What is (and what isn’t) a “constitutional matter” in the context of labour law?

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A Introduction

Section 23 of the Constitution\(^2\) establishes the right to fair labour practices. It is a right which forms part of the Bill of Rights in our Constitution. Every right (including the right to fair labour practices) binds the legislature, executive and judiciary, and to the extent applicable, natural and juristic persons (the right has both vertical and horizontal application).\(^3\) All persons, companies, institutions and organs of state must comply with the rights therein. The right to fair labour practices is expressed through legislation, most notably the Labour Relations Act, 1995 (the “LRA”).\(^4\) Section 1(a) of the LRA sets out as its first purpose the regulation of that constitutional right.\(^5\)

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

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

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

The Constitutional Court may decide only “constitutional matters” - conversely it may not decide matters which are not “constitutional matters.”

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\(^2\) Act No. 108 of 1996

\(^3\) Section 8(1) and 8(2) of the Constitution

\(^4\) Act No. 66 of 1995. The right is also given expression in the Basic Conditions of Employment Act, 1997. Refer to section 2(a) of that Act.

\(^5\) The section refers to section 27 of the Interim Constitution, as the LRA came into effect before the Final Constitution, but the rights set out in section 27 are substantively similar to those set out in section 23 of the Final Constitution.
The Constitutional Court has had opportunity to decide some key labour disputes,\(^6\) considered to be “constitutional matters”, and has thereby given meaning and content to the right to fair labour practices.

Hypothetically and arguably though, most if not all employment disputes could be framed as “constitutional matters” as employment disputes inevitably engage the right to fair labour practices. Again hypothetically most litigants in labour disputes could then claim that their dispute raises a constitutional matter and could arrive at the Constitutional Court’s door clambering for determination. Justice Ngcobo in *Nehawu v University of Cape Town*\(^7\) recognizes as much and says,

> “What must be stressed here…(is) that we are dealing with a statute which was enacted to give effect to s 23 of the Constitution, and as such, it must be purposively construed. If the effect of this requirement is that this court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy…”\(^8\)

Professor Halton Cheadle has cautioned that such an extensive interpretation of the Constitutional Court’s jurisdiction potentially undermines the specialist structures to determine labour disputes established by Parliament through the LRA. He says,

> “The argument is that, although the Constitutional Court is the ultimate arbiter of the right to fair labour practices, it should consider carefully before “second guessing” a system designed to balance the contending views of fairness through a system that encourages agreement within the confines of protective legislation. Where the legislature has itself created machinery to determine the fairness of a fair labour practice – whether in the form of the CCMA, the Labour Courts or the Employment Standards Commission – the Constitutional Court ought to defer to that forum’s determination.”\(^9\)

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\(^7\) [2003] 5 BLLR 409 (CC)

\(^8\) At para 16

\(^9\) Ch 18, Labour Relations in *South African Constitutional Law: The Bill of Rights*; Cheadle, Davis Haysom (2006) at18-15
The objection proceeds further and deeper – and that is to argue that non-specialist courts hearing labour matters potentially upset the carefully negotiated balance between the interests of employers and employees.\textsuperscript{10}

In fairness to the Constitutional Court, it must be mentioned that in numerous cases that court has recognized the role of those structures established by the LRA and has instructed litigants to process their disputes accordingly. Recently for example in \textit{Chirwa v Transnet Limited and Others}\textsuperscript{11} Justice Skweyiya writing for the majority commented,

\begin{quote}
“It is in my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment related matters. …Where an alternative cause of action can be sustained in terms of matters arising out of an employment relationship…it is in the first instance through the mechanisms established by the LRA that the employee should pursue his or her claim.”\textsuperscript{12}
\end{quote}

