INTERPRETING THE LABOUR RELATIONS ACT IN LINE WITH THE CONSTITUTION

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by

Thabo Pheto

Supervisor: P Myburgh

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1 Introduction

1.1 Problem Statement

It is evident from section 8 of the *Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution)* that every law, including labour rights should be interpreted and applied in accordance with the Constitution. Moreover, section 3 (b) of the *Labour Relations Act, 66 of 1995 (hereinafter referred to as the LRA)* directs any person applying the Act to interpret its provision amongst others in compliance with the Constitution. In terms of the latter, we must comply with section 39 when we interpret the bill of rights.

In addition, section 23 of the Constitution guarantees everyone the right to fair labour practices and the recent decision in *National Union of metalworkers of SA v Bader Bop (Pty)*[1] is a clear illustration of the principle of Constitutional Supremacy. Section 2 of the Constitution stipulates that the Constitution is the Supreme law of the Republic. Therefore, any law or conduct, which is inconsistent with it, is invalid and the obligations imposed by it must be fulfilled.

Notwithstanding above, a problem may arise as a result of the strict application of the principle of Constitutional Supremacy. This problem relates to the question as to whether a court should give more weight to the ordinary, grammatical meaning of the legislation or whether the Constitution must inform the way we interpret legislation. To answer the above question a study will be undertaken to investigate the methods which the courts adopt to interpret labour legislation.
The research will also focus on the effects of constitutionalising labour law and the impact the Superior Courts Bill will have on the current labour enforcement institutions. Furthermore, a comparative study will done to determine the applicability of the principle of justiciability in the

[1] *National Union of Metalworkers of SA v Bader Bop (Pty)* 2003 ILJ 305 (CC).

South African legal system as opposed to that practised by other commonwealth countries.

1.2 The Constitutional Court Shaping of a South African Labour Jurisprudence

Cheadle *et al* [2] *(hereinafter referred to as Cheadle) is* of the view that *the* CONSTITUTIONAL court has embarked on the process of constitutionalising labour law. In support of his argument, the author referred to *Bader Bop* above where the trade union represented a minority of the employer's workers. The union sought organisational facilities including the right to shop steward representation in the workplace.

The employer refused. After referring the dispute to conciliation, the trade union gave notice of its intention to strike over the issue. The employer sought to interdict the strike because that it was unlawful. The employer argued that the Act confers the right to workplace representation to majority trade unions only, and a minority trade union could not demand nor strike over workplace representation. The Labour Court refused to grant the interdict.

On appeal, the majority of the Labour Appeal Court held that it was unlawful for a minority trade union to strike over organisational rights. The trade union appealed against the decision to the Constitutional Court. The Constitutional court upheld the appeal. Judge O'Regan gave the judgment on behalf of the 'majority'. Judge Ngcobo concurred on the order but not on the approach adopted by the majority.

The court argued that the interpretation of the LRA[3] advanced by the majority in the Labour Appeal court amounted to a limitation of the right to strike. It argued that there was no justification given for the limitation

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2 Cheadle *et al Current Labour Law* 95.

and on that, ground alone the Constitutional court should have upheld the appeal. However, the court decided to approach the issue from a perspective of the interpretative principle of Constitutionality.
That principle directs that whenever there are two conflicting interpretations of a statute, the one that accords more with the Constitution should be preferred unless there is a clear legislative intention to limit the right. The court held, somewhat charitably, that the LRA was capable of being understood in the manner put forward by the majority of the LAC. The court had then to determine whether the LRA could sustain a construction that did not offend the right to strike. It approached its task by first commencing with an analysis of section 23 of the Constitution.

According to the court, the rights in section 23 had to be understood to be promoting a fair working environment. It further argued that given the dynamic nature of the wage-work bargain, courts had to be careful when interpreting section 23 to avoid setting- in Constitutional concrete, principles governing the bargain, which may become obsolete or inappropriate as social and economic condition changes. The court held that the right to strike is of significance for two reasons:

Firstly, it is of importance for the dignity of workers who in our constitutional order may not be treated as employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. The court outlines the relevant statutory provision, for example, section 1 of the LRA makes it clear that the purpose of the LRA is to give effect to Constitutional rights and to South Africa's public international law obligations.

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[3] *National Union of Metalworkers of SA v Bader Bop (Pty)* 2003 ILJ 305 (CC).

According to Cheadle *et al*[4], (hereinafter referred to as Cheadle) Judge O' Regan identified two key International Law Organization Conventions for the purposes of this case namely, Convention 87 (Freedom of Association and protection of the Right to organize) and convention 98 (Right to organize and collective Bargaining.) From the jurisprudence developed by two supervisory bodies of the ILO (the freedom of Association Committee of the Governing body, and the committee of Experts) the court identified two principles relevant to the case. The first principles arose from the freedom of association.[5]

An important aspect of freedom of association is the right of workers to choose the trade union they wish to join. A 'majoritarian' system of allocating rights is not inconsistent provided that minority trade unions are permitted to exist, organize members, represent members in relation to individual grievances, and to challenge the majority status of recognized trade unions. The second principle, which the court identified, concerns the right to strike over collective bargaining issues.

These principles inform the constitutional rights to freedom of association and the right to strike. The first principle is closely related to the right to freedom of association entrenched in section 18 of the bill of rights.[6] The court said:

> The rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.

The second principle is entrenched in section 23 (2) (c) of the Constitution. The court held that to prohibit the right to strike in relation to a demand that itself relates to a fundamental right not protected, as a matter of right in the legislation would constitute a limitation of the right to

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4 Cheadle *et al Current Labour Law* 95.
5 See discussion of Bader Bop on page 2.
6 S 18 and 23 of the1996 Constitution.

strike in section 23. The court held that the provisions of part A of chapter 3, which regulate organisational rights, could yield a construction that permitted minority trade unions to strike over organisational rights.

The majority of the court finds that the right to freedom of association and the right to form and join trade unions and to organise include the right of workers to be represented by minority trade unions. The court makes it clear that this is not a right but a freedom. It remarked as follows:

> The interpretation adopted does not mean that minority trade unions will be entitled to have their shop stewards recognized. It means only that the recognition of their shop stewards is a legitimate subject matter for bargaining and industrial action. Employer will not be obliged to recognize shop stewards for all or any of the purposed contemplated in Section 14.
>
> The precise purposes, for which recognition is granted, if granted at all, will be a matter for the process of collective bargaining to resolve. The court applied the principle of Constitutionality, and upheld the appeal.

In my opinion, a threshold, which favours majority unions, would force the minority unions to either join forces with majority unions failing which their influence will be diminished at the workplace. Thus, statutory rights should also be extended to minority unions.

Cheadle argument that the parties are free to achieve organisational rights in a collective agreement backed by the right to strike is not convincing. My argument is that it would be easy for the employer to refuse to grant minority unions' organisational rights knowing very well that legislation precludes minority unions from exercising those rights.

Another example, which affirms the influence of the Constitutional Court on labour law, is the judgment in *South African Defence Union.*[7] Cheadle referred to the first *South African National Defence Union V Minister of Defence & another*[8] where the constitutional court held that soldiers were akin to employees and accordingly workers for the purposes of section 23 of the Constitution.

Accordingly, provisions in the *Defence Act*[9] and its regulations, which prohibited soldiers from belonging to trade unions and from engaging in public protests, were declared to be invalid. In response, the Minister promulgated a set of regulations that provided for the registration and recognition of trade unions and that established a 'military bargaining council' and a 'military arbitration board' for the resolution of disputes.

The trade union was registered in terms of the regulation and subsequently admitted to the military bargaining council. During the process of establishing the bargaining council and the initial skirmishes, the department proceeded with a review of personnel policies. The trade union wished to negotiate these policies. After scheduled meetings of the military bargaining council were called off, the trade union wrote a letter to the minister threatening labour unrest. The minister responded by demanding an unconditional withdrawal of the threat and a commitment to refrain from threatening industrial action.

Negotiation with the trade union would be suspended until they comply with the demand. Approximately a month later, attorneys for the trade union replied giving the unequivocal undertaking, but demanding that negotiations concerning the personnel policies should commence immediately. By the time the attorneys gave the unequivocal undertaking, the personnel policies had been finalised an approved by

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7 *South African National Defence Union v Minister of Defence* 2003 (3) SA 239 (CC).

8 *South African National Defence Union v Minister of Defence* 1994 (4) SA 469 (CC).

9 *Defence Act* 44 of 1957.

the Department. The unilateral implementation of the policies further fuelled the fire. The Minister replied to the attorney's letter stating that the Minister was conditionally prepared to resume negotiation with the trade union.

The conditions were that the parties enter into a process of mediation with the view to conclude an agreement on the manner, and form of collective bargaining in order to avoid the conflict and complications generated by the present style of bargaining.

The trade union agreed to the conditions but insisted on conditions of its own. It insisted on collective bargaining collateral to the mediation process and an undertaking on the part of the Minister and the department not to unilaterally implement any polices that impact on the union or its members. The Minister was not prepared to engage in collateral negotiations, and so, the trade union applied to the High Court for relief. The trade unions case was that section 23 of the Constitution and the various provisions of the Defence Act and its regulations imposed a duty on the employer to negotiate in good faith and to deadlock.

The critical question for the determination of the application was the Constitutional question – whether section 23 (5) imposed a duty to bargain on employers. The court commenced its analysis by comparing the wording of section 23 subsection (5) of the 1996 Constitution – 'the right to engage in collective bargaining' – with the wording of its predecessor in section 27 subsection (3) – 'the right to bargain collectively'. It was argued that the difference in wording pointed to a distinction between a freedom and a right.

A right imposes a corresponding duty on another to ensure a protection of a right. A freedom involves an absence of interference of constraints. To illustrate the above distinction, Cheadle argues that if section 23 subsection (5) imposed a duty to bargain on the state, the refusal to

bargain with a sufficiently representative trade union may constitute a contravention of that right to engage in collective bargaining. Similarly, if Section 23 subsection (5) Guarantees a freedom to bargain collectively, the legislation that tries to prescribe it would constitute an infringement of the freedom to bargain.

The above demonstrates that section 23 subsection (5), unlike its predecessor[10] does not impose a duty on the employer or state to bargain collectively.

The distinguishing word between the two sections, i.e. section 23 (5) and 27 (3) is 'engage'. According to the concise Oxford English Dictionary, the latter means to participate or be involved in. I am of the view that the legislature included the word 'engage' in section 23 (5) deliberately. His intention was to encourage the parties to bargain in an environment devoid of compulsion. In reference to Wailer, Cheadle[11] argues that our adversarial court system is incapable of arriving at a proper balance between competing political, democratic and economic interest that are the stuff of labour legislation.

It is evident from above that Wailer discourages the constitutional court to preside over cases, which involve dispute about collective bargaining. The author's fears relate to the adversarial system found in Canada and the fact that in such cases the court applies Constitutional principles. Another labour matter, which the Constitutional court adjudicated on, is *National Education Health and Allied Workers Union V University Of Cape Town.*[12] The facts of the latter were as follows: The University retrenched its cleaners and contracted cleaning contractors to do their work instead. Those contractors offered the retrenched cleaners employment at lower wage. The union declared the dispute and referred it to conciliation and thereafter to the Labour court. The union argued

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10 Section 27 (3) of the *Interim Constitution.*
11 Cheadle *et al Current Labour Law* 99.

that the transaction amounted to a transfer of a going concern and, accordingly, subject to section 197 of the LRA, which provides for the automatic transfer of employees to the "new employer" on the same or similar terms and conditions of employment.

