A STUDY ON THE IMPACT OF THE CONSTITUTION ON LABOUR LAW IN SOUTH AFRICA

by

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ABSTRACT

Both the Interim Constitution, Act 200 of 1993 and the final Constitution, Act 108 of 1996 have brought about a new era in the South African legislative landscape and have had a profound impact on all legislation including labour legislation. The 1996 Constitution reflects the value of a new democratic government which is committed to social reform and eradication of all imbalances of the past. This research is aimed at examining the impact of the Constitution on labour law. Why is it necessary to study the impact of the Constitution on labour law? Firstly, because the Constitution makes it clear that it is the supreme law and all laws inconsistent with it will be null and void to the extent of the inconsistency.[1] As the supreme law therefore it must have a significant influence on how labour law is interpreted and applied and this in turn affects employment relations and labour practices. Secondly, the Constitution provides for certain labour law rights as fundamental rights. It is therefore necessary that labour law gives effect to these fundamental rights. Thirdly, the Bill of Rights, contained in Chapter II of the Constitution[2], applies to all law, and binds the legislature, the executive and the judiciary and all organs of the state. The actions of these structures must be in line with constitutional provisions. There is no doubt therefore that there are good reasons for undertaking this research.This is a library or desk-bound research in which extensive analysis was made of relevant case law. Law books, law journals and relevant statutes were also perused to ensure that the study was as complete as possible. The findings suggest that indeed the Constitution has a profound effect on labour law. The findings also suggest that there are other areas of labour law which still have to pass the test of constitutionality.

[1]Section 2, Act 108 of 1996

[2]Section 8(1), see note 1 supra

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Last but not least, I would like to thank God, the Almighty for giving me the wisdom, the strength and courage to start and finish this report.

I declare that the dissertation for the degree of Master of Business Administration at the University of North-West hereby submitted, has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution and that all material contained herein has been duly acknowledged.

Signed:____________________

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

The Constitution of the Republic of South Africa, Act 108 of 1996 as well as its predecessor, the interim Constitution, Act 200 of 1993, have brought about what could be regarded as radical changes from the previous apartheid era which was characterised by strife, conflict, untold suffering and injustice. The former racist policies generated, amongst others, gross violations of human rights, violent conflicts, hatred, fear, guilt and revenge. In the employment sphere these policies encouraged exploitation and unfair discrimination against the disenfranchised majority. The period preceding the interim Constitution of 1993 was characterised by parliamentary supremacy which was enshrined in section 59 of the 1961 Constitution[3] as follows:

(1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall make laws for peace, order and good government of the Republic.

(2) No court of law shall be competent to enquire into or pronounce upon the validity of any Act, which repeals or amends the provisions of sections 100 and 118.

The advent of both the interim Constitution of 1993 and the 1996 Constitution brought about what could be regarded as revolutionary changes not only politically but also in the South African legal system. According to De Waal et al (2000:2), the following fundamental changes were

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[3]Devenish (1986:3) "Change, reform and constitutionalism". *Constitutional Change and Reform in South Africa.* Research report.

brought about by the new dispensation:

(1) For the first time in South Africa's history, the franchise and associated and civil rights were accorded to all citizens without racial qualification. The racially qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid was brought to an end through the interim Constitution.

(2) The doctrine of parliamentary sovereignty was replaced by constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse. The courts were empowered to declare invalid laws and conduct inconsistent with the Bill of Rights and the Constitution.

(3) The strong central government of the past was replaced by a system of government with federal elements. Significant powers were devolved to the provinces and local government.

Of the three fundamental changes mentioned above the second one is the one on which most of the ensuing discussions will be based. Constitutional supremacy means that the Constitution is superior to other laws in the land. This suggests some kind of hierarchy of laws with the constitution being at the top of the hierarchy. It follows therefore that all laws must comply with the constitution and all laws and conduct inconsistent with it will be declared invalid to the extent of their inconsistency and the obligations imposed by it must be fulfilled.[4] Justice Chaskalson, the president of the Constitutional Court, emphasised this point of constitutional supremacy as follows:

[4] Section 2, see note 1 supra

"*The Constitutional Court has made it clear that all the provisions, will be strictly enforced, and the legislative and executive action inconsistent with the Constitution will be declared invalid.*" (De Rebus, 1997)[5]

The focus of this research is on the impact of the Constitution on labour law. The approach to this research is first of all to identify provisions in the Constitution which are relevant to labour law rights. These provisions, it will be shown, are contained in the Bill of Rights which is found in Chapter 2 of the new Constitution. These provisions impact directly on labour law and affect both the individual and collective employment relationships. This impact will be assessed through an analysis of relevant case law.

The impact of the Constitution on labour law has been researched in other parts of the world. According to Sir Otto Kahn-Freund[6] in many parts of the world that impact has been considerable and continues to do so. This point will be highlighted in various sections of this research. The next section will provide a bird's-eye view of the South African legal system. This will provide a framework on which the impact of the Constitution will be examined. This will be followed by a brief description on labour law, rationale and purpose of the research and the outline of the research.

[5]Griessel, D (1997). "Application of the Constitution". *De Rebus*. December 1997.

[6]Yale, D.E.C. (1976). "The Impact Constitutions on Labour Law. *The Cambrige Law Journal*. November 1976, vol.2, no.35 pp 240.

1.2 THE LEGAL SYSTEM IN SOUTH AFRICA

South Africa has a constitutional government similar to those of many western democracies.[7] The constitution provides for, *inter alia,* a bill of rights and a Constitutional Court which has the power of judicial review. The Constitutional Court does not hear evidence or question witnesses. [8] Its function is to determine the meaning of the Constitution in relation to matters in dispute. As a result of this, the Constitutional Court works largely with written arguments presented to it by parties.

The formalised court system in South Africa is hierarchical.[9] At the lowest level is the Small Claims Court which is informal. In these courts parties at dispute present their own cases and a verdict is rendered quickly. These courts, which are similar to those in the United States of America, deal with cases involving small monetary values. The Magistrate courts are in the next level of the hierarchy and they hear most criminal and civil cases in which disputed amounts are small. The High Court is on the next level above the Magistrate courts and it is divided into Provincial Divisions. The High courts are the appellate courts for the Magistrate courts and have binding authority in areas of their jurisdiction and only persuasive authority in outside these areas. At the same level as the High courts are other courts including Labour courts which have exclusive jurisdiction in all matters that must be determined by them in terms of the Labour Relations Act. The High Court retains its common law jurisdiction (Du Toit et al 2000: 611). The Labour Court has no jurisdiction over issues covered by collective agreements. Disputes relating

[7]Bernthal, S. " Legal System - South Africa."Http://www.shrike.depaul.edu/ (March 2000)

[8]http://www.law.wits.ac.za/court/courrtpam.html

[9]See note 7 supra

to rights are adjudicated upon by the CCMA whereas disputes of interest are subject to industrial action. Disputes about the interpretation and application of the LRA fall within the domain of the CCMA. The labour Court has concurrent jurisdiction with the High Court[10] in respect of any alleged or threatened violation of fundamental labour rights in the Bill of Rights. The Labour Court is empowered to review CCMA arbitration awards[11]. The question of review of CCMA cases was a contentious issue which was addressed in *Carephone (Pty) Ltd v Marcus NO & Others*[12]. In this case the court held that CCMA awards could only be held under section 145 of the LRA. Through this decision the court introduced a wider test for review because the Labour Court may review a CCMA award if there is no 'rational objective basis justifying the connection made between the material properly available to him and the conclusion he or she eventually arrived at.' In a subsequent decision, the Labour Court in *Nampak Corrugated Wadeville v Khoza*[13] revived the 'reasonable employer' test according to which the CCMA commissioner, when determining the fairness of a dismissal, may not second-guess the employer. Recently, the court rejected the reasonable employer test and expressed skepticism about the justifiability test in *Toyota South Africa Motors (Pty) Ltd v Radebe and others*[14]. This has obviously not helped much in terms of clarifying the issue of review. Sections 157 (1& 2) are generally accepted increasing the jurisdiction power even to the extent of negating section 145.

The Supreme Court of Appeal, which is on the next level in the hierarchy, has appellate

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[10]Section 157(2), Labour Relations Act, 66 of 1995.

[11]Section 145, see note 10 *supra*

[12](1998) 19 ILJ 1425 (LAC)

[13](1999) 20 ILJ 701(LAC)

[14]Case no DA 2/99 - (LAC) unreported.

jurisdiction only for non-constitutional cases but its decisions are binding on the lower courts. On the same level as the Supreme Court of Appeal is the Labour Appeal Court which is a court of law and equity and which hears appeals against judgement and orders of the Labour Court. The last level of the hierarchy is the Constitutional Court which hears all cases dealing with the interpretation and enforcement of Constitutional provisions.

The South African legal system is a common law system based on Roman-Dutch law. It is a hybrid system because it is heavily influenced by English law, French law and other European systems. For example, the Law of Contract is largely based on English statutes. Some laws are contained in the statutes (i.e. the laws made by Parliament) whilst the majority of the laws emanate from sources such as the Roman-Dutch law and judicial reports.

1.3 LABOUR LAW IN A NUTSHELL

Since the focus of the study is the impact of the Constitution on labour, it is only logical that at least a brief description be provided as to what labour law is all about. Labour law is a dynamic branch of the law which is constantly changing and developing in South Africa. For example at the time of compiling this research report efforts were underway to amend existing labour laws. Labour law, just like law in general, originates from common law, statutory law, delegated legislation, collective agreements case law and legal writings[15]. Common law, in the South African context, refers to the Roman-Dutch law which was imported to this country and which has been developed and extended by the courts. Statutory law refers to laws passed by law-making bodies

[15]"Introduction to law and labour law". *Labour Law Study Guide*. Unisa .1992.

such as a parliament. The laws passed by parliament are known as Acts or statutes. Delegated legislation refers to regulations which are made by a body or organ delegated by a law-making body to make such regulations. Case law refers to judicial decisions made by a court of law when it resolves legal disputes. In order to resolve a dispute a court must not only determine relevant facts but must also search for, state and apply the law applicable. In searching for the applicable law, the courts are sometimes obliged to give their own interpretation to which has the effect of changing and extending existing law. The writings of legal authors are frequently used by a court in deciding an issue and therefore also constitute a source of law.

Labour law is simply a body of legal rules, from various sources, which regulate various relationships such as those between the following persons and bodies:[16]

(1) an employer and employee;

(2) an employer and employees;

(3) employees and other employees;

(4) employers and other employers;

(5) employers and trade unions representing employees;

(6) employer organisations and trade unions representing employees;

(7) the state, employers and employees, as well as employer's organisations and trade unions.

In simple terms labour law is the law that regulates employment relations. Therefore, the impact

[16]See note 15 *supra*

of the Constitution on labour law has significant implications for employment relations.

1.4 RATIONALE AND PURPOSE OF THIS RESEARCH

The Constitution is the supreme law of the Republic. All laws must therefore comply with the Constitution. Certain labour rights are enshrined in the Constitution as fundamental rights. It is therefore crucial to determine whether labour law is giving effect to these fundamental labour rights and whether it is not in conflict with the Constitution. It is also equally crucial to see how enforcement mechanisms such as the courts of law, CCMA and other tribunals are interpreting labour law in relation to fundamental rights in the Constitution. This research was prompted by the need to assess the impact of the Constitution. In other parts of the World, as indicated earlier, the impact of the Constitution has been profound. It is therefore necessary to see if in South Africa the same conclusion can be reached.

Against this background therefore it is absolutely necessary to assess whether the Constitution has the effect on labour laws which the lawmaker purported to have, i.e. to bring about a new social order, remove the divisions of the past, redress imbalances, and improve the quality of life of all citizens and afford each person an opportunity to express his or her potential. The purpose of this research therefore is to identify the constitutional provisions applicable to labour law and to see how these impact on labour law.

1.6 OUTLINE OF THE RESEARCH

Chapter 1 provides an introduction to the report, including a brief background and purpose of the research. Chapter 2 discusses the research methodology and the research tools used in the research. Chapter 3 discusses the application of the Constitution and the Bill of Rights. Chapter 4 examines the impact of the Constitution on labour law. Chapter 5 provides major findings and conclusions.

1.7 ABBREVIATIONS USED IN THIS RESEARCH

In this report, unless otherwise stated-

"BCEA" means the Basic Conditions of Employment Act

"EEA" means the Employment Equity Act

"LRA" means the Labour Relations Act

"CCMA" means the Commission for Conciliation, Mediation and Arbitration

"ILO" means the International Labour Organisation

"Labour law" means the law that regulate relations between employers and employees

CHAPTER 2

RESEARCH METHODOLOGY

2.1 INTRODUCTION

This chapter outlines and explains the methodology used in the research process, both with regard to the gathering of data and the analysis thereof. It also explains the rationale behind the methodology employed and how the research was conducted.