The issue though of the extensive jurisdiction assumed by the Constitutional Court to hear employment disputes on the basis that the dispute gives rise to a “constitutional matter,” is very much alive. Just late last year Justice O’Regan in \textit{CUSA v Tao Ying Metal Industries and Others}\textsuperscript{13} in a minority decision cautioned (when the majority in the Constitutional Court decided that the enforcement of a collective agreement constituted a “constitutional matter” on the basis that the right to participate in collective bargaining had been triggered) that the Constitutional Court

\begin{footnotes}
\item Cheadle at 18-15 above comments that the observations made by McIntyre J with respect to Canadian labour law applies equally in South Africa: “Labour law … is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour – a very powerful socio-economic force – on the one hand and the employers of labour – an equally powerful socio-economic force – on the other. The balance between the two forces is delicate…Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time…Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.”
\item 2008(3) BCLR 251 (CC)
\item Para 41
\item (2008) 29 ILJ 2461 (CC)
\end{footnotes}
should recognize that this Constitution establishes it as a court that has jurisdiction in constitutional matters only; not as a general court of appeal in all matters. This Court must respectfully observe those limits placed on jurisdiction.\textsuperscript{14}

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

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

B Constitutional matters in theory

In order to approach the Constitutional Court a litigant must, apart from complying with procedural aspects envisaged in the rules of that court,\textsuperscript{15} convince the court that it is in the interest of justice to bring a dispute to the court’s attention, must obtain leave from the court to consider the dispute,\textsuperscript{16} and must satisfy the court that the dispute constitutes a constitutional matter.

The Constitution sets out a range of concerns which would qualify as “constitutional matters” and for completeness we have listed those: disputes between organs of state concerning their constitutional status, powers or functions; disputes about the constitutionality of any Bill; applications from the National Assembly on whether an Act or part of an Act is unconstitutional;

\textsuperscript{14} At para 128
\textsuperscript{15} Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003
\textsuperscript{16} Section 167(6) of the Constitution.
applications from a provincial legislature on whether a provincial Act or part of a provincial Act is unconstitutional; disputes on the constitutionality of any amendment to the Constitution; disputes on whether or not Parliament or the President has failed to fulfill a constitutional obligation; submissions and certification of provincial constitutions; confirmation of an order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status; and any issue involving the interpretation, protection or enforcement of the Constitution.”

In *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* Justice O’Regan recalling the Constitutional Court’s observations in *S V Boesak* notes that,

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

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

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17 Section 167(4) of the Constitution
18 Section 167(5) of the Constitution
19 Section 167(7) of the Constitution
20 (2002) 23 ILJ 81 (CC)
21 2001 (1) SA 912 (CC)
22 At para 10
It is worth noting that in order for a matter to qualify as a “constitutional matter” the Constitutional Court is not necessarily concerned with whether or not the litigant raising the constitutional matter is likely to be successful. Justice Langa in *Minister of Safety & Security v Luiters* comments,

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

C Constitutional matters in employment law

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

The constitutionality of provisions within an Act of Parliament:

It is trite that an Act of Parliament must comply with the Constitution. If an Act does not, then that legislation falls to be reviewed by the High Court (or a court of similar status), the Supreme Court of Appeal (the “SCA”) and ultimately by the Constitutional Court. According to section 167(5) read with section 172(2)(a) of the Constitution, the Constitutional Court must confirm

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23 (2007) 28 ILJ 133 (CC)

24 At para 23

25 This conceptualization resonates with Cheadle’s analysis referred to in A van Niekerk’s (ed) *Law at Work*, LexisNexis, 2008, pg 34

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

In *SA National Defence Union v Minister of Defence & Another* the Constitutional Court confirmed the order from the Transvaal Provincial Division that section 126B(1) (which prohibited members of the armed forces from forming and joining trade unions) and section 126B(4) (which prohibited acts of public protest) of the Defence Act 1957 were unconstitutional and invalid and could not be justified under the limitation clause in the Bill of Rights. The Court was of the view that those provisions were sweeping and whilst section 199(7) of the Constitution prohibits members of the armed forces from carrying out their functions in a party political partisan manner, the Defence Act had, according to the Court, gone beyond what was reasonable and justifiable to achieve this objective.

