The law is not the private property of lawyers, nor is justice the exclusive province of judges and juries. In the final analysis, true justice is not a matter of courts and law books, but of a commitment in each of us to liberty and mutual respect.

Introduction

In my first year of LLB studies our lecturers taught us that there are numerous sources of law: natural and common law, man-made or statutory law, customary law and common practices, treaties, jurisprudence and so forth. However, we were taught that judges do not make law – they apply "the law". It became apparent only later that there are quite a number of people who question this view of law, which focuses primarily on rules or orders regulating the conduct and relationships of people. In my final year of LLB studies we were taught that some also hold the viewpoint that the law is not made up of rules and regulations but rather of judicial decisions (in other words, a judge does not apply law but creates law through decisions greatly influenced by personal factors). 1 It became clear that once one has an idea of what the law is an even trickier question to answer is what the purpose of the law is. In that fifth year of studying law, we also learnt that "[p]hilosophy ... is something intermediate between theology and science".2 At the start of the semester course Introduction to Legal Philosophy, I read the often-quoted extract from Bertrand Russell:3

"Almost all the questions of most interest to speculative minds are such as science cannot answer .... Theologies have professed to give answers, all too definite; but their very definiteness causes modern minds to view them with suspicion. The studying of these questions, if not the answering of them, is the business of philosophy."

This truth led to my interest being kindled in labour law, which is an area of law concerned with vague and often contentious issues such as fairness, social justice and industrial democracy. It is an area of law that almost always involves contractual rights, bargaining rights and imposed standards. In essence this particular branch of the law is a convergence between science and philosophy.

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1 Carter
2 Russell History of Western Philosophy (1946) 10-11. According to Russell, all definite knowledge belongs to science, while all dogmas as to what surpasses definite knowledge belongs to theology. The writer also states that the chief thing that philosophy, in our age, can do is to "teach how to live with uncertainty, and yet without being paralysed by hesitation".
3 Ibid "But between theology and science there is a No Man's Land, exposed to attack from both sides; this No Man's Land is philosophy."
The indisputable fact is that people need rules and guidance in order to achieve social justice. The goal of achieving social justice is the ultimate aim to which we should all strive. I therefore embrace the definition attributed to Justinianus: "Ius est ars boni et aequi" (rough translation - legal justice is the art of the good and the fair). The philosopher Aristotle was a great proponent of justice, which he viewed as exceedingly important and inseparable from the value of equality. These values, principles and notions have in recent years come under attack due to globalisation, the financial recession and other economic, political and social factors. Growing income and social inequality is common worldwide. This illustrates the continued importance of striving for improved social justice in all societies. There are several basic labour law tools that can assist in this quest, including entrenchment of freedom of association and the right to engage in collective bargaining. However, it is my submission that labour law, books and judges are not capable of satisfying this aim either individually or with a combined effort. Rather, it requires a commitment in each of us to strive for a better world.

The focus in this paper is the institutional landscape set in place to achieve social justice. This will include consideration of the role of judges, lawyers, academics and ordinary people in this continuing endeavour.

The well-known principle that "labour should not be regarded merely as a commodity or article of commerce" is found in article 427 of Part XIII of the Treaty. Other principles found in article 427 include the right of association, the payment of a wage which is adequate to maintain a reasonable standard of life, the abolition of child labour, the principle that men and women should receive equal remuneration for work of equal value and that the standard set in countries in respect to the conditions of labour standards should have due regard to the equitable economic treatment of all workers lawfully resident therein.

The Declaration of Philadelphia (1944) adopted towards the end of World War II draws from Roosevelt's and Churchill's joint Atlantic declaration in 1941. The Declaration of Philadelphia was appended to the organisation's constitution. The fundamental principles contained in the 1944 Declaration are: 1) that labour is not a commodity; 2) the importance of the fundamental human rights of freedom of
expression and of association; 3) the importance of the continued fight or war against poverty and want; 4) and the principle of tripartism.

The Declaration recognises that lasting peace is based on social justice, which should be the primary aim of labour policy (both nationally and internationally). To this end the ILO adopts conventions that deal with all spheres of labour, but particularly with equality, child labour, freedom of association, collective bargaining, maternity protection, health and safety of workers, and social security measures. Article 19 of the ILO Constitution provides that states which ratify a convention must take such action as may be necessary to make the provisions of such convention effective. A general approach in labour law is that more favourable conditions in national law are not affected by the provisions of any ILO standard.

The Declaration on Fundamental Principles and Rights at Work of 1998 was adopted in the ever-widening shadow of globalisation and its feared impact on workers everywhere. A very important characteristic of this declaration is its role inadvocating the fundamental principles of the ILO. As a result the declaration evokes the fact that based only on membership of the ILO, member states have agreed to the principles and rights found in the Constitution and the Philadelphia Declaration. As those principles and rights have been expressed in specific conventions, member states have an obligation to respect, promote and realise in good faith the following principles: freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupations.

