

Policy considerations as an overriding mechanism against peremption in the South African Labour Law

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ABSTRACT

One of the primary objects of labour law litigation and similarly arbitration, is for an unbiased third party to come to a binding decision regarding a labour related matter. This would imply that justice is served as each party received the outcome that they deserved. Any party who may be unsatisfied with the said outcome, would have the option to appeal the judgment or take the arbitration award on review. In stark contrast to the labour law rights to appeal and review, is the doctrine of peremption. The doctrine of peremption is available as a defence in labour law proceedings where one party has exercised the option not to apply for appeal or review, and thereafter decided to alter that decision. Due to the severe impact that a successful plea of peremption would have on the rights of the unsatisfied litigant, the courts have adopted strict requirements for the successful implementation of the doctrine of peremption. In recent court cases there has been a deviation from the strict enforcement of the doctrine where courts have decided not to allow the successful plea of peremption despite the fact that all the requirements have been met effectively. The focus of this study will be on the identified policy considerations that have influenced the courts in their decision to enforce peremption or not. The two most prominent policy considerations is in the interest of justice, equality and non-racism. The study aims to provide some content and context for the in the interest of justice policy consideration. It is against this backdrop that focus will be placed on social justice in labour law and how it can influence a court to decide against the enforcement of peremption. The study will also investigate the policy standard of equality and how the infringement thereof, through racial remarks in the workplace, will affect the application of the doctrine of peremption. The outcome of the research shows that policy considerations will have an impact on the doctrine of peremption as the courts have opted to overlooked peremption due to the importance of policy considerations such as in the interest of justice and equality in an equal society such as South Africa.

KEY WORDS

Doctrine of peremption; appeal; review; policy considerations; in the interest of justice; equality and non-racism

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
BCEA	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	Constitutional Court Review
EEA	Employment Equity Act 55 of 1998
CILSA	Comparative and International Law Journal of South Africa
ILO	International Labour Organisation
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal of Human Rights
SA Merc LJ	South African Mercantile Law Journal
SAPR	Suid Afrikaanse Publiek Reg
SARS	South African Revenue Service
THRHR	Tydskrif vir hedendaagse Romeinse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UN	United Nations

CHAPTER 1: INTRODUCTION

1.1 Background

In South African Labour Law, an unsuccessful or unsatisfied party who wishes to review an arbitration award or apply for appeal, normally holds the option to exercise such rights in terms of the *Labour Relations Act*¹ (hereinafter LRA). However, there is a common law doctrine, known as the doctrine of peremption, which may limit or terminate a litigant's right to appeal or review a labour law matter if enforced by a court. If a litigant is successful with a plea of peremption, the other litigating party will be prevented from departing from their initial decision to abide with the outcome of a matter and subsequently appeal or review the matter.²

The doctrine of peremption provides that where litigating parties have two options available and they opted to exercise one such option, they cannot exercise the other option afterwards.³ Once a litigant has indicated that they do not wish to attack the outcome of a matter, it should be concluded as a final decision. The courts have taken a stance that the doctrine of peremption will only be affected if the conduct of an unsuccessful litigant indicates "indubitably" that he does not intend to attack the judgment.⁴ Such conduct must be unequivocal and must be incompatible with any intention to appeal.

In South African labour matters, the doctrine of peremption was endorsed, amongst others, in the case of *National Union of Metalworkers of SA & others v Fast Freeze*.⁵ The court established that when a litigant to a labour matter decides to acquiesce in the outcome of the matter, by means of an act fully inconsistent with the intention to confront the judgment, the right of appeal is said to be perempted.⁶ This entails that the party elected to accept the judgment and therefore will not be able to change the election by deciding to apply for appeal at a later stage. In recent cases there

¹ The *Labour Relations Act* 66 of 1995.

² *Dabner v South African Railways and Harbours* 1920 AD 583 at 592.

³ *Hlatshwayo v Mare and Deas* 1912 AD 242 at 249.

⁴ *Dabner v South African Railways and Harbours* 1920 AD 583 para 594.

⁵ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC).

⁶ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 969 I.

has been a firm decision from the judiciary that there are relevant policy considerations that would justify the non-enforcement of the doctrine of peremption. The question now arises: What circumstances would justify a court's decision to ignore a litigant's acquiescence and a successful plea of peremption, allowing the unsatisfied party the opportunity to have the matter heard on appeal or review?

In *South African Revenue Service (SARS) v CCMA*⁷ the court established that SARS took a conscious and firm decision against appealing the decision by the Labour Appeal Court and that peremption occurred. The Constitutional Court had to decide if there were policy considerations allowing the Court the discretion to opt for the non-enforcement of the doctrine of peremption. The Constitutional Court explained that it must be open to a court to disregard acquiescence where the interest of justice would not be served.⁸ As this case dealt with unfair discrimination concerning racial harassment, the overriding policy consideration was that it is the court's constitutional duty to entrench the values of equality, non-racialism and human dignity.⁹ Accordingly, where the enforcement of that acquiescence would not advance the interests of justice; the overriding constitutional standard for appealability would have to be granted by purposefully departing from the abundantly clear choice against an appeal.

In the unreported case of *Minister of Defence v SA National Defence Force*¹⁰ the court followed similar reasoning and held that the general rule that a litigant, "who has intentionally abandoned a right to appeal will not be permitted to revive it" is merely a single aspect of a broader policy that there must be finality in litigation.¹¹ A court should consequently be open to disregard the acquiescence where wider interests of justice would not be served. In this case it was held that the appellants

⁷ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 28.

⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 29C.

¹⁰ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012.

¹¹ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 23.

are charged with a constitutional duty to maintain a disciplined Defence Force. It would be intolerable if an interdict wrongly granted, were to impede the discharge of such duty.¹² The Court also considered the interest of justice as a policy consideration, mitigating against the enforcement of peremption. The court held that it will not be in the interest of justice if the Defence Force is restricted to such an extent that it could not enforce its constitutional duty to maintain a disciplined organisation.¹³

Indications are clear that South African courts adopted a somewhat variable approach to applying the doctrine of peremption in labour law, even in matters where there was undoubtable acquiescence in the judgment. The courts recognise that the strict enforcement of legal doctrines, such as peremption, would not serve the interest of justice, in cases involving legal challenges affecting the broader society. These cases require adjudication by the courts. The most apparent policy considerations that appear from the different judgments discussed in this study, is the guiding policy of "in the interest of justice" and a constitutional duty of the courts to entrench values, such as non-racism, equity and human dignity. In this study, these policies and their influence on peremption, were investigated as considerations of such importance, allowing a court to depart from the doctrine of peremption in labour law matters.

1.2 Research question

To what extent do various policy considerations influence the enforcement of the doctrine of peremption once an arbitration award or labour judgment is acquiesced?

1.3 Research methodology

The primary research methodology for this study was a literature review, comprising an analysis of legislation, case law, academic articles and text books. Electronic sources, such as journals and Internet were also reviewed. These sources were

¹² *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

¹³ Section 200(1)-(2) of the *Constitution of the Republic of South Africa*, 1996.

consulted to gain knowledge on the common law doctrine of peremption and applying it in South African Labour Law. The review of case law performed a significant part in determining the policy considerations and their extent. This may impact the enforcement of the doctrine of peremption. The study did not focus on one primary case. A critical evaluation of several cases was used to illustrate the difference in applying the principles of peremption in lieu of policy considerations and to explicate the findings.

1.4 Framework of the study

Chapter 1 provides the background and brief introduction of the enforcement of the doctrine of peremption within the South African Labour Law. It further provides the research question that this study aims to answer. Chapter 2 provides a definition of peremption and a general discussion of the application and enforcement of the doctrine of peremption. It is followed by a specific discussion on when the Labour Courts will enforce peremption and when the courts opted not to enforce peremption in labour matters. Lastly the chapter introduces some acknowledged policy considerations, influencing the enforcement of the doctrine of peremption. Chapter 3 comprises the first policy consideration, "in the interest of justice" that influences the judiciary's decision to enforce peremption. The notion of justice and social justice is explained adjacent to the conditions of labour law. The impact of social justice on the doctrine of peremption is explained through case law. The main focus of the chapter is the illustration of how the courts apply the interest of justice policy against the enforcement of peremption in case law. Chapter 4 focusses on equality and non-racism as an overriding policy consideration against the enforcement of peremption. The chapter contains an analysis of unfair discrimination, explicitly racial harassment, as a form of unfair discrimination. The *South African Revenue Service (SARS) v CCMA*¹⁴ case forms the central focus for illustrating how the enforcement of the doctrine of peremption was influenced by equality as policy consideration. Chapter 5 comprises the conclusions from the discussions and analyses from the preceding

¹⁴ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

chapters. The chapter follows brief summaries of the study that concludes to an answer of the research question.

CHAPTER 2: DOCTRINE OF PEREMPTION

2.1 Introduction and definition

Any party to a labour dispute who wishes to review an arbitration award or appeal against a judgment in any court, is expressly provided the right in terms of Sections 145 and 166 of the *Labour Relations Act* 66 of 1995 (hereafter LRA). The right of an unsuccessful or unsatisfied party to a labour dispute, to review or rescind arbitration awards and rulings are set out in section 144 of the LRA.¹⁵ The rights to vary and rescind orders of the Labour Court are provided in section 165 of the LRA.¹⁶ In the case of *Herholdt v Nedbank Ltd and Another*¹⁷ when applying the review test as decided in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹⁸ the Court concluded as follows:¹⁹

A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, and the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside but are only of consequence if their effect is to render the outcome unreasonable.

The rights to review awards or appeal against labour law judgments can be divested by the operation of the doctrine of peremption. The doctrine of peremption entails that when a party in a legal dispute has more than one available legal recourse, and

¹⁵ Section 144(a)-(c) of the *Labour Relations Act* 66 of 1995 states that any commissioner who has issued an arbitration award, may on his own accord or application of an affected party, vary or rescind an arbitration award or ruling that was erroneously made in the absence of any party affected by the award; in which there is an omission or error but only to the extent of that omission or error; or granted as a result of a mistake common to the parties to the proceedings.

¹⁶ Section 165(a)-(c) of the *Labour Relations Act* 66 of 1995 states that the Labour Court, acting of its own accord or on the application of an affected party may vary or rescind a decision or judgment erroneously sought and granted in the absence of any affected party by the judgment; in which there is ambiguity or an obvious error or omission, but only to the extent of the ambiguity, error or omission; or granted as a result of a mistake common to the parties of the proceedings.

¹⁷ *Herholdt v Nedbank Ltd and another* 2012 33 ILJ 1789 (LAC).

¹⁸ *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* 2007 12 BLLR 1097 (CC).

¹⁹ *Herholdt v Nedbank Ltd and another* 2012 33 ILJ 1789 (LAC).

he unequivocally exercises one, he cannot subsequently turn back and elect the other.²⁰ This doctrine is founded on the principle that no party in legal proceedings may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate.²¹ At common law, the doctrine of peremption states that a party cannot equivocate by accepting a judgment and thereafter decide to appeal.²² Such demonstration of acceptance may result in the peremption of the right to review or appeal, when raised as a defence by a respondent in a review or appeal application. The common law doctrine of peremption is explained in *Dabner v South African Railways and Harbours*²³ as follows:

If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.

Peremption consequently has the effect of eliminating or limiting the right to appeal or review labour proceedings. An affected party whose right to appeal was eliminated by a prior conduct that indicates acquiescing the entire judgment, cannot take the entire judgment on appeal. An affected party who acquiesced only a portion of the judgment, will still have a limited right to appeal or review.²⁴ Their right to appeal or review will be limited as they will only be allowed to focus on the part of the judgment that was not acquiesced.

Attributable to the severity of the consequences of peremption, the South African courts established strict rules to distinguish if acquiescence occurred, prior to reaching a decision whether a party has perempted their rights to review or appeal.²⁵ Peremption in labour law matters usually occurs once an employee accepted a settlement agreement or compensation,²⁶ where the employer took actions to

²⁰ *Hlatshwayo v Mare and Deas* 1912 AD 242 para 249. The meaning of "approbate and reprobate" is to "accept and reject" and comes from the maxim quod approbo non reprobo which translated in *Black's Law Dictionary: 2nd Edition* as "What I approve I do not reject".

²¹ Van Loggerenberg *Jones & Buckle: Civil Practice of the Magistrate Courts* 606.

²² Harms *Amler's Precedents of Pleadings* 384.

²³ *Dabner v South African Railways and Harbours* 1920 AD 583 para 594.

²⁴ *Samuel v Mograbi* 1917 TPD 656.

²⁵ Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 606.

²⁶ Harms *Law of South Africa* 687.

comply with an arbitration award or Labour Court order to reinstate or re-employ the employee.²⁷ Alternatively, compliance and payment of awards made at arbitration proceedings, will amount to acceptance of the outcome of such proceedings.²⁸ The onus to prove that peremption occurred, is the responsibility of the party who alleges that there was acquiescence with the judgment or award.²⁹

In deciding if the defence of peremption should be successful or not, the facts of each case should render the final decision. The courts are required to take note of the facts and circumstances presented in a particular matter, rendering a facts based determination; therefore peremption is fact specific.³⁰ The leading authority that deals with the doctrine of peremption is *Dabner v South African Railways and Harbours*.³¹ It was held that the plea of peremption will only succeed if the unsuccessful party in a particular dispute undoubtedly indicates that he or she does not intend to attack the order or judgment. To determine if a judgment was acquiesced in, requires an analysis of the objective conduct of the affected party and the relevant conclusions to be drawn from such conduct.³²

The subjective state of mind of the person, alleged to acquiesced in the judgment, is irrelevant to the enquiry.³³ In *National Union of Metalworkers of SA & others v Fast Freeze*³⁴ the court held that if there is enticing conduct by a party to a labour dispute, a mental reservation or decision not to acquiesce in the judgment will not assist the party whose conduct indicates a clear intention to accept the judgment.³⁵

²⁷ *Jusayo v Mudau NO & others* 2008 7 BLLR 668 (LC).