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

In *SA National Defence Union v Minister of Defence & Another* the constitutional matters raised were whether the SANDF had a duty to bargain with SANDU; whether SANDU was entitled to rely directly on section 23(5) of the Constitution when regulations promulgated under the Defence Act, 1957 had been enacted to regulate the right to engage in collective bargaining; and whether various regulations in chapter XX of the regulations were invalid. The contested regulations were concerned with peaceful demonstrations and pickets, affiliations with other trade unions or political parties, assistance by military shop stewards, trade union activities

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

28 (1999) 20 ILJ 2265 (CC)

29 Act No. 44 of 1957

30 Section 36 of the Constitution

31 2007 (8) BCLR 863 (CC)

32 General Regulations of the South African National Defence Force in GG 20376 of 20 August 1999

33 Regulation 8

34 Regulation 13(a)

35 Regulations 25 and 29
during military operations,\textsuperscript{36} and the power of the Minister of Defence to appoint members to the Military Arbitration Board.\textsuperscript{37}

The Court did not decide the question of whether or not the right to engage in collective bargaining gave rise to a correlative duty to bargain by the employer.\textsuperscript{38} The Court held that in circumstances in which legislation is enacted to give effect to a constitutional right a litigant may not bypass the legislation and rely directly on the right.\textsuperscript{39} O’Regan said,

“\textit{..., a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant’s view, then the legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights.}\textsuperscript{40}"

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

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

\textsuperscript{36} Regulation 37
\textsuperscript{37} Regulation 73
\textsuperscript{38} Para 56
\textsuperscript{39} Para 51
\textsuperscript{40} Para 52
**The interpretation of legislation:**

As already mention section 23 of the Constitution established the right to fair labour practices. One of the purposes of the LRA is to give effect to the labour relations provisions in the Constitution. According to section 341 of the LRA the interpretation of the LRA must accord with the Constitution and the country’s public international law obligations. The interpretation of the LRA thus constitutes a “constitutional matter.” Various issues (“constitutional matters”) raised in the key employment law cases before the Constitutional Court will now be discussed.

**Jurisdiction of the labour courts: Sections 157(1) and (2) and sections 167(2) and (3) of the LRA**

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

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

Section 157(2) reads,

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

(a) employment and from labour relations;

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

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

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**3 Interpretation of this Act**

Any person applying this Act must interpret its provisions –

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic.

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41 3 Interpretation of this Act

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

Understandably the potential for jurisdiction conflict / uncertainty is compounded by section 169(a) of the Constitution in that the High Court may entertain constitutional matters except those matters which only the Constitutional Court may decide or those matters assigned by an Act of Parliament to another court of similar status to the High Court. Section 169(a) reads,

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

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

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

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

The Constitutional Court held furthermore that the High Court had jurisdiction to consider the dispute in terms of section 157(2) of the Labour Relations Act which confers concurrent jurisdiction on the High Court and the Labour Court in respect of a violation of a fundamental right arising from the conduct of the State as employer. The Constitutional Court sent the applicants back to the High Court for a determination on the merits of the matter.

In *Chirwa*, heard some 6 years later in 2007, the Constitutional Court, contrary to the decision in *Fredericks*, discouraged a dual system of jurisprudence, one developing through the labour courts and another through the civil courts. The case had similar features to *Fredericks* in that it involved an employee in the public service approaching the civil courts, the High Court, for relief from what was in essence an employment dispute. The court considered both section 157(1) and (2) of the LRA and found that the intention of section 157(2) was not to accord jurisdiction on the High Court to entertain labour matters, the intention was rather to confer jurisdiction on the Labour Court to hear disputes founded on the Bill of Rights. Furthermore in circumstances in which there is concurrent jurisdiction, the litigant should proceed in terms of the LRA and the specialist institutions of the CCMA, Labour Court and Labour Appeal Court, rather than proceed in terms of the general, non specialist civil courts (Magistrates Court, High Court and the SCA).

In *Chirwa* the Constitutional Court was at pains to point out that the LRA covered employees in both the private and public sector (which was not the case prior to the enactment of the LRA in which different legislation and forums applied to public and private sector employees) and that the legislature did not intend to privilege public sector employees vis a vis private sector employees by permitting them a choice of procedure and a choice of forum. Ngcobo said,

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

The recourse previously available to public servants prior to the advent of the 1995 LRA to pursue a claim for unfair dismissal through the civil courts was no longer necessary (as the LRA had established specialist forums for that purpose), available or desirable. The development of a dual stream of jurisprudence which gave public servants an option of pursuing a genuine labour dispute through the civil courts on the back of the Promotion of Administrative Justice Act, 200044 (“PAJA”) or of pursuing the matter through the labour courts in terms of the LRA dropped dead with Chirwa.