In the 2008 Declaration on Social Justice for a Fair Globalisation the International Labour Organisation affirmed that the commitment of the organisation and its members to place full and productive employment and decent work at the centre of economic and social policies, should be based on four equally important strategic objectives. These objectives express the Decent Work Agenda and refer to: promoting employment by creating a sustainable institutional and economic environment in which individuals, societies and enterprises can be productive, grow and prosper; developing and enhancing measures of social protection including sustainable social security and labour protection; promoting social dialogue and tripartism as the most appropriate methods for responding to the needs and circumstances of each country and translating economic development into social progress, and social progress into economic development; and respecting, promoting and realising the fundamental principles and rights at work (recognising that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes). Although drafted in very legalistic and dense language the declaration serves as a recommitment to the 1998 Declaration.

It must be noted that the organisation is not without its weaknesses. Servais perhaps describes it best:

"International labour law is without doubt imperfect, as is the community of States, but it is also undoubtedly less imperfect than the law of other universal or regional institutions. It draws its version of the whole charade in order to keep a lid on things, they would not want to. So, there was a need for them to act discreetly and indirectly. Thus they came up with the idea of introducing a Trojan Horse, the Declaration, into the very citadel of labour rights, the ILO itself (Langille "Core labour rights – the true story (reply to Alston)" 2005 Eur/Int Law 418).

Although the binding value of a Declaration is limited, the 1998 Declaration was instrumental in the organisation’s drive for ratification of fundamental or core conventions. As stated, the Declaration also requires commitment to the fundamental values and principles of the organisation regardless of the actual ratification of specific conventions.


See also Langille (n 16) 419: "The international labour law regime is probably, and probably always will, much better regarded as a very complex web of rules, ripples of action, of non-rules, of non-people, at different levels, etc., probably with a single centre and shifting ownership."
strength not only from the support provided by the Member States, but also from the backing of employers' and workers' associations. That backing makes it all the more cogent and relevant.

South Africa has ratified all the core labour law conventions as well as other conventions as indicated by the International Labour Organisation's table on country ratifications:

<table>
<thead>
<tr>
<th>Convention</th>
<th>Ratification date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>C 1 Employment Conditions, Hours of Work and Wages Convention, 1933</td>
<td>28/02/1954</td>
<td>ratified</td>
</tr>
<tr>
<td>C 4 Right to Work (Women) Convention, 1930</td>
<td>01/11/1929</td>
<td>proposed</td>
</tr>
<tr>
<td>C 10 Equal Remuneration (Men and Women) Convention, 1929</td>
<td>30/01/1936</td>
<td>ratified</td>
</tr>
<tr>
<td>C 25 Minimum Wage (Semi-Mechanical Work) Convention, 1924</td>
<td>07/12/1923</td>
<td>ratified</td>
</tr>
<tr>
<td>C 26 Night Work (Women) Convention, 1926</td>
<td>31/03/1923</td>
<td>ratified</td>
</tr>
<tr>
<td>C 28 Equal Remuneration Convention, 1950</td>
<td>05/03/1950</td>
<td>ratified</td>
</tr>
<tr>
<td>C 47 Labour (Women) Convention (Revised), 1934</td>
<td>01/01/1931</td>
<td>deferred</td>
</tr>
<tr>
<td>C 53 Workers' Compensation (Occupational Disease) Convention, 1894</td>
<td>26/01/1927</td>
<td>ratified</td>
</tr>
<tr>
<td>C 57 Night Work (Women) Convention, 1933</td>
<td>21/08/1936</td>
<td>ratified</td>
</tr>
<tr>
<td>C 67 Minimum Wage (Mechanical Work) Convention, 1930</td>
<td>06/01/1930</td>
<td>ratified</td>
</tr>
<tr>
<td>C 72 Fixed Term Employment Convention, 1930</td>
<td>10/09/1936</td>
<td>ratified</td>
</tr>
<tr>
<td>C 73 Freedom of Association and Protection of the Rights of Organisers, 1930</td>
<td>10/02/1936</td>
<td>ratified</td>
</tr>
<tr>
<td>C 74 Right to Organs and Collective Bargaining Convention, 1934</td>
<td>02/01/1925</td>
<td>ratified</td>
</tr>
<tr>
<td>C 75 Equal Remuneration Convention, 1951</td>
<td>20/03/2000</td>
<td>ratified</td>
</tr>
<tr>
<td>C 85 Abolition of Forced Labour Convention, 1937</td>
<td>01/07/1937</td>
<td>ratified</td>
</tr>
<tr>
<td>C 91 Minimum Wages (Employment and Occupations) Convention, 1929</td>
<td>01/01/1937</td>
<td>ratified</td>
</tr>
<tr>
<td>C 92 Fixed Term Employment Convention, 1929</td>
<td>01/01/1937</td>
<td>ratified</td>
</tr>
<tr>
<td>C 99 Minimum Age Convention, 1927</td>
<td>30/06/1926</td>
<td>ratified</td>
</tr>
<tr>
<td>C 105 Medical Care for the Aged Convention, 1960</td>
<td>15/02/1960</td>
<td>ratified</td>
</tr>
<tr>
<td>C 107 Repayment of Employer's Labour Mortgage Convention, 1925</td>
<td>07/06/1925</td>
<td>ratified</td>
</tr>
<tr>
<td>C 152 Over-time Work (Women) Convention, 1931</td>
<td>15/02/1931</td>
<td>ratified</td>
</tr>
<tr>
<td>C 153 Safety and Health in Mines Convention, 1935</td>
<td>08/06/1935</td>
<td>ratified</td>
</tr>
<tr>
<td>C 158 Basic Labour Law Convention, 1924</td>
<td>07/04/1926</td>
<td>ratified</td>
</tr>
</tbody>
</table>