²⁸ *Venture Otto SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council & others* 2005 26 ILJ 349 (LC) 352 I

²⁹ Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 607.

³⁰ *Doorgesh v Commission for Conciliation, Mediation and Arbitration and Others* (CA4/2014; C965/2011) 2015 ZALAC 44 para 29.

³¹ *Dabner v South African Railways and Harbours* 1920 AD 583 para 594.

³² *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* 2016 1 SA 78 (GJ) para 25.

³³ *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* 2016 1 SA 78 (GJ) para 25.

³⁴ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC).

³⁵ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) para 27.

The conduct, when objectively assessed, must consequently lead the Court to the conclusion that the intention is to abide in the judgment or order.³⁶

The doctrine of peremption derived in a multitude of labour law cases and a few will be discussed in illustration of when and how the court will find that peremption occurred. There after cases are discussed where the courts opted for the non-enforcement of peremption attributable to policy considerations. From the discussion of these cases, it is evident that the South African courts have adopted a flexible approach to the enforcement of the doctrine of peremption. The discussion below, consequently introduce circumstances where the courts favoured the rights of appeal or review above peremption in conditions where policy considerations weigh heavier than the mechanical application of peremption. These circumstances and policies are described and discussed in greater detail in subsequent chapters.

2.2 Illustration of the application of the doctrine of peremption in labour law matters

In South African labour matters the application of the doctrine of peremption was illustrated, amongst others, in the cases of *National Union of Metalworkers of South Africa & Others v Fast Freeze*,³⁷ *Balasana v Motor Bargaining Council*³⁸ and *National Union of Metalworkers of South Africa v Fry's Metals and Others*.³⁹ These judgements are discussed with the purpose of illustrating the courts' approach to the application of the doctrine of peremption. A proper comprehension of the doctrine and its importance is necessary before the possibility of overriding mechanisms to peremption can be considered.

³⁶ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) para 29.

³⁷ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC).

³⁸ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 (LC).

³⁹ *NUMSA obo Thilivali v Fry's Metal* 2015 36 ILJ 232 (LC).

2.2.1 National Union of Metalworkers of South Africa (NUMSA) & Others v Fast Freeze (hereafter Fast Freeze case)

The matter dealt with 29 NUMSA members who were dismissed by Fast Freeze.⁴⁰ The Industrial Court established that the dismissal of the NUMSA members constituted an unfair labour practice and ordered compensation of eight weeks' salary to all NUMSA members concerned.⁴¹ Attributable to the large sum of payment involved, the court granted the respondent, Fast Freeze, the opportunity to pay the compensation in two separate instalments, one month apart.⁴²

On 19 July 1990 Mr Meyer who acted as the attorney for Fast Freeze, sent out a cheque to the amount of R14 784.00 to serve as payment of the first instalment, as directed by the order of the Industrial Court. The NUMSA representative, Mr Dotwana, requested that individual cash amounts should be paid to each individual member.⁴³ Mr Dotwana accepted the payment on behalf of the NUMSA members and signed a receipt, confirming the payment. The receipt read as follows:⁴⁴ "I, Mr Dotwana, a NUMSA official, acknowledge the receipt of R16 217,88 made up in 29 individual packets as the first part of the court order settlement from Fast Freeze Refrigeration". After the NUMSA representative received the first payment, NUMSA opted to file a notice of appeal against the judgement of the Industrial Court.⁴⁵ The attorneys of Fast Freeze had no prior knowledge or inclination that the appellants contemplated an appeal. The conduct of the appellants prior to their noting the appeal, which indicated their acquiescence in the judgment, was the acceptance of part of the judgment debt.⁴⁶

The court had to decide when a party has preempted the right of appeal. The Court had to consider if the judgment was acquiesced, expressly or tacitly, by an unequivocal act fully inconsistent with any intention to contest the judgment.⁴⁷ This

⁴⁰ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 965 J.

⁴¹ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 965 G.

⁴² *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 965 G.

⁴³ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 968 A.

⁴⁴ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 968 B.

⁴⁵ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 968 I.

⁴⁶ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 968 C.

⁴⁷ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 969 I.

would entail that a party who elected to accept the judgment, cannot change the election by opting to note an appeal. The question was whether the appellants' acceptance of the first instalment of compensation payable in terms of the order of the Industrial Court, will amount to "an unequivocal act wholly inconsistent with an intention to contest the judgment".⁴⁸

On judging the conduct of NUMSA, the court held that they perempted their right to appeal.⁴⁹ Mullins J established that the appellants' failure to indicate that they were contemplating an appeal to the respondent, combined with their acceptance of the compensation, concluded an acquiescence in the judgment, resulting in peremption.⁵⁰ The court identified the following principles, pertinent to the doctrine of peremption:⁵¹

- (a) If a party has a right to appeal or review, the party wanting to exercise his right to appeal loses that right where he or she has acquiesced in the judgment.
- (b) Acquiescence may be express or implied from the conduct of the party.
- (c) Acquiescence by conduct require firm actions that convey your attitude towards the judgement to other parties.
- (d) The conduct must show an attitude to abide by the judgment which is inconsistent with a desire to appeal against the judgment.
- (e) The test is an objective test which attempts to judge the indication of a party's attitude in relation to the judgment. The subjective state of mind or intention of the party is irrelevant.
- (f) Where there is such overt conduct, a mental reservation or resolve not to acquiesce in the judgment will not avail the party, which by its conduct evinces an intention to abide by the judgment.
- (g) The subjective state of mind of the party who is mentally reserving the right to appeal will be disregarded by the conduct of the party which looks to be inconsistent with such an intention.
- (h) The court must be satisfied that the conduct of the party will lead anyone to believe that he/she wants to abide by the judgment.
- (i) The conduct must be unequivocal, so if there is more than one conclusion that may be drawn from the conduct in question, it will not suffice to prove that there is peremption.

⁴⁸ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 969 I.

⁴⁹ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 976 C.

⁵⁰ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 976 C.

⁵¹ *National Union of Metalworkers of SA & others v Fast Freeze* 1992 13 ILJ 963 (LAC) 973 G.

- (j) The onus of proving that a party has perempted a right to appeal lies with the alleging party.
- (k) Voluntary payment or acceptance of payment as part of compliance of a judgment will usually be sufficient to satisfy a court that the party has acquiesced in the judgment.

Considering the court's approach to peremption in this matter, indicated that the outward manifestation of the conduct of the party is critical in deciding if there was acceptance of the judgment. If the conduct leads a party to believe that the judgment is acquiesced, the mental reservation of the party will be disregarded. The action of NUMSA prior to lodging an appeal, by accepting the funds, is not something that they were required to do but it was a choice. The acceptance and retaining of the compensation did not support an objective intention to challenge the award that made the payment of the compensation possible.

2.2.2 Balasana v Motor Bargaining Council (hereafter Motor Bargaining Council case)

In the *Motor Bargaining Council* case⁵² the question revolved around an employee who acquiesced in an arbitration award, by receiving compensation as ordered and thereby perempted his right to institute review proceedings. The arbitration award stated that the employee should be compensated, due to his unfair dismissal,⁵³ and it was decided that reinstatement would be an inappropriate remedy in the prevailing circumstances.⁵⁴ The employee's contention was that the commissioner did not apply his mind and ought to have ordered his reinstatement in terms of section 193 of the LRA.

In terms of this section, a commissioner or court who finds the dismissal of an employee to be substantively unfair, must demand the reinstatement of the employee, unless the employee expressly indicate a desire not to be reinstated,⁵⁵ alternatively, if the employment relationship became intolerable.⁵⁶ The commissioner

⁵² *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 (LC).

⁵³ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 (LC) para 4.

⁵⁴ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 (LC) para 4-6. The arbitrator held that continued employment would be intolerable, and reinstatement would be inappropriate because there was a breakdown in the relationship between the employer and employee.

⁵⁵ Section 193(2)(a) of the *Labour Relations Act* 66 of 1995.

⁵⁶ Section 193(2)(b) of the *Labour Relations Act* 66 of 1995.

established that reinstatement would not be an appropriate remedy as the employment relationship has irretrievably broken down.⁵⁷

With reference to the review proceedings, the employer contended that the employee cannot review the arbitration award as there was compliance with and acceptance of the initial award. The employer argued that the compliance was accepted by the employee as the employee did not offer to repay the compensation received.⁵⁸ The employer further argued, that by accepting the compensation paid into his bank account, the employee unequivocally abandoned his right to institute review proceedings.⁵⁹ Molahlehi J established that the employer failed to discharge the onus of indicating that accepting of the compensation in terms of the arbitration award, perempted the employee's right to apply for review of the arbitration award.⁶⁰ The objective facts did not supplement the notion that the employee accepted the funds unconditionally and without reservation of his right to challenge the arbitration award on review. His review application was lodged within a reasonably short period after the payment was deposited into his bank account.⁶¹

The mere payment of the compensation into the bank account of the employee did not mean acceptance thereof as the employee might not have been aware of the deposit made. The employee has not acquiesced in the arbitration award by receiving payment in the form of a bank deposit from the respondent. The doctrine of peremption therefore, cannot be used as a defence against the review application in this matter.

This case confirms that not all cases involving payment of compensation and acceptance of such compensation by the employee, will be sufficient to establish peremption. The employee did not physically receive the payment, but it was deposited into his bank account. This bequeaths some doubt as to whether the employee had knowledge of the payment and truly had the intention to accept the payment. In the *Fast Freeze* case, it was a decision of the NUMSA representative to

⁵⁷ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 (LC) para 4.

⁵⁸ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 LC para 7.

⁵⁹ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 LC para 8.

⁶⁰ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 LC para 19.

⁶¹ *Balasana v Motor Bargaining Council & others* 2011 32 ILJ 297 LC para 18.

accept the payment and to sign a receipt as confirmation. The outward display of conduct and the inference that can be drawn, is a choice to acquiesce in the judgment. In the *Motor Bargaining Council* case, the arbitration award was made on 5 June 2009; payment was made on 10 June 2009 and the review application was filed on 13 July 2009, which is still within the timeframe embarked by the LRA.⁶²

The short period within which the review application was filed, indicated that there must have been some consultation with Balasana's attorneys to discuss the review application shortly after the award was received. The onus of proving peremption is regarded as serious by South African courts, requiring a conduct that undoubtably indicates that the unsuccessful party does not intend to confront the order or reward. In finding that peremption did not occur, the court considered the following facts:

1. there was no evidence indicating when the applicant approached Legal Aid for assistance to challenge the arbitration award after receiving payment of compensation;⁶³
2. the brief period from receiving the compensation and filing of the review application;
3. there was no evidence that the applicant acknowledged receipt of the compensation and
4. no evidence was presented of the subjective state of mind of the applicant at the time he decided to accept the money.⁶⁴

⁶² According to s 145 of the *Labour Relations Act* 66 of 1995, any party affected by an arbitration award may apply to the Labour Court on the basis of an alleged defect with a commissioner's rulings or award. Such application to set aside the award, must be made within six weeks of the award being served.

⁶³ Although there was no evidence presented to the Court which indicated the exact dates of consultation, the fact that the review application was filed within a short period from when the original arbitration award was made, is indicative of earlier reservations experienced by Balasana. He had acted on his reservations by approaching Legal Aid and discussing the prospects of a review application. It would be reasonable to infer that there must have been some consultation between Balasana and Legal Aid prior to the lodgment of the review application and that this consultation would have happened shortly after the initial reward was made, in order for Legal Aid to have sufficient time to draft the review application.

Considering findings of the court in the *Motor Bargaining Council* case, the writer will argue that the approach adopted by the more recent case of *Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* (hereinafter Mdhuli case)⁶⁵ is more aligned with the principles established in the *Fast Freeze* case. In the *Mduli* case, the court noted that the applicant filed a review application within the prescribed six-week period. It was established that this is not decisive to prove that the applicant did not acquiesce in the judgment by accepting the compensation.⁶⁶ With respect support is granted to the court's reasoning that the relevant consideration is the conduct of Mdhuli prior to completing the review application.⁶⁷ The subjective state of mind of the applicant when accepting the funds, is irrelevant. To establish peremption, an objective test is used to determine if the outward manifestation of a party's conduct will lead the other party in the dispute to believe there is acceptance of the judgment, excluding his or her subjective state of mind or intention.⁶⁸ If the compensation is accepted with reservation or conditions, it must be communicated to the other party. The mental state of mind of the party reserving the right to institute review proceedings or lodge an appeal, must surrender to his or her outward conduct, which clearly contradicts alternative intentions, apart from acquiesce in the outcome of the matter.