In NEHAWU v UCT45 the procedural and jurisdictional issue which arose from the case was the status of the LAC. Section 167(2) of the LRA reads,

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

Section 167(3) reads,

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

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

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43 Para 111 and 112
44 Act No. 3 of 2000
45 [2003] 5 BLLR 409 (CC)
“It must be stressed at the outset that we are concerned here with a constitutional matter, a matter which is not within the exclusive jurisdiction of the Labour Court. The provisions of the LRA which give the LAC a status equal to that of the SCA and constitute it as the final court of appeal can have no application in constitutional matters. Those provisions can apply only to matters that are within the exclusive jurisdiction of the LAC and the Labour Court.”  

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

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

In NUMSA & Others v Bader Bop (Pty) Ltd & another the Constitutional Court considered whether the LRA (in particular Chapter 111, Part A Organisational Rights) should be interpreted to preclude minority unions from acquiring organisational rights through industrial action, and if so whether the LRA unjustifiably limited the constitutionally entrenched right to strike in section 23(2)(c) of the Constitution.

Ordinarily a sufficiently representative union seeking organisational rights (access to the workplace, stop order facilities, time off for union activities) may do so either through arbitration or industrial action. The LRA is silent about how unrepresentative trade unions (ie minority unions) may obtain organisational rights if an employer refuses to grant those rights. The Court after analyzing Chapter III and after considering ILO Conventions, No 87 (the Freedom of Association and Protection of the Right to Organise Convention) and No. 98 (the Right to Organise and Collective Bargaining Convention) held that the LRA could be read and interpreted to avoid such a limitation of a fundamental right. The Court reasoned,

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

46 At para 20
47 [2003] 2 BLLR 103 (CC)
48 See section 21 read with section 65(2) of the LRA
49 At para 43
The test of review of CCMA arbitration awards: Section 145 of the LRA

In *Sidumo v Rustenburg Platinum Mines Ltd & Others*\(^50\) the question the Constitutional Court had to grapple with was whether commissioners in the CCMA should show a “measure of deference” to an employer’s decision when deciding whether the sanction imposed by an employer was fair. The Court also had to decide whether the arbitrations conducted by CCMA commissioners constituted administrative action and therefore subject to the standard of review set out in the PAJA or whether the standard of review is that standard contemplated in section 145 of the LRA. The SCA’s view was that PAJA extended the ambit of review to parties at CCMA arbitrations.

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

“All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator... Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained.”\(^51\)

Later on Navsa comments,

“The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.”\(^52\)

On the second issue the Constitutional Court found that the CCMA performed an administrative act when arbitrating disputes, but that PAJA did not apply.\(^53\) Importantly the Constitutional Court established a new test of review – that of “reasonableness” which is to infuse the review grounds set out in section 145 of the LRA. That test may be expressed as follows: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

\(^{50}\) [2007] 12 BLLR 1097 (CC)

\(^{51}\) Para 61

\(^{52}\) Para 75

\(^{53}\) The reason PAJA was held not to apply to the review of awards was that the LRA was a specialist Act with specialist forums which “trumped” the general legislation of PAJA. This was reinforced by section 210 of the LRA which provides that if there is a conflict between two laws the LRA applies.
The position of employees in the transfer of a business as a going concern: Section 197 of the LRA

In *NEHAWU v UCT* the Constitutional Court was tasked with interpreting section 197 of the LRA to ascertain whether or not workers are automatically transferred from their old employer to a new employer upon a transfer of a business as a going concern. The case arose from a decision by the university to outsource its non-core services to contractors.

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

Ngcobo disagreed and said,

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

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

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54 At para 15
The extent of backpay upon reinstatement: Section 193(1)(a) of the LRA

In *Equity Aviation Services (Pty) Ltd v CCMA and Others* the Constitutional Court considered whether an order of reinstatement with retrospective effect contemplated in section 193(1)(a) of the LRA should be capped in a similar way to that of compensation for an unfair dismissal (i.e., capped to a maximum of 12 months for an “ordinary” unfair dismissal or a maximum of 24 months for an automatically unfair dismissal as contemplated in section 194 of the LRA.)