2.2 RESEARCH TYPE AND INSTRUMENTS

Jacobstein & Mersky (1977:504) maintain that legal research is as much an art as it is a science and that there are many approaches to legal research as there are problems to be resolved. There seems to be a lot of truth in this assertion and in addition, it is generally agreed in research circles that the type of problem being researched will dictate the type of research instrument to used.

This particular research is a library or desk-bound type of research. This type of research approach has been selected because of the nature of the problem at hand. The impact of one piece of legislation over another cannot be determined simply on the basis of comparing provisions of the legislation. It needs an analysis of applicable case law as well as an analysis of expert opinion as contained in law books, law journals and other relevant materials. This research has therefore relied heavily on the use of primary sources and secondary sources. These will be explained next.

2.2.1 PRIMARY SOURCES

It is first and foremost necessary to distinguish the primary sources from the secondary sources because the former carries more weight and authority than the latter. Cohen (1986:9) defines primary sources as "those recorded rules of human behaviour which will be enforced by the state. They include the statute passed by the legislatures, decisions of courts, decrees and orders, and regulations and rulings of administrative agencies." In this study, statutes and decisions of court have been used quite extensively and therefore a brief explanation on them will be provided.

2.2.1.1 Statutes

Cohen (1986:108) argues that statutes are often marked by ambiguities or vagueness which give rise to legal controversy by making their interpretation and application difficult. Such controversies frequently require lawyers to ascertain the lawmakers' intent through the collection of study documents of legislative history. This statutory ambiguity may stem from linguistic uncertainty or poor draftmanship, but frequently is the inevitable result of negotiation and compromise during the legislative process.

With statutes, as with case law, there are both official and unofficial editions. The unofficial text such as the annotated codes provides additional research material than the official editions.

2.2.1.2 Judicial reports

Judicial reports or law reports as they are commonly known, form one of the great sources of legal authority. The reports consist primarily of constitutional court and appellate decisions, but some also include decisions rendered by trial courts. Although statutes appear direct and imperative they are often ineffective until construed or interpreted by judges and actually applied to particular situations.

According to Cohen (1986:9) the development of the recording of judicial decisions has been related to the quest for predictability and certainty in law. With written reports one is able to evaluate the future impact of the law and conduct of individuals influenced thereby.

Owing to the large number of decisions and statutes at any point in time as well as the chronology and method of publication, it is necessary to have tools to facilitate access to information. In this regard, a varied group of finding tools provide such access. These include digests of decision citator, encyclopaedias, indexes, annotated statutory compilations and computerised research systems such as the Internet. Such research tools provide an important means of locating the primary sources of authority.

In this study indexes were used to identify relevant case law. The Internet played a significant part in locating other primary sources relevant to the research topic. The government websites http://www.polity.org.za/lists/sanet.html and http://www.webchart.com/ were used in searching for statutes and government policy documents whilst the non-government sites http://www.sangonet.org.za and http://www.hsrc.ac.za/prodder.html and http://www.sangoco.org.za were used to search for information pertaining to current and future research on similar topics to the one under study. The higher education site http://www.nrf.ac.za was used to find information on all the science councils and national research facilities, links with all South African universities and tecknikons, postgraduate supervision and supervision related articles. Lastly, information pertaining to constitutions was sourced from the Internet site http://www.ac.za/databases.html.

2.2.2 Secondary sources

Secondary sources are persuasive but lack mandatory authority. Included here are textbooks, treatises, practice manuals, commentaries, restatements and periodicals which describe the law from the viewpoint of the practitioner, scholar and the student. In addition, several other aids have been used and these include:

(1) the law dictionary - for the understanding and mastery of the language of law;

(2) guides to proper citation form and usage; and

(3) Websites

2.3 CONCLUSION

The type of research instruments used in this study were appropriate and very relevant to the type of research. The impact of one piece of legislation over another can best be determined through extensive analysis of judicial reports supplemented by expert opinions from legal practitioners and researchers. This has been the approach in this study.

On the other hand, it would be unrealistic to suggest that this study was free of limitations. As in any research, a number of possible limitations may have affected the research process. These include the collection of data, particularly secondary data. Periodicals and law books were not readily available and this in turn delayed the process of data collection.

CHAPTER 3

APPLICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS

3.1 INTRODUCTION

The focus of this study is the impact of the Constitution on labour law. In order to assess this impact it is first of all appropriate to take a closer look at what the Constitution entails. The focus is only on those provisions which are of relevance to this research, i.e. labour rights. Accordingly, this chapter examines the fundamental labour rights in the Bill of Rights, the basic features of the new constitutional order as well as the application of the Bill of Rights and the Constitution. With regard to question of application, the report focuses on the vertical and horizontal application of the Bill of Rights. In addition, this chapter examines briefly whether the Constitution applies retroactively.

3.2 FUNDAMENTAL LABOUR RIGHTS IN THE CONSTITUTION

Certain labour law rights, albeit sometimes referred to as second generation rights or socio-economic rights, are enshrined as fundamental rights in the Constitution. These are contained in section 23 of the Constitution and read as follows:

Labour Relations		
23	(1)	Everyone has the right to fair labour practices;
	(2)	Every worker has the right -

a. To form and join a trade union;

b. To participate in the activities and programmes of a trade union;

c. To strike.

(3) Every employer has the right -

a. To form and join an employers' organisation;

b. To participate in the activities and programmes of an employers' organisation.

(4) Every trade union and employers' organisation has the right -

a. To determine its own administration, programmes and activities;

b. To organise; and

c. To form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangement contained in collective agreements. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

This section protects employees against unfair labour practices by employers. It protects the right to associate freely and the right to strike. In addition, there are other fundamental rights which are also relevant to employment relationships. Section 33 protects administrative law rights as fundamental rights. The provisions of this section forms an important yardstick with which all government actions must comply. This means therefore that these provisions are applicable to the employment relationship between the government, as an employer, and the individual employee. Other rights include the following:

(1)	The right to equality (s.9);
(2)	The right to privacy (s.14);
(3)	Freedom of religion, belief and opinion(s.15);
(4)	Freedom of expression (s.16);
(5)	Freedom of association (s.18);
(6)	The right to just administrative action;

This study focuses on some of the rights indicated in the preceding paragraphs and the extent to which they impact on labour law. However, first it is important to take a brief look at some of the basic features of the new constitutional order which will provide a framework for understanding the said impact.

3.3 BASIC FEATURES OF THE NEW CONSTITUTIONAL ORDER

Basic features of the new constitutional order, according to De Waal et al(200:7) refer to constitutionalism, the rule of law, democracy and accountability, separation of powers and checks and balances, and co-operative government and devolution of power. This discussion will focus only on the first two basic features, the constitutionalism and the rule of law, which are relevant to this study. The importance of understanding the basic features, as pointed out by De Waal et al (2000:7), is that they tie the provisions of the Constitution together and shape them into a framework that define the new constitutional order. De Waal et al (2000:7) argues further that these basic features therefore have a broader effect because they influence the interpretation of many other provisions of the Constitution, including the provisions of the Bill of Rights, and in this way the Constitution shapes ordinary law and determines the way in which legislation is interpreted or the common law is developed. These basic features are in fact some kind of a prerequisite to the understanding of the impact of the constitution on labour law.

3.3.1 Constitutionalism

Constitutionalism means that government derives its powers from a written constitution. Its powers are limited to those set out in the constitution. De Waal et al (2000:7) points out that, the constitution limits the power of the government in two ways, namely: (a) by imposing structural and procedural limitations on power, and (b) by imposing substantive limitations principally through the operation of the Bill of Rights. However, according to De Waal et al (2000:7), these limitations on power will not be effective without three associated principles of law: constitutional supremacy, justiciability and entrenchment. In terms of the principle of constitutional supremacy, the rules of the Constitution are binding on all branches of the state and have priority over any other legal rules. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law. This principle of constitutional supremacy is enshrined in section 2 of the Constitution which provides that 'the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Section 8 of the Constitution also provides that the Bill of Rights has supremacy over all forms of law and that it binds all branches of the state and, in certain circumstances, private individuals as well.

Constitutional supremacy, as De Waal et al (2000:9) argues, would mean little if the provisions of the Constitution were not justiciable. This means that for a supreme constitution to be effective the judiciary must have the power to enforce it. Accordingly, section 172 stipulates that, provided it has jurisdiction to do so, a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

Lastly, in terms of the third principle, Parliament cannot amend the Constitution without following special procedures and without the support of special majorities. In this regard, section 74 deals with procedures for the amendment of the Constitution. This a necessary safeguard for the Constitution to ensure that it is not amended at the whim of government.

3.3.2 The rule of law

Originally the notion of the rule of law was to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.[17] The courts have, it seems, not provided a clear meaning of 'the rule of law'. However, in an attempt was made to attach meaning to this concept in *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[18]. In this regard the Constitutional Court stated that:

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[17] Dicey, A.V. (1959) "*An Introduction to the Study of the Constitution*", as quoted by De Waal et al (2000:9)

[18] (1999) 1 SA 374 (CC)

"It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law... It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality... There is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action' the principle of legality is enshrined in s 24(a)[IC]. In relation to legislation and to executive acts that do not constitute 'administrative action' the principle of legality is necessarily implicit in the Constitution. Therefore, the question of whether the various local governments acted intra vires in this case remains a constitutional question."

It is clear that according to the court in the above case, the rule of law includes the principle of legality which means that the government, including the legislature and the courts, must act in accordance with the legal principles and the rules that apply to it. Even though this is not a very clear definition, it has at least thrown some light on what the courts think about this concept of the rule of law.

3.3 DIRECT OR INDIRECT APPLICATION OF THE BILL OF RIGHTS

In order to determine the impact of the Constitution it is necessary to see how the Bill of Rights is applied in relation to any law. The first issue in this regard is the direct and indirect application of the Bill of Rights. De Waal et al (2000:33) provides an explanation on the direct and indirect application of the Bill of Rights which is provided below.

Direct application means that the Bill of Rights overrides ordinary law and any conduct that is inconsistent with the Bill of Rights. According to De Waal (2000:33) the Bill of Rights when applied this way and subject to justiciability and constitutional jurisdiction, generate its own set of remedies. On the other hand, the Bill of Rights contain a set of values that must be respected whenever ordinary law is interpreted, developed or applied. This is what is known as the indirect application of the Bill of Rights. When applied this way, the Bill of Rights does not override ordinary law or generate its own remedies. The special rules contained the Constitution that deal with procedural issues of standing and the jurisdiction of the courts are also irrelevant. Rather, the Bill of Rights respects the procedural rules, the purpose and remedies of ordinary law, but demands furtherance of the values contained in it through the operation of ordinary law.

According to Du Toit et al(2000:33), in practice the indirect application of the Bill of Rights must always be considered before its direct application to law or conduct. This approach was adopted in *S v Mhlungu*[19]. In this case Kentridge AJ stated that:

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[19] (1995) 3 SA 867 (CC)

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed."

The same position was subsequently upheld in Zantsi v Council of State, Ciskei[20]. In this case the 'salutary rule', which is followed in the United States[21] and according to which a constitutional law question should not be anticipated in advance of the necessity of deciding it.

The South African courts, it seems, have adopted the approach in which the indirect application of the Bill of Rights is given first preference to the direct application. This means that the constitutional question in any legal dispute should only become an issue when absolutely necessary and when required by the precise facts to which it is applied.

3.4 VERTICAL AND HORIZONTAL APPLICATION

Another issue regarding the application is whether the Constitution applies vertically only or whether it applies horizontally as well. This it seems is one of the most contentious areas of the Constitution. Section 8 of the 1996 Constitution provides as follows:

8.	(1)	The Bill of Rights applies to all law, and binds the legislature, the executive, and the judiciary and all organs of state.

[20](1995) 4 SA 615 (CC) para 8.

[21]See note 18 supra

(2) A provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural person or juristic person in terms of subsection (2), a court -

(a) in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

In terms of this section it is clear that the Constitution regulates the relationship between the state and the individuals. This is referred to as the vertical application of the Constitution. This section also implies that the judiciary is empowered to apply or to develop common law in order to give effect to a provision of the Bill of Rights as it applies to a natural or juristic person.

The question of whether the Constitution applies horizontally has been addressed in a number of cases and has remained somewhat unclear. However, this issue was addressed quite adequately in Du Plessis and Others v De Klerk and another.[22]. During 1993 a newspaper, the *Pretoria News*, published a series of six articles dealing with the supply of arms and other materials to the

[22](1996) 3 SA 850

Angolan rebel movement, UNITA. The tenor of the articles was that the operations were covert and entailed the evasion of the South African air control regulations. The flights were described as 'illegal' and 'pirate flights'. The articles suggested that those responsible for the flights were 'fuelling the war in Angola' and were doing so for motives of personal gain, notwithstanding the disastrous effect of the Angolan civil war on the inhabitants of that country.