The labour court found that the transaction did not amount to a transfer of a going concern. On appeal, the majority of the labour appeal court departed from a line of decision in *Schutte & Others v Power-plus Performance (Pty) Ltd &* another[13] and *Foodgro, a Division of a leisure-net Ltd v Keil* and held that, for the purposes of section 197, a business is transferred as a "going concern" only if its 'assets' including all or most of its employees are transferred to the "new" employer and that the "old" and the "new" employer agree to the transfer of the employees.

In contrast, the labour court in *Schutte* held that determining whether the whole or part of business has been transferred is a matter of substance, not form, and that the court must weigh the factors that are indicative of a transfer against those that are not. Thus, no single fact is conclusive in itself.

The court further regarded those aspects of the agreement, which dealt with transfer of employees, stock and equipment and sharing of premises as indicative of the fact that a transfer had taken place. On the other-hand, in *Foodgro,* the Labour Appeal Court gave the impression that the court endorsed the view that the contract of employment of affected employees transferred automatically whenever a transfer of business took place in circumstances other than those of insolvency, regardless of whether the employer to which the business is transferred wished to employ the employees of the 'old' employer.

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

13 *Schutte v Power plus performance (Pty) Ltd* 1999 20 ILJ 655 (LC); *Foodgro A division of leisurenet (Ltd) Keil (Pty)* 1990 ILJ 2521 (LAC).

The 'trade union' appealed to the Constitutional court on the ground that the interpretation adopted by the majority in the labour appeal court infringes the right to fair labour practices in section 23 (1) of the Constitution. The Constitutional Court, in a unanimous judgment given by judge Ngcobo, commenced the enquiry with the Constitutional right to fair labour practices in section 23. The court advanced the following propositions concerning that right:

The fairness of a labour practice depends on the circumstances of a particular case and involves a value judgment. The concept of a fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decision of specialist tribunals. In giving content to the concept of a fair labour practice, the specialist tribunals must seek guidance from domestic and international experience.

The court argued that the Constitutional Court has a crucial role in ensuring that the rights guaranteed in section 23 subsection (1) are honoured. It also has an important supervisory role to ensure that legislation giving effect to Constitutional rights is properly interpreted and applied. The focus of the right is the relationship between a worker and the employer and the continuation of that relationship on terms that are fair to both. Thus, the interests of both parties must be balanced.

The court proceeds to note that the LRA requires that it be interpreted in compliance with the Constitution and with South Africa's public international law obligations. The court draws special attention to the fact that security of employment is a core value of the LRA.

The court then analysed section 197 of the LRA in the light of comparative legislation,[14] case law and commentary on legislation. It held that the thrust of the latter is to find a balance in a transfer of a

business between the conflicting interest of the employers whose interest are in profitability, efficiency, survival or disposability of the business, and workers, whose interests area is job security.

This means that the transferring employer is obligated to retrench its employees. This threatens the job security of employees and at the same time increases the costs of transfer. The court argued that section 197, relieves the employers and the workers of some of the common law consequences. Its purpose is to protect the employment of workers and to facilitate the sale of a business.

The next step in the court's reasoning was to analyse the provision of section 197 of the LRA. The Labour Appeal Court was divided on the primary purpose of section 197. The majority held that the primary purpose of the above – mentioned section is to facilitate the transfer of businesses. The minority maintained that the primary purpose was to protect workers. The Constitutional Court argued that the section pursued both purposes. Applying a purposive approach to the interpretation of the section 197, the court concluded that a transfer of a business as a going concern did not require the transfer of most or all employees and that the transfer of employees was not dependent upon the consent of the new employer.

The above decision has three important Constitutional aspects: [15]

Firstly, it adopts an explicitly purposive approach to the interpretation of the LRA. The author argues that section 3 of the LRA bears testimony to the purposive approach in that it explicitly requires a court to interpret the provisions of the Act in compliance with the Constitution. Cheadle however, argues that in practice, the labour court seldom approaches

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[14] *The EEC acquires Rights Directive* 77/187/; *UK Transfer of Undertaking (Protection of Employment) Regulations*, 1981.

[15] Cheadle *et al Current Labour Law* 93.

interpretation questions by explicitly defining the purpose of the provisions of the Act.

Secondly, the court explicitly requires the court and tribunals to seek guidance from public international law and comparative jurisprudence in determining the content of the constitutional right to fair labour practices.

The third and controversial aspect of the decision is the court's view of its role in the determination of fair labour practices. The court held:

[The court] has a crucial role in ensuring that the rights guaranteed in S 23 (1) are honoured. In the *first Certification judgment*[16] the court remarked as follows in relation to Section 23:

> The primary development of this law will, in all probability, take place in the labour court in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers entrenched in Section 23 are honoured.

Although these remarks were made in the context of collective bargaining, they apply no less to Section 23 (1).

It is clear from *NEHAWU v university of Cape Town*[17] *(hereinafter referred to as UCT)* that there has been a shift by our courts from the orthodox 'literalist –cum- intentionalist' model of statutory interpretation to a purposive approach. The former approach decrees that the words of a statute are to be given their ordinary, grammatical meaning, unless this would lead to patently absurd or unjust result, in which case certain contextual aids may be invoked. According to Du Toit *et al, (hereinafter referred to as Du Toit)* this approach has been criticised for its failure to take into account the 'legal – political activity' involve in the process of

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16 Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 (4) 7344.

17 See discussion of NEHAWU on page 12.

statutory interpretation. In support of his argument, Du Toit referred to Du Plessis and Corder[18]

The latter argues that there is no such thing as a clear and unambiguous language in the abstract or prior to its meaning having been established. According to this, authors the language of a statute can in other words only be said be clear once its meaning together with its intra – and extra - textual structure has been determined.[19]

To supplement the forestated shortcomings of the literalist -cum-intentionalist approach, Du Toit referred to Devenish. The latter urges the courts to embrace a value- coherent approach. He states that:

> A purposive methodology looks beyond the manifested intention. The purposive theory has its ratio in the fact that a statute is a legislative communication between the legislation and the public that is inherently purposive". The interpreter must endeavour to infer the design or purpose, which lies behind the legislation.[20]

The decision in *UCT above* illustrates the application of the purposive approach. The court held that the latter approach is in the line with section 3(b) of the LRA. The effect of the court's decision is that when a business or part of a business is transferred as a going concern from one employer to another, the new employer is obligated to take the old employees into its service, whether he likes it or not.[2121]

1.2.1 The 'Purposive approach'

In this regard, the Constitutional court has approved the statement by the Canadian Supreme Court in *R v Big M Drug Mart Ltd.*[22] In *casu,* the court held that the meaning of a right or freedom guaranteed by the

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

19 Du Toit *et al Labour Relations* Law 59.

20 De Waal *et al the Bill of Rights Hand Book 131.*

21 See S 197 of the LRA as amended.

22 De Waal et al *The Bill of Rights Hand Book* 129.

charter was to be ascertained by an analysis of the purpose of such a guarantee. Moreover, the purpose of the right or freedom in question should be sought by reference to the specific right or freedom.

Notwithstanding the above, the court in *S v Zuma*[23] warned against underestimating the importance of the literal meaning of the text, and held that if the language indicates a general resort to 'values,' the result is not interpretation but divination. According to the court, a Constitution, which embodies fundament principles should as far as its language permit, be given a broad construction.

For the reasons stated above the court stated that the starting point for determining the meaning of a provision of the Bill of rights is the text itself. This means that the clear language used by the legislature in a provision should be considered first before we resort to its underlying values. By contrast, De Waal *et al (hereinafter referred to as De Waal)* argue that Constitutional disputes can seldom be resolved with reference to the literal meaning of the Constitution's provision alone. According to him the provisions of the Constitution embodies a complex framework for the exercise of state power.

This means that Constitutional interpretation involves more than the determination of the literal meaning of a particular provision. The author further argues that even when there is an evident literal meaning that can be given to a Constitutional provision, the proper interpretation of the provision may entail looking beyond that meaning.[24]

In S v Makwanyane,[25] the Constitutional Court adopted the following approach to the interpretation of the Bill of Rights:

> Whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights

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23 *S v Zuma* 1995 2 SA 642 (CC).
24 De Waal *et al the Bill of Right Hand Book* 129.
25 *S v Makwanyane* 1995 (3) SA 391 (CC).

> should be] 'generous' and 'purposive' and' give expression to the underlying values of the constitution.

In the above - mentioned case the court considered the literal interpretation approach. However, it held that this approach is not necessarily conclusive. Thus, interpretation of the text must accord with the underlying values of the Constitution. On the other hand, in Zuma the court emphasises the literal meaning of the text.

According to De Waal,[26] the purposive interpretation tells us that once we have identified the 'purpose' of a right in the Bill of Rights we will be able to determine the 'scope' of the right. For example, a law that harms Y will not infringe a right that has a purpose of protecting values or interest X Thus, the purposive approach to interpretation requires a value judgment to be made about which purposes are important and are to be protected by the Constitution and which are not. We can illustrate the above by taking section 16 of the Bill of Rights as an example.

Section 16(1) provides that everyone has a right to freedom of expression. One can argue that section 16 encourages political debate. If that were so, then no purpose would be served by protecting pornography from censorship laws. De Waal argues that if, however, the right to freedom of expression is also underpinned by the values of personal self-fulfillment and autonomy[27] then pornography may well fall within the scope of protection afforded by Section 16.

In my opinion, the scope of the right or value protected in the Bill of Rights does not cover values, which are *contra bonos mores*. However, Chief Justice Mahomed cautioned in *Ex parte Attorney- General, Namibia*[28] that this value judgment should not be made on the basis of a judge's personal values. The court remarked:

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26 De Waal *et al the Bill of Rights Hand Book* 131.

27 De Waal *et al the Bill of Rights Hand Book* 131.

28 *Ex parte Attorney – General, Namibia; In Re Corporal Punishment by Organs of State* 1991 3 SA 76 (NMSC).

> Mohammed CJ argues that the value judgment must be objectively articulated and identified and regard must be had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people expressed in its national institutions and constitutions.

and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibian's share. The court further said:

> This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a form of punishment some decades ago may appear to be manifestly inhuman or degrading today? Yesterday's orthodoxy might appear to be today's heresy.

De Waal states that the values referred to should not be equated with public opinion. He cited the decision S v Makwanyane[29] where the Constitutional court held that while public opinion may be relevant, it is itself in no substitution for the duty vested in court to interpret the Constitution. Therefore, the court's duty is to protect the right of minorities who cannot protect their right through the democratic process. In addition to the above, the court in the *Christian Education of South Africa v Minister of Education* remarked that:

> It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regards as unusual, bizarre or even threatening.[30]

In view of the above, it is clear that contextual interpretation is important for the interpretation of any text, whether it is a contract, the provision of a statute or the Constitution. De Waal[31] argues that the context of the Constitutional provision is essential for a court to make value judgments required by the purposive approach to interpretation.

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29 See discussion on page 16 above.

30 De Waal *et al the Bill of Rights Hand Book* 132.

1.3 The Primary objective of LRA

According to Du Toit,[32] the purpose of the LRA is to fulfill the following primary objects:
To give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

To give effect to the obligation incurred by South Africa as a consequence of its membership of the International Labour Organisation and to provide a framework for collective bargaining and the formulation of industrial policy by trade unions, employers and employers' organizations. According to Du Toit,[33] the fundamental rights contained in Chapter 2 of the Constitution are protected from encroachment by either the legislative or executive organs of the government.

These include political and civil rights,[34] socio-economic and cultural rights and environmental rights. Included amongst the socio-economic rights are the labour relations rights set out in section 23 of the Constitution. According to the author when the courts apply the Act it will have to distil the values underlying these rights, and then interpret the Act in a way that gives effect to them.