The Constitutional Court referring to the decision in *NEHAWU v UCT* granted leave to hear the matter as according to Nkabinde J,

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

The Constitutional Court held that there was no limitation to the backpay upon reinstatement – that remedy can take effect to the date of dismissal, even if the date of dismissal was longer than two years (and in this particular case the order, and back pay operated retrospectively to 2001 – some 7 years).

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

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

In *SA Police Service v Public Servants Association* the Constitutional Court considered the proper interpretation of regulation 24(6) of the SA Police Service Regulations dealing with the

55 (2008) 29 ILJ (2507)

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

57 Para 31

58 Par 43

extent to which (if at all) the National Commissioner had a discretion to advertise an upgraded post if the incumbent in that post was performing satisfactorily.

Regulation 24(6) reads as follows:

\[
(6) \text{If the National Commissioner raises the salary of a post as provided under subregulation (5) she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –}
\]

\[
(a) \text{already performs the duties of the post;}
\]

\[
(b) \text{has received a satisfactory rating in her or his most recent performance assessment; and}
\]

\[
(c) \text{starts employment at the minimum notch of the higher salary range.}
\]

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

The commissioner approached the High Court for a declarator on the meaning of that regulation explaining that there were numerous disputes on the matter arising from 1333 posts for the position of superintendent and 3356 for the post of captain. The High Court granted the declarator favouring his exercise of a full discretion to make appointments regardless of the performance of incumbents in the posts at the time. The union, PSA then approached the SCA on appeal. The SCA found that the National Commissioner had no such discretion. The commissioner then appealed to the Constitutional Court.

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

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

In *CUSA v Tao Ying Metal Industries and others*\(^{60}\) the issue before the Constitutional Court was whether an exemption from minimum wages and other provisions granted to Tao Ying Metal in April 1997 in terms of a collective agreement concluded in 1980 under the 1956 LRA in an industrial council continued to operate despite a new agreement concluded in the Metal and Engineering Industries Bargaining Council (the bargaining council”) in 1998 under the 1995 LRA. The union CUSA declared a dispute, arguing that the exemption no longer applied and that Tao Ying should be compelled to pay the minimum entitlements agreed to in the industrial council. The dispute proceeded to the CCMA and the CCMA found in favour of the union. Eventually the case wound its way through the Labour Court, the Labour Appeal Court and the Supreme Court of Appeal. The SCA raised the question of whether the CCMA had jurisdiction to hear the dispute, and concluded that the CCMA did not and set aside the award. CUSA then appealed to the Constitutional Court, the employer objected arguing that (amongst other arguments) that the proper construction of an exemption does not raise a “constitutional issue.” The Constitutional Court disagreed and Ngcobo reasoned that the issue concerned the role of commissioners in resolving disputes and the role of the courts in overseeing the arbitration process and furthermore that the issues raised in the case were of public interest.\(^{61}\)

The Court found that the employer’s exemption had terminated with the industrial council agreement and that the employer was to pay the minimum wages and conditions of employment applicable in the bargaining council agreement.

O’Regan dissented and expressed the view that the Constitutional Court should only hear a dispute if it materially concerned the right to engage in collective bargaining. The dispute before the Court, according to O’Regan did not.

O’Regan J stated that for leave to appeal to be granted, the first question that arises is whether the case raises a constitutional issue.\(^{62}\) She said,

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\(^{60}\) (2008) 29 ILJ 2461 (cc)

\(^{61}\) At para 54

\(^{62}\) At para 119
“It seems to me that only two issues can be said directly to raise constitutional issues. The first is whether a reviewing court is entitled of its own accord to raise a question regarding the jurisdiction of a CCMA commissioner to determine a particular dispute; and the second is whether the award falls to be set aside because the Commissioner failed to apply her mind to the terms of the exemption.”

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

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

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

“Ngcobo J states that because this case concerns the enforcement of a bargaining council agreement, and because there is a right in section 23(5) of the Constitution to engage in collective bargaining, the enforcement of a bargaining council agreement raises a constitutional matter. I am not persuaded that this is correct.