As a result of these publications the respondents instituted a defamation action in the Provincial Division against the appellants. On 25 May the appellants filed a plea in which they admitted publishing the articles, but denied that the articles meant that the respondents were involved in illegal activities, or that the articles were defamatory of the respondents. In the alternative, the appellants argued that the general subject matter was of public interest and that they had published the articles in good faith. After the Constitution came into effect on 7 October 1994, the appellants sought to amend their plea to the effect that publication of the articles had not been unlawful on the strength of the protection by section 15 of the Constitution, which provides for a right to freedom of speech and expression, including freedom of the press and other media. The Transvaal Provincial Division of the Supreme Court referred two issues to the Constitutional Court: (1) whether the Constitution could be invoked where the relevant events had occurred prior to the coming into effect of the Constitution and (2) whether Chapter 3 of the Constitution was applicable to legal relationships between private parties. With regard to the second question, which is relevant to the current discussion, the majority of the Court found that Chapter 3 could not be applied directly to the common law in actions between private parties, but left open the question whether there were particular provisions of the Chapter that could be so applied. Section 15, the right relied upon by the applicant, was in any event, not such a provision. However, in terms of section 35(3) courts were obliged, in the application of and development of the common law, to have due regard to the spirit, purport and objects of Chapter 3. The majority of the Court held that it was the task of the Supreme Court including the Appellate Division to apply and develop common law in the manner required by section 35(3). The Constitutional Court had jurisdiction in the final instance over the interpretation of section 35(3).

However a few moths later the same Court[23], during the certification of the constitution, held that section 8(2) of Chapter 2 unequivocally provides for the horizontal application of the Bill of Rights. No doubt this has yet left room for further debate on this issue.

What is the situation in other countries? According M Olivier, in Germany the courts accept the indirect applicability of the fundamental rights in the private sphere more readily, bearing in mind the exigencies of a particular situation. In other words the horizontal application of the fundamental rights is recognised but it applies indirectly. M Olivier also indicates that in Canada, the government agency or organisation will be subject to the provision of the Charter of Fundamental Rights only where it exercises a substantial degree of control on regular and ongoing basis of the daily activities of the agency or organisation in question.

3.5 DOES THE CONSTITUTION APPLY RETROSPECTIVELY?

Since the coming into effect of the Constitution, a number of labour law cases in which the Constitutional principles had to be dealt with, were reported. It is upon these cases that this study will focus to assess the magnitude of the impact of the Constitution on labour law. It should be

[23](1996) CCT 23/96

noted that neither the interim Constitution nor the 1996 Constitution is retrospective in its operation.[24] This question of retrospectivity was addressed and resolved in at least one or two cases. In the *Du Plessis* [25] case it was held "that the interim Constitution did not operate retroactively in the sense of enacting that, as at past date, the law should be taken to have been that which it was not, so as to invalidate what was previously valid or *vice versa.* There was nothing in the Constitution which suggested that conduct which had been unlawful before the Constitution came into effect was deemed to be lawful by reason of chapter 3." This approach was again used in *S v Pennington* [26] where it was held 'that nothing in the 1996 Constitution suggested that the non-retrospectivity rule is no longer applicable, or that it was intended that the 1996 Constitution should have retrospective application.'

In view of the two cases cited above it is clear that the Constitution was not intended to have retrospective effect. This, it is submitted, is a reasonable position because it respect and protects court decisions taken before the advent of the new Constitution. One shudders to think what would have happened if the constitution had retrospective application.

3.6 LIMITATION OF RIGHTS

Any discussion on the impact of the Constitution on other laws will not be complete without

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[24]The interim Constitution came into effect on 27 April 1994 and the 1996 Constitution on 4 February 1997.

[25] See note 22 *supra*

[26](1997) 4 SA 1076(CC)

reference to the general limitation clause.[27] It must be pointed out that fundamental rights and freedoms are not absolute. As De Waal et al (2000:132) argue, their boundaries are set by the rights of others and by the legitimate needs of society. Generally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights.[28] Section 36 of the Constitution, which as pointed out by M Olivier Slabbert et al (1998:5-16), reflects the influence of Canadian jurisprudence, subjects a limitation of a fundamental right to a threefold test, in terms of which the limitation must be:

- contained in a law of general application;
- reasonable; and
- justifiable in an open and democratic society based on human dignity, equality and freedom.

De Waal et al (2000:133) argue that ' limitation' is a synonym for 'infringement', or 'justifiable infringement' and therefore that a law which limits a right infringes that right. However, they point out that the infringement will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. Put differently, not all infringements of fundamental rights are unconstitutional.

M Olivier in Slabbert et al (1998:5-16) maintains that, in keeping with Constitutional

[27]Section 36, see note 1 *supra*

[28]Gerhard Erasmus 'Limitation and Suspension' in D van Wyk et al (eds) as quoted by De Waal et al(2000:132)

jurisprudence in countries with entrenched bills of rights, two questions should be asked in order to determine whether a limitation of a fundamental right pass Constitutional muster. First, has there been an actual or threatened infringement of the right in question? Second, is there sufficient justification for the infringement? M Olivier also points out that the wording of the limitation's clause suggests that the Canadian and German constitutions have had an influence in the South African constitution.

In S v Makawane[29] the president of the court, President Chaskalson made the following remarks in connection with the limitation of fundamental rights:

> "***In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose in such a society; the extent of such limitation, its efficiency, and ... whether the desired ends could reasonably be achieved through other means less damaging to the right in question.***"

In terms of the principles of reasonableness or balance, as pointed out by M Olivier [30], an act is declared unconstitutional if there is a radical imbalance between the public interest served by the act and the limitation infringing the social and economic sphere of people's lives.

[29] 1995 3 SA 391 (CC)

[30] "Statutory employment relations in South Africa"(Slabbert et al 1998:5-17)

3.6 CONCLUSION

By providing for labour law rights as fundamental rights, the Constitution has undoubtedly provided an important framework of values within which labour laws must be interpreted, implemented and enforced. It is therefore incumbent upon every court, tribunal or forum to distil the values underlying these rights and interpret labour laws in a way that gives effect to them.

It seems that it is generally agreed that the Bill of Rights is not capable of direct horizontal application. This matter has been to a large extent adeqautely addressed in the Du Plessis case. However, the position of the Constitutional Court in the certification of the constitution seems contradictory to the one in the Du Plessis case.

Regarding the question of limitation of rights, a law may legitimately limit a right in the Bill of Rights if it is a law of general application and it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

CHAPTER 4

THE IMPACT OF THE CONSTITUTION ON LABOUR LAW

4.1 INTRODUCTION

The previous chapter looked at the application of the Constitution as well as its provisions relevant to labour law. This chapter examines the impact of the Constitution on labour law. Owing to constraints of time, the vast scope of labour law and numerous labour law reports and the restrictions on the size of the report, it is practically not possible to consider all instances where the Constitution has had an impact on labour law. However, a few important areas of labour law have been carefully selected to demonstrate this impact. These include, the freedom of association, unfair discrimination, privacy, legal representation, medical and psychological testing, residual unfair labour practices and strikes and lock-outs.

4.2 FREEDOM OF ASSOCIATION

As indicated in the previous Chapter the Constitution provides for the employees and employers, to associate freely. Chapter II of the LRA explicitly protects this right which is enjoyed by employees, unions, employers and employers' organisations. The rights and duties contained in sections 4 -8 of the LRA probably give effect to the rights contained in section 23(2), (3) and (4) of the Constitution. It should be noted also that South Africa is bound to international conventions and recommendations on freedom of association.[31]

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[31]Article 2 &3 of Freedom of Association and the Right to Organise Convention (No.87/1948).

Freedom of Association is one of the cornerstones of workplace democracy. Freedom of association means that employees should have the freedom to join the organisation of their choice. In addition, Bendix (1996:277) points out that there should be no manipulation of membership and that the collective organisations themselves should be free to choose and be free from influence and that members of such organisations or their office bearers should not fear victimisation.

Freedom of association has been embraced in many other countries and it is only proper to have a brief look at some of these countries. According to M Olivier,[32] in Germany the constitutional guarantee of the right to freedom of association has been given a wider interpretation to include the right to be free not to associate and closed shop and other forms of union security are regarded as being in violation of the right not to associate. In the United States, as M Olivier points out, the right to be free not to associate enjoys extensive protection similar to the right to associate. Lastly, in Canada, according M Olivier, the right to freedom of association is protected by the constitution but not the right to be free to join or not to join. The South African statutory law makes provision for freedom of association only and not for the right to be free to associate or not associate. On a comparative basis the South African situation is similar to that of Canada in that the Constitution does not necessarily provide for the right to be free to associate or not to associate. However, in all the other countries mentioned above, the right to associate freely is protected.

The Constitutional Court has dealt with freedom of association in <u>South African National Defence</u>

[32]"The Impact of Human Rights Legislation on Labour Law" (Conference Paper)

Force v Minister of Defence and another[33]. In this case, the Constitutional Court had to deal with the question of whether it was constitutional to prohibit members of the armed forces from participating in protest action and from joining trade unions.

According the facts of the case, the South African National Defence Force (the Defence Force), which includes the South African Army, navy, and air force, is divided into the Permanent Force which consists of the core military personnel who are enrolled in the Defence Force, the citizen and commandos. There is also a Reserve, which for the purposes of the Defence Act is not considered to be part of the Defence Force. According to section 126B(1)only members of the Permanent Force were barred from joining the trade union.

Regarding the issue of trade union membership, the applicant argued that prohibiting membership of a trade union infringed the constitutional right of every worker to form or join a trade union. With reference to the International Labour Organisation's construction of 'worker', O'Regan J of the Constitutional Court interpreted the term 'every worker' to include members of the armed forces, even though their relationship with the Defence Force is unusual and not identical to an ordinary employment relationship. The court decided that this is a case in which a generous interpretation of the right is appropriate, for although members of the Defence Force may not be employees in the full contractual sense of the word, their conditions of enrolment in many respects mirror those of the people employed under a contract of employment.

The respondents argued that any infringement of the right was justified by the constitutional

[33](1999) 234 (CC)

imperative to structure and manage the Defence Force as a 'disciplined military force'. They maintained that a Defence Force could not be such a 'disciplined military force' if its members belonged to trade unions and wished to exercise their rights to collective bargaining and strike action. The applicant argued that a trade union can function and further the interests of its members without participating in strike action. The Court decided that the requirement of strict discipline would not necessarily be undermined by permitted Defence Force members to join a trade union, as the structure and scope of such a trade union might differ given the military environment. The Court referred to Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948, which was ratified in South Africa in 1995. It provides that:

> "***Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.***"

The Court also made reference to Article 9(1) of the same Convention which provides that:

> "***The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations***."

The Court stated that in appropriate circumstances, the constitutional right to join a trade union may be limited, provided such a limitation were constitutionally justifiable. The Court held that section 126B of the Defence Act, 44 of 1957 was unconstitutional and invalid to the extent that it prohibits members of the South African Defence Force from joining trade unions.

It is submitted here that this judgement is an important milestone in labour law which has undoubtedly entrenched the right to associate freely. An interesting observation in this case that the Constitutional Court followed the ILO guidelines when interpreting the term 'worker' which enabled it to make a generous interpretation and expand the meaning thereof to include members of the Defence Force.

4.3 AGENCY SHOP AND CLOSED SHOP

The provisions of both the agency shop and closed shop seem to infringe on freedom of association. The section of the research examines the provisions of the agency shop and closed shop with a view to see whether the limitation brought by them on the right to associate freely is constitutionally valid or not.

4.3.1 Agency shop

Section 25 of the LRA provides for an Agency shop. This Agency agreement requires an employer to deduct an agency fee from identified employees[34] who are not members of the union but are eligible for membership.[35] The LRA stipulates the following requirements for a valid agency shop agreement:

[34]The restriction of 'identified employees' to those eligible for membership of the union was brought about by the Labour Relations Amendment Act 42 of 1996. The effect is that only employees of this category, rather than employees in general, can be converted by an agency shop.

[35]Section 25(1) of the LRA

- it can be entered into only by one or more unions which have as members the majority of employees in the workplace [s 25(2)];
- non-members of unions may not be compelled to become members [s25(3)(a)];
- the agency fee must be equal to, or less than, the applicable union subscriptions [s25(3)(b)]; and
- the fee must be paid into a separate account administered by the union and must be subject to similar limitations to those which apply in the case of closed shop agreements [s25(3)(c)].

This type of agreement does not force the non-memebers to become union members but merely attempts to curb the 'free rider' [36] problem. The issue of "free riders" was addressed in National Manufactured Fibres Employers' Association and another [37]. In this case the court observed that agency shop agreements were considered necessary because it took effort and money for a union to establish itself in a workplace and to bargain collectively on behalf of employees. According to the court therefore "free riders" benefitted from the efforts of the majority unions without contributing to its costs. Section 4 (b) provides for a conscientious objector who "may request the employer to pay the amount deducted from his or her wages into a fund administered by the Department of Labour.

The agency shop provision has not been challenged on constitutional grounds in South Africa, hence it in order to look at relevant cases in other countries. Du Toit et al (2000:97) point out that

[36]Those employees who are not members of the trade but nevertheless enjoy the benefits of collective bargaining.