Du Toit argues that the primary consideration must be given to the collective rights of employers and employees, subject to the individual's rights to fair labour practices. However, he warned that individual rights should not be disregarded altogether because Section 39 (2) of the Constitution calls for an infusion of all constitutional values into legal interpretation.

Section 39 (2)[35] provides that–

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31 De Waal *et al the Bill of Rights Hand Book* 132.
32 Du Toit *et al Labour Relations Law* 62.
33 Du Toit *et al Labour Relations Law* 62.
34 These rights were traditionally known as first, second and third – generation rights.
35 *Constitution of the Republic of South Africa Act* 108 of 1996.

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights.

Du Toit is of the view that equal prominence should be given to both collective and individual rights and values. But where two competing values dictate mutually destructive interpretation of the Act, the interpreter will be entitled to tip the balance in favour of collective values of section 23.

2 Interpretation of the LRA in Compliance with the Constitution

Du Toit[36] states that the Act must be interpreted in compliance with the Constitution. This implies that all laws which prima facie violate the provisions of the Constitution, but which are reasonably capable of more restrictive interpretation consistent with the Constitution, should be construed accordingly. The aim should be to preserve, as far as possible, the validity of laws, which *prima facie* violates the Constitution.

In addition, section 3(b) is applicable only where a provision of the Act prima-facie violates the Constitution. Where a provision is neutral vis-à-vis the Constitution, that is, prima facie, it does not involve a violation of the Constitution, section 3(b) has no application. But section 3 (a) read with section 1(a) continues to play a role. It requires a value-based interpretation even of provisions, which are prima facie Constitutional.

2.1 Application of section 3(b)

To give effect to the requirement of section 3(b), the person interpreting the Act has first to determine whether or not the provision in question constitutes, prima facie, a violation of any one or more of the provisions of the bill of rights. For example, the rights of equality, privacy, freedom

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36 Du Toit *et al Labour Relations Law* 66.

of expression et cetera. In determining, whether or not any one or more of these rights are violated, the interpreter will have to determine the ambit of the right in question. The directions of how the rights contained in the Bill of rights are to be interpreted should guide him.[37]

3 Enforcement Institutions

3.1 Introductory remark

The discussion will focus on the enforcement institutions, which plays a role in the adjudication of labour matters. These institutions are the CCMA, Bargaining council, labour court, the Labour Appeal Court and the Constitutional Court. Our discussion will be limited to the extent these institutions interpret the Constitution and deal with "Constitutional matters". The chapter will be concluded by the discussion of the Superior Court Bill on the adjudication of labour issues.

3.2 The Commission for conciliation, mediation and Arbitration (The CCMA)

The CCMA plays a central role in the dispute resolution process. According to Grogan, [38]all disputes not handled by private or accredited bargaining councils or agencies must be referred to the CCMA for Conciliation before they can be referred to arbitration or adjudication. The CCMA may also give accreditation to private agencies to perform any or all of its functions. Its function is quasi-judicial.

The CCMA functions are set out in Section 115 (1) and (2) of the LRA. Its main function is the resolution of disputes by Conciliation and arbitration. In addition to its dispute resolution function, the CCMA is also charged with advisory functions, the overseeing of union ballots where requested, the publication of guidelines, assisting employers and

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[37] See discussion on page 16.

employees with establishing collective bargaining structures, internal disciplinary procedures, affirmative action programmes, dealing with sexual harassment, and workplace restructuring. The CCMA may also publish rules regulating its own procedures.

The CCMA may at the request of an employer, and with the employees consent supply a commissioner to conduct a pre- dismissal arbitration to establish whether the employer is guilty of misconduct and, if so, the sanction to be applied.

3.3 Bargaining councils

According to Du Toit,[39] section 29 of the LRA provides that application for the registrations of the bargaining councils must be forwarded to NEDLAC. The latter may demarcate the sectors and areas for which bargaining councils should be registered. Participation in bargaining councils is voluntary but the Act seeks to promote the development of the bargaining council system through the following strategies:

In terms of section 32(5) of the LRA, the Registrar can register a bargaining council if the parties to the council are deemed to be sufficiently representative. Secondly, the Minister has the discretion to extend bargaining councils agreement to non-parties if the parties are sufficiently representative, and when he is satisfied that the failure to extend the agreement may undermine bargaining at the sectoral level or in the public service as a whole. Du Toit states that the LRA[40] provides some inducement to participate in bargaining councils; for example, in terms of section 28 subsection (i) bargaining councils has the power to determine that certain matters may not be the subject of a strike or lock-out at the workplace level.

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38 Grogan *Workplace law* 382.
39 Du Toit *et al Labour Relations Law* 34.
40 See S 28(1), 18, 28(j), and 84(2) of the LRA.

Bargaining councils may alter the thresholds at which trade unions may acquire organisational rights, and add to the issues over which workplace forums are consulted. In addition, section 19 of the LRA provides that union parties to a bargaining council automatically acquire organizational rights in respect of access and stop-order facilities at all workplaces within the scope of the council irrespective of their representativeness[41] in any workplace.

Moreover, sections 28(h), 51 and 52 of the LRA add to the status of bargaining councils. In terms of the former section, bargaining councils may develop proposals for forum on policy and legislation that may affect the sector and area. The author states that these links bipartite policy formulation at the sector level in bargaining councils with the tripartite policy formulation at national level in NEDLAC. According to section 51 and 52 respectively, bargaining councils may apply to the CCMA for accreditation as dispute resolution agencies. .

3.4 Labour Court

Du Toit states that section 151[42] establishes the Labour Court as a court of law and equity with authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to a provincial division of the high court. The President appoints the judge President, Deputy judge President, judges and acting judges, 'acting on the advice of' the judicial services commission and NEDLAC and after consultation with the Minister of justice.[43] The Deputy Judge President and other judges can be appointed only after consultation with the Judge President.

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41 Du Toit *et al Labour Relations Law* 34.
42 Section 151 of the LRA.
43 Du Toit *et al Labour Relations Law* 610.

3.4.1 Jurisdiction

According to Du Toit, the Labour Court has national jurisdiction in all nine provinces. Section 157[44] subsection (i) provides that the Labour Court has exclusive jurisdiction in all matters that must be determined by the Labour Court. The High Court retains its common law jurisdiction. The Labour Court also has jurisdiction to adjudicate dispute under the Employment Equity Act.[45]

3.4.2 Limitation *on jurisdiction*

Du Toit, states that the Labour Court has no jurisdiction over issues covered by collective agreement. Disputes about the interpretation and application of collective agreements must be directed to CCMA or the agency designated in the agreement. Notwithstanding the above, the exclusive jurisdiction of the Labour Court is subject to the Constitution in terms of section 157 of the Act.

In addition, the Labour Court is subordinate to the Labour Appeal Court and its jurisdiction is exclusive to the extent that the Act does not provide otherwise.[46] The Labour Court has no jurisdiction to adjudicate a dispute which the Act requires to be arbitrated[47] but it may stay the proceedings and refer the dispute to arbitration, or with the parties consent and if it is expedient to do so, assume the role of arbitrator.

It has also concurrent jurisdiction in terms of section 157 (2) with the High Court in respect of any alleged or threatened violation of fundamental right entrenched in Chapter 2 of the Constitution, which arises from:

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44 See S 157 (1) of the LRA.
45 See S 49 of the *Employment Equity Act* 55 of 1998.
46 Du Toit *et al Labour Relations Law* 613.
47 Du Toit *et al Labour Relations Law* 613.

> (a) Any dispute over the Constitutionality of any executive or administrative act or conduct, by the state in its capacity as an employer; and (b) The application of any law for the administration of which the Minister is responsible.

According to Du Toit, the mere allegation of a Constitutional question does not in itself oust the jurisdiction of the Labour Court and confer jurisdiction on the High Court. He argues that if that was the case, a party could readily abuse the residual jurisdiction of the High Court. However, if a cause of action arises in a contract,[48] the Labour Court has concurrent jurisdiction with the High court. But the Labour Court has no jurisdiction to determine delictual claims. The civil courts retains exclusive jurisdiction over the latter.

3.5 Labour Appeal Court

3.5.1 Jurisdiction

According to Du Toit,[49] the Labour Appeal Court (LAC) has jurisdiction to hear and determine appeals against any final judgment and orders of the Labour Court and to decide questions of law reserved for it. If a matter before the LAC concerns issues, which fall within the jurisdiction of the Constitutional Court, the LAC may dispose of the matter and refer the matter to the Constitutional Court for decision.

3.5.2 Powers of the LAC On Appeal

Du Toit,[50] states that an appeal may be a complete rehearing where an affected party may not have had an opportunity to be heard before a decision was made. The author states that in such instances an appeal would be in the wide sense encouraged as held in *Tikly v Johannes*.[51] The court may confirm, amend or set aside the judgment or order, which

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48 See *Basic Conditions of Employment Act* 75 of 1997.
49 Du Toit *et al Labour Relations Law* 611.
50 Du Toit *et al Labour Relations Law* 625.
51 Du Toit *et al Labour Relations Law. Tickly v Johannes* 1963 SA 588 (T) 591.

gives rise to appeal and make any judgment or order that it considers requisite in the circumstances.

The LAC may in its discretion allow evidence on appeal as the court did in *Fidelity Holding Pty Ltd*[52]. If evidence is required to be heard on a matter, which is to be considered by the Constitutional court such evidence will be heard in the LAC before being remitted to the Constitutional court. `Du Toit further states that the jurisdiction of the LAC to order costs is based on law and fairness and reflects parallel provision in the Labour Court. As in the Labour Court, LAC decision may be served and are enforceable in the same way as high court orders.

3.6 The Constitutional Court

Grogan[53] states that the Constitutional Court held that it has jurisdiction to 'decide any question from or connected with the Labour Court interpretation of the right to fair labour practices'[54]. In addition section 167 (3) (a) and (e) of the 1996 Constitution[55] provide that the Constitutional Court is the highest court in all Constitutional matters, and it makes the final decision whether a matter is a Constitutional matter or whether an issue is connected with a decision on a Constitutional matter.

Subsection (5) enjoins the Constitutional Court to make the final decision whether an Act of Parliament, a provincial Act or conduct of the President is Constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that, order has any force.

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52 *Fidelity Guard Holdings (Pty) Ltd* PTWU 1997 9 BLLR 1125 (LAC).
53 Grogan *Workplace Law* 395.
54 *SA Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* 2000 21 1583 1585 B.
55 *Constitution of the Republic of South Africa Act* 108 1996.

3.7 The extent to which the enforcement institutions interpret the constitution and deal with "constitutional matters"

Grogan[56] states that sometime in 1998 the workers at *Chevron Engineering (Pty) Ltd* began to suffer from various ailments, including headaches and sores. They asked the doctor to remove the "muti" to which they attributed their plight. The owner of the company did not approve of traditional healers, and suggested that the workers cure themselves "through Christian means such as prayer", and invited two priests to the factory. They prayed and spread a "red substance" on the ground; to no avail. The workers renewed their request for a "prophet", and when the owner again refused their plea, the entire workforce went out on strike for a day.

The employer added to the workers' travails by firing them. The entire process took about two months. Then *Chevron* made a fatal error. After the dismissal, the company was restructured and a number of the dismissed strikers were rehired. Only then did the company relent and find a "prophet" who was also of the Christian faith. This prophet unearthed a horn on the premises and destroyed it. The 18 former employees who were not rehired challenged their dismissal in the erstwhile *Industrial Court*. The Industrial Court found in their favour. The company successfully took the matter on review to the Supreme Court, which set aside the industrial court's judgment and remitted the dispute to be heard by another member. About four years after the dismissal, the Industrial Court handed down a second judgment in which it was found that both the dismissal of the workers and the failure to rehire them along with their former colleagues constituted unfair labour practices.