Clearly the building blocks of social justice are recognised and entrenched in our constitution. Chapter 2 includes the following principles and rights: equality; human dignity; freedom from slavery, servitude and forced labour; privacy; freedom of religion, belief and opinion; freedom of expression; freedom of association; freedom of trade, occupation and profession; fair labour relations, including the right to organise, strike and engage in collective bargaining; adequate health care, food, water and access to social security; and just administrative action.


The Constitution of South Africa states that the Republic is a sovereign, democratic state founded on the principles of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law. The constitution contains fundamental rights.

s 1(a)-(c).
The constitutional court has explicitly endorsed the notion of social justice, as through the unanimous judgment in the case of Grootboom.46

"The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment."37

See also Minister of Finance & another v Van Heerden.38

"Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of redress for past exclusion, dispossession, and indignity within the discipline of our constitutional framework."38

The pursuit of social justice requires much of relevant role players and in a recent labour court case39 the judge lamented the attitude of a CCMA commissioner in a review application:40

rights to a fair bargaining process." As to what distinguishes labour law from other branches of the law Langille states that: "The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination - what people call industrial democracy - and its results are basic right which, it is believed, lead to better, but self-determined, outcomes. These are two different approaches to securing the overarching goal of justice in employment relations. Taken together, they and the contractual approach they respond to, as joined by the narrative just outlined, are labour law - i.e., what make labour law, labour law, and not family law, or tax law, or anything else for that matter."34 15 16

[27] s 33.

46 Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) 536-C.

37 Commenting on this dictum Van der Walt ("A South African reading of Frank Michelman's theory of social justice" (2004) 19 SAR/PS 253 254) states: "For a society characterised by vast poverty and by social, political and economic divisions institutionalised along racial lines, this is a significant statement. In referring to the attainment of social justice and the improvement of everyone's quality of life, Yacoob J's dictum draws attention to the following aspects: (a) even now, after the establishment of a constitutional democracy, social justice does not prevail in South African society - it has to be attained through reform and transformation. (b) Social justice involves and is premised upon a number of fundamental rights such as equality and human dignity, but a particularly important aspect is socio-economic support and upliftment - improving everyone's quality of life. (c) Neither social justice nor improved quality of life can be established at once, and therefore the focus has to be on attainment of these goals over time. (d) However, the attainment of social justice and improved quality of life is not an empty promise or a hollow aspiration either - it is a constitutional commitment, which means that it has to be pursued in compliance with constitutional obligations and requirements. Each of these observations finds support in the South African Constitution."

38 [2004] 12 BCLR 1181 (CC) par 25. In Daniels v Campbell NO and Others 2004 7 BCLR 733 (CC) the court further stated that: "The process of interpreting legislation must recognise the context in which we find ourselves and the constitutional goal of establishing a society based on democratic values, social justice and fundamental human rights" (par 54).


40 par 22-23. An employee was assaulted and the court regarded that nothing had been done about it - the commissioner had not enquired further into the circumstances or consequences of such assault.

"The extraordinary failure to stem the tide of the schism between the have and have-nots cannot be solely blamed on the Government. The courts must accept their responsibility in this very important task to bring about social justice and to give effect to the meaning of the values enshrined in our Constitution in the Republic of South Africa, 1996.