[37](1999) 10 BLLR 1076 (LC)

in both Canada and the United States the agency shop has survived constitutional scrutiny and quotes two cases to support this assertion. The first of these cases is *Lavigne v Ontario Public Service Employees' Union*[38] . In this case the Canadian Supreme Court declined to find unconstitutional an agency shop provision in a public sector collective bargaining agreement, despite the fact that contributions were used for political and ideological purposes that went beyond the immediate concerns of the collective bargaining unit.

In *Abood v Detroit Board of Education*[39] the United States Supreme Court held that agency shop provisions were, in principle, justified notwithstanding their impact upon the employees' constitutional rights. However, the court upheld the dissenting employees' objection to the expenditure of union dues on political causes unrelated to collective bargaining. It should be noted though that the United States Constitution does not provide for the right to collective bargaining, a right which is embodied in the South African Constitution. This means therefore the approach of the South African courts will probably differ with that of the United States courts in this regard.

The two cases cited above shows that the courts in those countries are prepared to protect the agency provisions. Whilst it is still a matter of speculation on how the South African courts will approach the agency shop provision, one can reasonably expect that they will take their cue from these foreign courts. This stance is supported by Du Toit et al (2000:98) who argue strongly that given the above two important North American cases, the Agency shop provision in the LRA should have little difficulty in surviving a constitutional challenge.

[38](1992) 4 CRR 2D 193

[39]52 Led 2d 261

4.3.2 Closed shop

Section 26 of the LRA provides for closed shop agreements. In terms of this section, a Closed Shop Agreement is a collective agreement which requires all employees covered by the agreement to be members of the trade union. This provision seems to provide a union with a more powerful way of strengthening its bargaining position with the employer. On face value, however, it appears that this provision infringes on the right to associate freely. Unfortunately, in South Africa the courts have not dealt with legal disputes involving closed shop.

As in the case of an agency shop therefore international law will provide guidance as far as the closed shop regime is concerned.[40] A case which is of great relevance in this regard is *Young, James & Webster v United Kingdom*[41]. In this case, a closed shop had been introduced after the appointment of certain employees and they were subsequently dismissed for non-compliance with the closed shop. The court found the dismissal of these employees to be contrary to article 11of the Convention, which guarantees freedom of association. The court expressed the view, however, that the closed shop system held considerable advantages for both employers and employees (such as the fostering of orderly collective bargaining and the avoidance of the proliferation of trade unions). A similar conclusion was arrived at in *Sigurjonsson v Iceland*[42]. In this case a taxi driver was compelled to be a member of a union. The court declared a provision contained in the particular Islandic statute invalid. It is clear from these two cases that the courts are determined to protect freedom of association. The benefits that are offered through the closed

[40]Du Toit et al (2000:94)

[41][1981] IRLR 408 (ECHR)

[42](1992) 24 ECHR 369/443

shop regime are far outweighed by the principles of freedom of association. It is therefore submitted that the in view of the international trends, closed shop provisions will not stand constitutional attack.

4.4 UNFAIR DISCRIMINATION

4.4.1 Definition and background

According to Schedule 7 of the LRA, unfair discrimination refers to discrimination:

(a) against employees or job applicants

(b) based on any arbitrary reason such as race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility.

The Constitution provides for the right to equality which is meant to root out unfair discrimination. Section 9 of the Constitution provides as follows:

Equality

9. (1) Everyone is equal before that law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.

(4) No person may discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

De Waal et al (2000:183) point out that the importance of this right in a post-apartheid constitutional order. The apartheid social and legal system was squarely based on inequality and discrimination. This state of affairs was clearly explained in Brink v Kitshoff NO [43] as follows:

"***Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing***

[43] 1996 (4) (CC)

in areas classified as 'white', which constituted nearly 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society."

Indeed the previous system of divide and rule left huge inequalities which are still evident in many areas such as education and health. White South Africans are significantly healthier and enjoy a relatively high standard of literacy and education. A study conducted in 1994 found that 80 per cent of Africans and 40 per cent of whites could not read or compute at a standard five level (the basic level of literacy).[44] Clearly this is a huge discrepancy considering that Africans are in the majority.

The legacy of inequality inherited from the past means, according to De Waal et al (2000:183), that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality (sameness of treatment: the law must treat individuals in the same manner regardless of their circumstances). It is not sufficient to remove racist laws from the books and to ensure that similar laws cannot be enacted in the future. That will result in "a society that is formally equal but unequal in many other ways" (De Waal et al 2000:183). Therefore substantive equality, which takes care of the circumstances referred above and requires the law to ensure the equality of outcome, is required.

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[44]South African Institute of Race Relations South Africa Survey 1995/6 96.

Discrimination according to De Waal et al (2000:193) is a form of differentiation. Unlike 'mere discrimination' unfair discrimination is differentiation on illegitimate grounds. As stipulated in section 9(3) the LRA set out to incorporate the prohibition contained in section 9(3) of the Constitution and the principles developed by the Industrial Court into a broader framework which, while specifically proscribing certain prevalent forms of employment discrimination, could be used to strike down unfair discrimination in any form (De Waal 2000:193). This function has now been taken over by the Employment Equity Act (EEA) which forces employers to promote equal opportunity in the workplace by eliminating unfair discrimination in their employment policies and practices.'[45] Section 6(1) of the EEA prohibits unfair discrimination as follows:

> '***No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.***'

The list of prohibited grounds is potentially unlimited. This point was highlighted in *Brink v Kitshoff NO*[46] as follows:

> "***Although the most visible and most vicious pattern of discrimination in South Africa had been racial, other systematic motifs of discrimination were inscribed on the social***

[45]Section 5 of the EEA

[46]See note 43 *supra*

fabric. In drafting s 8, the drafters recognised the systematic patterns of discrimination on grounds other than race had caused, and might continue to cause, considerable harm. For this reason, s 8(2) listed a wide, and not exhaustive list of prohibited grounds of discrimination."

The burden of proving that the discrimination is fair is effectively placed on the person who infringed the right to equality[47]. Fair discrimination refers to discrimination based on the inherent requirements of a job and affirmative action measures. [48]

The EEA and LRA both distinguish between direct discrimination and indirect discrimination. Direct discrimination occurs if an employer intends to discriminate. For example, if an employer refuses to pay a woman doing the same job as a man the same wage simply because she is a woman. Indirect discrimination, on the other hand, occurs as a consequence of another apparently fair action. For example, if an employer decides that employees who are absent from work longer than 30 days in a year will not get a bonus, he or she will be guilty of unfair discrimination against pregnant women, because such women will be off work for longer than 30 days owing to pregnancy. Indirect discrimination therefore implies that although the criterion used to distinguish may be neutral in form, it is discriminatory in effect.

A number of labour law cases have dealt with the distinction between the direct and indirect discrimination. These include *Leonard Dingler Employee Representative Council & others v*

[47]Section 9(5), see note 1 *supra*

[48]Section 6(2), see note 45 *supra*

Leonard Dingler (Pty) Ltd [49]. In this case, the respondent was running three pension funds. The fund in dispute (the Staff Benefit Fund) was for monthly paid employees and had originally been reserved for whites. The black employees had belonged to a separate pension fund until a provident fund was established. In 1996 race was removed as a criterion for eligibility for any of the schemes. The respondent argued that the applicants were not allowed to join the Staff Benefit Fund because they were weekly paid and the fund was reserved for monthly paid employees. The court held that the prohibition of unfair discrimination contained in item 2(1) (a) of Schedule 7 to the LRA 'sorts permissible discrimination from impermissible discrimination. By this mechanism the legislation recognises that discriminatory measures are not always unfair. What is not clear is where to draw the line between permissible and impermissible discrimination. The notion of permissible discrimination is in keeping with a substantive, rather than formal, approach to equality that permeates the Constitution and from which item 2(1) draws its inspiration'. The court accordingly held that the respondent had discriminated against its black employees in two ways. First, by hiring new black employees on a weekly paid basis and new white employees on a monthly paid basis, irrespective of the work they did. Second, by not offering or requiring membership o the Staff Benefit Fund to its black monthly paid employees. It is submitted that the membership of this benefit scheme was still racially based. The decision of this court was therefore quite appropriate under the circumstances.

The other case is Kadiaka v Amalgamated Beverage Industries [50]. In the Kadiaka case the respondent had refused to employ the applicant on the basis that the latter had previously worked

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[49](1998) 19 ILJ 285 (LC)

[50](1999) 8 LC 6.12.1

for a rival company, New Age Beverages. The reason offered was that '[b]ecause the manner in which New Age Beverages and its employees acted towards [the respondent], the trust required for the employment relationship will not necessarily be present between ABI and any ex-NAB employee'. The applicant alleged that this constitutes unfair discrimination in terms of section 2(1)(a) of Schedule 7 to the LRA. The court found that ABI's policy amounted to differential treatment of ex-NAB employees but that it did not constitute discrimination in a pejorative sense because it made 'commercial sense', it was temporary, not vindicative and not inimical to the values of society at large. Again it is clear that no unfair discrimination was involved in this instance. This is a form of fair discrimination. This an example of a company which is trying to keep its competitive position in the market.

4.4.2 Discrimination based on nationality

Two cases are worthy of mention here. The first of these cases is *Baloro and others v University of Bophuthatswana and others*[51]. Following demonstrations, toyi toying and disruptions of university affairs, the respondent, the University of Bophuthatswana placed a moratorium on the promotion of its alien or expatriate staff. The applicants, who were members of the teaching or academic staff, filed an application with the High Court. They contended that they were being unfairly discriminated against on the grounds of their nationality and origin. They made the legal submission that the respondents were infringing their fundamental rights as contained in the Constitution of the Republic of Africa Act 200 of 1993.

[51](1995) (8) BCLR 1018 (B)

The principle and substantial issues between the parties as indicated in heads of argument were the following:

(1) whether the applicants have the right, which is protected by the Constitution, not to be discriminated against on the grounds of national origin;

(2) whether the applicants have a contractual right protecting them against discrimination on the grounds of their nationality; and

(3) whether the applicants have been prejudiced or unfairly discriminated against.

The court took a dim view of the demonstrations against the expatriate staff. It also expressed its unhappiness with the way things were running at the University as follows:

> "***It ill behoves an institution of learning which propagates the credo of 'academic freedom' to indulge in or be party to acts of discrimination against any persons, let alone members of its staff, no matter what their ethnic or social origin is***".

The court held that the decision of the Interim Council of the University of Bophuthatswana of placing a moratorium on promotions of non-national academic staff with valid contracts of employment while promoting members of staff with South African citizenship, is a gross violation of section 8(2) for the following reasons:

(1) "***There was no valid reason for their application to be subject to a moratorium while other members of staff receive promotion based on, inter alia, the fact that they are South African citizens***.

(2) *The words '(n)o person' in section 8(2) of the Constitution apply to aliens. 'Person' does not mean only a citizen of South Africa.*

(3) *The international standard relating to the treatment of aliens postulates that, if a State admits an alien into its territory, it must conform in its treatment of him to the internationally determined standard. This means that the State should accord treatment to the alien which measures up to the ordinary standards of civilisation. The international standard of treatment of aliens applies in respect of fundamental human rights, such as the right to life and integrity of persons, but not political rights.*

(4) *Having regard to s 8(2) of the Constitution, public international law, foreign and comparable case law, which the Court is, in terms of s 35(1) of the Constitution, entitled to take into account, an overwhelming had on the facts been made out that no-national (ie expatriate) academic staff (the applicants) had been discriminated against because they were not South African nationals.*

(5) *The onus in s 8(4) was applicable and, on the facts, the responses given by the University and the other respondents were devoid of substance: the qualification for appointment of staff of a university was, and should be, merit and suitability of for the position, and not ethnic or national origin.*"

This case shows the courts' attitude towards unfair discrimination. It is clear that the courts are prepared to root out all forms of unfair discrimination including those that fall outside the listed grounds as explained above. The decision of the Interim Council was clearly biased and prejudicial. The decision of the court was therefore fair.

The second case of unfair discrimination based on nationality is *Larbi-Odam v Minister of the*

Executive Council for Education[52]. This was in fact an appeal against a judgement delivered on 29 August 1996 by Waddington J in the Bophuthatswana Provincial Division of the Supreme Court in *Larbi-Odam and Others v Member of the Executive Council for Education and Another*.[53] The appeal was against regulation 2(2) in the Terms and Conditions of Employment in Education. The material portions of this regulation provided as follows:

> " ... no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen and meets the requirements of section 212(4) of the Constitution of the Republic of South Africa, 1993."

These regulations were issued by the Minister of Education, the second respondent in the case. The second respondent, the MEC for Education in the North West Province relied on regulation 2(2) for rationalising the Department of Education in his Province. That process included, amongst others, the conversion of temporary teaching posts to permanent ones. The first responded advertised the posts held by foreign teachers temporarily employed in the province and issued such teachers with notices purporting to terminate their services. The applicants sought an interdict restraining the respondents from enforcing regulation 2(2). Waddington J held that although regulation 2(2) was at variance with section 8(2)[54] of the interim Constitution, it was nevertheless justified under section 33(1)[55]. In reaching this decision, Waddintong J considered, amongst others, the high number of unemployed teachers in the country, the limited financial

[52] 1997 (2) (CC)

[53] 1996 (12) BCLR 1612 (B)

[54] "No person shall be unfairly discriminated against, directly or indirectly, and, ..."