2.2.3 National Union of Metalworkers of South Africa (NUMSA) obo Thilivali v Fry's Metals and others 69 (hereafter Fry's Metal case)

In the *Fry's Metals* case the issue of peremption was again considered from the approach of challenging an arbitration award after compliance. A NUMSA member

⁶⁴ The Court established that there was no evidence of the subjective state of mind of Balasana at the time he decided to accept the money, and that such evidence could have assisted in determining whether it could be said that he had objectively elected to comply with the arbitration award. This view is in stark contrast to the judgment of *Venmop 275 (Pty) Ltd and Another v Cleveland Projects (Pty) and Another* 2016 1 SA 78 (GJ) para 25, where the court held that the subjective state of mind of the person alleged to have acquiesced in the judgment is irrelevant.

⁶⁵ *Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* 2018 39 ILJ 1614 (LC).

⁶⁶ *Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* 2018 39 ILJ 1614 (LC) para 23.

⁶⁷ *Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* 2018 39 ILJ 1614 (LC) para 24.

⁶⁸ *Mdhluli v Commission for Conciliation, Mediation & Arbitration & others* 2018 39 ILJ 1614 (LC) para 24.

⁶⁹ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC).

was dismissed by Fry's Metals, attributable to high lead levels in his blood. NUMSA and Fry's Metals entered into a collective agreement, stating the acceptable lead levels in the blood of employees at less than 45ug/100ml. Fry's Metals unilaterally reduced the levels to 40ug/100ml to which the union did not agree. On testing the blood levels of Mr Thilivali, it was established on 44ug/100ml and for this reason, his employment was terminated.⁷⁰ The matter was referred to arbitration where the arbitrator established the dismissal to be unfair and made an award for retrospective reinstatement and payment of three months' salary.⁷¹

The applicant reported back to work on 20 July 2009 and received back pay without any reservations.⁷² In August 2009, approximately three months after compliance with the arbitration award, NUMSA expressed its dissatisfaction with the award in internal communications, but never indicated this to the first respondent.⁷³ Compliance with the award continued for more than three months without any inconsistency until the review application was filed. Snyman J quoted the *Fast Freeze* judgement by stating:

If a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal.⁷⁴

Snyman J also referred to the *Motor Bargaining Council* case to illustrate that the period between the compliance of the award and review application was an important factor to consider when determining if there was unequivocal acceptance of the award.⁷⁵ In the *Fry's Metals* case the court held that the subjective intentions of NUMSA is irrelevant as these intentions were never communicated to the first respondent until some period after the arbitration award was complied with.⁷⁶ The NUMSA member accepted the reinstatement and the compensation payment in

⁷⁰ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 7.

⁷¹ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 10.

⁷² *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 10.

⁷³ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 10.

⁷⁴ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 41.

⁷⁵ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 44.

⁷⁶ *NUMSA obo Thilivali v Fry's Metals* 2015 36 ILJ 232 (LC) para 46.

terms of the award, indicating that the award was acquiesced; therefore NUMSA is perempted from reviewing the award.

In this case, the court reaffirmed that the expressed or implied conduct of the party challenging that peremption occurred, is the determining factor in deciding if there is an indubitably and necessary conclusion that the judgment was accepted. NUMSA internally expressed its grievance and reservation with the arbitration award during August 2009. This did not suffice in proving that it did not acquiesce in the judgment. The outward manifestation of their member, returning to work, or the lack of any outward manifestation of discontent by NUMSA and the lack of engaging with Fry's Metals on any dissatisfaction or recording any reservation of rights, lead the employer to believe that the arbitration award was accepted and that NUMSA had no intention of challenging the award.

Once again it is clear that the subjective intention of a party who perempted the right to appeal, will be undermined by any objective conduct, displaying an intention to abide or accept the outcome of a matter. In the Fry's Metals case there was a period of three months wherein the parties all complied with the arbitration award as if there were no reservations towards it. The study's opinion is that this was a crucial factor that persuaded the court to conclude that there was no other intention but to acquiesce in the award.

The aforementioned cases indicate the instances when the court decides to enforce the doctrine of peremption. The following paragraphs introduce instances where the court decided not to enforce the doctrine of peremption.

2.3 Non-enforcement of the doctrine of peremption in certain labour law matters

There are times when the doctrine of peremption was successfully relied upon and all elements were proven. It is also factual that the doctrine may be disregarded, in the instance where there are policy considerations that function as overriding

mechanism against peremption. The question subsequently arises: What circumstances would be sufficient enough to justify a court's decision to ignore a successful plea of peremption and allow for leave to appeal?

In *South African Revenue Service (SARS) v CCMA*⁷⁷ the court established that SARS took a conscious and firm decision not to appeal against the decision by the Labour Appeal Court (LAC) and that peremption occurred.⁷⁸ The court explained that it must be open for a court to disregard acquiescence where the interest of justice would not otherwise be served.⁷⁹ This was a racial discrimination matter, dealing with the constitutional duty⁸⁰ of the court to assist entrenching the values of equality, non-racialism and human dignity; therefore peremption may be disregarded.⁸¹ According to Mogoeng J, if the acquiescence would not serve the interest of justice, the overriding constitutional standard for appealability should be approved by decisively departing from the doctrine of peremption.⁸² This case is discussed in greater detail in chapters to follow.⁸³

In the unreported matter of *Minister of Defence v SA National Defence Force*,⁸⁴ the court followed the same reasoning and held that a court should disregard the acquiescence where the broader interests of justice would otherwise not be served. In this case it was held that the Defence Force has a constitutional duty to maintain a disciplined organisation.⁸⁵ It would be inexcusable if an interdict, erroneously

⁷⁷ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

⁷⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27.

⁷⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 29.

⁸⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 33. See also *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* 2002 6 BLLR 493 (LAC) para 35 and *Rustenburg Platinum Mine v SAEWA obo Bester and Others* 2018 39 ILJ 1503 (CC) para 37.

⁸¹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 29.

⁸² *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 28.

⁸³ Chapter 4.

⁸⁴ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

⁸⁵ Section 200 of the *Constitution of the Republic of South Africa*, 1996.

granted, was to impede the discharge of that duty.⁸⁶ This matter receives detailed attention in chapter 3.

In *Government of the Republic of South Africa v Von Abo*,⁸⁷ the court held that it would be intolerable if, in the current situation, this court would be prevented from examining the legal correctness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession.⁸⁸ The court contended that if the first order is wrong in law, the second order is legally untenable. If the appellants were wrongly advised to endeavour to comply with the first order, thereby perempted the right to appeal, it should not have the undesirable result that the court be held to a mistake of law by one of the parties.⁸⁹ If the court were to adhere to the principle of peremption, the result would mean that the court will be bound to what is legally untenable.

2.4 Conclusion

This chapter aimed to illustrate the enforcement of the doctrine of peremption. In some cases⁹⁰, non-enforcement thereof is indicated, despite the fulfilment of all the requirements of peremption.⁹¹ The doctrine of peremption is still frequently used in labour law matters where parties often encounter awards or judgments involving financial compensation. A party who alleges that peremption occurred is charged with the strict onus of proving that there was some conduct that aims indubitably and necessarily to the conclusion of an abandonment of the right to appeal and an acceptance of the unfavourable judgment or award. To determine if a judgment was

⁸⁶ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

⁸⁷ *Government of the Republic of South Africa v Von Abo* 2011 5 SA 262 (SCA).

⁸⁸ *Government of the Republic of South Africa v Von Abo* 2011 5 SA 262 (SCA) 270E.

⁸⁹ *Government of the Republic of South Africa v Von Abo* 2011 5 SA 262 (SCA) 270G.

⁹⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC), *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012, *Government of the Republic of South Africa v Von Abo* 2011 5 SA 262 (SCA).

⁹¹ The requirements are that there must be prior conduct that indicates acquiescing the judgment, the conduct must be unequivocal & the conduct must clearly convey your attitude towards the judgement to other the parties involved in the matter.

acquiesced, it will require an analysis of the objective conduct of the affected party and the relevant conclusion.

From the aforementioned judgments discussed, it becomes clear that the courts may disregard the doctrine of peremption where they believe there is a constitutional duty to ensure the interest of justice. This would also ensure that the values of non-racialism, human dignity and equality are upheld. In the following chapters, these policy considerations, regarding peremption in labour law matters, are scrutinised and discussed in greater detail to illustrate how they function as overriding factors that persuaded the courts to disregard peremption. As aforementioned, a primary notion of the doctrine of peremption is to ensure finality in decisions, which assists promoting legal certainty. If policy considerations could override the enforcement of peremption, it is important to ascertain the policies influencing the judiciary's decisions, including reasons for such decisions.

CHAPTER 3: IN THE INTEREST OF JUSTICE AS POLICY CONSIDERATION

3.1 Introduction

The first policy consideration influencing the enforcement of the doctrine of peremption is the Constitutional expectation⁹² placed on courts to act "in the interest of justice". Justice is a legal and social concept that received ample attention throughout time. Plato and Greek poet Simonides attempted to provide a definition to this vague concept of justice. In Plato's Republic, which was transmitted into South Africa's legal system by Justinian, justice means providing to each his due or what is proper.⁹³ The Greek poet Simonides's notion of justice has a judicial aspect by adding that "giving each his due" concerns administering punishment and rewards according to what you deserve. His definition contains a sense of proportionality, or "fairness", which society associates with modern justice.⁹⁴ It is this concept of fairness which is also favoured by Roman-Dutch law writers such as Voet.⁹⁵ According to Landman J a need exists to define what is meant by justice in a South African Labour Law context. Although jurisprudence is devoted to this end, he is of the opinion that a theoretical debate is somewhat unnecessary as a simple definition will do: "that justice is performed when one is provided what is lawfully and fairly attributable to one".⁹⁶

Following the dawn of the South African constitutional democracy, an embedded policy indicates that law must be applied in such a manner to serve the interest of justice. This can be observed in procedural and substantive law, in judicial precedents and legal writing. Section 173 of the *Constitution*⁹⁷ provides that the courts have the inherent power to regulate their own processes and to develop the common law, whilst considering the "interest of justice".

⁹² S 173 of the *Constitution of the Republic of South Africa*, 1996.

⁹³ Republic 423d - 434a.

⁹⁴ Domanski "Plato, Justice and the Constitution" 2.

⁹⁵ Voet *Commentarius ad Pandectas* 11 7

⁹⁶ Landman "What role for justice in a world class labour relations system" 70- 71.

⁹⁷ *Constitution of the Republic of South Africa*, 1996.

The term "in the interest of justice" is frequently referred to in court judgments and serves as a guiding policy for the judiciary and commissioners alike.⁹⁸ One of the most challenging facets of this guiding policy is a lack of principled clarity, provided by the South African courts as to what the term "interest of justice" means. Instead, there are merely vague factors, such as the urgency of the matter, the attitude of the parties concerned and the nature of the case before the court,⁹⁹ which courts chose to apply on a case by case basis, depending on the circumstances presented by the relevant matter. The above-mentioned approach seems rational in a legal context, ensuring some flexibility in rigid judicial proceedings.¹⁰⁰

The *Labour Relations Act of 1956*¹⁰¹ extended the role of the Industrial Court beyond the mere interpretation of the law and provided the court with the discretion to develop the law through the unfair labour practice jurisdiction.¹⁰² The *Labour Relations Act of 1995*¹⁰³ conversely, abolished this discretion of the Labour Courts and assigned them the more traditional role of application and interpretation of the law.¹⁰⁴ The flexible guiding policy of "in the interest of justice" allowed the judiciary to respond to economic and social states of affairs. This includes an increased sense of equity that leaves the execution thereof to the judge in the individual case.¹⁰⁵ It would seem in this regard, that the interest of justice is a flexible standard that may become a moral assessment of facts.¹⁰⁶ Judicial discretion and the court's power of interpretation, provide judicial officers the ability to substantially increase the rights, protection and freedom of people.¹⁰⁷ According to Mashikaro, when courts decide cases "on the facts" they mean to allow courts the discretion to exercise their own

⁹⁸ For example, see *National Union of Metalworkers of SA & another v Rotor Electrical CC* 1993 14 ILJ 1042 (LAC) para 14; *Chizunza v MTN (Pty) Ltd & others* 2008 29 ILJ 2919 (LC) para 19; *Minister of Defence and Others v South African National Defence Force Union* 2012 (SCA) para 23, *Windybrow Theatre v Maphela & others* 2015 36 ILJ 1951 (LC) para 10; *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27; *Minister of Higher Education & Training & another v Business Unity SA & another* 2018 39 ILJ 160 (LAC) para 13.

⁹⁹ Rautenbach 2003 *PELJ* 7.

¹⁰⁰ Mashikaro 2015 *CCR* 291.

¹⁰¹ *Labour Relations Act* 28 of 1956.

¹⁰² Landman "What role for justice in a world class labour relations system" 71.

¹⁰³ *Labour Relations Act* 66 of 1995.

¹⁰⁴ Landman "What role for justice in a world class labour relations system" 71.

¹⁰⁵ Roodt 2003 *CILSA* 3.

¹⁰⁶ Mashikaro 2015 *CCR* 292.

¹⁰⁷ Smit 2010 *TSAR* 11.

judgement, considering the purpose, social and especially moral reasons for having a general rule such as regulating court process in the interest of justice.¹⁰⁸

To prevent labour law from becoming outdated and irrelevant in the changing employment environment, there should be some scope for judicial officers to observe the public policy, social needs or background of a case, to come to a decision that, apart from merely applying the law, also ensures justice. The guiding policy of "in the interest of justice", serves this discretionary function and ensures that the courts do not just hold a purely mechanical function of simply applying the law without considering the interest of justice.