The facts of this case illustrate the failure of the legal system we have inherited. There exists in our legal system an inherent bias in favour of the wealthy established class to the detriment of the poor and the vulnerable."41

The "constitutionalisation of labour law"41 is no longer hotly debated.42 Cheadle confirms that the process of constitutionalising labour law in South Africa is well under way.43 The question to what extent section 23(1), which provides that "everyone has a right to fair labour practices", should influence express and negotiated labour regulation in specialised statutes is, however, still unanswered. For example, should a duty to bargain be understood to exist on the basis of section 23(1) even though the drafters of the Labour Relations Act 66 of 1995 had expressly chosen the route of a voluntary system underpinned by the rights to organise and to strike?

Our courts have also been rather keen to develop the common law - interpreted by the courts as an obligation placed on the courts in terms of section 39 read with section 173.44 This has a significant impact on labour law.45

41 See First Certification Judgment 1996 4 SA 744 (CC) par 67 in reference to s 23 of the constitution:

"The primary development of this law will, in all probability, take place in the labour courts in the light of labour legislation. "The legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers entrenched in NT23 are honoured."

42 See Beatty "Constitutional labour rights: Pros and cons" (1993) 14 ILJR 1; and Cheadle "Labour law and the constitution" paper delivered at the 2007 SASLAW annual conference. See also Kahn-Freund 'The impact of constitutions on labour law' 1976 Cambridge Law Journal 240.

43 ibid 1. "The process of constitutionalising labour law has begun. The Constitutional Court has established the principle that the labour rights in section 23 extend to workers outside of those employed under the common law contract of employment. The Court has inferred a right to union representation in the workplace for minority trade unions, although only enforceable through industrial action. The Court has given content to the meaning of fairness in the right to fair labour practices - it is a balance of the competing interests of employer and employee. It accordingly rejected the 'reasonable employer test' as the basis for determining the substantive fairness of a dismissal. It has asserted a supervisory role over the interpretation and application of the constitutional right to fair labour practices in so far as that right has been given effect to in the LRA. It has turned its back on a parallel labour law jurisprudence based directly on the right itself. Although it has declared to decide whether or not the right to engage in collective bargaining includes a duty to bargain, it has expressed a view that the complexity of the issues involved in establishing a regulatory framework for collective bargaining ought to be left to the legislature."

44 Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC) par 39: "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately."

45 This issue often hinges on the difficult question of jurisdiction and whether the common law contract of employment should be used as a course of action where best practice has been codified in labour regulation. Although this issue was canvassed extensively by a wide range of courts, two cases especially pertinent to this jurisdictional dilemma were heard after Chinwa v Transnet Ltd (2008) 2 BCLR 97 (CC).
Some pronouncements of the court in cases seemingly unrelated to labour law indicate the impact of the constitution and the bill of rights on all fields of law, including labour law. See, for example, the *dictum in Barkhuizen v Napier*, where the majority stated that the principle of *pacta sunt servanda* is not a "sacred cow that should trump all other considerations". The court held that contractual agreements, just as all other law, are subject to constitutional supervision or control. This case is particularly relevant to labour lawyers, as the majority confirmed that public policy may result in a contractual provision being invalid:

"The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy." 46

Contractual provisions should therefore be measured against public policy against the backdrop of our constitutional values:

"Interpretation is one thing but application is another. If the application of a right constitutes a breach of fair trial rights in section 35(3). The statement was not necessary to the decision and probably was not intended" (n 42 par 6).

The constitutional values and rights provide a solid foundation for the pursuit of social justice. The upholding and application of those values and rights through the enactment of suitable statutes and the proper interpretation and enforcement thereof will ensure that the acid test of justice is met and that the goal of social justice is progressively advanced.

4 From black and white statutory rights to purposive judicial interpretation: pros and cons

4.1 Recognition and application of international and constitutional values, principles and rights

4.1.1 Principles at work

Sir Otto Kahn-Freund, in his inaugural lecture, reflected on the impact of constitutions on labour law. Of interest to us is Kahn-Freund's conclusion that "a
The doctrine of separation of powers was canvassed in *Doctors for Life International v Speaker of the National Assembly*.

Kahn-Freund distinguished between different meanings of the word “constitution”. The word can be understood in the substantive as well as formal sense. The prior notion refers to the sum total of rules determining the organisation of governments and the fundamental rights and liberties of individuals. The latter notion refers to a document (or documents) “systematically” setting out the principle of the substantive constitution. The United Kingdom has a constitution in the substantive sense of the word, but not in the formal sense, while France, the United States of America, Germany and South Africa, inter alia, all have constitutions in the formal sense.

Beatty, with reference to the imminent introduction of the South African bill of rights, stated in 1993 that although the positive consequences flowing from an entrenched bill of rights are more than any perceived detrimental ones, the concern involved in the debate about constitutionalising labour law is valid. In other words, a matter of principal importance for all democracies, involving the separation of powers, is at stake in this debate. In Beatty’s words:

“In a country with a history like South Africa’s, it would be more than a little ironic if the price of guaranteeing more social justice in the workplace was a less democratic system of government in the country as a whole.”

