a constitutional matter:

> 'Ngcobo J states that because this case concerns the enforcement of a bargaining council agreement, and because there is a right in s 23(5) of the Constitution to engage in collective bargaining, the enforcement of a bargaining council agreement raises a constitutional matter. I am not persuaded that this is correct.
>
> If it is clear that the enforcement of the bargaining agreement materially affects the right to engage in collective bargaining or any other right in the Bill of Rights, its interpretation will give rise to a constitutional issue. Where, however, the interpretation is concerned with a provision that does not affect the right to engage in collective bargaining nor any other right entrenched in the Bill of Rights, but concerns substantive terms and conditions which have been negotiated (which by and large are the stuff of bargaining council agreements), it does not seem to me that a constitutional issue is automatically engaged. In this case, the primary dispute insofar as it relates to the bargaining council agreement turns on whether the wage provisions of the 1998 main agreement apply to the employer or whether the exemption granted on 7 April 1997 exempts the

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> employer from those provisions. This does not seem to me to raise a constitutional matter. There is no provision in the Constitution which is directly relevant to the interpretation of either the 1998 main agreement or the exemption; nor can it be said that either of the interpretations for which the parties contend gives greater or lesser effect to the provisions of the Bill of Rights.63
>
> Ngcobo suggests that the enforcement of collective agreements is crucial to a society founded on the rule of law. I agree. I do not think however that the consequence of this assertion is that the enforcement of all collective agreements automatically raises a constitutional matter.'64

Conclusion: The Boundaries Between Constitutional Non-Constitutional Matters

To start with the uncontested point, if a matter concerns any matter listed in s 167(4) or concerns the constitutionality of an Act of parliament as contemplated in s 167(5) and as discussed in the *SANDU* cases such matters will be regarded as 'constitutional matters' adjudicated upon before the CC. No debate there.

If the matter concerns an interpretation of a section in the LRA, then that matter will constitute a 'constitutional matter' as the LRA was enacted to give effect to the constitutional right to fair labour practices. In this respect the CC has interpreted sections of the LRA concerned with: the jurisdiction of the LC (ss 157(1) and (2)) in *Fredericks* and *Chirwa*, and the jurisdiction of the LAC (s 167(2) and 167(3)) in *NEHAWU v UCT*; the provisions dealing with collective bargaining and strike action (chapter 111 and ss 64 and 65) in *NUMSA v Bader Bop*; the test of review of CCMA awards (s 145) in *Sidumo*; the position of employees in the transfer of businesses (s 197) in *NEHAWU v UCT*; and the

quantum of backpay upon reinstatement (s 193(1)*(a)*) in *Equity Aviation Services*.

The proper interpretation to the various sections provided by the CC has been valuable to the numerous players in the industrial relations arena because there is clarity on previously contested issues: For example, since the decision in *Chirwa* we know that public servants must approach the institutions established under the LRA to pursue employment disputes. Since the decision in *Bader Bop* we know that minority unions may strike in pursuit of organizational rights. Since the decision in *Equity Aviation* we know that there is no cap to backpay upon reinstatement. And so on and so on. The value of the decisions have been meaningful beyond the parties to the respective disputes.

If the matter concerns the interpretation of ordinary legislation including subordinate legislation (not enacted specifically to give effect to the labour rights in the Constitution) such as the South African

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Police Service Regulations in *SAPS v PSA*, and those regulations appear to engage a right broadly envisaged in s 23 of the Constitution (in that case the right not to be unfairly dismissed) then the matter is regarded as a constitutional matter. Is that correct? Perhaps arguably so as when interpreting any legislation a court must promote the spirit, purport and object of the Bill of Rights. However, the nexus between the regulations and the right in s 23 is a weak one, different from the nexus between the LRA and s 23 as the LRA was enacted to give effect to the right in s 23 and the interpretation of a section within that Act clearly constitutes a constitutional matter. It is arguable therefore that the *SAPS v PSA* scenario suggests a less compelling claim to the mantle of a constitutional matter. Even more so, when considering that the interpretation to the regulations provided by the CC was meaningful to the parties only and not to the general industrial relations public as is the situation when the CC pronounces on the proper interpretation to sections within the LRA.

When entering the realm of the application of legislation enacted to give effect to a constitutional right, the distinction between constitutional and non-constitutional matters becomes a contested one and the appropriate boundary to the concept of a constitutional matter comes under increasing strain. This occurred most notably in the *CUSA v Tao Ying Metal Industries* case. Quite simply the majority of the CC regarded the dispute (about the validity of an exemption clause in a collective agreement) as one giving rise to a constitutional matter because it concerned the role of CCMA commissioners in resolving labour disputes and the supervisory powers of the courts in overseeing the arbitration process. There was minority dissent to such wide jurisdiction based on arguments of the lack of constitutional importance in such cases, the fact that such cases do not affect the rights in s 23, and that neither interpretation advanced by the parties in such a dispute affected a provision in the Bill of Rights. Finally, such a wide interpretation undermined one of the purposes of the LRA which is to provide for the expeditious resolution of labour disputes. Those are important reasons which may help to distinguish 'impermissible' from 'permissible' cases before the CC. The decision of the court in that case did not further an understanding of the nature of the right to fair labour practices, nor of the nature of the right to engage in collective bargaining. It was not of interest to the broader industrial relations community - only to the parties themselves. In short the decision of the CC in that case was not impactful or clarificatory and therefore arguably that case (and similar cases which deal with the application of a right) should not have been before that court. The nature of the dispute simply did not in my view qualify as a constitutional matter.

Regrettably for purposes of this analysis there are no employment law reported decisions of cases proceeding to the CC and being dismissed on the basis that the dispute raised before the court did not constitute a constitutional matter. The CC has thus not distinguished

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with real clarity the boundaries between the two types of matters (ie constitutional and non-constitutional matters). To the extent that such an analysis is in its infancy, perhaps the reasons advanced by O'Regan as to why the *CUSA* matter did not (in her view) give rise to a constitutional matter worthy of the court's attention is a useful start.

59(2008) 29 ILJ 2461 (CC).
60 at para 54.
61 at para 119.
62 at para 120.
63 at para 126.
64 at para 128.