Justice has several elements, and various forms can be identified. In labour law, a core element of justice is "social justice".¹⁰⁹ In the interpretation of social justice, there is a further distinction between two possible approaches to social justice in the labour law. The first approach flows from social law, where employment relations are regarded as part of the broader scheme of anti-discrimination laws. The second approach follows the Marxist notion of inequality in bargaining power between employees and employers, indicating the role of legislation and the judiciary.¹¹⁰ This chapter aims at a critical investigation into the various elements of the interest of justice as a guiding policy consideration in a labour law context, the interest of justice test, the impact thereof on peremption and how the courts utilised this flexible policy consideration to justify the non-enforcement of the doctrine of peremption in labour law matters.

¹⁰⁸ Mashikaro 2015 *CCR* 302.

¹⁰⁹ The preamble of the ILO specifies that social justice was crucial to establish peace. From the inception of the ILO, there has been an attempt to improve labour conditions for workers so as to prevent social unrest, which could lead to political revolutions.

¹¹⁰ Rogers "Human rights, social justice and Labour Law".

3.2 Justice and social justice in the labour context

3.2.1 Labour law's theory of justice

The fundamental principles contained in the International Labour Organisation's (hereafter ILO)¹¹¹ *Declaration of Philadelphia* can be summarised as follows: Labour is not a commodity; the importance of the fundamental human rights of freedom of expression and of association; the importance of the continued fight or war against poverty and want, and the principle of tripartism.¹¹² The ILO, of which South Africa is a member state, significantly participates in the search for foundations of labour law. The notion of "fundamental human rights" and the principle that "labour is not a commodity" belong to the concept of social justice.¹¹³ This principle represents the notion that labour incorporates additional values than mere market value, therefore labour law must be evaluated by considering additional norms and criteria than those favoured by a free market.¹¹⁴ The aim should also be to recognise the non-market elements of labour, which would include workers behind the labour, their human dignity and their fair treatment. According to Langile:¹¹⁵

The principle that "labour is not a commodity" does not limit itself, and should not be limited, to providing a rationale for limiting the market power of others - it gives us a broader and more positive reminder and rationale for Labour Law.

Labour law can be observed as the part of the law, structuring the mobilisation and development of human capital, which is at the core of human freedom. Policies should be developed to manage the lives of human beings when they enter the workforce whether as employees, independent producers, or under any other legal or economic arrangement or relation of production.¹¹⁶ Legal systems and labour law should be structured in a manner that aids creating an economic environment where

¹¹¹ According to Van Niekerk *et al Law@Work* 24 the ILO is a specialist agency of the United Nations that has the core duty of establishing global Labour standards. The ILO comprise three main bodies: the global Labour Conference is the highest policy making body of the ILO, the Governing Body is the executive arm of the ILO and the global Labour Office performs the daily administrative functions.

¹¹² A. 1 of the *Declaration of Philadelphia* (1944).

¹¹³ Hendrickx "Social Justice and labour rights: EU and ILO face palms in the governance web" 6.

¹¹⁴ Hendrickx "Social Justice and labour rights: EU and ILO face palms in the governance web" 6.

¹¹⁵ Langile and Davidov *The notion of Labour Law* 112.

¹¹⁶ Langile and Davidov *The notion of Labour Law* 114.

human capital is respected and sufficiently valued. It can be expressed as, "individual freedom is a social commitment".¹¹⁷ The paragraphs that follow will indicate how values that form part of labour law's theory of justice, such as the worker behind the labour, their human dignity, fair treatment and social justice, are incorporated into the guiding policy of "in the interest of justice" and the impact thereof in the non-enforcement of peremption.

3.2.2 *Social justice and Labour law*

During the period of 1900 to 1968, when the term "social justice" became a popular legal contention, social justice represented the notion that justice could not only be achieved through established abstract legal rights that were removed from the general society. Justice could be achieved if various social groups deliberated and participated in the design and application of law.¹¹⁸

The ILO always recognised the importance of social justice within labour law. The *Declaration of Philadelphia*¹¹⁹ was adopted towards the end of the Second World War, confirming that lasting peace is based on national and International law social justice, which should be the primary aim of labour policies.¹²⁰ The *Declaration on Fundamental Principles and Rights at Work*¹²¹ enhanced the realisation of social justice by providing the ILO with some binding force without ratification of conventions by member states. Member states were bound to the core values through membership of the ILO and therefore had to take steps to realise these core labour rights.¹²² According to Langille,¹²³ the core rights are observed as pre-requirements for achieving social justice in employment. Without these core rights,

¹¹⁷ Langille and Davidov *The notion of Labour Law* 119.

¹¹⁸ Rodgers "Human rights, social justice and Labour Law".

¹¹⁹ *The Declaration of Philadelphia* (1944).

¹²⁰ Smit 2010 *TSAR* 3.

¹²¹ *The Declaration on Fundamental Principles and Rights at Work*, 1998.

¹²² The core rights as established by the Declaration on Fundamental Principles and Rights at Work, 1998 were: freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination.

¹²³ Langille 2005 *European Journal of global Law* 409 425.

workers are oppressed concerning negotiations with employers. Social justice thus requires redistribution of power from employers to workers, combined with acknowledging the value of work to workers and the social system.¹²⁴ It was regarded that this acknowledgement of work quality meant that labour would not merely be treated as a commodity or an article of commerce.¹²⁵

In the 2008 *Declaration on Social Justice for a Fair Globalisation*, the ILO affirmed their commitment and that of its members, to place proper employment and decent work fundamental to economic and social policies.¹²⁶ The four important strategic objectives to render this a reality are: Promoting employment through creating a sustainable, institutional and economic environment, strengthening social protection measures by including sustainable social security and labour protection. These would ensure promoting social dialogue and tripartism and realising the fundamental principles and rights at work.¹²⁷ The declaration also places a responsibility on member states to contribute to the decent work agenda through their social and economic policies; member states are free though, to determine the way to achieve these objectives.¹²⁸

An important change established during the 2008 Declaration, was the increase of status on fundamental rights.¹²⁹ Fundamental principles and rights at work are observed as more than just fundamental rights, but as "enabling conditions that are necessary for the full realisation of all of the strategic objectives".¹³⁰ South Africa is a member of the ILO thus there is a duty on the legislature and judiciary to ensure these aforementioned values are incorporated and realised in South African Labour Law. Section 39 of the *Constitution*¹³¹ states that when courts interpret the Bill of Rights, they must consider International law. Section 233 of the *Constitution*¹³² furthermore provides, when courts interpret legislation, they must provide preference

¹²⁴ Rodgers "Human rights, social justice and Labour Law".

¹²⁵ A. 427 of the Treaty of Versailles (1919).

¹²⁶ A. 1A *Declaration on Social Justice for a Fair Globalisation* (2008).

¹²⁷ Smit 2010 *TSAR* 5.

¹²⁸ Van Staden 2012 *TSAR* 103.

¹²⁹ Van Staden 2012 *TSAR* 104.

¹³⁰ A.I A (iv) of the *Declaration on Social Justice for a Fair Globalization* (2008).

¹³¹ Section 39 of the *Constitution of the Republic of South Africa*, 1996.

¹³² Section 223 of the *Constitution of the Republic of South Africa*, 1996.

to any reasonable interpretation that is consistent with International law above any other interpretation, conflicting with International law. Through the aforementioned International law mechanisms, and national legislation, the South African courts must incorporate social justice into the guiding policy of "in the interest of justice" when using it as policy consideration against the enforcement of peremption.

The preamble of the South African Constitution¹³³ introduces the term social justice, stating that a primary goal of the *Constitution* is to "establish a society based on democratic values, social justice and fundamental human rights". To achieve these general goals embarked in the Constitution,¹³⁴ the legislature enacted various national Acts with the purpose of the realisation of such goals. One such Act is the LRA: section 1 of the LRA¹³⁵ identifies the aims of the Act as economic development, social justice, labour peace and the democratisation of the workplace. This obligation is also reaffirmed in the BCEA.¹³⁶

According to Grogan: ¹³⁷

The professed aims disclose rather that the LRA is intended to be an instrument of social change aimed, in particular, at purging the labour dispensation of past inequalities and injustices and extending democracy into the economic sector. It is in that spirit that the specific provisions of the LRA must be read.

The LRA fails to provide a definition of social justice; a definition for social justice would almost be impossible. There are some recurring thoughts through the array of definitions that social justice concerns equal justice and fair treatment, not merely in the courts, but in all aspects of society.¹³⁸

Observed from a labour law perspective, social justice would entail the realisation of labour rights created under the LRA, for all workers in the South African labour

¹³³ Preamble of the *Constitution of the Republic of South Africa*, 1996.

¹³⁴ Preamble of the *Constitution of the Republic of South Africa*, 1996.

¹³⁵ Section 1 of the *Labour Relation Act* 66 of 1995.

¹³⁶ Section 2 of the *Basic Conditions of Employment Act* 75 of 1997.

¹³⁷ Grogan *Collective Labour Law* 16.

¹³⁸ Matlou 2016 SA Merc LJ545.

market.¹³⁹ In labour law the concept of social justice may be described more accurately by using comparative interpretation, although not a formal definition.¹⁴⁰ It can be observed in *National Education Health and Allied Workers Union v University of Cape Town*¹⁴¹ that the court had to determine the vague concept of fair labour practice; the court established it as unnecessary or undesirable to define the concept of fair labour.¹⁴²

The court left the concept accessible for meaning to be inserted by courts and tribunals, emphasising that they may seek guidance from domestic and International lawexperience; the same can be accomplished to find an accurate interpretation of social justice. International law knowledge or experience regarding social justice can be collected from various ILO instruments.¹⁴³ In *Government of the Republic of South Africa v Grootboom*¹⁴⁴ the court placed immense emphasis on the constitutional requirement of achieving social justice and the improvement of quality of life for all.¹⁴⁵ The court placed a duty on the state to take reasonable legislative and other measures to ensure that social justice is achieved within the available resources of the state.¹⁴⁶ The court further reiterated that the fundamental constitutional values of dignity, equality and freedom must be respected.¹⁴⁷ *Various* fundamental rights are interrelated and interdependent, such as the right to dignity, equality, socio-economic rights and the right to fair labour practices; the realisation of fundamental values in isolation, will be an inaccurate approach to the interpretation and enforcement of socio-economic rights.¹⁴⁸ The advancement of a

¹³⁹ Matlou 2016 SA Merc LJ 546.

¹⁴⁰ Van Staden 2012 TSAR 91.

¹⁴¹ *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC).

¹⁴² *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) para 33.

¹⁴³ *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) para 34.

¹⁴⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 53.

¹⁴⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 53

¹⁴⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 20.

¹⁴⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

¹⁴⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44.

certain right promotes the development and progression of other rights but equally, if one right is impeded on, it can adversely affect other rights.¹⁴⁹

Social justice in labour law is central to promoting workplace justice and redressing the past social injustices, which may include assisting the vulnerable sector of South Africa's population to regain their human dignity. To achieve social justice, it is imperative that workers are made aware of their workplace rights, affording respect and human dignity in their workplaces.¹⁵⁰ In *AG's Distributors v CCMA*¹⁵¹ the court reaffirmed the importance of the judiciary's duty to create social justice and provide effect to the values embedded in the *Constitution*. The Labour Courts were provided the traditional position of interpretation and application of the law; the courts cannot develop laws in conflict with formalised law, except to a degree that purposive interpretation and constitutional validity permits.¹⁵² The effect is that the courts cannot and should not adjust the fairness and equity of the laws tasked to be applied.¹⁵³

In South Africa, section 23 of the Constitution¹⁵⁴ provides workers with constitutional labour rights, such as fair labour practices, the right to organise, strike and engage in collective bargaining. Any discussion, analysis of social justice must consider the constitutional context. Additional constitutional rights, such as the right to equality¹⁵⁵ and dignity¹⁵⁶ always perform a crucial part in labour related matters. It could be argued that the denial of social justice constitutes denial or infringement of the right to human dignity. The interrelatedness of values that inspires social justice, indicating that workers are made aware of their workplace rights and afforded respect and human dignity in their workplaces and fundamental rights, such as human dignity, reaffirms that rights cannot be adjudicated in isolation. The *LRA* and additional labour legislations¹⁵⁷ have the primary purpose of providing effect to the

¹⁴⁹ United Nations date unknown <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

¹⁵⁰ Matlou 2016 *SA Merc LJ* 546.

¹⁵¹ *AG's Distributors v CCMA* 2009 5 BLLR 407 (LC) para 22.

¹⁵² Landman "What role for justice in a world class labour relations system" 71.

¹⁵³ Landman "What role for justice in a world class labour relations system" 71.