The company was ordered to reinstate the workers retrospectively to the date of their dismissal. By this year (1999), the present Labour Appeal

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[56] Grogan *ELJ* 13.

Court had replaced the Labour Appeal Courts constituted under the *Labour Relations Act 29 of 1956*[57]. The company appealed to the new court, as required by the transitional provisions of the current Labour Relations Act 66 of 1995. On appeal, Chevron conceded that the selective re-employment of some of the dismissed workers constituted an unfair labour practice and that reinstatement was the appropriate remedy.

The only issue was whether the Industrial Court could make reinstatement orders retrospective for periods longer than six months. Chevron argued that the Industrial Court's power to reinstate was limited to the period of six months. The workers argued that it was no. In *Chevron Engineering (Pty) Ltd v Nkambule & others*[58], the three judges of the Labour Appeal Court agreed with the workers that there was no limitation on the extent to which the Industrial Court could make reinstatement orders retrospective, but disagreed on how the Industrial Court should have exercised its discretion in the particular circumstances of the case. Two judges (Zondi JP and Nicholson JA) held that the delay was due to the company's "intransigent opposition" to the workers' unassailable claim for reinstatement. According to these two judges the delay was entirely attributed to *Chevron*. They argued that the company's faith to concede to the workers claim in the Industrial Court had created its own misfortune. Moreover, it had placed no evidence before the Labour Appeal Court as to why a fully retrospective order should not be granted.

The dissenting judge (Nugent AJA) agreed that the Industrial Court could make reinstatement orders retrospective for as long as it thought appropriate; however, the judge noted that the Industrial Court's judgment gave no indication that the presiding officer had given any thought to the exercise of his discretion in that regard in the contrary.

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57 *Labour Relations Act* 28 of 1956 has been repealed by S 212 of the *Labour Relations Act* 66 of 1995.

58 *Chevron Engineering (Pty) Ltd v Nkambule* 2001 4 BLLR 395 (LAC).

Nugent AJA said the Industrial Court seemed to have regarded the principle that the order should be fully retrospective as "axiomatic". There was, accordingly merit to *Chevron's* argument that the order was "grossly excessive".

Judge Nugent's more tolerant approach did not assist the company. Its appeal was dismissed with costs on 28 November 2000 and the Industrial Courts order reinstating Mr Nkambule and his colleagues was confirmed with effect from 24 March 1995. Grogan states that this seemed to be the end of the road for *Chevron*. Under the repealed *1956 LRA*, the company would have had a further opportunity to appeal to the Appellate Division of the Supreme Court in terms of section 17(c) of that Act.

In terms of the transitional provisions in schedule 7 to the current Labour Relations Act, all appeals from the Industrial Court lay to the Labour Appeal Court established by section 167 of the current LRA, which is required to deal with such appeal "as if the labour relations laws had not been repealed". This phrase is, however, qualified by item (6), which states:

> Despite the provisions of any other law but subject to the constitution, no appeal will lie against any judgment or order given or made by the Labour Appeal Court established by this Act in determining any appeal brought in terms of sub-item (5).

In spite of the clear wording of item (6) and a number of LAC judgments in which it had been emphatically ruled that its judgments were not appealable, the company appealed to the Supreme Court of Appeal. The company sought leave to appeal from the Labour Appeal Court. That application was dismissed in a judgment written by Nugent AJA, with whom the other two judges this time concurred.

The LAC held that item 22(6) expressly provided that no appeal lay against its judgments. However, the court declined to express a view on

Chevron's further argument that a further appeal to the SCA was permitted by the Constitution; the LAC contend itself with the observation that, if this were indeed the case, the company did not need leave to appeal because neither the Constitution nor the LRA required leave to appeal in there circumstances. The court held on that basis that the company was not entitled to an order granting leave to appeal.

Chevron was not deterred by its failure in the LAC, the company approached the Supreme Court of Appeal for leave to appeal or, if leave proved unnecessary, for such 'directions' as the SCA deemed appropriate for the prosecution of an appeal. The company raised two arguments firstly, that item 22(6), properly construed, permitted an appeal from the Labour Appeal Court to the Supreme Court of Appeal; secondly, that if item 22(6) in fact prevented such appeals, it was unconstitutional.

The first argument was based on section 168(3) of the Constitution. It reads that:"The Supreme Court of Appeal may decide appeal in any matter. It is the highest court of appeal except in Constitutional matters, and may decide only

> (a) Appeals; (b) issues connected with appeals; and (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

In *Chevron Engineering (Pty) Ltd v Nkambule* and others[59], the court dealt with the above issues and held that the inclusion of the words 'subject to the constitution' saves item 22(6) from being found unconstitutional. According to it the words can only mean that if the Constitution says something different about the possibility of an appeal lying to some other court from a decision of the LAC hearing an appeal under item 22(5), then what the Constitution says will prevail.

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[59] *Chevron Engineering (Pty) Ltd v Nkambule* 2003 7 BLLR 631 (SCA).

This follows from the use of the expression 'subject to' which indicates clearly to which the rest of the sub-item is subject. *Chevron* was accordingly entitled to appeal again to the Supreme Court of Appeal. In *Chevron,* the Supreme Court of Appeal held that, given the clear meaning of section 168(3) and item 22(6), it would be idle to speculate on why the words "but subject to the Constitution" were used in item 22(6). According to it, the answer may well be that they were included precisely to avoid the result to which the court itself alluded, namely, to rescue the provision from unconstitutionality.

According to Grogan the question as to whether the *Chevron* judgment means that appellants from the Labour Court may now enjoy the right of a second appeal to the SCA must be sought first in the LRA[60]. The first relevant provision is section 167, which provides for the establishment and status of the LAC. As amended in 1998, section 176 (2) and (3) reads as follows:

> (2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.
> (3) The Labour Appeal Court is a Superior Court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.

Moreover, Section 173 and 183 of the LRA are relevant. Grogan states that the former provides that, "subject to the Constitution and despite any other law", the Labour Appeal Court has "exclusive jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court".

> (a) Any appeal in terms of section 173(1) its decision on any question of law in terms of section (b) 173(1); are any judgment or order in terms of section 175.

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60 Grogan *ELJ* 17.

On the other hand section 183 reads; Subject to the Constitution and despite any other law, no appeal lies against any decision judgment or order given by the Labour Appeal Court.

Section 173(1) (a) and (b) provide for appeals from the Labour Court and decisions on questions of law reserved by the Labour Court. Grogan states that like item 22(6), section 183 provide that no appeal lies against any decision, judgment or order of the LAC in matters falling within its jurisdiction.

The above section is similar to section 183, which like item 22(6) is expressly made "subject to the Constitution" it also applies "despite any other law".

3.7.1 LAC has no exclusive jurisdiction

Grogan is of the view that section 185 must be understood in the same manner as the Supreme Court of Appeal interpreted item 22(6) of schedule 7. In addition, section 185 must be read subject to section 168 of the Constitution. Section 168 still provides that the Supreme Court of Appeal is the highest court of appeal in all but Constitutional matters, and that it may decide appeals in all matters. In other words, sections 185 of the Labour Relations Act and 168 of the Constitution conflict and, according to the reasoning in *Chevron,* the Constitution must prevail to the extent of such conflict.

Moreover, section 167, which declares the Labour Appeal Court as the final court of appeal in respect of all judgments and orders made by the Labour Court in respect matters within its exclusive jurisdiction, is not expressly made subject to the Constitution. To this extent, section 167 conflicts with section 183. The latter states "subject to the Constitution, no appeal lies against any decision, judgment or order given by the Labour Appeal Court". However, Grogan argues that section 183 is implicitly made subject to the Constitution, because in terms of section

3(b) of the LRA the entire Act is to be read "in compliance with the Constitution".

3.7.2 Counter argument to the above

According to Grogan there seems to be only one argument to the contrary. That section 183 of the LRA must be read subject to section 167 which, to the extent that it is not expressly made subject to the Constitution, must be read to mean precisely what it says – namely, that the Labour Appeal Court is "the final court of appeal in respect of all judgment and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction".

Grogan states that if these provisions are read in this way it would leave no room for any conclusion but that the legislature intended to make the LAC a final court of appeal notwithstanding section 168 (3) of the Constitution. This assumption is strengthened by section 167(3). Grogan further argues that although the Constitution may state that the Supreme Court of Appeal can decide appeal in any matter, and that barring the Constitutional court, it is the highest court of appeal the Constitution does not prohibits the creation of a separate court of equal standing to the SCA to finally dispose of appeals that would otherwise fall within the jurisdiction of the SCA.

His argument is that section 168(3) of the Constitution provides that the Supreme Court of Appeal "may," decide appeals in any matters – not that it must necessarily do so in all matters. This means that the reservation of certain matters for final appeal to the LAC does not actually conflict with the Constitutional requirements for the establishment of a Supreme Court of Appeal.

3.7.3 Overruling the LAC

In the discussion, which follows, Grogan explains the circumstances under which the Constitutional Court will entertain appeals from the Labour Appeal Court. The Constitutional court heard two appeals from the Labour Appeal Court. Those appeals emanated from *NEHAWU v University of Cape Town & another*[61] *and Bader bop (Pty) Ltd & Another*[62]. The respondents argued in Bader Bop that the Constitutional Court lacked jurisdiction to entertain appeals on the merits against judgments of the LAC, and that the particular appeal should not be allowed because a constitutional issue had not been raised in the LAC.

UCT argued that when the courts deals with statutes designed to give effect to fundamental rights guaranteed in the Constitution, the only Constitutional matter that can arise is the Constitutionality of the statute itself. Otherwise, said *UCT,* the Constitutional Court would have jurisdiction in all labour matters.

In *Bader Bop* and *UCT*, the Constitutional Court held that it indeed has jurisdiction to entertain appeals from the LAC involving Constitutional matters. Judge Ngcobo held in *UCT* that the LRA was enacted to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution. Moreover, the judge held that the fact that section 3(b) of the LRA requires the provisions of the LRA to be interpreted in compliance with the Constitution; the proper interpretation and application of the LRA will raise a Constitutional issue.

3.7.4 Constitutional Court response to UCT

The court dismissed *UCT* argument as lacking in merit and argued that in relation to a statute a Constitutional matter may arise either because

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61 *NEHAWU v University of Cape Town* 2003 2 BCLR 154 (CC).
62 *National Union of Metalworkers v Bader Bop (Pty)* 2003 2 BLLR 385 (CC).

the Constitutionality of its interpretation or its application is in issue or because the Constitutionality of the statute itself is in issue.
As to the exclusive jurisdiction of the LAC in terms of S167 (2) the court held that the LAC had overlooked a crucial phrase in section 167(3). The inherent powers and standing of the LAC are equal to those of the SCA only in matters under its jurisdiction. The court held that the word jurisdiction refers to "exclusive jurisdiction".
The judge held that the Labour Appeal Court has exclusive jurisdiction only over those matters reserved for it by the LRA in terms of section 173(1). Section183, which provides that "no appeal lies against any decision, judgment or order given by the Labour Appeal Court's applies only to appeals in matters expressly reserved for the LAC. The court argued that cases involving Constitutional matters are not reserved for the LAC exclusive jurisdiction. Judge Ngcobo went further and pointed out that the Constitution recognizes two highest courts of appeal and assigns specific jurisdiction to each.