The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

In the *Certification judgment* the constitutional court had already reasoned that there is no separation that is absolute. The court stated that “[n]o constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation.” The court did, however, continually stress the importance of the functional independence of branches of government and the importance of the principle of checks and balances to ensure this.

### 4.1.2 Interpretation rules at work

As illustrated above, the judiciary has through its power of interpretation the ability to substantially increase the rights, protection and freedoms of people. Conversely, the judiciary also has the ability to control and limit the scope of rights, protection and freedoms. The latter may occur where recognised principles, such as freedom of contract and the right to property, are given undue weight. Generally, courts have refused to be drawn into issues concerning political priorities and/or fiscal issues.

In *Bastian Financial Services v General Hendrik Schoeman Primary School* the court referred to the *dictum* in *Manjinysha v Minister of Law and Order* that it is trite that the golden rule of statutory interpretation is that:

“the primary rule in the construction of statutory provisions is to ascertain the attention of the Legislature . . . . One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the [Legislature] could not have contemplated it.”
In the Bastian case, however, the court went on to state that it is also a well-established rule that words used in a statute must be interpreted in the light of their context. The context is not limited to the language of the rest of the statute; often the matter of the statute, the statute's apparent scope and purpose and to some extent even its background are even more important to the construction or interpretation of a statute. This approach has been approved by the constitutional court (in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others) and the court has even remarked that such a contextual interpretation of a statute is the emerging trend in statutory interpretation even where the words to be construed are clear and unambiguous. Finally, in the Bastian case the court reaffirmed that it has long been recognised in our law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question. It is therefore correct to state that our law is an "enthusiastic supporter of 'purposive construction'."

In Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd, under the heading "The proper approach to statutory interpretation", the constitutional court reiterated that the constitution must be interpreted purposively. But what does this mean? What should a judge do when interpreting a statute giving effect to a fundamental right such as the right to fair labour practices?

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The courts have had to interpret the provisions of labour legislation, in particular the Labour Relations Act of 1995, on several occasions. In Numsa v Fry’s Metals (Pty) Ltd80 the supreme court of appeal held that section 168(3) of the constitution properly interpreted meant that that court could hear appeals from the labour appeal court (despite the provision in section 167(2) of the Labour Relations Act that 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 matters within its exclusive jurisdiction).81

The case was distinguishable from previous cases where the issue in dispute dealt with a constitutional matter – in those cases the constitutional court had earlier confirmed that an appeal from the labour appeal court on a constitutional matter did lie with the supreme court of appeal.81 The supreme court of appeal held that:

“It is a long established principle – based on concern for intelligibility of legislative language– that similar words in an enactment should be taken to carry the same meaning. It thus follows from the CC’s reasoning in relation to its own appellate power, and this court’s appellate power over the LAC in relation to constitutional issues, that decisions of all other courts on both constitutional and non-constitutional matters are subject to appeal to this court.”82

The labour court has held that the principles of interpretation provide that words must be given their ordinary meaning and that “[t]here is no need to resort to an interpretation of a section – generous, purposive or otherwise – where there is no uncertainty as to its meaning. … If the intention of the Legislature is clear, it has to be followed.”83 In the same case an earlier dictum of the supreme court of appeal is cited with approval, namely, that courts are not entitled under the guise of preventing an absurdity to avoid the Legislature’s clear intention because they regard particular consequences to be harsh or even unwise.84

In Aviation Union of South Africa v Barnes v South African Airways (Pty) Ltd85 the court emphasised sections 1 and 3 of the Labour Relations Act when interpreting a provision relating to the transfer of a part of an undertaking. The court also stated that “by now” it is accepted that the act must be interpreted purposively and the purpose of the provision in question must carry due weight. In the court a quo86 it was held that although the court preferred a purposive interpretation of section 197 of the act the wording of section 197 was neither ambiguous nor unclear and therefore the plain wording of the provision, as interpreted by the court, was given effect to.87 Such reading of the provision excluded vulnerable employees from protection in the event of the transfer of an undertaking as a going concern in circumstances related to second-generation outsourcing.

It is possible for considerable divergence to persist regarding the “ordinary” or “plain” meaning of words. In order for a court to arrive at the conclusion that the wording of a statutory provision is simple or clear the court must in fact first embark on a reading and interpretation of such provision. This is where the caveat of Kahn-Freund again resonates – that a bill of rights enables the courts to translate into principles of law their own moral and social preferences.88

5 Some grey areas in labour law provisions and the courts’ approach

Four examples of factual situations that prima facie seem(ed) to be addressed in our statutes in plain and ordinary provisions are highlighted. However, upon further examination it becomes apparent that the outcome of the disputes was not so cut and dry – it depended to a significant degree on the interpretation by the relevant court of the provisions in question.