¹⁵⁴ Section 23 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁵ Section 9 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁶ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁷ *Basic Conditions of Employment Act* 75 of 1997; *Employment Equity Act* 55 of 1998.

rights conferred by the *Constitution*. The *LRA* encourages meaningful employee participation in workplace issues and industry decision-making,¹⁵⁸ which is coherent with the notion of social justice. In South Africa, social justice is an ideal that courts and tribunals endeavour to realise by incorporating various employee-employer participation mechanisms. These mechanisms have the power to increase the realisation of constitutional values, such as human dignity and equality within the wider concept of justice. The *LRA* insists on encouraging the employer and the employee to collaborate in the South African institutional framework established to achieve social justice.¹⁵⁹

Social justice is an important aspect of justice in labour matters and will inherently form part of the guiding policy of "in the interest of justice". It therefore impacts on the application of the doctrine of peremption. As can be observed from the case discussions that follows, the courts will not apply the doctrine of peremption in matters where the strict application or enforcement of the doctrine will lead to consequences that the court deems "not in the interest of justice". The determination when peremption will not be in the interest of justice, is a moral assessment of the facts of each case. Some of the values, which also form part of social justice, that exert influence on the judiciary's decisions, include dignity and redressing the past social injustices.¹⁶⁰ Due to courts lacking the power to adjust the equity and fairness of the law, or as in the case of peremption, the doctrine that should be applied if certain requirements are met, indicates the policy consideration of "in the interest of justice" providing some discretionary scope to ensure social justice is achieved.

The flexibility of this policy consideration and the courts' discretion in terms of Section 173 of the *Constitution*¹⁶¹, allow the courts to consider International law and social justice values when deciding if it would be fair and in the interest of justice to find that parties preempted their rights to appeal or review.

¹⁵⁸ Benjamin *Reinventing Labour Law* 28.

¹⁵⁹ Smit 2010 *TSAR* 1.

¹⁶⁰ Van der Walt 2004 *SAPR* 253.

¹⁶¹ *Constitution of the Republic of South Africa*, 1996.

3.3 In the interest of justice-test and the impact of social justice on the doctrine of peremption in labour matters

As can be observed from the aforementioned discussion, what is considered to be in the interest of justice, is not definite and will differ between cases. In labour law matters involving the doctrine of peremption, justice can assume formal justice and social justice principles.¹⁶² Formal justice entails that what is right or just for one matter where the requirements of peremption were met, will also be right and just for any similar peremption case,¹⁶³ which involves a strict consistency of the application of peremption. If a court therefore finds that the requirements for peremption were met, the party acquiesced in the judgment will lose the rights of appeal or review.

In applying for leave to appeal, the courts employ a "in the interest of justice" test. In *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others*¹⁶⁴ the Court provided some substance to the factors to consider when deciding if it will be in the interest of justice to grant leave to appeal to the Constitutional Court.¹⁶⁵ Although this case did not deal with a labour law matter, involving the doctrine of peremption, there is no reason why similar factors could not be utilised to decide if it would be in the interest of justice to disregard peremption and grant leave to appeal. First, it should be established whether there is a reasonable prospect for the court to conclude a different decision or materially alter the decision appealed, and whether the matter concerns an important issue, for the law and the public, on which the decision of the court is desired.¹⁶⁶ In determining the desirability of a decision by the court, it should be established if the lack of a decision by the court on the matter in question, would negatively impact society.

¹⁶² As explained in paragraph 3.2.2.

¹⁶³ Carr 1980 *Philosophical Studies* 211.

¹⁶⁴ *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* 2018 39 ILJ 311 (CC).

¹⁶⁵ *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* 2018 39 ILJ 311 (CC).

¹⁶⁶ *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* 2018 39 ILJ 311 (CC) para 26.

Relying on authority from Kenyan and English courts,¹⁶⁷ the Court decided that matters of public importance would be beyond the judicial interests of the affected parties and advances on the interest of the public. The Court indicated that the matter must pertain to an issue that could arise again in additional cases, where its determination would affect a large class of persons.¹⁶⁸ This case dealt with the constitutional rights of freedom of association, indirectly related to justice and more specifically social justice in the workplace. As illustrated above, the judiciary has the ability to substantially increase the rights, protection and freedom of individuals, using its discretion when interpreting matters and deciding if the interest of justice will be served if peremption is disregarded and the application to appeal is granted.¹⁶⁹

In *South African Revenue Service v CCMA and others*¹⁷⁰ (hereinafter SARS case) the Constitutional Court had to decide if there were policy considerations that hinder the application of the doctrine of peremption against SARS' right of appeal. This case is briefly discussed in the following section. The discussion is structured on the policy consideration of in the interest of justice.¹⁷¹ The case involved an employee of SARS who made racial remarks regarding his immediate supervisor. A disciplinary action followed after the incident. During arbitration proceedings, the employee was found guilty on misconducting charges.¹⁷² The matter was decided in the CCMA, the Labour Court, the Labour Appeal Court and the Constitutional Court.

The Constitutional Court had to decide on the doctrine of peremption and if SARS acquiesced the judgment of the LAC. SARS informed Mr Kruger, in writing, that it would not lodge an appeal against the order of the LAC and that he should contact

¹⁶⁷ *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* 2018 39 ILJ 311 (CC) para 26.

¹⁶⁸ *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others* 2018 39 ILJ 311 (CC) para 24.

¹⁶⁹ Smit 2010 TSAR 11.

¹⁷⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC). This case will be discussed in further detail in Chapter 4 of this study where the focus will be on racism and equality as a policy consideration.

¹⁷¹ In Chapter 4 the case is discussed in detail, with specific attention to equality as policy consideration.

¹⁷² *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 7.

the SARS offices to arrange his return to work.¹⁷³ Shortly thereafter, he was informed not to return to work and that SARS will indeed be lodging an application to appeal.¹⁷⁴ The Constitutional Court established that SARS indubitably decided not to appeal against the order of the LAC as there was an offer of reinstatement communicated to Mr Kruger; arrangements were made for him to return to work, with a letter of peremption instructed by SARS.¹⁷⁵

The Constitutional Court decided that peremption had occurred but that there were constitutional and policy considerations that could justify the non-enforcement of peremption.¹⁷⁶ According to Mogoeng J the advancement of the interest of justice is a major consideration that should be considered when deciding to enforce peremption.

In the Courts reasoning, the broader policy considerations that would encourage the enforcement of peremption, are that parties who unreservedly discarded their right of appeal, "must for the sake of finality be held to their choice in the interests of the parties and justice".¹⁷⁷ If it would seem that the strict enforcement of the doctrine of peremption would not serve the interest of justice, or if alternative policy considerations would necessitate a decision to disregard peremption, it should be open to a court to decide to ignore the acquiescence.¹⁷⁸ The Court quoted the *Minister of Defence v SA National Defence Force*¹⁷⁹ case where it was also held that a court should be able to disregard peremption where the broader interest of justice

¹⁷³ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 24.

¹⁷⁴ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 24.

¹⁷⁵ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27.

¹⁷⁶ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27.

¹⁷⁷ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 28.

¹⁷⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 28.

¹⁷⁹ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012.

would not be served.¹⁸⁰ In deciding if the interest of justice would be served, the court applied values of social justice¹⁸¹ and the desirability of a final decision by the Constitutional Court on some of the important legal challenges, such as equality in the workplace, raised in the matter.¹⁸²

In the unreported case of *Minister of Defence v SA National Defence Force*¹⁸³ the court held that the general rule "that a litigant, who has intentionally abandoned a right to appeal will not be permitted to revive it" is merely a single aspect of a broader policy, indicating finality in litigation, in the interests both of the parties and the proper administration of justice.¹⁸⁴ A court should consequently be open to disregard the acquiescence where the broader interests of justice would otherwise not be served. The court did not attach a single definition or meaning to "broader interest of justice" but provided two reasons for concluding that it would not serve the interest of justice if the South African National Defence Force (SANDF) lost their right of appeal.

The first was that the acquiescence by the SANDF did not hold any material consequences as, for a brief period, the union assumed that the SANDF would not proceed with the appeal.¹⁸⁵ There was no proof that the SANDF's change in decision caused any prejudice to the union or their members. The second, and more important reason, was that the SANDF is charged with a constitutional duty to maintain a disciplined Defence Force.¹⁸⁶ The court established that it would be

¹⁸⁰ *Minister of Defence and Others v South African National Defence Force Union* 2012 (SCA) para 23.

¹⁸¹ The Court established that there is a constitutional duty on the Court to assist entrench the values of equality, non-racialism and human dignity and therefore there is a need for this application be appealable in the interests of justice.

¹⁸² *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 29.

¹⁸³ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012.

¹⁸⁴ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 23.

¹⁸⁵ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 25.

¹⁸⁶ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

intolerable if an interdict wrongly granted were to impede the discharge of that duty.¹⁸⁷

On 26 August 2009 several SANDF members assembled at the Union Buildings in an attempt to demonstrate their grievances. This gathering was in contravention of SANDF orders issued earlier that morning.¹⁸⁸ Several of the members who attended the meeting, were armed and their actions led to altercations with the police.¹⁸⁹ The SANDF issued notices to over 1200 of their members, informing them that their services were provisionally terminated, attributable to their participation and activities during the congregation on 26 August 2009.¹⁹⁰ The SANDF notified SANDF members of their intended provisional discharge from the Defence Force, in terms of section 59(2)(e) of the *Defence Act*,¹⁹¹ and invited them to manifest why their provisional discharge should not become final.¹⁹²

The South African National Defence Union approached the High Court for an urgent order, interdicting the SANDF from discharging their members. The order was granted in their favour.¹⁹³ In the founding affidavit of the union, they suggested that they intended to refer the dispute to the Bargaining Council. This was conceived as prima facie right of the union was misplaced. The interdict was not meant to be directed at restraining the military from acting, pending the outcome of legal proceedings, restraining them until the occurrence of an extraneous event.¹⁹⁴

The Supreme Court of Appeal established that there were no grounds for granting the initial interdict by the High Court. In the ordinary course of proceedings, the

¹⁸⁷ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

¹⁸⁸ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 1.

¹⁸⁹ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 1.

¹⁹⁰ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 2.

¹⁹¹ *The Defence Act* 42 of 2002.

¹⁹² *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 3.

¹⁹³ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 4.

¹⁹⁴ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 13.

SANDF would have had the opportunity to have it reserved; it was argued that the appellants ordained their right to appeal by publishing a media statement wherein it was held that the Minister decided to withdraw the case from the Supreme Court of Appeal.¹⁹⁵ The court stated that the broad and vague language in which the interdict was formulated, was capable of restricting the SANDF beyond the purpose for which it was granted. This would result in an abuse of the interdict and the court sensed it as a sufficient reason to disregard the peremption.¹⁹⁶

It is constitutionally impermissible to establish military courts to deal with military and civilian transgressions by members of the SANDF.¹⁹⁷ The context of justice as provided earlier in this chapter, indicated that justice is performed when humans are provided with lawfully and fairly attributable.¹⁹⁸ It is in line with the view of the Supreme Court of Appeal that the military should punish members for conducts against the rules embarked by the SANDF. The members of the SANDF should have the opportunity to present their case and thereafter an outcome must be provided.

In this case the court rightly disregarded the acquiescence as the interest of justice would not otherwise be served, as the Defence Force would be restricted to such an extent that they could not enforce their constitutional duty to maintain a disciplined Defence Force. It is in the interest of the general public if confidence in the military is restored. It is also in the interest of justice for the members of the SANDF, to know if they are discharged. The military should be observed as a force that is held to a high standard of respect for rules. The military should be able to discipline their members according to established military procedures.

3.4 Conclusion

This chapter introduced "in the interest of justice" as a primary policy consideration that the courts use to disregard the enforcement of the doctrine of peremption. The

¹⁹⁵ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

¹⁹⁶ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

¹⁹⁷ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 26.

¹⁹⁸ Landman "What role for justice in a world class labour relations system" 70- 71

content or substance linked to this vague concept of justice is discussed to emphasise the extent to which the courts may use this guiding policy as instrument to influence the decision to implement peremption. When courts find that a matter is in the interest of justice, it is essentially based on the facts in a particular case.

As observed from the two cases discussed, it is a flexible guiding policy allowing courts the discretion to not merely enforce the doctrine of peremption in matters where a party acquiesced in a judgment. If courts apply the notion of formal justice, it would mean that all similar matters involving the doctrine peremption, would be treated alike and peremption would be enforced, regardless surrounding circumstances or social injustices. Courts conquered this difficulty by incorporating social justice into the broader term of justice. Social justice denotes that constitutional values, such as dignity of the worker, equal opportunities in the workplace, non-discrimination and fair and due treatment will be considered when deciding on a matter. If a labour matter, that includes the enforcement of doctrine of peremption, also involves the infringement of other constitutional and social justice related values, it will justify the non-enforcement of the doctrine of peremption. The South African courts can receive some direction on the approach that should be adopted, when encountered with work related racial matters to facilitate the elimination of racism in the workplace and the wider South African society.

These are some of the aspects combined with the fundamental values of equality and dignity, rendering it in the interest of justice to disregard the doctrine of peremption and grant leave to appeal. This is an example of a case where the court used the interest of justice as a guiding policy, with section 173 of the *Constitution* to develop the common law, whilst considering the interest of justice. Justice and social justice, as applied in the SARS case, considers promoting workplace fairness and equality, redressing the past social injustices. SARS assists workers in protecting their human dignity. The interest of justice will always have a direct and indirect relationship concerning the principles of dignity, equality and freedom. This was established through the reasoning followed by the court. The following chapter will discuss the remaining policy considerations of non-racialism and equality.