[55] "The rights entrenched in this Chapter may be limited by law of general application, ..."

resources available for the remuneration of teachers and the rationalisation process that was carried out in accordance with the provisions of section 237 of the Interim Constitution.

The Constitutional Court, however, overturned this decision. At issue was the constitutionality of regulations purporting to exclude no-South African citizens from permanent employment as educators. The court ruled that differentiation of this kind amounted to 'discrimination' and went on to say that such discrimination was unfair not only in relation to foreign citizens who had been granted permanent residence status in South Africa but also in relation to temporary residents whose lawful rights might be threatened as a result of these regulations. Mokgoro J explained the reasoning of the court as follows:

> "***If employees working under temporary residence permits were denied job security only to the extent required by the terms of lawful permits, it could not be said that such discrimination was unfair. But regulation 2(2), in effect, may go beyond that ... I cannot be sure that if I were to limit the declaration of invalidity to educators appointed in permanent capacity, I would not be doing an injustice to temporary residents***."

In this Larbi-Odam case the court emphasised that its ruling did not affect the status of temporary residents. Its ruling was confined to the constitutionality of regulation 2(2). No finality was, however, not reached on whether the regulation was unfair discrimination with regard to temporary residents. The Court noted that irrespective of the regulation, the position of temporary residents in South Africa was precarious. They cannot stay for longer than specified in their residence permits and cannot be employed for longer than that period. However, the Court also noted that the regulation at issue allowed these temporary residents to be disadvantaged to a greater degree than was required by their residence permits with respect to job security, and other employment benefits. Further, the Court noted that some teachers, although employed on 'temporary' contracts in form, were in substance employed in contracts that were consistently renewed every year.

The Court decided to invalidate the regulation in its entirety. This was mainly in view of the fact that an injusticemight be caused if the regulation was invalidated only with respect to permanent residents and not with respect to temporary residents.

This decision by the Constitutional Court and the one taken in the Baloro case confirm the South African courts' strong stance against discrimination on the grounds of nationality. It must be recalled that the constitution protects all the inhabitants of South Africa. This point is well captured in the preamble to the Constitution. Non-nationals are a minority in this country. It is important that their rights be protected and that they not are discriminated against unfairly on the basis of their nationality.

4.4.3 Race discrimination and affirmative action

Race discrimination is one of the specified prohibited grounds contained in the Constitution and the Employment Equity Act 55 of 1998[56]. In simple terms race discrimination means that a person is discriminated against because he or she belongs to a particular race. Affirmative action was

[56]Section 6

brought about to eradicate the imbalances of the past. It is hoped that affirmative, through its preferential treatment for the historically disadvantaged groups, will remove these imbalances and restore the equilibrium in the workplaces.

The introduction of the affirmative action legislation did not enjoy a smooth sailing. It has been attacked in some sectors as "reverse discrimination" and there have been legal disputes on affirmative action appointments. Grogan (2000:203) notes that although item 2(2) of the LRA seeks to protect affirmative action appointments against attack on the basis of unfair discrimination. Grogan (2000:203) cautions, however, that the following internal limitations of the clause must be carefully noted:

(1) The policy or programme must not be inherently unfair.

(2) Affirmative appointments must be made to 'achieve adequate protection and advancement of persons disadvantaged by unfair discrimination. This implies that the benefits granted to those who are affirmed must be proportional to the goal of achieving equality.

(3) Thirdly, the beneficiaries must have been disadvantaged by unfair discrimination. An interesting case in this regard is *Auf der Heyde v University of Cape Town*[57]. During 1994, the University of Cape Town (UCT) advertised the position of lecturer/senior lecturer in the Department of Chemistry. It was indicated that it would be a 'contract post' initially for three years, with a possible extension to five years. The applicant applied for the post and was appointed in this capacity. The letter of appointment referred to a three-year contract but does not appear to have referred to the possibility of extension. It was also

[57](2000) 8 BLLR 877 (LC)

stated that the appointment did not "carry any commitment to a permanent appointment". At about the same time two other persons, both of whom were black, were appointed on the same terms.

Towards the end of 1997, it was recommended that one of the black employees, should be interviewed for a permanent position without the post being advertised. The other black employee, as well as the applicant objected to this procedure and it was decided that all three employees should have the opportunity to apply for the position, which was then advertised. The two black employees were appointed. One of the factors taken into account was the affirmative action policy of UCT. During this period the applicant also applied for position as a lecturer, but was unsuccessful. When his contract expired a few months later, it was not renewed.

The applicant felt unfairly treated and aggrieved. He approached the Labour Court for relief. He argued his case on three points. Firstly, the University's failure to renew his contract constituted an automatically unfair dismissal as envisaged in section 187(1)(f) of the LRA. Secondly, the actions of UCT constituted unfair discrimination within the meaning of item 2(1)(a) of schedule 7 to the LRA. Thirdly,his dismissal on the grounds of operational requirements had not been procedurally fair.

It must be pointed out that in this case the applicant had hoped that the University, as is the practice in many other academic institutions, would renew his contract and utlimately employ him on permanent basis. Therefore the remedy that he was seeking before the court was an order awarding him permanent appointment. The Court, following the decision in *Dierks v University of South Africa*[58], rejected this.

However, the Court found that the applicant had had a reasonable expectation of renewal of his fixed-term contract. He had therefore been dismissed. This led to an enquiry as to whether the dismissal was automatically unfair by reason of the applicant's race, and/or whether unfair discrimination as envisaged in item 2(1)(a) of schedule 7 to the LRA had taken place. An interesting point in this case was that the Court found that UCT could not, in the case of one of the appointees, rely on the defence of compliance with affirmative action policy. This was because the employee was not a South African. However, on the facts, the Court found that there had been no discrimination on the basis of race in the failure to appoint the applicant. The court, nevertheless, found that the dismissal was procedurally unfair as there had been no consultation prior to dismissal as required in terms of dismissals based on operational requirements.

(4) When employees are discriminated against by the adoption of affirmative action measures, the employer must be able to show that it acted in terms of a coherent and defensible plan. This, as pointed out by Grogan (2000:204) was one of the bases on which the Minister was held to have acted unfairly in *PSA v Minister of Justice & others*[59], in which the criteria adopted by the Department of Justice to promote blacks and women before highly experienced white men were stigmatised by the Court as irrational.

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[58](1999) 20ILJ 1227 (LC)

[59](1997) 18 ILJ 241 (T)

(5) Finally, the affirmative action programme or measures must be aimed at conferring to the beneficiaries the 'full and equal enjoyment of all rights and freedoms'. Grogan (2000:206) argues that the use of the word 'equal' indicates clearly that an affirmative action programme cannot be used to create a new group hegemony - protection will fall away when the effects of past discrimination have removed and equality achieved. Grogan quotes *George v Liberty Life Association of Africa*[60] to illustrate this last limitation. The applicant, a white male complained that the company's refusal to promote him was unfair because, amongst others, it had appointed a 'coloured outsider' on affirmative action grounds. The court noted that the composition of workplaces in South Africa was shaped by the legacy of racial discrimination and that inequality would be perpetuated unless employers were permitted to act positively in order to correct them. Having said that, however, the court suggested that affirmative action programmes should be subjected to two limitations: (a) membership of a disadvantaged group is not in itself enough to justify favouring a person over other claimants; and (b) the beneficiary must be shown to have suffered some personal disadvantage along with the other members of his or her group. Liberty Life was accordingly held to have been justified in making the outside appointment rather than promoting Mr George internally, because the outsider in this instance had been schooled in a historically deprived system.

If affirmative action is to succeed and not be regarded as unfair discrimination employers must take heed of the limitations indicated above. If this is the case, legal disputes on affirmative action appointments will probably survive constitutional scrutiny.

[60](1996) 17 ILJ 571 (IC)

4.3.5 Gender discrimination

As far as gender discrimination is concerned, women have suffered the most compared to men. Women have been unfairly discriminated against in terms of, amongst others, employment opportunities, promotions, remuneration and benefits. An interesting case regarding discrimination against the fairer sex is *G v K*[61]. In this case a senior director of the respondent had an affair with the applicant. This affair was discovered by the director's wife who then informed the company about it. The board of directors terminated the applicant's contract in order to save the marriage. The court held that the dismissal constituted an unfair labour practice.

In *Collins v Volkskas Bank (Westonaria Branch)*[62], the applicant was forced to resign after she had fallen pregnant and applied for maternity leave. The resignation was based on a provision in a collective agreement between the employer and the union of which she was a member, and in terms of which maternity leave could only be granted in two year cycles. In this case, she applied for maternity leave after only 18 months.

The court rejected the employer's argument that her dismissal for reasons of incapacity did not amount to discrimination. The court found that the dismissal was a form of indirect discrimination, since it constituted a labour practice that was fair in form but discriminatory in effect. The court concluded that there were insufficient grounds for terminating her employment.

[61] (1998) 9 ILJ 314 (IC)

[62](1995) 4 LCD 85 (IC)

Another interesting and well-publicised case is *Woolworths (Pty) Ltd v Whitehead*[63]. In this case, Ms Whitehead had applied for a vacant position at Woolworths and was given an offer which she duly accepted. However, this offer was subsequently repudiated by Woolworths and she was informed that she was no longer being employed by them. She approached the Labour Court alleging that she was unfairly dismissed and unfairly discriminated against because she was pregnant. Woolworths argued that its requirement for continuity of employment was based on the commercial or operational needs of the business. The court held that Woolworths had acted unfairly in refusing to employ Ms Whitehead. The court held that there was no justification why the continuity requirement should be imposed and that there had been discrimination on arbitrary grounds.

On appeal, however, the decision of the Labour Court was overturned. The Labour Appeal Court found that there had been no discrimination on the basis of pregnancy. The majority of the judges found that there was no causal relationship between the applicant not been appointed and her pregnancy. The minority findings were that the applicant had been refused employment due to her pregnancy. The issue of whether there had been unfair dismissal was not considered because Whitehead did not appeal against the finding.

Of the three cases discussed above, the Woolworth is interesting because the final judgement lacks unanimity. It therefore does not provide clear guidelines (on the inherent requirements of the job) for future similar cases. On the other hand the other two cases were decided unambiguously.

[63]LAC CA06/99 - unreported

4.5 PRIVACY

Section 14 of the Bill of Rights provides for the right to privacy as indicated below.

Privacy 14. Everyone has the right to privacy, which includes the right not to have - a. their person or home searched; b. their property searched; c. their possessions seized; or d. the privacy of their communications infringed.

As can be seen, the first part on this section guarantees a general right to privacy whilst the second protects against specific infringements of the privacy, namely searches and seizures and infringements of the privacy of communications. This section will deal with case law pertaining to the privacy of communication as it applies in the employment arena. In *Klein v Attorney-General*[64] the applicant was facing charges of fraud, theft and forgery arising from his previous employment at a certain company. Owing to this he lost his job. Some officials managed to restore and retrieve privileged information from the computer previously used by the applicant. This information was then handed over to the Attorney-General. The Supreme Court held that the applicant's right to privacy had been violated. The court also held that the order the applicant was entitled to was the recovery of the documents. The applicant was, however, not entitled to an order declaring that the information was inadmissible at his trial. A similar decision was arrived at in *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd/Tru Food & Dairy Products (Pty)*

[64] (1995) 3 SA 848 (W)

Ltd[65]. In this case tape recordings of telephone conversations were illegally obtained. From the tape recordings it appeared that the chairman of the disciplinary inquiry, an attorney, and the managing director of the employer had discussed the matter before and after the hearing, and the attorney had given the employer advice. The industrial court had to rule on the admissibility of these tape recordings. The employer amongst others alleged that his Constitutional right to privacy had been infringed.

The court accepted that the evidence had been illegally obtained. However, the court also mentioned that the test to be applied when determining the admissibility of the evidence gave rise to the question of the relevancy of the evidence and not how it had been obtained. The court concluded that the chairman of the inquiry was biased and that the applicant was not afforded an objective and fair hearing. The applicant was accordingly granted an order for reinstatement.

Lastly, *Protea Technology v Waiver*[66] the applicants sought an interdict restraining the respondents from competing unlawfully with them. They wished to use, in support of the application the transcripts of telephone calls recorded by means of a surveillance device. The calls had been made and received by the respondent while working for the applicant.

The respondents argued that the transcripts were inadmissible on two grounds. First, the respondents argued that the interception contravened the Interception and Monitoring Prohibition Act 127 of 1992, that the evidence was therefore illegally obtained and that it should be excluded

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[65](1995) 4 LCD 152 and 155 (IC)

[66](1997) 9 BCLR 1225 (W)

on this basis. Section 2 of this Act provides that no person shall, in the absence of a judge directing otherwise, intentionally and without the knowledge and permission of the dispatcher intercept a communication by telephone. This section also prohibits the intentional monitoring of a conversation by means of a monitoring device so as to gather confidential information concerning any person, body or organisation. In terms of section 75 of the Act, the Judge may only issue a directive that conversations be monitored if he or she is convinced that the offence that has been or will probably be committed is a serious offence that cannot be properly be investigated in any other manner.