5.1 Persons working in South Africa in contravention of a statutory prohibition and persons performing illegal work

80 Refer to par 5.2, where this dictum was ironically enough used in the matter of Apax v The Workforce Group (below) to justify a narrow interpretation of a contract of employment and s 186(1) of the LRA to exclude a finding of a dismissal being relevant in those circumstances.
82 The court, per Nqobile DP and Cameron JA, formulated the legal questions as follows (par 1): “The first is whether this court has jurisdiction to hear appeals from the Labour Appeal Court (LAC). If it does, the second is whether leave to appeal must be obtained. The third is the substance of the case the applicants seek to bring before us – whether the dismissal or threatened dismissal … by their employer … after they refused to agree to proposed changes to their terms and conditions of employment in late 2000, qualifies as ‘automatically unfair’ under the Labour Relations Act 66 of 1995.”
83 Nkana v UCT 2003 3 SA 1 (CC) par 22.
84 par 15. The court also stated that: “The implications of the contrary conclusion must be emphasised. If, despite the provisions of s 168(3), the LRA creates a Final Court of Appeal in labour-related matters to the exclusion of this Court’s appellate powers, it would have to follow that the legislature could create Final Courts of appeal also in other areas – crime, welfare, environment, land, personal injuries, contract, commerce, landlord and tenant, company law, family law and administrative matters. The list is theoretically endless. The entire jurisdiction of this Court could on this approach be assigned piecemeal or wholly to one or more other appellate tribunals of similar authority” (par 26).
85 CCMA v Gauteng Buildings Bargaining Council (in Aequidistant) [2006] 5 BLLR 469 (LC) par 16.
86 Ibid par 17 (the reference is to the case of Gouw v Van der Linde 2003 4 All SA 553 (SCA)). The judge continues: “Once the intention of the Legislature is clearly established, it can be dangerous to speculate as to why the Legislature would intend a particular result.”
87 Case no JA 51707 labour appeal court judgment of 9 Oct 2009.
88 Aviation Union of South Africa v South African Airways (Pty) Ltd, LQM SA Facility Managers and Engineers (Pty) Ltd [2008] 1 BLLR 20 (LC).
89 This matter will be considered again in par 5.3.
90 Kahn-Freund (n 42) 269. It must also be noted that just as the meaning of ‘plain’ language may be hard to pin down, the substance of the bona fides is even more contested – a good example being the narrow majority in the constitutional court regarding whether or not prostitution should still be a criminal offence (n 51).
The labour courts were recently confronted with individuals claiming labour law rights while being employed illegally or performing illegal work. There is sufficient common ground to discuss these two categories of workers together.

According to Kylie v CCMA and others, sex workers fall under the definition of "employee" as provided in labour statutes. However, they are not entitled to the relief and rights contained therein. The court found that a contract to perform illegal work (in casu prostitution in contravention of the Sexual Offences Act 23 of 1957) is invalid and unenforceable in terms of the common law, legislation (including labour statutes) and the constitution. It pointed out that: "There is a fundamental principle of public policy that courts, by their actions, ought not to sanction or encourage illegal activity." For that reason, the applicant's claim for compensation for unfair dismissal was rejected by the court.

In Discovery Health Limited v CCMA & others the court held that where an employer terminated a contract with a foreigner on learning that he had no valid work permit such termination constituted dismissal as defined in section 186 of the Labour Relations Act. This was based on the finding that a contract between a South African employer and a foreigner without a valid work permit was illegal – not void – and therefore the foreigner was entitled to all rights afforded employees under labour legislation and the constitution. Consequently, a South African sex worker is not entitled to claim protection or relief due to the illegal nature of the work while a foreigner working illegally in South Africa may claim such relief. The distinction lies in the illegal status of the worker versus the illegal nature of the work being performed.

To summarise, in the Discovery case the contract was in contravention of a statutory prohibition but the relevant act did not expressly state that a contract in contravention therewith would be ab initio void, while in the Kylie case the contract was in contravention of a statutory provision which criminalises and outlaws prostitution in South Africa. Does this distinction warrant such diverse outcomes? These cases were decided not too long after a comparable matter was heard in the high court.