CHAPTER 4: EQUALITY AND NON-RACISM AS POLICY CONSIDERATIONS

4.1 Introduction

This chapter comprises of an investigation of the impairment of equality through unfair discrimination in the form of racial harassment, as an overriding policy consideration in non-enforcement of peremption. The *South African Revenue Service (SARS) v CCMA*¹⁹⁹ case serves as practical illustration and discussion of a racial harassment instance where the Constitutional Court used equality as a policy consideration that influenced the enforcement of the doctrine of peremption. The constitutional value of equality will be discussed against the background of unfair discrimination and racial harassment, impeding on the right to equality.

A detailed discussion of the case law provides insight to the Constitutional Court's view that the court's duty to uphold values, such as human dignity, equality and non-racialism, would be in the interest of justice to overlook peremption and grant leave to appeal. The social and legal problems present in the SARS case demands the attention of the Constitutional Court. Racism in the workplace raises important constitutional issues that stretch beyond the interest of the only parties involved. Constitutional involvement may affect the broader society; it may provide guidance to employers dealing with racial remarks or attitudes of employees.²⁰⁰

4.2 Equality as a constitutional and social justice value

Equality equally represents a constitutional value²⁰¹ and a fundamental right,²⁰² receiving ample attention in the South African Labour Law. Unfair discrimination exemplifies the contradiction of equality. The concept "discrimination" was first used by the Industrial Court in the early 1950s. It identified discrimination, based on grounds like race and membership to unions, to be an unfair labour practice.²⁰³ In

¹⁹⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

²⁰⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 29.

²⁰¹ Preamble of the *Constitution of the Republic of South Africa*, 1996.

²⁰² Section 9 of the *Constitution of the Republic of South Africa*, 1996.

²⁰³ Du Toit and Potgieter *Unfair Discrimination in the Work Place* 9.

1988 the definition of unfair labour practice was extended to include "unfair discrimination by any employer against employees, solely on the grounds of sex, race or creed".²⁰⁴ The phrase "unfair" was included to ensure that the apartheid practices imposed by the government, could not be challenged in the Industrial Court.²⁰⁵

The *Interim Constitution* of 1993 effect crucial changes to the South African labour market. The equality clause in the Bill of Rights contained a general prohibition of unfair discrimination.²⁰⁶ The present constitutional dimension of equality is established when stating that South Africa is based on the values of human dignity, achieving equality and the freedom advancement.²⁰⁷ Section 9 of the *Constitution*²⁰⁸ elaborates on the right to equality; the Constitution states that each person is equal before the law with equal protection by the law;²⁰⁹ equality includes the full and equal enjoyment of all rights and freedom.²¹⁰ The Constitution further necessitates promoting equality by the enactment of legislation or measures to advance persons affected by unfair discrimination in the past,²¹¹ providing a list of grounds for unfair discrimination.²¹² Sections 9(4) states that no person may directly or indirectly, unfairly discriminate against anyone, based on aspects specified in the listed grounds. National legislation is required to prevent or prohibit unfair discrimination in this respect. As a matter of principle, discrimination based on the listed grounds, will be deemed unfair until it can be proved that the discrimination is fair.²¹³

From the content of section 9, two concepts of equality are evident: First, it is observed as consistency or formal equality. Secondly, substantive equality is

²⁰⁴ Section 1 of the *Industrial Conciliation Act* 28 of 1956 (later renamed *Labour Relations Act*).

²⁰⁵ Du Toit and Potgieter *Unfair Discrimination in the Work Place* 10.

²⁰⁶ Section 8(2) of the interim Constitution of the Republic of South Africa Act 200 of 1993.

²⁰⁷ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁸ Section 1 of *Act 28 of 1956*.

²⁰⁹ Section 9(1) of the *Constitution of the Republic of South Africa*, 1996.

²¹⁰ Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

²¹¹ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

²¹² Section 9(3) of the Constitution include grounds such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²¹³ Section 9(5) of the Constitution of South Africa, 1996.

observed.²¹⁴ Formal equality requires that people with similar attributes be treated alike. There should be no distinction in their treatment, based on any arbitrary grounds, such as religion, gender or race.²¹⁵ A uniform application of the law exists, embracing persons who are alike without any further examination of their background or circumstances.

Fraser²¹⁶ states that by removing individuals from their social and cultural background, they are by default, observed and treated alike those in the privileged groups. This notion of equality is impractical and unfavourable in a country such as South Africa, with a history of oppression and racism. Achieving equality and social justice in South Africa remains a challenge. South Africa is still deemed one of the most disproportionate societies globally.²¹⁷

In the South African Labour Law and social justice context, a notion of equality is needed to ensure that laws or policies do not impose strict, uniform and inferior treatment of people or groups who suffering social, political or economic disadvantages.²¹⁸ Substantive equality is preferred in South Africa.²¹⁹ Substantive equality focusses on the equality of outcome and less on the equal treatment of everyone. The social, cultural and economic background of each person within an ethnic group should be considered.²²⁰ This is in line with the notion of "in the interest of justice" where the courts have the discretion, considering social justice values when deciding to enforce the doctrine of peremption. Substantive equality allows courts the flexibility not to merely apply the doctrine of peremption in all similar cases, but to focus on whether the application of the doctrine of peremption would have an outcome, in the interest of justice. A factor that would influence the

²¹⁴ Van Niekerk *et al Law @ Work* 121.

²¹⁵ Smith *AHRLJ* 611.

²¹⁶ Fraser 'From individual to group' in B Hepple & E Szyszczak (eds) *Discrimination: The limits of the law* 102-103.

²¹⁷ Dupper & Garbers *Equality in the workplace, reflections from South Africa and beyond* 75.

²¹⁸ Smith 2014 *AHRLJ* 612.

²¹⁹ Van Niekerk *et al Law@Work* 122.

²²⁰ Liebenberg and Goldblatt 2007 *SAJHR* 341.

selection, is achieving equality in an unequal South African work environment and society.²²¹

Equality gained various definitions and interpretations. For the purpose of this study, the focus is on equality and the infringement thereof, due to unfair discrimination in the workplace. The *Employment Equity Act (EEA)*²²² is the main labour legislation, dealing with the various forms of unfair discrimination in the workplace. Section 5 of the EEA assigns a positive duty on all employers to promote equal opportunity in the workplace, through eliminating unfair discrimination in all employment policies or practices.²²³ The EEA also contains a set of entrenched anti-discriminatory grounds,²²⁴ which is wider than the Constitution's list.²²⁵ Section 6(1) of the EEA²²⁶ also includes family responsibility, HIV status, political opinion and the phrase "or any other arbitrary ground", evidently rendering the list contained in section 6 open-ended. The EEA further expressly includes harassment of employees on any listed grounds, as a particular form of unfair discrimination.²²⁷ The word "including" in Section 6, similarly suggests that the list of prohibited grounds is not a closed set of grounds. Additional claims for unfair discrimination are possible.²²⁸ In order to understand the context of equality and the infringement thereof by means of unfair discrimination, it is necessary to explain unfair discrimination and racial harassment as a form of unfair discrimination.

4.3 The meaning of unfair discrimination

Unfair discrimination is undefined in the *Constitution*,²²⁹ but the Constitutional Court provided meaning to the term "unfair discrimination", stating that "differentiation that violates human dignity or differentiation with similar serious consequences".²³⁰

²²¹ Smit 2014 *Global Journal of Comparative Labour Law and Industrial Relations* 378.

²²² *Employment Equity Act* 75 of 1997.

²²³ Section 5 of the *Employment Equity Act* 75 of 1997.

²²⁴ Section 6(1) of the *Employment Equity Act* 75 of 1997.

²²⁵ *The Constitution of the Republic of South Africa*, 1996.

²²⁶ Section 6(1) of the *Employment Equity Act* 75 of 1997.

²²⁷ Grogan *Workplace Law* 86.

²²⁸ *Employment Equity Amendment Act* 47 of 2013.

²²⁹ *The Constitution of the Republic of South Africa*, 1996.

²³⁰ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 23.

The Constitutional Court places extreme emphases on substantive equality and the link between unfair discrimination and dignity impairment.²³¹ Differentiation entails dissimilar treatment of people or groups, based on a distinguishing attribute, characteristic, feature or circumstances of these people or group of people.²³² Employees are discriminated against if they are denied privileges, rights or benefits provided to people in similar circumstances.²³³ Employees are reckoned discriminated against, if they are selected for prejudicial treatment on some unacceptable ground.²³⁴ In terms of Section 9(5) of the Constitution,²³⁵ discrimination based on any of the listed grounds established in Section 9, is presumed unfair; an aggrieved party does not need to prove the unfairness of the discrimination.²³⁶ Instead, the defendant determines prove that the alleged discrimination was fair.

In *Minister of Finance v Van Heerden*,²³⁷ the Constitutional Court reaffirmed that the main purpose of the prohibition of unfair discrimination is to prevent and address patterns of group disadvantages in society.²³⁸ In *Harksen v Lane*,²³⁹ the court provided a set of considerations to assist in determining if the discrimination or differentiation would result in a dignity violation:

- a) the position of the complainant in society and whether they have suffered any discrimination in the past.
- b) the nature of the provision and the aim that it meant to achieve.
- c) taking (a) and (b) into account, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has resulted in an impairment of fundamental human dignity or constitutes an impairment of a comparably serious nature.²⁴⁰

Once discrimination is established, the enquiry budes to whether it quantifies fair or unfair discrimination. In constitutional matters, the balance is often inclined in favour

²³¹ Pretorius et al *Employment Equity Law* 5.

²³² Rautenbach and Fourie *TSAR* 2016 112.

²³³ Grogan *Workplace Law* 87.

²³⁴ Grogan *Workplace Law* 86.

²³⁵ *The Constitution of the Republic of South Africa*, 1996.

²³⁶ *Sali v National Commissioner of the South African Police Service and Others* 2014 35 ILJ 2727 (CC) para 8.

²³⁷ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 27.

²³⁸ McConnachie 2015 *SAJHR* 504.

²³⁹ *Harksen v Lane NO* 1998 1 SA 300 (CC).

²⁴⁰ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 50.

of the vulnerable. Courts have a duty to scrutinise the context of each case to assess the violation that occurred.²⁴¹

In labour law, the notion of fairness relates to ideas of equity and the balance between the interests of the employer and the employee.²⁴² The prohibited grounds contained in Section 6 of the EEA,²⁴³ forms the basis for unfair discrimination claims in the workplace. If discrimination is based on one or more of these listed grounds, it is presumed to be unfair; if the discrimination is based on additional arbitrary grounds, the plaintiff must prove unfairness.²⁴⁴ Context can be of immense aid in deciding whether remarks based on race, would extent to unfair discrimination.²⁴⁵ In the case of South Africa *Equity Workers Association on behalf of Bester v Rustenburg Platinum Mine & another*,²⁴⁶ the LAC made use of the context in which the referral to "black man" was made. Upon proper analysis of the background of the case, it was established that the employee used the word "black man" to identify the fellow employee whose name was unknown to him, and not to denigrate the person.²⁴⁷ The comment did not affect the dignity of the fellow employee. The infringement of the right to equality and the constitutional value of equity also contain an element of dignity. Based on an unlisted ground, the employee must provide evidence that the discriminatory action also affected their dignity.²⁴⁸ Since the 2014 amendments to the EEA came into force, presiding officers at the CCMA and courts require applicants to prove that the differentiation, based on an arbitrary ground beyond the listed grounds, impacted the applicant's human dignity to constitute unfair discrimination.²⁴⁹ Dignity should not be viewed as emotions alone as bruised feelings

²⁴¹ *Harksen v Lane* NO 1998 1 SA 300 (CC) para 38.

²⁴² Dupper & Garbers *Equality in the workplace, reflections from South Africa and beyond* 79.

²⁴³ Section 6 of the *Employment Equity Act* 75 of 1997.

²⁴⁴ Section 11 of the *Employment Equity Act* 75 of 1997.

²⁴⁵ *SA Transport & Allied Workers Union obo Dlamini and Transnet Freight Rail* 2009 ILJ 1692 (ARB) para 1711E-F.

²⁴⁶ *SA Equity Workers Association on behalf of Bester v Rustenburg Platinum Mine & another* 2017 38 ILJ 1779 (LAC) in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* 2018 39 ILJ 1503 (CC) the Court overruled the decision of the LAC and found that when referring to another employee as a black man the test for determining if the remark is derogatory and racist is objective and the history of apartheid must be taken into account.

²⁴⁷ *SA Equity Workers Association on behalf of Bester v Rustenburg Platinum Mine & another* 2017 38 ILJ 1779 (LAC) para 29.

²⁴⁸ *Mothoa v SA Police Service & others* 2007 28 ILJ 2019 (LC) para 17.

²⁴⁹ Bassuday 2017 *De Rebus* 34.

are insufficient to prove a claim of unfair discrimination. Applying "dignity" as a test for discrimination, originated in Constitutional Court cases²⁵⁰ on discrimination occurring external from the workplace, gradually entering the employment law.²⁵¹ Prior to the 2014 amendments, Section 11 of the EEA provides that whenever unfair discrimination is alleged, the onus is on the employer to prove that the discrimination is fair. The new dignity test adds an additional condition to Section 11 of the EEA, requiring complainants to prove the impairment of their dignity.²⁵²

Due to South Africa's history of Apartheid the courts have a duty to ensure that unfair discrimination is dealt with in a serious manner and reprimanded accordingly.²⁵³ Therefore it would be unreasonable if a court were not in a position to act as a representative of the Constitution due to restrictions such as peremption. If a party to an unfair discrimination matter wishes to take a matter on appeal, their prior conduct should not halter a court to ensure that justice is done.