The Court, after discussing the meaning of the statutory provisions which largely give effect to section 14(d), concluded that the statute does not expressly or by necessary implication render the production of the recordings made in contravention of its terms inadmissible in evidence before a court trying a civil dispute. The evidence could therefore not be excluded on this basis.

Secondly, it was argued that the evidence was obtained in violation of the respondent's constitutional rights to privacy and that it should be excluded on this basis. The Court held that, even in the employment context, the employee may receive and make telephone calls that have nothing to do with his or her employer's business. In respect of such calls the employee has a legitimate expectation of privacy. But, in respect of conversations involving the employer's business, the employer is entitled to demand and obtain a full account of the conversation as the employee is capable of furnishing. These conversations are not private and protected by the Constitution.

All the three cases discussed above indicate the courts' unwavering position on the protection of the right to private communication. However, the courts have consistently indicated that, in appropriate and justifiable circumstances, they will allow information which is obtained through unothordox or illegal means to be used as evidence in resolving legal disputes. It is submitted here that this approach is appropriate because it offers some kind of a balancing act for the rights of the parties involved in the dispute.

4.6 LEGAL REPRESENTATION IN DISCIPLINARY PROCEEDINGS

The Labour Relations Act does not provide for legal representation in disciplinary proceedings. Is there perhaps a constitutional right to legal representation in disciplinary proceedings? This question, it seems, has been addressed in a few cases. It is now settled law that where a hearing takes place before a tribunal other than a court of law then there is no general right to legal representation. However, in *Lambert and another v McNeillie*[67] a rider was added to this position. According to this it was held that there is no general right to legal representation in domestic disciplinary hearings unless there is a contractual stipulation to the contrary. In yet another case the court made similar ruling. In *Cuppan v Cape Display Supply Chain Services*[68] it was held that there was no indication in section 25 of the interim Constitution that the right to legal representation ought to extend to all internal disciplinary proceedings and it was unnecessary to adapt the common law in this regard. The court concluded therefore that there was no general right to legal representation.

[67] 1994 3 SA 655 (A)

[68] 1995 4 SA 195 (D)

In the following recent and unreported case, the court again held that there was no general right to legal representation but nevertheless allowed the applicant legal representation. The said case is *Mofokeng v Delport and another*[69] where the court had to decide on the issue of whether the applicant was entitled to legal representation at the disciplinary enquiry. The applicant, a Deputy-Vice Chancellor (Academic) and an Acting Vice-Chancellor for the University of North West, was suspended by the University Council on 9 August 1999 and subjected to a disciplinary enquiry into his conduct. The applicant was served with the first charge sheet on 30 November 1999 and with an amended charge sheet on 1 February 2000. The disciplinary enquiry was scheduled for hearing on 16 to 18 February 2000 and on 17 February 2000, the presiding officer ruled that the hearing against the applicant could not continue because the Statute of the University had not been complied with. He held that section 125[70] did not provide for an external presiding procedure or for an external *pro forma* prosecutor.

On 1March 2000, the disciplinary proceedings instituted against the applicant were withdrawn and fresh disciplinary proceedings were instituted against the applicant. It was also resolved by the University Council that 'the disciplinary committee be constituted in terms of section 125 of the Statute and that the external member of the council from a legal background assist the disciplinary committee, presents evidence on behalf of the University, cross-examines witnesses on behalf of employees [sic], makes submissions on behalf of the University and generally performs any duty that he is called upon to perform by the disciplinary committee or which is generally performed by a prosecutor in disciplinary proceedings.'

[69](2000) 252 BCLR

[70]Statute of Universty of North West, No.180204

On 11 April 2000, the disciplinary committee ruled that the applicant should not be allowed legal representation at the disciplinary hearing to commence on 2 May 2000. On 2 May 2000 the applicant himself was allowed to make submissions on the question of legal representation and he requested the disciplinary committee to revoke its decision not to allow him legal representation. On 3 May 2000 the disciplinary committee, after having listened to further representation from the applicant, decided that he was not entitled to legal representation. The applicant requested a postponement of the disciplinary proceedings pending the outcome of a review application in respect of the decision to deny legal representation. The disciplinary committee, however, decided to proceed with the enquiry on 4 May 2000 at 09h00 and indicated furthermore that if the applicant chose to absent himself, the committee would nevertheless continue with the hearing. On 4 May the applicant was granted *interim* relief by agreement with the respondents.

The repsondents contended that the court had no jurisdiction to hear the application and that the Labour Court had exclusive jurisdiction. In counterargument, the applicant contended that the High Court has concurrent jurisdiction with the Labour Court in respect of any violation or threatened violation by the State in its capacity as employer of any fundamental right entrenched in Chapter 2 of the Constitutional. It was further argued that such concurrent jurisdiction also exist in respect of any dispute over the constitutionality of any administrative act or conduct or any threatened administrative act or conduct by the State in its capacity as employer.

Having heard the arguments from the parties involved in the dispute, Friedman J P ordered, *inter alia*, that the applicant is entitled to legal representation. An interesting point was that in addition, it was also ordered that the Chairman of the Bar of Pretoria be requested to appoint an admitted advocate of High Court 'to act in the stead of the present disciplinary committee of the University of North West of which the First respondent is the Chairperson.'

The discussions above seem to suggest that although the courts have not yet found that there is a fundamental right to legal representation before domestic tribunals, nevertheless there is a clear willingness on the part of the courts to ensure procedural fairness in such hearings. The Mofokeng case clearly shows this procedural fairness and surely guarantees protection against unfair labour practices.

4.7 MEDICAL AND PSYCHOLOGICAL TESTING

Du Toit et al (2000:452) point out that internationally, the issue of medical and psychological testing have long been subject to debates because of their potential for indirect unfair discrimination through the imposition of unjustifiable or unreasonable requirements on employees or job applicants. In the US, for example, employers may not 'require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity'.[71] Psychological tests have come under attack for their apparent racial bias.

In South Africa this principle is applied in a more comprehensive manner. Section 7 of the Employment Equity Act (EEA) prohibits all medical testing unless it is (a) permitted or required

[71] Section 102 (c) (4) (A), Americans with Disabilities Act of 1990 (42 USC 12112) as qouted by Du Toit et al (2000:452)

by legislation or (b) 'justifiable in the light of medical facts, employment conditions, social policy the fair distribution of employee benefits or the inherent requirements of a job'.[72] With regard to the testing for HIV the Act goes further. Section 7(2) prohibits testing to determine an employee's HIV status. Section 19 extends these provisions to applicants for employment.

The increasing incidence of persons who are HIV positive and who suffer from AIDS, as well as the cost implications that this will have for employers, pension funds, provident funds and medical aid schemes, makes it inevitable that disputes involving the rights of people who are HIV positive, as well as those with full-blown AIDS, will be considered by the courts.[73] Two recent court decisions are relevant in this regard.

In *Hoffman v South African Airways*[74] an applicant for employment approached the High Court for an order declaring that the refusal of the South African Airways to employ him constituted unfair discrimination. In this case, the applicant had applied for a position as a flight attendant with the South African Airways (SAA). His application was processed in the normal way and he attended various interviews. His progress through the process was successful. One of the last steps in the process was that of having a medical examination. He was found to be medically fit for employment. During the course of the medical examination a blood sample was obtained from him. This was later tested and it became apparent that the applicant was HIV positive. As a result he was found unsuitable for employment.

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[72]Section 7 (1)(b)

[73]Le Roux, P.A.K (2000)"Discrimination on the Grounds of HIV status."*Contemporary Labour Law*. May 2000, Vol 9, No.10.

[74] (2000) 2 SA 625 (W)

He challenged this decision in the High Court on the grounds that his rights to dignity had been violated. He also argued that his rights to fair labour practices, privacy and to equality of treatment had been violated.

The refusal to employ the applicant was premised on SAA's policy of not employing persons as flying or cabin crew if they were HIV positive. In terms of this policy persons were excluded from employment in these jobs if they were not free of other medical conditions and if, for example, were less than 157,7cm or more than 188cms, tall. The respondent argued that the requirements set were all occupational requirements and that non-compliance with one of them made the refusal of employment as a flight attendant justified. SAA justified its policy on the following grounds:

- Because employees were required to fly to countries where yellow fever is endemic, it was necessary for them to be vaccinated against this disease. Immunisation against this disease is potentially dangerous and ineffective to persons who are HIV positive.
- It was required of SAA to maintain certain safety standards. Persons with certain physical and mental disabilities would not be able to comply with emergency procedures and safety standards.
- Training a flight attendant costs approximately R30 000,00 and SAA is entitled to a reasonable expectation that such a person will serve in this capacity for at least 10 years. Because HIV infection reduces life expectancy, SAA's expectancy of such a period of employment would not be met.

The court found that it was not necessary to resolve the conflicting evidence and opinions of the medical experts put forward by the parties. It was found that it was common cause that:

- HIV is life-threatening and reduces life expectancy. This varies according to each individual and according to how the disease is managed.
- The yellow fever virus can have a detrimental effect on an HIV infected person.
- That the HIV infected person is subjected to the risk of other infections, some of which may be submitted within an aircraft.
- That HIV infected persons have a major risk of contracting tuberculosis, which although it is preventable, is transmitted within an aircraft.

The Court also accepted that, although the risk of flight attendants having to perform safety duties during an emergency was remote, SAA was nevertheless entitled to guard against it. The fact that the applicant had already been immunised against yellow fever was regarded as irrelevant.

The Court found that on the available evidence, from a medical and safety point of view, there is need to require medical examinations of candidates who seek employment as flight attendants. This was justified on the basis of the inherent requirements of the job.

The applicant argued that he was still in the asymptomatic stage of the disease and that he was capable of carrying out the duties of a flight attendant. This was rejected by the Court on the basis that SAA's policy was not merely based on the ability or otherwise of a person to do the job. It was based on the broader consideration of the operational requirements of SAA's business.

In view of these findings, the Court went on to consider whether section 9 of the Constitution, dealing with equality, had been breached. In particular, whether there had been unfair discrimination based on the grounds of disability. It was found that there was no unfair discrimination. Even if there was unfair discrimination, it was justifiable in terms of section 36 of the Constitution. The policy did not apply to HIV infected persons only and did not totally exclude the applicant from other employment with SAA. It only did so in respect of certain jobs.

The Court regarded SAA's policy as serving an important and legitimate purpose and that it was based on rational considerations intended to ensure the health and safety of passengers and crew. According to the Court, the applicant's dignity had not been impaired and he had not been denied an opportunity to be employed at all. Also regarded as important by the Court was the fact that SAA's competitors adopted similar policies. Also of interest was the fact that the Court referred to but in essence rejected guidelines of the World Health Organisation, the International Labour Organisation and the Southern African Development Community, all of which state that pre-employment testing should not be required. The Court stated that although it was sympathetic to these guidelines it was not appropriate to apply them in labour practice generally. In certain circumstances such testing may be required.

The decision of the Court in this case is interesting. First of all it shows that the Court does not follow guidelines set by regional and international organizations blindly. The Court was very cautious and clearly applied its mind in putting the interest of the public before those of the particular individual. Secondly, the Court set clear guidelines which should be followed in similar cases. This was a proactive and important case on the part the court.

An approach similar to the one used in the Hoffman case was followed in a Namibian court. In

N Applicant v Minister of Defence[75] an applicant for employment had been refused employment on the basis that he was tested as HIV positive, despite the fact that he had been medically examined and found to be fit and able to perform normal duties of a member of the Namibian Defence Force. The Court accepted the evidence that the mere fact that a person is HIV positive does not necessarily mean that he is ill and that he cannot perform his duties. Two further tests can be performed to ascertain whether the employee is ill and cannot do his work. The first is to ascertain a person's CD 4 count. This test indicates the degree of damage to a person's immune system. The lower the CD count, the more damage there is to the immune system. The second is the Viral Load test, which tests the amount of virus multiplying in the blood. A high viral count indicated high levels of viral infection and a shorter period of the development of full-blown AIDS. The medical experts who gave evidence before the court agreed that a CD count below 200 and a viral load in excess of 100 000, would make a person unfit for military duty.

The evidence also revealed that when the Namibian Defence Force was established HIV tests were not carried out, that HIV tests after enlistment do not take place and that there were existing members of the Defence Force that HIV positive. On the basis of this evidence the Court found that the refusal to employ the candidate constituted unfair discrimination.

The Court ordered that should the applicant re-apply for enlistment, the Namibian Defence Force would be required to enlist him provided that tests established that the applicant's CD 4 count was below 200 and his viral load was not above 100 000. The Court also ordered that the Defence Force should in future not only test for HIV but also administer a CD4 and a viral load test.