The SCA is the highest court of appeal except in Constitutional matters. Its jurisdiction in Constitutional matters is only limited by section 167(4) of the Constitution, which reserves certain matters for the exclusive jurisdiction of the Constitutional Court. The court held that the SCA is competent to hear appeals in other Constitutional issues, subjects to the litigants' right to appeal again to the Constitutional Court with the leave of that court in terms of Rule 20. In view of the latter argument, judge Ngcobo held that appeals from the LAC on Constitutional matters do lie to the SCA.

3.7.5 Implications of the NEHAWU and Bader Bop

Grogan states that the extent of the potential implications lies in the breadth of the term "Constitutional matters" and the way that term is applied in labour dispute. He argues that since the LRA is expressly designed to give effect to the Constitutional right to fair labour practices,

any finding that limits the right to fair labour practices can arguably be said to involve a Constitutional matter.

3.7.6 A comment on Chevron Engineering, UCT and Bader Bop.

The decision of the SCA in *Chevron Engineering* has altered the position that existed since 1996. The effect of *Chevron* is that the Labour Appeal Court is no longer regarded as the final arbiter of labour disputes. Moreover, the court differed with the LAC decisions in *Khoza v Gypsum Industrial Ltd and Kem – Lin Fashions v Brunton & Another.* In *Khoza*[63], a unanimous bench of the Labour Appeal Court declared that the provisions of item 22 (6) are consistent with the provision of the 1995 Act and that the LAC is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters in its exclusive jurisdiction.

In *Kem-Lin fashions* the LAC reiterated the latter view and added that it was "inconceivable that a judgment of a court of equal authority can be taken on appeal to a court of equal authority and standing. In arriving at its decision the Supreme Court of Appeal in *Chevron* held that section 183 of the LRA which prohibit an appeal against any decision, judgment or order given by the Labour Appeal Court should be read subject to section 168 of the 1996 Constitution. The SCA in Chevron resolved the conflict apparent in section 167 and section 183.

The former section is not expressly made subject to the Constitution. The SCA held that section 183 is implicitly made subject to the Constitution because in terms of section 3 (b) of the LRA, the entire Act is to be read "in compliance with the Constitution". The effect of *Chevron* is that the LRA and subordinate legislation must be interpreted

63 *Khoza v Gypsum Industries Ltd* 1998 ILJ 53 (LAC) *And Kem – Lin Fashions v* Brunton 2002 7 BLLR 597 (LAC).

in line with the Constitution. In case of conflict the Constitution must prevail to the extent of such conflict.

The effect of this judgment is that all appeals decided by the Labour Appeal Court are subject to further appeal to the Supreme Court of Appeal. The above position was confirmed in *NUMSA & others v Fry's Metals.*[64] *In casu*, the appellants, a trade union and several of its members, applied for leave to appeal against a decision of the Labour Court of Appeal which reversed an interdict granted to them to restrain their employer, the first responded, from, inter alia, dismissing them for refusing to accede to an operational change. The union contend that the dismissal was automatically unfair in terms of section 187(1) (c) of the Labour Relations Act 66 of 1995 (LRA) because it compelled employees to accept a demand about a matter of mutual interest between the employer and the employee.

The court held that section 168(3) of the Constitution gives the Supreme Court of Appeal jurisdiction to hear appeals from the LAC in matters that fall within the exclusive jurisdiction of the Labour Court, whether constitutional or non-constitutional. It argued that the provisions in the LRA, which relate to the jurisdiction of the LAC, must be read subject to the appellate hierarchy created by the Constitution itself. According to the court, leave to appeal was necessary to protect the process of the SCA against abuse by appeals from the LAC that have no merit and it is in the interest of justice that the requirement of special leave be imposed. Therefore applications for leave to appeal from the applicants must show that the appeal has reasonable prospects of success and there are special considerations why, having already had an appeal before a special tribunal, there should be a further appeal to the Supreme Court of Appeal.

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64 NUMSA v Fry's Metals (Pty) 2005 JOL 14141 (SCA).

It is evident from the decision in *Bader Bop that* the Constitutional court will only entertain appeals from the LAC if such appeals raise a "Constitutional matter". In deciding the latter it is clear from the decision in *UCT* that the court does not limit itself to the Constitutionality of a statute. For example the Constitutionality of the interpretation and application of the statute is also taken into account.

The misunderstanding created by section 167(3) of the LRA was corrected by the court .The effect of this decision is that the Labour Appeal Court has "exclusive jurisdiction only over those matters reserved for it by the LRA.In my opinion the Constitutional Court decision is correct because cases involving constitutional matters does not fall under LAC exclusive jurisdiction.

The court's decision in *Fry's Metals* and *Chevron* has diluted the powers of the Labour Appeal Court in that most labour appeals are currently been referred to the Supreme Court of Appeal. In my opinion the equal standing of the LAC to that of the SCA has been undermined. Thus the retention of the LAC as an appeal tribunal does not serve any purpose.

3.8 **Superior Courts Bill, 2003**[65]

3.8.1 Introductory remarks

The under – mentioned discussion focuses on the object of the bill and on matters which relates to jurisdiction and existing rules. The latter would be followed by an explanation, which deals with the effects of the Bill on future adjudication in labour matters.

[65] The Superior Courts Bill, 2003. (This is the explanatory summary of a bill published in the Government Gazette No. 25282 of July 2003).

3.8.2 The object of the bill and Jurisdictional issues

3.8.2.1 Object of the bill

In terms of section 2(1) the object of this Bill is:

> (a) To bring the structure of the Constitutional Court, the Supreme Court of Appeal and the high courts of South Africa into line with the provision of chapter 8 of the Constitution;(b) to make provision for the adjudication of labour matters by the High Court on the Supreme Court of Appeal; and (c) To consolidate and rationalize the laws pertaining to these courts.

This Bill repeals the outdated Supreme Court Act[66] and corresponding legislation of the former TBVC States.

In brief section 2 (1) (a) above gives effect to the provision of chapter 8 of the 1996 Constitution. The section rationalizes the various Superior Courts and legislation which applied to them with a view of establishing a judicial system suited to the Constitution.

3.8.2.2 Jurisdictional issues

A significant change of the Bill is found in section 12. The latter provides as follows:

> 12(1) Subject to subsection (2), the majority of judges hearing any labour matter in the Supreme Court of Appeal or a Division must, for the purpose of that hearing, be judges where names appear on the panel of judges referred to in subsection (3); 12(2) If, during the course of the hearing of any matter by a court referred to in subsection (1), it becomes apparent that the matter concerned is or may be a labour matter and the names of the majority of judges hearing that matter do not appear on the panel referred to in subsection (3), the validity of the hearing or any ensuing judgment is not affected. In terms of subsection 3(a), a committee must be established in order develop the content of training courses with the object of building a

[66] Supreme Court Act 59 of 1959.

pool of suitably qualified judges for the purpose of dealing with labour matters.

3.8 2 Existing Rules and Amendments

In terms of section 47 of the Bill the rules applicable to the Superior Courts, the Labour Court and Labour Appeal Court before the commencement of this Act, remain in force to the extent that they are not inconsistent with this Act until they are repeated or amended by a competent authority. Moreover, section 50 of the Bill provides that section 5B is inserted in the Rules Board for Courts of Law Act[67] after section 5A.

Section 5B (ii) enjoins the Minister to establish a Standing Labour Matters Rules Committee to make recommendations to the Board on rules of court for the Supreme Court of Appeal and Division of the High Court when they deal with Labour matters as defined in section 1 of the Supreme Courts, Act, 2001.This committee must submit recommendation to the Board in the form of draft rules that are either new rules, amending existing rules or measures repealing existing rules in order to regulate the conduct of proceedings in the Supreme Court of Appeal and the Division of the High Court[68].

3.8.4 The effects of the superior courts bill on the enforcements institutions.

The Superior Courts Bill abolishes the Labour Court and bestows its jurisdiction on the High Court. Moreover, any division of the High Court of South Africa would adjudicate upon functions, which were previously performed by the Labour Court. However, if the Bill is passed into law, proceedings in labour matters will still be governed by existing rules of the Superior Courts taking into account section 5B as inserted into the Rules Board for Courts of Law Act.

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67 Rules Board for Courts of Law Act 107 of 1985.

68 S 5B (3) of the Rules Board for Courts of Law Act 107 of 1985.

In addition, the provisions of the LRA which governed the Labour Court would also apply to the High Court, for example, the High Court will still be able to preside over matters which are covered by a collective agreement and disputes about the interpretation, and application of a collective agreement would have to be determined by the CCMA or an agency designated in the agreement. Similarly, the High Court will have no jurisdiction to preside over dispute, which requires arbitration in terms of section 157(5) of the Act.

In addition, in terms of section 46 of the Bill the powers of the judges of the Labour Court ceases to exist and are transferred to a panel of judges referred to in section 12(3) above. In my opinion, labour issues will still be reviewed in terms of section 158 (1) of the Labour Relations Act because the Bill does not repeal the LRA. Contrary to the position, which obtained in the past, appeals in labour matters will lie directly with the Supreme Court of Appeal.

Insofar as the Constitutional Court is concerned, the Bill does not contain any significant new provision relating to the court, it has incorporated the applicable provision of the *Constitutional* Court *Complementary Ac.*[69] Thus anyone who alleges that his right to fair labour practices has been infringed, has legal recourse to the Constitutional Court. In spite of the above, the Bill has its own shortcomings. The first limitation is found in section 12(2). From the reading of the latter, it is evident that judges who are not conversant with Labour Law can still preside over labour matters.

In addition, in terms of section 12(3) (d) training courses should be developed with a view of building a pool of suitably qualified judges. The question that can be asked with regard to the latter is what would happen if the various division of the High Courts experience an influx of labour cases when the committee mentioned in section 12(3) (d) is on

the process of training the judges. If such a situation can arise, the High Court would be forced to allow judges who do not have experience in labour matters to preside over labour cases.

This has a potential of prejudicing the litigants and decisions arising from such process can produce absurd results. The judicial service commission should have recommended that the judges should first be trained before the Bill is passed into law. In my opinion, the object of section 12(3) (d) would be achieved in the long-term. In addition, the inclusion of the three members of NEDLAC in the committee, which selects a panel of judges, raises questions. One wonders as to what criteria NEDLAC members are going to use to select judges given the fact that they are not trained jurists.

4. Comparative Study

4.1 Introduction

The discussion will focus on the Principle of justiciability and Constitutional adjudication in the commonwealth. Thereafter, a comparison will be made between South Africa and the commonwealth in relation to justiciability.

4.1.1 Definition of justiciability

According to Okpaluba, "justiciability" arises where the court finds that its jurisdiction cannot be exercised in light of the subject matter of the proceedings not being amenable to the judicial review such as where it is political in nature and thus adequate for political resolution and where the case involves complicated, economic, social or financial factors that may prove impossible for the court to resolve.[70]

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[69] Constitutional Court Complimentary Act 13 of 1995.

4.1.2 Constitutional Limitations

According to Okpaluba[71] the problem surrounding the definition of justiciability is exacerbated in situations where the Constitution itself expressly or by necessary implication renders a matter judicially unassailable (not open to judicial review) by either placing the subject matter beyond judicial review, or clearly ousting the jurisdiction of the court[72]. Such matters are by definition not justiciable.

The author gave an example of the so-called principles of 'state policy'. These policies are found in most of the commonwealth Constitutions. For example in chapter 11 of the Constitution of Namibia, and in the Nigerian Constitution they are referred to as "fundamental objectives and Directives Principles of State Policy"[73]. To highlight the latter the author discusses the Constitutional limitations on justiciability with reference to directive principles of state policy; limiting the scope of judicial powers and the so-called "ouster of jurisdiction" provisions.