4.4 Racial harassment as a form of unfair discrimination

The EEA also provides for harassment as a form of unfair discrimination, prohibiting harassment of an employee on any or a combination of the prohibited grounds.²⁵⁴ Employees affected by harassment are not obliged to compare their situation to those of their colleagues, but the harassment must relate to one of the listed grounds.²⁵⁵ The dignity test is also apparent in harassment cases. Item 5.4 of the Code of Good Practice on Sexual Harassment states that the harassing conduct should conclude an impairment of the employee's dignity. Section 6(3) of the EEA²⁵⁶ denotes harassment as a form of discrimination.²⁵⁷

²⁵⁰ *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) para 41.

²⁵¹ Bassuday 2017 *De Rebus* 35.

²⁵² Du Toit 2014 *ILJ* 2634.

²⁵³ *Rustenburg Platinum Mine v SAEWA obo Bester and Others* 2018 39 ILJ 1503 (CC) the Court stated that the history of apartheid must be taken into account when considering unfair discrimination matters based on race.

²⁵⁴ Section 6(3) of the *Employment Equity Act* 75 of 1997.

²⁵⁵ Grogan *Workplace Law* 87.

²⁵⁶ Section 6(3) of the *Employment Equity Act* 75 of 1997.

²⁵⁷ Van Niekerk et al *Law@Work* 139.

4.4.1 Harassment

Harassment is undefined in the LRA or EEA, though promoting *Equality and Prevention of Unfair Discrimination Act*²⁵⁸ defines harassment as follows:²⁵⁹

unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to

- (a) sex, gender or sexual orientation; or
- (b) a persons' membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group;

Harassment in terms of the *Protection from Harassment Act 17 of 2011*²⁶⁰ is defined as any means, which the respondent knows or ought to know, causing harm or encouraging the reasonable belief of the possibility of harm to the complainant or a related person by unreasonably:

- i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
- ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues;
- iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be established by, provided to or brought to the attention of, the complainant or a related person.

Any form of harassment in the workplace establishes arbitrary barriers that affects employees full and equal enjoyment of their rights, violating the dignity of the harassed employee, therefore determining unfair discrimination.²⁶¹ Harassing conducts must be based on one or more of the prohibited or unspecified grounds, embarked in the EEA.²⁶² From the formulation of Section 6(1) of the EEA it appears

²⁵⁸ *Promotion of Equity and Prevention of Unfair Discrimination Act 4 of 2000.*

²⁵⁹ Section 1 of promoting *Equality and Prevention of Unfair Discrimination Act 4 of 2000.*

²⁶⁰ Section 1 of the *Protection from Harassment Act 17 of 2011.*

²⁶¹ Van Niekerk *et al Law@Work* 128.

²⁶² McGregor 2014 *TSAR* 649.

that harassment is regarded as a form of unfair discrimination, therefore the fairness or unfairness of the Act does not present a determining function.²⁶³

4.4.2 Racial harassment

The *UN Convention for the Elimination of All Forms of Racial Discrimination*²⁶⁴ affirmed the principle that all human beings are equal in dignity and rights; the existence of racial barriers is incompatible with the ideals of any human society. The South African history provided rise to a reality whereby the sustained patterns of inequality in the country are inextricably linked to race.²⁶⁵ Race is one of the most prevalent grounds of discrimination in South Africa. Sixteen per cent of the complaints received by the South African Human Rights Commission, for the year 2016, relates equality infringement concerns. Elevated levels were recorded on derogatory and offensive racial remarks in the workplace.²⁶⁶

Although the current South African labour legislation does not provide specific guidelines on how to react and attend to racial harassment matters, authors argue that guidelines embarked by the Code of Good Practice on Sexual Harassment matters in the workplace, may be sufficiently adapted to assist in dealing with various forms of harassment such as racial harassment.²⁶⁷ attributable to the social impact of racial harassment in a country encountered with a history of racism and apartheid, the courts accepted dismissal as an appropriate sanction.²⁶⁸ In exceptional cases, rehabilitation may be an alternative solution.²⁶⁹ McGregor argues that context should be an indicator to establish racial harassment in the workplace and states: ²⁷⁰

²⁶³ Van Niekerk et al *Law@Work* 126.

²⁶⁴ UN General Assembly, global *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, which has been signed by South Africa in 1994.

²⁶⁵ South African Human Right Commission 2016 *National Hearing on Unfair Discrimination in the Workplace* 33.

²⁶⁶ South African Human Right Commission 2016 *National Hearing on Unfair Discrimination in the Workplace* 35.

²⁶⁷ Du Toit and Potgieter *Unfair Discrimination in the workplace* 39.

²⁶⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

²⁶⁹ Du Toit and Potgieter *Unfair Discrimination in the workplace* 40 argue that in some cases involving racial harassment, the appropriate solution or best-case outcome will be rehabilitation

Even though harassment, and in particular racial harassment in South Africa, is an extremely serious matter attributable to the country's history of racial discrimination, complainants should be careful to assess their reaction in order not to be oversensitive when deciding to institute a claim.

In the paragraphs that follow, the *South African Revenue Service (SARS) v CCMA*²⁷¹ case serves as practical illustration and discussion of a racial harassment occurrence where the Constitutional Court used equality as a policy consideration that influenced the enforcement of the doctrine of peremption. It is further argued that courts should consider context when assessing racial harassment in determining if the dignity and equality of the complainant was infringed.

4.5 *South African Revenue Service (SARS) v CCMA*²⁷² (hereinafter *SARS case*)

This matter was decided in the Labour Court, the Labour Appeal Court²⁷³ and finally in the Constitutional Court. Emphasis are on the judgments by the Labour Appeal Court that concurred with the judgment of the Labour Court, with the appeal decision of the Constitutional Court. The judgment of the Labour Court and Labour Appeal Court serves as background for the facts presented in the Constitutional Court litigation. The constitutional litigation forms the primary focus, as this is where the issue regarding the enforcement of the doctrine of peremption was discussed against equality as policy consideration. The Constitutional Court referred to the interest of justice policy consideration, though it made specific reference to equality as an important independent component that can serve as an overriding policy consideration against the enforcement of peremption.

of the perpetrator and healthier workplace relationships, as suggested by the Code of Good Practice on sexual harassment.

²⁷⁰ McGregor 2014 *TSAR* 656.

²⁷¹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

²⁷² *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC).

²⁷³ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC).

4.5.1 Labour Court litigation

The matter concerned an employee of SARS, Mr Kruger, who made racial remarks against his immediate supervisor, Mr Mboweni. In the racial remark of Mr Kruger on 27 July 2007, he referred to Mr Mboweni as a "kaffer" after a tempestuous telephone conversation, stating: "*Ek kan nie verstaan hoe 'n kaffer dink nie*".²⁷⁴ He made a further remark that "a *kaffer* must not tell me what to do".²⁷⁵ At the disciplinary hearing, Mr Kruger pleaded guilty to the charges of misconduct and blamed his outburst of racial behaviour on the stress that he experienced at work.²⁷⁶ The chair of the disciplinary hearing accepted a plea bargain and found Mr Kruger guilty on the charges of misconduct. The chair imposed a final warning, implemented 10 days unpaid suspension and directed him for counselling.²⁷⁷

The SARS Commissioner notified Mr Kruger on 3 October 2007 that the "recommended sanction" from the disciplinary hearing was declined and that his services were terminated with immediate effect.²⁷⁸ Mr Kruger referred an unfair dismissal dispute to the CCMA where the arbitrator had to decide on two related matters: The first enquiry was if SARS could substitute the sanction decided on by chair of the disciplinary hearing, and implement a more severe sanction. The second enquiry was if the dismissal of Mr Kruger was unfair.²⁷⁹ The arbitrator established that the disciplinary code of SARS vested the power of a final decision in the person designated to chair the disciplinary hearing and therefore SARS was prohibited from substituting it.²⁸⁰ The dismissal of Mr Kruger was subsequently established to be unfair and the sanction imposed by the chair of the disciplinary hearing remained in force.²⁸¹

²⁷⁴ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 6.

²⁷⁵ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 15.

²⁷⁶ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 7.

²⁷⁷ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 7.

²⁷⁸ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 8.

²⁷⁹ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 11.

²⁸⁰ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 13.

²⁸¹ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 13.

SARS applied to the Labour Court to review the decision of the arbitrator, alleging that the award is "vitiating by gross irregularity".²⁸² The review application was heard by Pillay J who dismissed the application. It was held that the finding by the arbitrator, implying that the employer had no power to change the sanction, was a reasonable decision. The Labour Court held that the arbitrator's decision regarding the dismissal of Mr Kruger, concerning a substituted sanction, based on non-existent authority to render such a substitution, was reasonable. The merits of the allegations of misconduct did not affect the decision and Pillay J, correctly, did not deal with the arbitrator's treatment of the topic.²⁸³

In the Labour Appeal Court, the attorney acting on behalf of SARS, argued that although SARS was not in a position to overturn the sanction imposed by the chair of the disciplinary hearing, the arbitrator still had the power to bequeath a different sanction to that the chair.²⁸⁴ This submission was based on the substitution decision, as an instance of procedural unfairness. SARS argued that a case where an employer's decision was established to be procedurally unfair, an arbitrator may still uphold the sanction if it was objectively appropriate according to the circumstances.²⁸⁵ The Labour Appeal Court established that the invalidity of the substitution of the sanction made the Act vitiated.²⁸⁶ Invalidity indicates the presence of an unlawful act, thus constituting more than mere procedural unfairness.²⁸⁷ The Labour Appeal Court established that the court *a quo* was correct in its finding that the substitution of the sanction by SARS was more than a procedural challenge that could still provide leeway to render an enquiry to the appropriateness of the sanction for the misconduct charges against Mr Kruger.²⁸⁸ The Labour Appeal Court allude to the racial harassment incident in the case and agreed with SARS that racial abuse in the workplace constitutes severe misconduct that would justify dismissal.²⁸⁹

²⁸² *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 17.

²⁸³ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 28.

²⁸⁴ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 30.

²⁸⁵ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 30.

²⁸⁶ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 42.

²⁸⁷ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 42.

²⁸⁸ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 42.

²⁸⁹ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 44.

The court justified this view, adding that instances where misconduct would authorise an employer to fairly dismiss an employee, "it does not mean that the employer must elect to do so".²⁹⁰ The court expressed their dismay at the sanction provided by the chair of the disciplinary hearing and headed that racial harassment cases will not be dealt with lightly. The court referred to the judgement of Zondo J in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others*²⁹¹ and cautioned readers not to take the words in paragraph 39²⁹² too literary. Instead, the court is of the view that the correct stance concerning racial harassment, is that it would be unlikely that employees or employers who are guilty of racial harassment, would provide sufficient mitigating circumstances to avoid dismissal, but an enquiry into the circumstances remain necessary and important for a fair process.²⁹³

In conclusion, the court made specific reference all people as beneficiaries of the system of law. The outcomes in this particular matter is to the credit of the presiding officers who did not allow their resentment to undermine their devotion to the law.²⁹⁴ The court established that it was not indicated that the award could not indicate a reasonable arbitrator and the judgment of Pillay J must stand, therefore the appeal must be dismissed.²⁹⁵

4.5.2 Constitutional Court litigation

Mogoeng J presents the conditions of the matter by stating:²⁹⁶

This case owes its genesis to the use of the term *kaffer* in a workplace and a more assertive insinuation that African people are inherently foolish and incapable of providing any leadership worthy of submitting to. It bears testimony to the fact that

²⁹⁰ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 44.

²⁹¹ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* 2002 23 ILJ 863 (LAC).

²⁹² *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* 2002 23 ILJ 863 (LAC) para 39 reads as follows: "viewed in the light of the history of racism and racial abuse in this country and the constitutional values of human dignity and equality and the repugnancy of the first respondent's racist conduct, it will be observed that the first respondent's conduct was such that the only appropriate sanction for it was dismissal. Maxim had done nothing to invite such conduct but, on the contrary, he was entitled to expect the first respondent to respect his dignity."

²⁹³ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 46.

²⁹⁴ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 49.

²⁹⁵ *South African Revenue Service v CCMA and Others* 2016 37 ILJ 655 (LAC) para 52.

²⁹⁶ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 1.

there are several bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality.

The court elaborated on the history and meaning of the term '*kaffer*' to provide context to the racial harassment in the form of verbal abuse. The use of the term '*kaffer*' acquired a dehumanising and humiliating effect in the apartheid era of South Africa, when used by White people against their Black African fellow citizens.²⁹⁷ The intentional aim and effect of using the term is to denigrate Black African people as lower human beings who are lazy and stupid.²⁹⁸ The court took a strong stance against the lack of progress in addressing the occurrence of racism in South Africa and the workplace. According to Mogoeng J one of the several possible reasons for this, is the tendency to refocus attention from racism to technicalities in typical cases where racial harassment is central to the dispute in question.²⁹⁹ The court established that judicial officers, especially in the highest courts, have a constitutional obligation to meaningfully contribute towards the eradication of racist tendencies in South Africa.³⁰⁰

On appeal, the matter of peremption was pleaded by Mr Kruger. The attorneys of SARS informed Mr Kruger in writing, that they would not lodge an appeal against the judgement of the LAC and that he should render arrangements for his return to work.³⁰¹ Three days later, he received further information that there was a change in the decision of SARS and that they lodge an appeal to the Constitutional Court.