It is clear that the enforcement of the bargaining agreement materially affects the right to engage in collective bargaining or any other right in the Bill of Rights, its interpretation will give rise to a constitutional issue. Where, however, the interpretation is concerned with a provision that does not affect the right to engage in collective bargaining nor any other right entrenched in the Bill of Rights, but concerns substantive terms and conditions which have been negotiated (which by and large are the stuff of bargaining council agreements), it does not seem to me that a constitutional issue is automatically engaged. In this case, the primary dispute insofar as it relates to the bargaining council agreement turns on whether the wage provisions of the 1998 Main Agreement apply to the employer or whether the exemption granted on 7 April 1997 exempts the employer from those provisions. This does not seem to me to raise a constitutional matter. There is

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63 At para 120
no provision in the Constitution which is directly relevant to the interpretation of either the 1998 Main Agreement or the exemption; nor can it be said that either of the interpretations for which the parties contend gives greater or lesser effect to the provisions of the Bill of Rights.  

Ngcobo suggests that the enforcement of collective agreements is crucial to a society founded on the rule of law. I agree. I do not think however that the consequence of this assertion is that the enforcement of all collective agreements automatically raises a constitutional matter. …”

D Conclusion: The boundaries between constitutional and non constitutional matters

To start with the uncontested point, if a matter concerns any matter listed in section 167(4) or concerns the constitutionality of an Act of Parliament as contemplated in section 167(5) and as discussed in the SANDU cases such matters will be regarded as “constitutional matters” adjudicated upon before the Constitutional Court. No debate there.

If the matter concerns an interpretation of a section in the LRA, then that matter will constitute a “constitutional matter” as the LRA was enacted to give effect to the constitutional right to fair labour practices. In this respect the Constitutional Court has interpreted sections of the LRA concerned with: the jurisdiction of the Labour Court (sections 157(1) and (2) in Fredericks and Chirwa and the jurisdiction of the LAC (section 167(2) and 167(3) in NEHAWU v UCT; the provisions dealing with collective bargaining and strike action (Chapter 111 and sections 64 and 65) in NUMSA v Bader Bop; the test of review of CCMA awards (section 145) in Sidumo; the position of employees in the transfer of businesses (section 197) in NEHAWU v UCT; and the quantum of back pay upon reinstatement (section 193(1)(a) in Equity Aviation Services.

If the matter concerns the interpretation of other legislation (ie not the LRA) such as the South African Police Service Regulations in SAPS v PSA, and those regulations purport to engage a right in section 23 of the Constitution then the matter is regarded as a constitutional matter. Is that correct? Perhaps arguably so as when interpreting any legislation a court must promote the spirit, purport and object of the Bill of Rights. However, the nexus between the regulations and the right in section 23 is a weak one, different to the nexus between the LRA and section 23 as the LRA

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64 At para 126
65 At para 128
was enacted to give effect to the right in section 23 and the interpretation of a section within that Act clearly constitutes a constitutional matter. It is arguable therefore that the *SAPS v PSA* scenario suggests a less compelling claim to the mantle of a constitutional matter.

When entering the realm of the application of legislation enacted to give effect to a constitutional right, the distinction between constitutional and nonconstitutional matters becomes a contested one. This occurred most notably in the *CUSA v Tao Ying Metal Industries* case. Quite simply the majority of the Constitutional Court regarded the dispute (about the interpretation of an exemption clause in a collective agreement) as one giving rise to a constitutional matter because it concerned the role of CCMA commissioners in resolving labour disputes and the supervisory powers of the courts in overseeing the arbitration process. There was minority dissent to such wide jurisdiction based on arguments of the interests of justice, the lack of constitutional importance in such cases, the fact that such cases do not affect the rights in section 23, and that neither interpretation advanced by the parties in such a dispute affected a provision in the Bill of Rights. Finally too such a wide interpretation undermined one of the purpose of the Act which is to provide for the expeditious resolution of labour disputes.

Regrettably for purposes of this analysis there are no employment law reported decisions of cases proceeding to the Constitutional Court and being dismissed on the basis that the dispute raised before the court did not constitute a constitutional matter. The Constitutional Court has thus not distinguished with real clarity the boundaries between the two types of matters (ie constitutional and nonconstitutional matters). To the extent that such an analysis is in its infancy, perhaps the reasons advanced by O’Regan as to why the *CUSA* matter did not (in her view) give rise to a constitutional matter worthy of the Court’s attention is a useful start.