4.1.2.3 Directive principles of state policy

Constitutions incorporating these principles of state policy state in clear terms that they are not enforceable. Okpaluba refers to the Constitution[74] of Namibia where it is provided that the principles of state policy "shall not of and by themselves be legally enforceable by any court". In Nigeria, the fundamental objectives of state policy are excluded from the ambit of judicial powers by section 6 (6) of the Nigerian Constitution. The latter provides that the judicial powers vested in the courts by section 6 (1) and (2) "shall not extend... to any issue or question as to whether any act or omission by any law or any judicial decision is in conformity with the Fundamental objectives and Directive Principles of state Policy".

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70 Okpaluba 2003 THRHR 632.
71 Okpaluba 2003 THRHR 610.
72 Most of the Caribbean Constitutions embody "ouster clauses".
73 See part II, chapter II, of the 1997 and the 1999 Constitution of the Federal Republic of Nigeria.
74 Article 101 of the Constitution of the Republic of Namibia of 1990.

In terms of the Nigerian Constitution, the government and court are obliged to conform, observe and apply the provisions of the principles of State Policy[75]. The situation under the Ghanaian Constitution is not different from the above. For example, in *New Patriotic Party v Attorney General*[76] the Supreme Court of Ghana held that the Directive Principles of state Policy in the 1992 Constitution of the Republic of Ghana had the effect of providing goals for legislative programmes and a guide for judicial interpretation, but were not of and by themselves legally enforceable by the court.

In support of the above Okpaluba cited *Reddy v state of Jammu and Kashmir*[77] where judge Bhagwati held that the Directive Principles "give shape" to the Constitutional Concept of reasonableness, such that any action taken by government with a view to giving effect to any clause in the Directive Principles would ordinarily qualified to be regarded as reasonable. However, the court in *New Patriotic Party* above, explained that where some provisions of the Directives Principles formed an integral part of some enforceable rights either because they qualified them or could be held to be rights in themselves, such provisions could, of themselves, be justiciable.

The author states that these so-called principles of state policy, tend to lay down not only rules which inform good governance, but they also state the aspiration of the people with respect to the political, economic, social, educational and foreign policy objectives. Okpaluba further remarked as follows in respect of the principles of state policy:

> They do not create rights nor do they impose duties capable of enforcement in a court of law. Clearly, they are lofty ideals, values and objectives that may be realized one day. Whether or not all, or any of them, may or may not be realized, is a policy-cum-political

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75 S 13 of the Constitution of the Federal Republic of Nigeria of 1979 and Article 101 Of the Constitution of Namibia.

76 New Patriotic v Attorney – General 1992 2 LRC 283 296 – 298.

77 Reddy v State of Jammu Kashmir 1980 3 13339 at 1356 – 1357.

> question to which the politician must answer to the electorate. The non-observance of the principles of these state policies raises no question of rights of which the courts may be called upon to determine by way of adjudication.[78]

4.1.2.4 Limiting the scope of judicial powers

Okpaluba states that in terms of the Nigerian Constitution "judicial powers" vested in the courts extend not only to "all inherent powers and sanctions of a court of law", but also "to all matters between person, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[79]
However, the acts of past military administration in Nigeria are placed beyond the operation of the judicial powers of the courts and are therefore not justiciable.[80]

As a result of these limitations, attempts by the victims of unjust actions and decrees of the federal military government and the edicts of military governors regarding forfeiture of properties and chieftaincy dispute to get the supreme court to review and declare such decrees, edicts and actions unconstitutional have failed since the court treats the limitations on the scope of judicial powers as tantamount to an ouster of the courts jurisdiction.

A clear illustration of the latter is found in *Attorney General of Lagos State v Dosunmu.*[81] In *casu,* the judge remarked that:

> Courts guard their jurisdiction zealously and jealously. And that is how it should be. But if, in any given case, jurisdiction has been ousted by the provision of the constitution or a Decree (Act), then the path of

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78 Okpaluba 2003 THRHR 612.

79 S 6 (6) of the 1979 Constitution of the Federal Republic of Nigeria.

80 The Constitutions drafted in Nigeria since the emergence in 1996 of military Dictatorship was masterminded by the military rulers. Thus, they were Undemocratic.

81 Attorney – General Lagos State v Dosunmu 1989 3 NWLR (III) 550 – 581.

constitutionalism will dictate a willing compliance with the ouster clause.

4.1.2.5 Ouster of jurisdiction

According to the author, jurisdiction[82] is generally accepted to mean "authority to decide" the power of the court to entertain an action, petition or other proceeding. It is the power the court has to deal with and decide the dispute with regard to the subject matter before it. According to the author, the courts resent any attempt by the legislature to oust their jurisdiction. Therefore, there is a presumption of jurisdiction in favour of the superior courts and statutes seeking to oust the jurisdiction of courts are construed strictly, that is *fortissimo contra preferentes*.

This means that the subject matter sought to be shielded from judicial review must conform strictly with the scheme of the legislature before the ouster can operate. The under-mentioned discussion will concentrate on "ouster clauses" which are found constitution.

4.1.2.5.1.1 Impeachment of the chief executive: Nigeria

According to Okpaluba, the Nigerian constitution reveals an abiding faith in judicial review. For instance, section 33 (1) and (4) are clear on the matter of access to the courts for the determination of an individual's rights and obligations. In order to place the rights access to the courts beyond judicial scrutiny, section 4(8) provides that "the National Assembly or a house of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law".

In contrast, the same constitution seeks to leave the matter of impeachment of chief executive of the federation and the states to the

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82 Okpaluba 2003 THRHR 614.

legislature[83], In terms of the Nigerian constitution, these functionaries can only be removed from office upon being found guilty of "gross misconduct" and after complying with the procedure laid down in the constitution.

4.1.2.5.1.2 Parliamentary Bills and Acts.

In *Cormack, v Cope[84] CJ Barwick of the High* of Australia made the following classical statement in respect of the legal status of a parliamentary bill and its consequent non- justiciability in a written constitutional setting:

In similar vein the court of Appeal in Nigeria[85] was called upon by a state governor to make declaration of invalidity of a bill of the state house of assembly of which the applicant / governor had not yet assembled to, the court declined and held that a bill, even if passed the House of Assembly but before the assent of the governor, confers no rights or obligations on any persons or authority.

It is clear from the remarks made by the Australian and Nigerian courts that a parliamentary Bill which has been passed by the House of assembly but not assented to is not opened to judicial Review. In brief, it is non-justiciable for the simple reason that it does not confer rights or obligation. The Bill would be justiciable if it is assented to by either the president or the governor depending on the form of a state in question. After it has become an Act of parliament.

According to Okpaluba, there are exceptions to the general rule that the court will not entertain the constitutional challenge of a parliamentary bill for instance, where the constitution itself grants limited access" to the Supreme Court as is the case in Canada, India, Namibia and the

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[83] Similarly, article 1 S 6 of the Constitution of the United States of America ousts the jurisdiction of the courts insofar as impeachment of the president is concerned.

[84] Cormack v Cope 1974 131 432 454.

Constitutional Court in South Africa to give "advisory opinion" on the constitutionality of a bill if requested to do so by the governor- general or President in the circumstances clearly stipulated[86]. A clear illustration of the above is the situation is found in South Africa.

In terms of section 79 (1) of the 1996 constitution of South Africa, the president must either assent to and sign a Bill passed in terms of chapter 4 or, if the president has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration. In addition, section 79 (4) (b) provides that" If, after reconsideration, a bill fully accommodates the President reservation, the President must assent to it and sign the Bill: if not, the President must either – refer it to the constitutional court for a decision on its constitutionality".

Similarly, section 121 (2) (b), which deals with provinces contains similar provisions. It was held in *Ex parte the President of the Republic of South Africa*[87] that a bill referred to the Constitutional Court under S 79 must be considered in light of the President's reservations, and this could happen only after Parliament had reconsidered the bill in the light of the president's reservations and had not accommodated those reservations.

The aforestated is in contrast with the Nigerian position. According to the latter, the Supreme Court can only entertain the challenge of the constitutionality of an enactment that has gone through the legislative process and has received the assent of the president. In South Africa the Bill must be reconsidered first by parliament in light of the President's reservations, only after parliament has reconsidered the bill and if it does not accommodate the President's reservations, it can be referred to the constitutional court.

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85 House of Assembly of Bendel State v A-G Bendel State 1984 5 NCLR 161 – 169.

86 In Canada, "limited access" is stipulated in S 53 of the Supreme Court Act of 1985 and affirmed in Attorney – General of Ontario v Attorney – General of Canada AC 571. In India, it is contained in article 134 of the Constitution. In Namibia, it is Stipulated in article 64 (2) of the Constitution of Namibia of 1990.

87 Ex parte the president of the Republic of South Africa; In re Constitutionality of the Liquor Bill 2000 1 SA 732 (CC).

Thus, a bill cannot be directly referred to the constitutional court for advisory opinion. Similarly, a premier cannot pretend to obey section 121 (2) of the constitution and refer a matter which deals with the constitutionality of a provincial bill to the court without first submitting his reservations to the provincial legislature for reconsideration.

4.1.2.5.1.3 The reverse situation: Sri Lanka

Okpaluba states that the situation under the constitution of Sri Lanka 1978 is the reverse of the foregoing discussion, which deals with ouster clause[88]. First, article 80 (3) provides that no court or tribunal is empowered to enquire into, pronounce upon, or in any manner call in question the validity of an act of parliament. In effect, once the president (in accordance with article 80 (2), or the speaker in the case of all other bills certifies that a bill has become law, no once can challenge the Constitutionality of that law. The jurisdiction of the court is thereby ousted in respect of testing the validity of acts of parliament in Sir Lanka.

By contrast, to the foregoing what can, therefore be challenged in the courts of that country is the reverse, namely, the constitutionality of a bill pending before the legislature Pursuant to this reverse order testing, article 120 of the Sri Lanka constitution vest "sole and exclusive jurisdiction" on the supreme court to determine any question as to whether any bill or any provision of the bill is inconsistent with the constitution, subject to the four provisos therein stipulated. According to Okpaluba, a private citizen can petition the Supreme Court in respect of the constitutionality of a bill and where the alleged inconsistency pertains to breach of his or her fundamental right(s).

The aggrieved person may invoke the jurisdiction of the Supreme Court via article 126 (1), as was the case in *Athukorale v Attorney General of*

[88] Okpaluba 2002 THRHR 617.

Sri Lanka[89]. In *casu,* a number of private individuals and concerned media organization had successfully challenged the Sri Lanka Broadcasting Authority Bill of 1997 as an attempt by the government to interfere with their constitutionally guaranteed freedom of thought and expression, and it was accordingly declared to be inconsistent with article 10 of the constitution of Sri Lanka.

The Second ouster clause appears in these words:

> Save as otherwise provided in Articles 120, 121, and 122, no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process on any ground whatsoever.

It is evident from the second ouster clause that although the constitution of Sri Lanka permits a challenge in relation to the constitutionality of a Bill it places some restrictions on the challenge of a bill beyond Articles 120, 121, and 122. Furthermore, we have seen that in commonwealth countries such as Nigeria and South Africa, unlike in Sri Lanka, that a bill is unassailable by the courts. The arguments behind this are that a bill does not confer a right or obligation.