In Van Wyk v Daytona Stud Farm (Pty) Ltd the dispute concerned a claim on behalf of a minor child who was injured in an incident which occurred while she was being conveyed on a trailer drawn by a tractor driven on the first respondent's farm. The child was at the time working in the orchard with other children who lived on the farm. In a special plea to the plaintiff's claim for damages, the first respondent contended that the child was an employee at the time of the accident, and that her injury was an occupational injury as defined in section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, and that by virtue of section 35(1) of that act, the plaintiff was precluded from recovering any part of the damages claimed from the first defendant as her "employer". The court was not convinced that the child was capable of and did conclude a valid contract of service, such contract was void ab initio by reason of the statutory prohibition against the employment of a child under the age of 15 years or school-leaving age in the Basic Conditions of Employment Act 75 of 1997.

The special plea was not upheld, as the Basic Conditions of Employment Act does not expressly provide that a contract in contravention with such provision would be void ab initio, although an offence was not committed by the "employer" of such child. The court considered the question whether the contract in terms of which such employment occurs is itself invalid, and relied extensively on the following dictum of Swart v Smuts:

"The position in this regard (has) been stated as follows by Corbett JA in Swart v Smuts: "Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangaan, is of 'n handeling wat vering is, in sry met 'n statutaire bepaling of met verontagting van 'n statutaire vereiste, is welbekend en is alhier dikwels deur hierdie Hof gekonstateer .... Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die wetsbepaling negatief ingeklee is, in die vorm van 'n verbod, Selfs in sodanige gevalle kan daar ander oorwegings wees wat desondanks tot 'n geldigheidsbeoordeling lei dat die Wetgewer nie geldigheid van die transaksie afhang. In die algemene word 'n handeling wat in sry met 'n statutaire bepaling verig is, as 'n nietigheid beschou, maar hierdie nie as 'n wase of ongelsone rel nie. Daaglikse oorweging van die bewoording van die transaksie wat aangegaan is, of in handeling word, kan deur die konsekwensies wat van 'n gevolgsreg van die transaksie is, die doel van die Wetgewer verskyn. Met verontagging van 'n nietigheidsbeoordeling, is die toepassing van 'n wetsbepaling nie noodwendig van toepassing nie, nie is daar 'n onmiddellike wese van 'n uitleg van die wetsbepaling nie. Daar is in hierdie verband verskeie indicia en interpretasievere wat van diens is om die bedoeling van die Wetgewer vas te stel. Dit is by boek, na aanleiding van die bewoording van die wetsvoorskrif, dat die gebruik van die woord 'moet' (Engels 'shall'), of enige ander woord van 'n verbod onmogelike is, en daar moet ook aandag geneem word aan die vorderings wat die Wetgewer in hierdie verband verskyn. Die Wetgewer is toe werklik aangegaan nie, maar die bedoeling van die Wetgewer is hoopvol daarvan dat die bedoeling van die Wetgewer, en die gevolgsreg van die transaksie wat aangegaan is, in gevalle waar die transaksie of handeling nie in sry met die wetsbepaling nie, moet word.""

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The court held that the contract of employment was not invalid regardless of the absence of a valid work permit, which brought section 38 of the Immigration Act 13 of 2002 into play. That article prohibits any person from employing a foreigner without the necessary permit. The court attached significant importance to the fact that the act criminalised only the conduct of an employer who employs a foreign national without a valid permit (and not the foreigner), coupled with the absence of an express provision providing for such agreement to be void. The court considered the true intention of the legislator against the backdrop of the fundamental right to fair labour practices in section 23(1) of the constitution and decided that the legislator was content with the criminal sanction applicable.

"There is a sound policy reason for adopting a construction of s 38(1) that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable circumstances that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA, for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the necessary permit. The court attached significant importance to the fact that the act is not enforceable by anyone of the sides, that is, by neither the employer nor the child."

The court concluded that the legislator did not intend the contract to be void ab initio, as to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of section 23(1) of the constitution to give effect, through labour legislation, to the right to fair labour practices. The court also continued to consider (obiter) that the worker would even in the absence of a valid contract qualify as an "employee" as defined in section 213 of the Labour Relations Act.

The court regarded the fact that the prohibition is couched in the negative ("no person may employ") as an indication of an intention to render the contract in terms whereof the child is employed void and unenforceable. However, the intention of the legislature is also established by way of the long title of the act; its stated purpose, eradicating child labour in accordance with relevant international conventions; and the purpose and effect of the Compensation for Occupational Injuries and Diseases Act. The court reasoned that:

"In my view, the purpose and objects of BCEA and of the provisions of section 43(1) cannot effectively and completely be achieved if the underlying contract to the employment of a child which is prohibited in terms of that provision, is not itself void. The recognition of such a contract as valid would, in my view, bring about the very situation which the prohibition seeks to prevent. Although [illegible] both illegal and an offence to employ the child, holding the contract of employment of the child to be valid renders it capable of enforcement. The enactment clearly seeks to protect the child below the age enacted, but, as is clear from the purpose and primary objects of the Act, it seeks to do more. One of the objects is the introduction of effective measures to combat the scourge of the practice of child labour and to ensure the effective abolition of child labour and to provide measures to secure the prohibition and elimination of the worst forms of child labour. The enactment seeks to go beyond the interest of the individual child and the benefits that such child might in the circumstances of a particular case derive from a particular contract of employment entered into by it. The achievement of the objects and purpose will, in my view, be achieved only if the contract itself is void ab initio and is not enforceable by any one of the sides, that is, by neither the employer nor the child."