Mr Kruger was of the opinion that peremption occurred.³⁰² The Constitutional Court established that SARS indeed perempted their constitutional right to appeal.³⁰³

²⁹⁷ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 3.

²⁹⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 4.

²⁹⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 10.

³⁰⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 14.

³⁰¹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 24.

³⁰² *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 24.

Peremption was established attributable to the written communication that the attorneys of SARS directed to Mr Kruger, informing him of their decision not to lodge an appeal, by instructing him to render arrangements for his re-employment. Lastly, the communication was directed by the attorneys of SARS, indicating that SARS acquired legal advice on the matter after they considered the merits of the case.³⁰⁴ The court established that the conduct of SARS aimed "indubitably and necessarily to the conclusion that there was an abandonment of the right to appeal".³⁰⁵ The only other deliberation was for the court to identify overriding constitutional policy considerations that would justify the non-enforcement of a proven argument in law, such as peremption.

The policy considerations that would call for the enforcement of peremption, is that any litigant that perempted the right of appeal must be in the interest of justice and finality, held to that decision.³⁰⁶ It should also be unrestricted to a court to disregard peremption where the broader interest of justice would not be served.³⁰⁷ The Constitutional Court was of the opinion that there were policy considerations present in this matter that would justify granting leave to appeal:

The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism. This, coupled with this court's constitutional duty to assist entrench the values of equality, non-racialism and human dignity, demand that this application be appealable in the interests of justice.

The court reaffirmed that it would be in the interest of justice if peremption is disregarded as the decision on racial harassment. Reconcilability with reinstatement,

³⁰³ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27.

³⁰⁴ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 27.

³⁰⁵ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 26.

³⁰⁶ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 28.

³⁰⁷ *Minister of Defence v SA National Defence Force* (unreported) case number 161/11 ZASCA 110 of 30 August 2012 para 23.

is of such public importance that it requires the attention of the highest court in South Africa.³⁰⁸

SARS contended that the reinstatement part of the arbitration award was unreasonable and must therefore be dismissed. The court questioned if the reinstatement of Mr Kruger, was a decision that a reasonable decision-maker could have made in the circumstances.³⁰⁹ SARS argued that, attributable to standing as an organ of the State and that Mr Kruger was guilty of racial harassment, SARS had a duty to promote the rights contained in the Bill of Rights such as the worker's right to equality and dignity.³¹⁰ SARS stated that racial harassment violated these rights and therefore a continued employment relationship will be intolerable.³¹¹ Mr Kruger argued that SARS could not prove that the trust relationship between employee and employer was deprived irretrievably by using the term *kaffer* in the manner that he did.³¹²

The court established that the racial statements of Mr Kruger should have led the arbitrator to the conclusion that reinstating Mr Kruger would not be a satisfactory remedy³¹³ in terms of section 193(1) and 193(2) of the LRA.³¹⁴ The court further confirmed that this does not mean that all cases involving using racial slur by an employee, will always result against the reinstatement of that employee.³¹⁵ It is possible for an employee to illustrate that the employment relationship remains tolerable despite the racial harassment that occurred, but the employee would

³⁰⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 32.

³⁰⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 36.

³¹⁰ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 39

³¹¹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 39.

³¹² *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 40.

³¹³ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 46.

³¹⁴ Section 193(1) - 193(2) of the *Labour Relations Act* 66 of 1995.

³¹⁵ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 43.

include an immense involvement in accounting for the offensive nature of the racial slur or insults.³¹⁶

In the case of Mr Kruger, he failed to accept his racist conduct or to show remorse by apologising to his African co-employees or truly participate in any rehabilitation programmes that could assist him to embrace constitutional values, such as equality, non-racialism and human dignity.³¹⁷ The court established that such disregard for equality, human dignity and racial hatred, displayed by an employee, would ordinarily render the relationship intolerable.³¹⁸ It is a rejection of the notion of equal treatment and human dignity of African people to refer to them as *kaffers*, and Mr Kruger's statements initiate "racial minefield in the workplace that is ever ready to explode at the slightest provocation".³¹⁹

The court upheld the appeal and dismissed the part of the arbitrator's award in terms of which Mr Kruger was reinstated. The court placed immense emphasise on equality as the policy consideration that influenced its decision to disregard the acquiescence of the judgment of the LAC by SARS and opt for the non-enforcement of peremption even though the requirements for the doctrine of peremption were met.

4.6 Conclusion

It is apparent from this judgment that a court will disregard the doctrine of peremption if there are more serious constitutional values, such as equality, non-racialism and human dignity present. In matters involving racial conduct, these values are undermined, and the dignity of the affected person is harmed. In a country such as South Africa, with a tainted history of racial discrimination, the Constitutional Court emphasised that a central purpose of the prohibition of unfair discrimination is to address "patterns of group disadvantage" in the South African

³¹⁶ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 43.

³¹⁷ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 45.

³¹⁸ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 46.

³¹⁹ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 55.

community.³²⁰ This exhibits the court's serious commitment to the constitutional duty placed on presiding officers to enforce these values in South Africa. The decision of the court not to merely accept that peremption occurred, failing the right to appeal, indicates that transformative constitutionalism requires more than just the formalistic application of rules or legal doctrines.

McConnachie states that "slavish application of rules can be contrary to transformative aims, so too can unconstrained discretion".³²¹ In deciding if the constitutional value of equality was infringed a judgment call remains that has to be fact specifically. The interest of justice policy may be implemented to aid a court in deciding if the infringement of the right to equality will justify the non-enforcement of the doctrine of peremption. As mentioned in the cases discussed above, once persons are treated unfairly, based on the listed grounds or any arbitrary ground, their dignity is afflicted.

According to Vice³²² the rights to dignity and equality can therefore in principle be balanced. A party may need to be infringed in a situation of conflict. Mogoeng J clearly states his dismay at presiding officers who redeploy their attention from racism to legal technicalities in typical cases where racial harassment is central to the dispute in question.³²³ If he would strictly apply the doctrine of peremption, it would emphasise the legal doctrine, a legal technicality, ignoring the infringement of equality that occurred in the matter.

³²⁰ Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) para 27.

³²¹ McConnachie 2015 *SAJHR* 524.

³²² Vice 2015 *CCR* 135.

³²³ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* 2017 38 ILJ 97 (CC) para 10.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study sought to address the extent various policy considerations influence the enforcement of the doctrine of peremption, once an arbitration award or labour judgment was acquiesced. The doctrine of peremption originates from the principle that no party in legal proceedings may be allowed to opportunistically endorse two conflicting positions, indicating approbate and reprobate. The broader policy consideration, instituting peremption, is that a litigant who clearly abandoned the right to appeal, through their outward conduct, should be held to their decision. This would ensure finality and legal certainty in litigation matters. The doctrine of peremption finds more frequent applications in labour law, attributable to the nature of the remedies provided for labour disputes, such as reinstatement, re-employment and compensation. Attributable to the serious implications of a successful reliance on the doctrine of peremption where the party will lose their right of appeal or review, the courts established strict principles, relevant in peremption matters. Chapter 2 explains how the courts applied and implemented these principles, determining if there are factors leading a presiding officer to conclude, after analysing the outward conduct of the party, that there was acquiescence in the judgment.

An investigation into the cases where peremption was proved, affirmed that the courts incline to disregard peremption under certain conditions. The constitutional duty of presiding officers to entrench values, such as equality and non-racialism combined with decisions in the interest of justice, are considered as the most important policy issue, militating against the enforcement of peremption.

5.2 Summary and concluding remarks

South African courts and legislature leave concepts open for meaning to be inserted by courts and tribunals. The interpretation to policies, such as the interest of justice, equality and non-racism, are no exceptions. Courts may consider International lawinstruments such as the ILO, for guidance when interpreting concepts and

policies, instead of a moral assessment only, of each case's facts. When courts decide on cases based on facts, an accepted notion exists, allowing a court or tribunal some discretion to exercise their own judgement. Factors, such as social justice, dignity and equality should be considered to reach a finding, in the interest of justice.

Social justice became a profound influence within the broader concept of justice, with a particular function in South African Labour Law. Social justice seeks to achieve more than merely formal justice in the workplace, by addressing social inequalities influencing vulnerable groups within the labour force. Social justice in the workplace can be observed as the realisation of labour rights created under the LRA, by every worker in the South African labour market. The constitutional values that underpin South Africa's Labour Laws, signify the LRA and EEA. Section 3 of the LRA renders this clear by stating that:

- Any person applying this Act must interpret its provisions:
- (a) to provide effect to its primary objects;
 - (b) in compliance with the Constitution; and
 - (c) in compliance with the public International law obligations of the Republic.

The Constitutional Court also agree that the correct approach to statutory interpretation in employment matters is the purposive approach. The contextual interpretation in employment rights are of extreme importance. Presiding officers should be mindful of the Bill of Rights: The expressive language used to describe the right or value, the historic content of right, and the meaning and purpose of additional associated rights and values.

As can be observed from SARS and SANDF cases, deciding if it will be in the interest of justice to disregard peremption in matters where it was successfully proven, remain a discreet decision of the presiding officer. Although certain indicators or factors can be endured from these cases, as the court's interpretation of justice, these remain factors and not facts.

This study identified crucial factors that could influence the decision of a presiding officer to conclude that it will not be in the interest of justice to enforce the doctrine of peremption. These can be summarised as follows:

1. When there is little or no prejudice to the other litigant if peremption is disregarded, it will not be in the interest of justice if important legal issues, such as the ability of the Defence Force to discipline their members or racism in the workplace, cannot be decided on, attributable to the strict enforcement of the doctrine of peremption.

The interest of justice must incorporate the achievement of social justice in the workplace. This can be conducted by incorporating various employee-employer participation mechanisms with the power to increase the realisation of constitutional values, such as human dignity and equality within the wider concept of justice. If a litigant is unduly deprived of the right to take a matter on appeal or review, which they could do under different circumstances, can hamper the achievement of social justice by limiting their rights. Equality laws can assist promoting social justice, but the achievement thereof cannot be reached if the equal treatment of employees is performed without the recognition of their dignity.

2. Justice always incorporates other constitutional rights and values, such as the right to equality and dignity, which participation is crucial in labour related matters. The duty placed on the courts to uphold values, such as human dignity, equality and non-racialism would establish that it is in the interest of justice to disregard the doctrine of peremption if any of these values or rights were infringed upon.
3. Matters that raise prominent issues beyond the interest of the litigants involved, affecting the broader society, would be in the interest of justice if the court is granted the opportunity to have a matter decided on appeal rather than being barred by the doctrine of peremption. The interest of justice will always have a direct and indirect relevance to the principles of dignity, equality and freedom.

4. Racisms remains a challenge in social and labour related matters in South Africa. The harmful impact of racial harassment in the workplace is detrimental to the delicate social framework of South Africa; the courts always treat it in the most serious manner to endeavour to effect social cohesion, social justice and equality in the South African labour market. The SARS case dealt specifically with a matter where a litigant should have been dismissed for racial comments towards a fellow employee, considering the view of the courts that racial harassment should be accounted for through dismissal. The Constitutional Court established that attributable to the constitutional values of equity, dignity and non-racism should be upheld by the South African courts; it would not be in the interest of justice if the doctrine of peremption is enforced. The Constitutional Court emphasised the fact that a central aim of the prohibition of unfair discrimination is to address "patterns of group disadvantage" repressing the achievement of equity within the South African community. To assess if the right to equality infringed the primary focus of a racial harassment or unfair discrimination enquiry in labour matters, must indicate the effect that the alleged harassing conduct had on the complainant.

It is submitted that the effective enforcement or non-enforcement of the doctrine of peremption in labour law matters, remain a factual determination to be conducted by the presiding officer of each individual case. The courts established firm and effective requirements for determination if the conduct of the unsatisfied litigant displayed unequivocal conduct, incompatible with intentions to lodge an appeal or apply for review. The courts do not have the same established policies for determining circumstances that would qualify the choice of easing the doctrine of peremption, opting for its non-enforcement. It became apparent in this study that the courts have a duty to uphold the values of the Constitution when encountered with labour disputes. In matters where these constitutional values are undermined, the doctrine of peremption will be disregarded to ensure that transformative constitutionalism is practised in labour law. This requires more than just applying the formalistic rules or legal doctrines. The flexibility of a policy, such as interest of justice, render it possible

for courts to apply the law within the factual, social and economic context of each case.

The effects of policy considerations on the doctrine of peremption in labour law matters are twofold. First, it can affect legal certainty where not all cases where courts established that a litigant acquiesced in the judgment will be treated alike and the doctrine of peremption enforced. The policy notion for the enforcement of peremption is part of the broader policy will be departed from, indicating that there must be finality in litigation. Courts have the discretion to disregard the enforcement of the doctrine of peremption if the interest of justice are not be served. It is the presence of the Constitutional Court's duty to uphold constitutional values.

Secondly, it assists labour law to persevere the fast changing social and economic environment wherein it functions, enabling courts to disregard legal doctrines, such as peremption, in cases where the strict enforcement thereof would cause unattainable results on social justice in the workplace.

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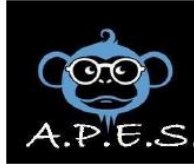
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