It must be first assented to by the president before it could be subjected to judicial scrutiny on the other hand challenges of unconstitutionality of acts of parliament in Sri Lanka are not justiciable in the courts. Nor can anyone challenge the constitutional correctness of the procedure leading to a legislature enactment, as was the case in the above-mentioned case of *Cormack v cope* and *Attorney General of Bendel State.*

The situation in Sri Lanka has the potential of prejudicing the majority of citizen if they failed to exercise vigilance when the bill does its rounds in parliament (during the debate). In normal circumstances, the majority of

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89 Athukoral v Attorney General of Sri Lanka 1997 BHRC 610

the citizens would wait until the law comes into close contact with them, such as when the individual is brought to court.

If the people of Sri Lanka fail to exercise vigilance at the time a bill is introduced in parliament once a bill is assented to and becomes law, all avenues of constitutional challenge would be closed. In other words, the Act would be non-justiciable.

4.1.2.5.1.4 Shielding the functions of the services Commissions: West Indies

According to the author, a common feature found in the constitutions of the commonwealth Caribbean countries is the protection from "judicial review" afforded to the functions of the services commissions, whether those of the "public service", "police service', "teaching service" or the "judicial service" established by those constitutions.

Okpaluba refers to article 226(1) of the constitution of the Co-operative Republic of Guyana 1980, which provides that a commission established by it shall not be subjected to the direction or control of any other person or authority, Moreover, article 226(6) provides that: "any question whether... a commission has validly performed any function vested in it by or under this constitution... shall not be enquired into any court". However, in *Barnwell v Attorney General*[90], the court held that the provisions of article 226(1) and 226(6) do not suggest that the constitution has ousted the court's jurisdiction in judicial review proceedings to determine the limits of the functions of the commissions.

4.1.2.5.1.5 The Guyanese trilogy

The courts in the Caribbean, starting with the court of Guyana, have for decades held that the "ouster clause" in the constitution could only shield

[90] Barnwell v Attorney- General 1994 3 LRC 30. (Guyana) 74 and 117

the commissions when they act within their jurisdiction. Okpaluba states that when the courts unlawfully delegate their powers to some other body or authority not properly constituted to exercise such powers, or acted ultra virus their powers or in excess of their jurisdiction or in breach of the rules of natural justice, the "ouster clause" would not afford the courts protection. Thus, they will be amenable to judicial review.

To emphasize the latter in Guyana court of Appeal trilogy, *In Re Langhorne*[91] *In Re Garriah Sarran*[92] *and* Evelyn v Chichester[93], the court considered the ouster "clause in article 119 of the 1996 constitution of Guyana and clearly laid that for the "ouster clause to be effective, the commission must have properly assumed its constitutional function since the court would enquire as to whether (a): a function was truly vested under the constitution in a commission, as commission would not be allowed to arrogate to itself what the constitution did not wish it to have, and (b) the commission in the performance of that function acted in accordance with the law, statutory or unwritten which actually governed the way in which the function was exercised.

Thus, in *Barnwell v Attorney General of Guyana*[94], which represents the court's recent interpretation of the equivalent "ouster provision" in article 226(6) of the constitution of the co-operative Republic of Guyana 1980, it was held by the court of Appeal that the removal of a judge from office by the president on the recommendation of the judicial service Commission was in violation of the judge's right to a fair hearing under article 40 (1) (a) of the constitution, and that the commission had failed to hear the judge's side of the story on the allegations upon which the commission proceeded before it made its recommendation to the President.

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91 In Re Langhorne 1969 HLR 534 – 536.
92 In Re Garriah Sarran 1969 GLR 518 523.
93 Evelyn v Chichester 1970 15 WIR 410.
94 See full citation in footnote 89.

Bishop CJ and Kennard JA held that articles 226 (6) would not oust court's jurisdiction in judicial review proceedings where, as in this case, the court had to determine the limits of the functions of the commission and, certainly, where it was patent that the commission had breached one of the fundamental protections afforded the individual by the constitution.

Similarly in *Rees v Crane*[95] *the* Privy Council found that by sending a judge on "indefinite suspension," both the chief justice and the judicial and legal service commission acted *ultra vires* their powers under Section 137 of the constitution of Trinidad and Tobago of 1976 by not complying with the procedure laid down therein.

Again, that in view of the seriousness of the allegations and the suspicions both for decision to suspend a judge which subsequent revocation of the suspension would necessarily dissipate and in all the circumstances, the commission had not treated the judge fairly in failing to inform him at that stage of the allegations made against him or give him a chance to reply to them in such a way as was appropriate, albeit not necessarily by an oral hearings; and that, accordingly, the commission had acted in breach of the principles of natural justice thereby contravening the judge's right to the protection of the law, including the right to natural justice, afforded by S 4 (b) of the constitution.

4.1.2.5.1.6 Belize Advisory Council Case

To add further on our discussion of the Caribbean countries, in Rivas and the Belize Advisory Council[96], the question raised in limine was whether or not the supreme Court had the jurisdiction to inquire into a decision of the Belize Advisory council in view of section 54 (15) of the constitution of Belize 1981. The applicant had sought a *certiorari* to

95 Rees v Crane 1994 WLR 476 (PC).
96 Rivas v Belize Advisory Council 1993 LRC 261 (Belize SC).

quash his discharge from the armed forces by the Public Service Commission and affirmed on appeal by the council and a declaration that such a decision was null and void for being in breach of the principles of natural justice.

Upon a consideration of relevant authorities, Judge Singh held that it was clear that the Supreme Court had jurisdiction to inquire into the purported exercise of authority by an inferior court or tribunal, where it was alleged that such court or tribunal acted in "excess" of the jurisdiction vested in it notwithstanding the ouster clause. Accordingly, it was held that any institution, however, superior or inferior, which dealt with the legal and human rights of any person had to conform to the time-honoured and allowed principles of fundamental rights and natural justice. The court further stated that if there is an allegation that there had been a breach of the principles aforesaid in relation to any person, this allegation would be subjected to review by the Supreme Court, regardless of the authority or reputation of the institution in respect of which the allegation was made.

Thus, an ouster clause in a constitution could not take precedence over another provision in the constitution, which sought to preserve the fundamental rights of individuals.

4.1.2.5.1.7 Antigua medical superintendent's case

The decision in *Attorney General of Antigua and Barduba v Lake*[97] *prese*nts entirely different scenario from the usual complaint of breach of natural justice or excess of jurisdiction as discussed above. In *casu* the Public Service, commission did not perform its function by itself in accordance with the constitution; it was dictated to as to what to do by the Prime Minister. The respondent (lake) was informed by the Minister of Health immediately after the elections that the Prime Minister intended

to have him removed from his position and replace by another doctor. On the same day that the minister wrote to the Permanent Secretary stating that the respondent would be proceeding on leave, another doctor assumed the position of superintendent in the hospital.

The essence of the "respondent's" case was that the Prime Minister was motivated to take the action he did by discriminating against him because respondent had once supported a political opponent of the Prime Minister. The respondent further contended that the manner in which he was removed from office by the Prime Minister and the commission had not only breached sections 99 and 100 of the constitution, but had also violated his section 14 right not to be treated in a discriminatory manner.

On the other hand, the appellants countered that there was no discrimination and that if any difference existed between the Prime Minister and the respondent, it was due to personal animosity; further appellants alleged that the court lacked jurisdiction since the issues raised by the respondent did not constitute an infringement of his fundamental rights, nor would they give rise to constitutional remedies.

The court upheld the decisions in *Camacho Ltd v collector of customs* [98]*Roncarreli v Dupplessis*[99] and *Hart v Military government of River state*. It held that from the evidence adduced, the respondent had a *prima facie* case that could go to trial for a breach of the protection conferred on the public servants by section 99 and 100 of the constitution. A *prima facie* case of breach of the constitutional powers of the commission occurred when the Prime Minister instructed it on how to proceed with its function.

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97 Attorney – General of Antigua and Barbuda v Lake 1998 4 348, 1999 1 WLR 68 (PC)

98 Camacho v Ltd Collector Customs 1917 18 WIR 159.

99 Roncarreli v Dupplessis 1959 16 DLR 689.

According to the Privy Council, the effect of the latter was to make the commission subject to the direction of the Prime Minister and, in so doing, the Prime Minister was found to have acted *ultra vires* in terms of section 99 (ii) of the constitution which provided that the commission in the exercise of its function was no to be subjected to the direction or control of any other person or authority.

In the same vein in *Camacho Ltd v Collector of customs* the Minister of trade of Antigua had directed the collector of customs not to renew the import licence of the appellant company because its director were supporters of the opposing political party. The Minister was found to have acted *ultra vires* in breach of section 99 (11).

Again in *Roncarreli v Dupplessis* the premier of Quebec had ordered the chairman of the licence authority not to renew the liquor licence of the appellant because he was a member of the Jehovah's Witness.

The acts member of the officials who had received dictation from political functionaries were in both cases held to be *ultra vires* and unlawful. Similarly in *Hart v Military Government of Rivers* state[100] the compulsory retirement of the appellant was quashed because the Public Service Commission whose function it was to remove or retire civil servants, abdicated that power to the military governor.

4.1.2.5.1.8 General Comment

In summing up the foregoing discussion it is evident that commonwealth constitutions place some matters beyond judicial review. The limitations placed on the constitution determine whether a matter is justiciable or not. An example of a constitutional limitation is the "principles of state policy".

[100] Hart v Military Governor of Rivers State 1976 11 SC 211.

The latter are incorporated in constitutions of the commonwealth countries and they state in clear terms that they are not enforceable or justiciable. Okpaluba is of the view that these principles state aspirations of the people with respect to political, economic, social, and educational and foreign policy objectives. These principles do not create or impose duties. Notwithstanding that they are unenforceable, where some of its provisions formed an integral part of some enforceable right, such provision could be justiciable.

This is the only exception where the principles of state policy may be enforced by as held in *New Patriotic*. If these principles do not qualify the enforceable rights or formed rights, which are cable to be protected and enforced by the courts, they would not be justiciable. In addition, some constitutions limit or exclude judicial powers in relation to some acts of government officials or leaders. A clear example of this is the situation, which obtains in Nigeria.

In my opinion, "ouster clauses" encourage human rights abuses and are not in line with international human rights instruments. I further disagree with the decision in *Attorney General of Largos states v Dosunmu* to extent that the doctrine of constitutionalism does not mean that the courts must blindly apply the provisions of the constitution. Individual human rights must carry more weight in the interpretation and application of the law by the courts. Doing otherwise, the courts would be seen as abdicating their social responsibility of protecting human rights violations.

By contrast, "impeachment" of the president, in Nigeria is left to the legislature and it is treated as a political question. This position also obtains in the United States. On the other hand in South Africa section 8(1) of the constitution provides that:

> The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

In my view, the special reference to the 'executive' in Section 8(1) makes it abundantly clears that the South Africa courts will adopt a different approach. My reasons are as follows: section 83 (b) of the 1996 Constitution requires the President to uphold, defend and respect the Constitution as the Supreme law of the Republic. Thus executive conduct, which is not consistent with this provision, will be subjected to constitutional Scrutiny. In addition, De Waal et *al* state that in principle, policy developed by the cabinet under executive powers listed in Section 85 (2) of the constitution must be consistent with the Bill of Rights. To substantiate the author's argument section 7 (2), provides that the 'state must respect, protect, promote and fulfill the rights in the Bill of Rights; Moreover, in the President of the Republic of South Africa the court held that the President is bound whether he acts as head of state (as he does for example, when he pardons offenders) or as head of the national executive, (as he does, for example, when he implements legislation together with members of cabinet).