[75] LC 24/98

The Hoffman case has undoubtedly set the guidelines for employers regarding pre-employment medical testing as well as how to approach the issue of HIV/AIDS. The courts, as in the case of freedom of association, gave due regard to international conventions and foreign law. However, interesting enough in this case, the court elected to adopt a different approach in view of the peculiar nature of the position of flight attendants. A whole range of pertinent factors such as the health and safety of passengers, the competitive position of SAA, and the international and domestic civil aviation norms, were considered. It is submitted accordingly that the decision of the court in this case was a well-balanced one which took into account the interests of the employer and the prospective employee. The approach and decision made in the Namibian case are very similar to those in the Hoffman case and therefore the comments made *supra* apply in the same way.

4.8 RESIDUAL UNFAIR LABOUR PRACTICES

4.8.1 Promotion, demotion and training

The residual unfair labour practice definition[76] expressly includes unfair conduct by an employer relating to promotion. The question to ask here is what constitutes "unfair conduct" relating to promotion? The concept of "unfairness" implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended[77]. As Christoph Garbers[78] points out, the perceptions of unfairness also do not necessarily equate to

[76]Schedule 7 of the LRA

[77]Garbers, C. (1999) "Promotions".*Contemporary Labour Law*.October 1999Vol 9No 3

[78]See note 77 supra

unfairness. This view was expressed in SA Municipal Workers Union obo Damon v Cape Metropolitan Council[79] as follows:

> "***The process of selection inevitably results in a candidate being appointed and the unsuccessful candidate(s) being disappointed. This is not unfair***."

In view of these general considerations therefore the managerial prerogative to promote is limited both procedurally and substantively. Put differently this means that employers may exercise their prerogative when it comes to promotions but they may do so within the confines of both procedural and substantive fairness.

The demotion of an employee without his or her consent amounts to the repudiation of a contract and is not allowed at common law (Grogan, 2000:218). It is interesting to note, however, that item 2(1)(b) expressly prohibits only 'unfair' demotion. This indicates that in some circumstances such demotion may be deemed to be fair. According to Grogan (2000:218) fair demotions may include those implemented to avoid retrenchment or dismissal for incapacity, or as a disciplinary penalty imposed for a valid reason and after a fair procedure. Grogan(2000:218) quotes *Bensch v Phalaborwa Transitional Local Council*[80] to highlight an unfair demotion. In this case it was held that the employer's conduct amounted to unfair labour practice in terms of section 2(1)(b) when the employer advertised an employee's position, indicating that if the position were filled the employee would be demoted. This is clearly an unfair labour practice as there is no real

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[79](1999) 20 ILJ 714 (CCMA)

[80](1997) 9 BLLR 1163 (LC)

justification for the demotion. It seems like a punitive measure which is applied without having followed proper procedure.

It is not clear what is meant by 'unfair conduct in relation to training'. Grogan(2000:218) expresses the view that the phrase may, at face value, be suggesting that the employer is under an obligation to train its employees. The question whether this provision entitles an employee to relief if the employer does not provide training or provides it inadequately has yet to be tested.

4.8.2 Benefits

An employer may be guilty of unfair labour practice if it commits any form of unfair conduct in the provision of benefits to an employee. It is important, however, to point out exactly what is meant by benefits in the context of unfair labour practice. Generally, benefits refer to payments other than salary and wages such as bonus, medical aid, and housing allowance. Grogan (2000:218) argues that what is contemplated in this regard are such benefits as discretionary bonuses, housing allowances, medical aid, retirement benefits and other allowances. The Labour Court addressed the issue of benefits. In particular the court had to determine whether commission constituted a benefit. In <u>*Schoeman & another v Samsung Electronics SA (Pty) Ltd*</u>[81] the court held that:

> "***Commission payable by the employer forms part of the employee's salary. It is therefore part of the basic terms and conditions of employment. Remuneration is***

[81](1997) 10 BLLR 1364 (LC)

different from 'benefits'. A benefit is something extra apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract."

It is clear therefore that benefits are something paid in addition to salary or wage and that they form part of the contract of employment and the conditions of service. However, Grogan (2000:219) maintains that the distinction between 'extras' and payments in money or in kind which fall within the definition of remuneration is extremely murky.

4.8.3 Unfair suspension

Unfair suspension is an unfair labour practice in terms of the LRA[82]. As pointed out by Carl Mischke[83] " for a number of reasons the suspension of an employee has become somewhat notorious. This ill fame can be ascribed mainly to well-known delays in the disciplinary system of the public service, delays often entailing the suspension of a public service for a number of months - in some instances even longer than a year. And, as most of these suspensions are on full remuneration, questions relating to costs and taxpayers' money are often raised. It remains to be asked to what extent these experiences remain the exception rather than the rule and whether the potential for abuse (specifically in the form of long-term suspensions) reflects also on other uses of the suspension. ".

[82]Sch 7 item 2(1)(c)

[83]"The suspension of employees".Contemporary Labour Law. June 2000, Vol 9, No. 11

When is a suspension justifiable? Generally, a suspension applies in two ways. First, an employee may be suspended pending a disciplinary hearing. In this case, the employer has a duty to inform the employee about the suspension and the reasons for the suspension. This, as Carl Miscke points out is referred to as an interim or 'holding operation' suspension. The reasons for this type of suspension are, inter alia, to ensure that the evidence is not tampered with and to protect potential witnesses from possible intimidation. Another question which arises from this type of suspension is whether to hold hearing before the suspension. That is, whether to afford the employee an opportunity to make representation before the suspension is effected. It seems that the courts have not addressed this particular issue and it therefore remains unclear as to what is the right position. However, it seems fair that the employee must at least be properly informed about the suspension and the reasons thereof.

The second form of suspension is implemented as a punitive measure short of dismissal. This would normally follow from a formal disciplinary hearing. As this is an alternative to dismissal, the employee would normally face dismissal if he or she refuses to give consent. However, as Carl Mischke points out, the dismissal must be justifiable and the facts of the misconduct must satisfy the requirements of substantive fairness.

What are the basic legal principles involved in a suspension? At common law a suspension without pay is breach of contract but, as pointed out by Du Toit et al (2000:469), in the absence of agreement to the contrary, payment of remuneration satisfies the employer's contractual obligations. Exceptional circumstance would be where the employee, by reason of status, seniority, or the nature of the work itself, is entitled not merely to remuneration but to work. However, in spite of these common law principles it seems that the courts have recognised that a suspension constitutes a significant disruption in the life of the employee[84]. In _Muller & others v Chairman of the Minister's Council: House of Representative & others_[85] , it was held that:

> " ***The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling and of being seen by the community around one to be so barred, are not so immediately realised by the outside observer.... There are indeed substantial social and personal implications inherent in that aspect of suspensions. These considerations weigh as heavily in South Africa as they do in other countries***."

Indeed the psychological pain that a suspended employee, especially high profile individuals, is unbearable. It seems that the courts are taking a dim view of the issue of long suspensions and perhaps in the near future the courts might take a stand which will root out these unfair practices. These long suspensions are punitive by themselves and are being used by unscrupulous employers against defenceless employees.

4.9 STRIKES AND LOCK-OUTS

Strikes and lock-outs are employee and employer "weapons" which often resorted to in a deadlocked situation. The intention of the legislature through the 1995 LRA was to regulate industrial action and reduce it as much as possible. The LRA has introduced dispute resolution

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[84]See note 83 *supra*

[85](1991) 12 ILJ 761 (C) at 775GBH

mechanisms such as bargaining councils, CCMA and labour courts and has narrowed down the issues for which a strike action would be justified. In addition, the LRA has introduced procedures for embarking on protected strikes[86]. Before looking at relevant case law on strikes, it is apposite to pause and take a brief look at what is taking place in other countries.

M Olivier points out that in Germany, there has been a major shift of approach to strikes and lockouts. Initially, the courts held that a lock-out was a counterpart of the strike. However, the German Federal Court, having realised that the lock-out was in fact causing a disequilibrium or imbalance in the collective bargaining relationship, changed its approach and introduced limitations on the scope of defensive lock-out. The German Federal Constitutional Court found that these limitations were not violating the constitution and accordingly ratified them.

Canada, according to Bamber & Landsbury (1993:83), has a highly decentralised industrial relations system. Canadian labour laws prohibit strikes during the term of a collective agreement while also requiring that each agreement contain a grievance procedure and a dispute mechanism for resolving disputes which may arise during the life of the collective agreement.

4.9.1 Strikes

Chapter IV of the LRA comprehensively regulates industrial action and attempts to bring it into line with section 23(2)[87] of the Constitution and the relevant standards of the International Labour

[86]Section 64 of the LRA

[87]Provides that: 'Every worker has the right ... to strike.'

Organisation.[88] The LRA essentially gives statutory protection to the constitutional right to strike and limits its exercise. The LRA defines a strike as follows:

*'**The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory**.'*[89]

Swanepoel(1999:256) argues that it can perhaps be regarded as one of the most important achievements of the new labour legislation that the right to strike is now recognised. It also enjoys constitutional protection. Employees may therefore not be dismissed for participating in a protected strike action. Protected strikes are those strikes that comply with section 64 of the LRA whereas the unprotected strikes are those strikes that do not comply with this section. It is worth noting that the protection is not limited to strike action in its normal form, but extends to other related forms of industrial action such as secondary strikes, picketing and protest action.

It must be noted that the LRA imposes certain limitations on the right to strike. These include a situation where employees are bound by a collective agreement which prohibits a strike, an agreement that requires the dispute to be referred to arbitration, the issue in dispute must (in

[88]Conventions 87 and 98 of the ILO

[89]Section 213

terms of the Act) be referred to the Labour Court for arbitration, the issue in dispute is regulated by an arbitration award, collective agreement ior statutory council determination, or employees are engaged in an essential or maintenance service. An interesting case on the limitation of the right to strike is *South African Security Employers Association v TGWU & others* [90]. In this case, the South African Employers Association and the Transport and General workers Union negotiated a collective agreement for 1997/8 which was due to expire on 7 April 1998. However, before it could expire, the employer association and the union commenced the next round of negotiations. The parties reached a deadlock and referred the dispute to the CCMA for conciliation.the dispute could not be resolved and the union, after giving forty eight hours notice, embarked on a national strike in security industry. The strike commenced before the expiry of the collective agreement. The employer association applied to the Labour Court for an interdict. They contended that the strike was unprotected as the dispute was covered by a collective agreement that prohibited industrial action and that the matter was regulated by a collective agreement.

The court found that there was no merit in the submission that collective action was prohibited in the agreement. The court also held that the issue in dispute was not regulated by the current agreement. The held that the dispute referred to demands that were related to the new wage agreement still to be finalised. The strike was therefore a protected strike and the application for the interdict was dismissed with costs.

It clear that the union did its best to follow the right procedures pertaining to strike action. It is also clear that the court applied its mind carefully and could not be swayed by the technicalities

[90](1998) 4 BLLR 436 (LC)

which the employer association was attempting to use in defence of its case. It must therefore be submitted that this was a fair decision on the part of the court.

4.9.2 Lock-outs

The LRA defines a lock-out as:

> '***The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion***.'[91]

It is clear from the above definition that the lock-out, just like the strike is coercive in nature. It is the employers' counterpart to the strike. As Grogan(2000:341) points out, a lock-out gives the employers the power to perform acts which prejudice their workers and which would otherwise constitute breach of contract in order to compel them to comply with some proposal or demand.

It must also be noted that while the employer's freedom to lock-out was entrenched in the interim Constitution, it was omitted from the final text of 1996. During the certification hearings[92] the business sector argued that the omission of the right to lock-out did not comply with the

[91]Section 213 of the LRA

[92]Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) at 794-7

constitutional principle of equality because the right to strike was entrenched and the employers' right to collectively bargain was accordingly weakened. The court acknowledged that collective bargaining implied a right of both parties to exercise economic power against the other but rejected the proposition that the right to lock-out was necessarily equivalent to the right to strike.

The court also rejected the argument that the exclusion of the right to lock-out from the final Constitution would mean that legislation protecting the right to lock-out would be unconstitutional. The court indicated that the effect of such legislation would merely be that the right of employers to use economic weapons would be regulated by legislation within a constitutional framework. In this way, the court confirmed that such legislation would not be unconstitutional on that ground alone.

Protected lock-outs are those that comply with the provisions of Chapter IV.[93] This Chapter imposes procedural requirement and substantive limitations on the use of strikes and lock-outs.

In conclusion, whilst the right to strike is enshrined in the Constitution as a fundamental right, lockout is not a fundamental right and is only contained in the LRA not necessarily as a right but as "recourse" for employers. The legislators have deemed it fit not include the lockout as a right as this would have disturbed the bargaining relationship between the employers and trade unions and tipped the scale in favour of employers.

[93]Section 67(1) of the LRA

4.10 CONCLUSION

The South African National Defence Force case has provided a major victory for workers in terms freedom of association. Through this case, the scope of application of this right has been broadened to include defence force personnel who, due to the peculiarity of their appointment and conditions of service, would not be classified 'workers' in the ordinary meaning of the term. The courts, however, still have to decide whether freedom of association include the negative right of freedom not to associate.