In affirming the latter decision, section 239 of the 1996 Constitution provides that the exercise of a power or the performance of a function in terms of the constitution amounts to conduct of an organ of state. According to De Waal et al this will include both head of the state and the executive powers of the President[101]. However, De Waal[102] states that the courts will not interfere with political decisions made by the executive. The Constitutional Court in Ferreira v Levin has articulated this position *No*[103]. In casu, chaskalson P remarked as follows:

> [Whether or not there should be regulation and distribution is essentially a political question, which falls within the domain of the legislature and not the court. It is not for the court to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decisions to undertake such policies conforms to the constitution. It should

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101 President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).
102 De Waal et al the Bill of Rights Hand Book 51.
103 Ferreira v Levin NO 1996 (1) SA 984 (CC).

not, however, require the legislature to show that they are necessary if the constitution does not specifically require that this be done].

Furthermore, De Waal et al[104] argue that it is difficult to envisage review of the President's powers to appoint and dismiss Minister of the cabinet. To illustrate this point the author referred to *SARFU* case[105]. In the latter the constitutional court reiterated that there are significant constraints placed upon the exercise of powers by the President as Head of state. In this case, the court was concerned with S 84 (2) (f). The latter empowers the President to appoint a commission of enquiry. The court placed the following legal restraints; the President must act alone, not infringe the Bill of Rights, observe the Principle of legality and must act in good faith and not misconstrue his powers.

De Waal et al state that it will be difficult to launch a successful challenge to the exercise of these powers by the President. This position applies to the Courts judgment in *Pharmaceutical Manufactures*[106]. In *casu* the court had to consider the basis on which the exercise by the President of a power granted by an Act of Parliament to bring the Act into operation was constitutionally reviewable. The power, it was held, though derived from legislation and close to the administrative process was not administrative action. According to the court the power that was given to the President lay between the law-making process and the administration of the legislation.

The exercise of the power required a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation, which comes into force only when the power is exercised. Although not administrative action and therefore not subject to the administrative justice right in the

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104 De Waal et al the Bill of Rights Hand Book 53.

105 President of the Republic of South Africa v South African Rugby Football Unions 2000 9 1 (CC).

106 Pharmaceutical Manufactures Association of the SA: in re, Ex parte President of The Republic of South Africa 2000 (2) SA 674 (CC).

Bill of rights, the president's conduct was held to be an exercise of public power which had to be carried out lawfully and consistently with the provisions of the constitution.

The court further held that, at the very least, the exercise of public power by the executive would be tested against the 'rule of law'; which requires that decision must be rationally related to the purpose for which the power was given, otherwise they will be arbitrary and inconsistent with the constitution. However, as long as such political decisions are objectively rational, a court will not interfere with the decision because it disagrees with it or considers that the powers were exercised inappropriately.

In view of the above discussion, the President in South Africa can be impeached if his conduct is contrary to section 83 (b), S85 (2) and section 7 (2) of the 1996 constitution. Furthermore, although the courts will not interfere with the policy decision of the executive, these political decisions must be objectively rational to the purpose of the state. Therefore, the President must exercise the powers entrusted to him in terms of section 84 (2) with due regard to section 2 of the constitution.

4.2 Conclusion

The Constitutional Court interpretation and application of the law in *UCT*, *Bader Bop* and *Union of South African National Defence* emphasizes the Supremacy of the Constitution. The decisions in the above cases illustrates that the constitution must inform the way legislation is interpreted. Moreover, the Constitutional Court has moved away from a rigid application of the law, which was prevalent before 1994. For instance, the interpretation of the *Labour Relation Act* provisions in the above cases was not limited to the ordinary, grammatical meaning of the legislation.

The court took into account the underlying values and the purpose of the legislation. To illustrate the above the Constitutional Court in *National Union of Metalworkers of SA v Bader Bop Pty*[107] held that section 3 of the LRA requires the Act to be interpreted to give effect to its object and to comply with the Constitution and South African's public international law obligations as stipulated in section 39 of the 1996 Constitution. Furthermore, the court opted for a more flexible approach and extended organisational rights to minority unions on condition that these rights are stipulated in a collective agreement backed by the right to strike.

Thus, the 'purpose' of the constitution is accorded more weight. In my opinion the decision in Bader Bop has its own limitations. For example, the court stated clearly that the recognition of shop stewards for bargaining and industrial action does not amount to a right but a freedom.

This means that an employer has no duty to recognise all the rights of minority unions stipulated in section 14. This decision favours majority unions. Similarly, in the *Minister of Defence and others* the court emphasized the purpose of the constitution[108].

In *casu*, the Constitutional Court held that soldiers should be afforded the same treatment as workers for purposes of section 23 of the bill of rights. In terms of the decision in *NEHAWU*[109] *the* Court will entertain appeals, which concerns dismissal or labour practice, in which the fairness of the dismissal or labour practice is in dispute. The reason given by the court is that these matters raise a Constitutional issue. In view of the decision in *UCT* the Constitutional Court will entertain appeals from the Labour Appeal Court if the judgment or order appealed against involves a "Constitutional matter'.

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107 See discussion of Bader Bop on page 2.
108 See discussion and citation of the case on page 5.
109 See discussion of NEHAWU on page 8.

The apparent conflict in section 167 and 183 of the LRA has been resolved in *UCT* and *Chevron*. The latter is implicitly made subject to the constitution in terms of section 3(b) of the Act. The judgment in chevron, *UCT* and *Bader Bop* has reduced the powers of the Labour Appeal Court. The Labour Appeal Court is no longer a final arbiter of labour disputes. Its judgments are subject to the scrutiny of the Supreme Court of Appeal.

However, Grogan argues that the decisions in aforesaid cases have not resolved the High Courts jurisdiction in labour matters[110]. For example, section 137(2) which states that the High Court and Labour Court have concurrent jurisdiction to deal with matter involving alleged violations of Constitutional relations" arising from employment and from labour relations", is fuzzily worded. The overlap between the jurisdiction of the High Court and that of the Labour Court is extremely wide.

In my view, the passing of the Superior Courts Bill into legislation will do away with the uncertainties which exist between the jurisdiction of the High Court and the Labour Court. The fact that the bill abolishes the Labour Court and integrates its jurisdiction on the High Court, would remedy the problem of "concurrent jurisdiction". If the bill can be enacted into law labour disputes would pass through the following five forums. Firstly, the CCMA or an accredited bargaining council; the High Court the Supreme Court of Appeal and finally the Constitutional Court.

Insofar as the principal of justiciability is concerned, all laws in South African had to be interpreted in accordance with the Constitution. Moreover, the South African Constitution does not contain *"ouster clauses*". Although the courts will not interfere with matters that raise political questions like issues of policy and executive powers listed in section 85(2) of the Constitution, the conduct of the executive must be consistent with the bill of rights. The latter also applies to the conduct of

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110 Grogan ELJ 8.

the Head of State. Thus, all legislation in South Africa is amenable to judicial review.

The current trend of litigating labour disputes at the Constitutional Court, defeat the object of the legislature of ensuring a speedy and inexpensive resolution of labour disputes.

The effect of the above is that the workers, unions and employers must brace themselves for the costly and protracted litigation in the Constitutional Court. The fact that litigation in the latter court is expensive does not do justice to the workers because majority of them do not have sufficient funds to sustain an appeal at the Constitutional Court. To remedy the above situation, the jurisdiction of the *Legal Aid Board* in respect of labour matters should be extended to the extent that it encompasses a substantial amount of labour matters. As things stands now the Legal aid board[111] renders legal assistance only to "certain labour matters".

The current position of the board defeats the objective of section 35(3) (a) of the bill of rights. According to the latter a legal practitioner must be assigned to the accused person by the state and at state expense, if substantial injustice would result. Another solution is the one suggested by Grogan[112]. According to the latter, either the High Court or the Supreme Court of appeal should forestall abuse of the extended opportunities of appeal to the Constitutional Court by refusing leave to appeal; however, this power should be used sparingly, failing which it would deny prospective litigants their right of access to the Constitutional Court.

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111 Legal Aid Guideline of 2003.

Bibliography

Textbooks

Cheadle H *et al Current Labour Law* (Butterworths Durban 2003)

De Waal J *et al the Bill of Rights Hand Book* 4th Ed (Juta Cape Town 2001)

Du Toit D *et al Labour Relations Law* 3rd ed (Butterworths Durban 2000)

Grogan J *Workplace law* 7th ed (Juta Cape Town 2003)

Journal Articles

Okpaluba C "*Justiciability and Constitutional adjudication in the Commonwealth* "2003 THRHR 610 – 633

Grogan J "Employment Law "2003 ELJ 4 - 19

Constitutions

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of Namibia, 1990

Constitution of the Federal Republic of Nigeria, 1999

Acts

Basic Conditions Employment Act 75 of 1997

Constitutional Court Complementary Act 13 of 1995

Defence Act 44 of 1957

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Rules Board for Courts of Law 107 of 1985

Superior Courts Bill of 2003

Supreme Court Act 59 of 1957

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[112] Grogan ELJ 9.

Cases

South African Judgments

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (4) 7344

Chevron Engineering (Pty) Ltd v Nkambule 2003 7 BLLR 631 (SCA)

Christian Education of South Africa v Minister of Education 2000 (4) SA 757 (CC)

Ex parte the President of the Republic of South Africa: In Re Constitution of the Liquor Bill 2000 (4) SA 732 (CC)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

Fidelity Guards Holding (Pty) Ltd PTWU 1997 9 BLLR 1125 (LAC)

Foodgro CA division of leisurenet (Ltd) v Keil 1990 ILJ 2521 (LAC)

Khoza v Gypsum Industries Ltd 1998 ILJ 53 (LAC)

Kem – Lin Fashions v Brunton 2002 7 BLLR 597 (LAC)

National Union of Metalworkers Bader Bop (Pty) Ltd 2003 ILJ 305 (CC)

National Education Health Allied Workers Union v University of Cape Town 2003 BCLR 154 (CC)

NUMSA v Fry's Metals (Pty) Ltd 2005 JOL14141 (SCA)

Pharmaceutical Manufactures Association of the SA: In re: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

President of the Republic of South Africa v Hugo

President of the Republic of South Africa v South African Rugby Football Union 2001 (1) SA 1 (CC)

Schutte v Power Plus Performance (Pty) Ltd 1990 20 ILJ 655 (LC)

SA Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd 2000 21 ILJ 1583 1585 (LAC)

Shabalala v Attorney of the Transvaal 1996 (1) SA 725 (CC)

S v Zuma 1995 (2) SA 642 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

South African National Defence Union v Minister of Defence 1994 (4) 469 (CC)

South African National Defence Union v Minister of Defence 2003 (3) SA 239 (CC)

Tickly v Johannes 1963 SA 588 590 591 (T)

Foreign Judgments

Athukoral v Attorney - General 1994 3 LRC 301

Attorney General of Antigua and Barduba v Lake 1998 4 348 WLR 68 (PC)

Attorney General of Lagos State v Dosunmu 1989 NWLR 550

Camacho Ltd v Collector Customs 1917 18 WIR 159

Cormack v Cope 1974 131 432 454

Ex parte Attorney – General, Namibia: In recorporal Punishment by organs of State 1991 (3) SA (Nm SC)

Evelyn v Chichester 1970 15 WIR 410

House of assembly of Bendel State v A – G Bendel State 1984 5 NCLR 161

Hart v Military Governor of Rivers State 1976 11 (SC)

In re Garriah Sarran 1969 GLR 518

In re Langhorne 1969 HRL 534

Reddy v State of Jammu Kashmir 1980 SCR 13339

Roncarreli v Dupplessis 1959 16 DLR 689

Rees v Crane 1994 WLR 476 (PC)

Rivas & the Belize Advisory Council 1993 LRC 261 (Belize SC)

New Patriotic Party v Attorney – General 1999 2 LRC 283