Both the agency shop and the closed seem to infringe on freedom of association. However, one could also agrue that these provisions serve as limitations on the freedom of association in terms of section 36 of the Constitution. The courts still have to decide on the constitutionality of these provisions. Foreign case law will be very useful in this regard.

The courts have taken a firm stance on unfair discrimination. In the few cases discussed above, the courts have made importnt decisions to eliminate unfair discrimination not only on listed grounds but also on unlisted grounds. The courts are also treating affirmative action disputes with absolute caution to ensure that those workers who were historically disadvantaged and discriminated upon are give the type of redress they deserve.

On the issue of the right to privacy, the courts have tried to balance the right of individual employees to private communication as against the right of employers to receive information which work related. The issue of the right to legal representation in domestic disciplinary hearings has been clarified by the courts. It is now accepted that there no general right to legal representation in domestic disciplinary hearings. However, each case is considered on its own merits and if there is enough justification the courts will not hesitate to issue an order for legal representation. Pre-employment medical testing, including HIV/AIDS is not permitted unless it is permitted or required by national legislationor is justifiable in terms of medical facts, employment conditions or social policy. In the Hoffman case a major breakthrough was made in terms of providing useful guidelines to employers on how to deal with the issue of pre-employment HIV/AIDS testing.

Residual unfair labour practices such as unfair promotions, demotions, unfair provision of benefits and unfair suspensions are been dealt with satisfactorily by the courts. Lastly, although the right to strike is a fundamental right in the constitution, it seems that the LRA is imposing certain restrictions on it. The courts might have to decide on whether these restrictions satisfy section 36 of the Constitution. If not they will be in violation of the right to strike and will be nullified accordingly.

CHAPTER 5

SUMMARY OF FINDINGS AND CONCLUSIONS

It is clear from the discussions so far that the advent of both the interim Constitution of 1993 and the final Constitution of 1996 have had a profound effect on labour laws. The national legislation referred to in subsections (5) and (6), which refers to the LRA restricts certain rights, such as the right to strike. However, the constitutionality of this restriction still has to be tested.

The 1995 LRA was intended to give statutory effect to some of the fundamental labour law rights contained in the Constitution. Both the BCEA and the EEA were brought about to complete the picture. Fair labour practices have been protection under the BCEA, which has been bolstered by the EEA. It must be recalled that these fair labour practices are enshrined in section 23(1) of the Constitution.

Whether some of the provisions such as the closed shop and agency shop will pass the constitutionality test, remains to be seen. However, the fact of the matter is in so far as legislation fails to give effect to fundamental labour law rights, or unreasonably limits some of these rights, the Constitutional Court may set them aside.

The Bill of Rights applies to all law, including common law and the actions of private persons. This has been supported to a large extent by the case law cited in this report. It is also apparent that even if there is no Constitutional matter at stake, all labour law (and of course all law) must be interpreted to promote the spirit, purport and objects of the Bill of Rights in compliance with section 39(2) of the Constitution. What does this mean? Obviously it implies that the common law and labour law will gradually change in order to obtain the character of the fundamental rights guaranteed in the Bill of Rights.

Other major conclusions of this study on both the application of the Constitution and its impact on labour law are as follows:

(1) The question of whether the Bill of Rights applies horizontally has been extensively addressed in the Constitutional Court in the Du Plessis and Others v De Klerk and Another. The majority of the court held that the Bill of Rights is not, in general capable of direct horizontal application. It must be noted, however, that subsequent to the Du Plessis case, the same court contradicted itself and certified that section 8(2) of Chapter 2 of the Constitution unequivocally provides for the horizontal application of the Bill of Rights. Therefore it seems that this issue has still been left with a question mark.

(2) Freedom of association has undoubtedly been addressed by the Constitutional Court in the South African National Defence Force Union v Minister of Defence and another. In this case, conventions and recommendations of ILO were relied upon in determining the meaning and scope of 'worker'. The Court decided that the requirement of 'strict discipline' would not be undermined by permitting Defence Force members to join a trade union. The Court, however, stated that in appropriate circumstances, the constitutional right to join a trade union may be limited, provided such a limitation were constitutionally justifiable. The right to freedom of association has therefore been well entrenched through the judiciary.

It remains to be seen, however, whether freedom of association implies the negative right of freedom not to associate. As explained in the preceding chapters, this right is not provided for in the constitution but the courts will have to apply the mind to determine whether the lawmaker intended freedom of association to include the right not to associate.

(3) Unfair discrimination has been dealt with quite extensively by the courts on listed grounds such as race and gender as well as on unlisted or analogous grounds such as nationality. Affirmative action does not violate the right to equality but is rather a means of achieving equality to bring about a more equal society. To pass constitutional test affirmative action programmes must not promote unfair discrimination but must be designed to protect and advance persons disadvantaged by unfair discrimination in the past until equality is attained.

(4) The right to privacy in the employment context relates to a great deal to the privacy of communication. The courts have protected this right with regard to private conversations. However, with regard to conversations relating to the employers' business, there is no constitutional protection as they are not private.

(5) With regard to legal representation in internal domestic disciplinary hearings there is no general right to legal representation. Disputes of this nature will be resolved on their own individual merits.

(6) Medical testing, particularly pre-employment testing still has to withstand

Constitutional scrutiny. However, HIV testing has been dealt with in *Hoffman v South African Airways*. According to this case it would seem that HIV testing may be allowed strictly on the basis of the inherent requirements of the job.

From the above findings it is clear that the impact of the Constitution on labour law has been profound on some areas in labour law. This impact, as indicated in the introductory part of this report, has been considerable in many parts of the world and continues to do so. It seems therefore that South Africa is following this trend and this surely augurs well for labour law and labour relations.

This has been a very interesting and rewarding research topic. There is no doubt that there are a lot of areas in labour law to be put to constitutional test as and when labour disputes arise.

BIBLIOGRAPHY

Books & Journals

1. Bamber, G.J. & Landsbury R.D. (1993). *International and Comparative Industrial Relations*. A study of the industrialised market economies. (2nd ed.).London: Routledge.
2. Bendix, S. (1996). *Industrial Relations in South Africa*. (3rd ed.) Kenwyn: Juta & Co.Ltd.
3. Cohen, M. (1985). *Legal Research*. (4th ed.) St. Paul Minn: West Publishing Co.
4. De Waal J, Currie I, & Erasmus G. (2000). *The Bill of Rights Handbook*. (3rd ed.) Kenwyn: Juta & Co.Ltd.
5. Devenish, G.E. (1986). "Change, reform and constitutionalism." *Constitutional Change and Reform in Sout Africa*. A research report. Unibo.
6. Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D & Christie S. (2000). *Labour Relations Law*. A comprehensive guide. (3rd ed.) Durban: Butterworths (Pty) Ltd.
7. Finnemore, M. (1998). *Introduction to Labour Relations in South Africa*. (6th ed.). Durban: Butterworths (Pty) Ltd.
8. Griessel, D.(1997). "Application of the Constitution." *De Rebus*. A Journal for attorneys. December 1997.
9. Grogan J.(2000). *Workplace law*. (5th ed.). Durban: Juta & Co.Ltd.
10. "Introduction to law and labour law. *A Labour Law Study Guide*. Unisa. 1992.
11. Jacobstein, J.M. & Mersky, R.M. (1977). *Fundamentals of legal research*. (2nd ed.). Mineola, New York: Foundation Press, Inc.
12. Jennings I. (1959). *The Constitution and the Law*. (5th ed.) London: Hodder & Stoughton.
13. Olivier, M. "The Impact of Human Rights Legislation on Labour Law." A conference

paper.

14. Slabbert J.A., Prinsloo J.J., Swanepoel B.J. & Backer W. (1998). *Managing Employment Relations in South Africa*. Durban: Butterworths Publishers (Pty) Ltd.

15. Swanepoel B.J. , Slabbert J.A., Erasmus B.J., and Brink M. (1999). *The Management of Employment Relations*. Durban: Butterworths Publishers (Pty) Ltd.

16. GARBERS, C. (2000). "The demise of the "reasonable employer" test. *Contemporary Labour Law*. April 2000, vol.9, no. 9.

17. Le ROUX, P.A.K. (2000). "Discrimination on the Grounds of HIV status." *Contemporary Labour Law*. May 2000, Vol. 9, No.10.

18. Le ROUX, P.A.K. (2000). "Unfair dismissal and discrimination." *Contemporary Labour Law* .September 2000, Vol. 10, No.2.

19. Yale, D.E.C. (1976). "The Impact of Constitutions on Labour Law. *The Cambridge Law Journal.* November 1976, vol.2, no.35.

20. Bernthal, S. "Legal System - South Africa". Http://www.shrike.depaul.edu/ (March 2000).

Websites

Http://www.ac.za/databases.html

Http://www.hsrc.ac.za/prodder.html

Http://www.nrf.ac.za

Http://www.polity.org.za/lists/sanet.html

Http://www.sangoco.org.za

Http://www.sangonet.org.za

Http://www.webchart.com/

Http://www.law.wits.ac.za/court/courtpam.html

TABLE OF CASES

Abood v Detroit Board of Education

Association of Professional Teachers & Rademan v Minster of Education & Governing Body of Primrose Hill Primary School 1995 BLLR 29 (IC)

Auf der Heyde v University of Cape Town (2000) 8 BLLR (LC)

AZAPO v President of the Republic of South Africa 1996 (4) SA 671 (CC)

Baloro and others v University of Bophuthatswana and others 1995 (8) BCLR 1018 (B)

Bensch v Phalaborwa Transitional Local Council 1997 (9) BLLR (LC)

Brink v Kitshoff NO 1996 (4) (CC)

Carephone (Pty) Ltd. v Marcus NO & Others (1998) 19 ILJ 1425 (LAC)

Certification of the Amended Text of the Constitution of the Republic of Sout Africa, 1996 (2) (CC)

Collins v Volkskas Bank (Westonaria Branch) 1995 LCD 85 (IC)

Cuppan v Cape Display Supply Chain Services 1995 (4) SA 195 (D)

Dierks v University of South Africa (1999) 20 ILJ 1227 (LC)

Du Plessis and Others v De Klerk and another 1996 3 SA 850

Eskom v Hiemstra NO & others (1999) 20 ILJ 2362 (LC)

Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council (1999) 1 SA 374 (CC)

George v Liberty Life Association of Africa (1996) 17 ILJ 571 (IC)

Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd/Tru Food & Dairy Products (Pty) Ltd (1995) 4 LCD 152 and 155 (IC)

Hoffman v South African Airways 2000 (2) SA 625 (W)

Kadiaka v Amalgamated Beverage Industries 1999 8 (LC)

Klein v Attorney-General 1995 (3) SA 848 (W)

Lambert and another v McNeille 1994 (3) SA 655 (A)

Larbi-Odam v Minister of the Executive Council for Education 1996 BCLR 1612 (B)

Lavigne v Ontario Public Service Employees' Union

Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty)Ltd. 1998 19 ILJ 285 (LC)

N Applicant v Minister of Defence 24/98 (LC) - unreported.

Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 701 (LAC)

National Manufactured Fibres Employers' Association v Bikwani (1999) 10 BLLR 1076 (LC)

Mofokeng v Delport and another 2000 252 -unreported.

Muller & others v Chairman of the Minister's Council(House of Representative & others) 1991 (12) ILJ

PSA v McNellie 1994 (3) SA 655 (A)

Protea Technology v Waiver 1997 (9) BCLR 1225 (W)

S v Mhlungu 1995 (3) SA 867 (CC)

S v Pennington 1997 (4) SA 1076 (CC)

SA Municipal Workers Union obo Damon v Cape Metropolitan Council (1999) 20 ILJ 714 (CCMA)

Schoeman & another v Samsung Electronics SA (Pty) Ltd 1997 (10) BLLR (LC)

Sigurjosson v Iceland (1992) ECHR 369/443

South African National Defence Force v Minister of Defence Force and another 1999 234 (CC)

South African Security Employers Association v TGWU & others 1998 (4) BLLR 436 (LC)

Toyota South Africa Motors (Pty) Ltd v Radebe and others (case no. DA2/99)- unreported.

Woolworths (Pty) Ltd v Whitehead CA06/99 (LAC) - unreported.

Vereniging van Staatsamptenare obo Badenhorst v Department of Justice (1999) 20 ILJ 253 (CCMA)

Young, James & Webster v United Kingdom (1981) IRLR 408 (ECHR)

Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC)

TABLE OF STATUTES

Basic Conditions of Employment Act, 75 of 1997

Constitution of the Republic of South Africa, Act 200 of 1993.

Constitution of the Republic of South Africa, Act 108 of 1996.

Employment Equity Act, 55 of 1998.

Labour Relations Act, 66 of 1995.

Labour Relations Amendment, Act 42 of 1996

Labour Relations Amendment, Act 127 of 1998