The court, therefore, after having applied its mind to all relevant circumstances, held the contract to be void ab initio. In the Discovery case the court followed exactly the same approach but came to a completely different conclusion. The court considered the authority on interpretation of statutes but did so in a constitutional context.

The court held that the contract of employment was not invalid regardless of the absence of a valid work permit, which brought section 38 of the Immigration Act 13 of
"dependent contractor". Some commentators have even gone so far as to question the continued exclusion of "independent contractors" from the scope of labour laws.

It is clear that the courts will play an active and leading role in reshaping the scope and reach of labour law in future. Although legal uncertainty is not desirable, from time to time it seems unavoidable and represents an opportunity for rejuvenation. Labour lawyers will hopefully use the opportunity presented by the changing boundaries of work to reinvent labour law to continue to be relevant in the era of changed work. In between prostitutes and foreigners, on the one hand, and the traditional "employee", on the other, a whole new world of atypical workers, including home workers, piece workers, tele-workers, e-lancers, dependent contractors, etc lies. A "judge-led renaissance" may result in a new view of the traditional employment relationship and the rules governing it. Russell's view that the main function of philosophy, in our age, is to "teach how to live with uncertainty, and yet without being paralysed by hesitation" therefore seems to suggest that labour lawyers should in future be more philosophical in their outlook and approach. It seems that the focus should always be on what exactly labour law should aspire to achieve, and as I indicated at the start of this lecture, social justice seems to be a pivotal and constant aspiration.

5.2 Temporary employment services

The Labour Relations Act, in section 198, provides for a triangular relationship between a temporary employment service (for ease of reference "labour broker" hereafter), client and employee. Where there is a triangular relationship the labour broker places a person's services at the disposal of a client, under whose direction the person works at the premises of the client, while the broker pays the employee. In this relationship the labour broker is deemed to be the employer. Section 198(4) of the act stipulates that both the labour broker (employer) and the client are jointly and severally liable in respect of contraventions of conditions of service that emanate from: collective agreements concluded at bargaining councils; the Basic Conditions of Employment Act; and arbitration awards that regulate terms and conditions of service. Joint and several liability does not, however, extend to unfair dismissals or unfair limitation clause in the Constitution, are not necessarily entitled to claim the protection of the LRA or services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service.

105 Le Roux ("The meaning of 'worker' and the road towards diversification: Reflecting on Discovery, Sita and 'Kylie" (2009) 30 ILJ 49) summarizes the current position aptly: "The argument above can be summarized as follows: 1 A worker as intended in s 23(1) includes, but is not limited to, a person who has concluded a contract of employment and includes a range of relationships that resemble common-law employment relationships. 2 The current definition of employee in the LRA is also capable of covering an equally broad range of workers, excluding only independent contractors. 3 Despite this inclusive interpretation of the definition of employee in the LRA, all those workers, by virtue of the limitation clause in the Constitution, are not necessarily entitled to claim the protection of the LRA or other labour legislation" (54).

106 For a comprehensive discussion of the traditional notion of "employee" see Olivier "Die belang van status en kontak vir die diensverhouding" 1993 TSAR 17.

107 "Any person who, for reward, procures for or provides to a client other persons - (a) who render services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service." 108 But see NEHAWU v Nursing Services of South Africa [1997] 10 BLR 1387 (CCMA).

109 NEHA WU v Nursing Services of South Africa (LAC) (2001) 22 ILJ 1113 (LAC). In this case the employee was found not to be an "independent contractor" but an employee of the labour broker. The court granted Manda 12 months' compensation for a substantively and procedurally unfair dismissal, as the dismissal did not comply with the requirements for a dismissal for operational requirements in s 189 of the Act.

110 To this, section 198(3) of the act adds that a person who is an "independent contractor" is not an employee of the labour broker, and in LAD Brokers (Pty) Ltd v Mandla it was held that in order to establish whether or not Manda was an independent contractor the relationship to be considered was the one between Mandla and the client and not the one with the labour broker (this is in accordance with the provisions of the Code on Who is an Employee). For purposes of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the labour broker and not the client is regarded as the employer, however, in terms of the Occupational Health and Safety Act 85 of 1993, the client is deemed to be the employer.

Section 198 introduces a legal fiction - the client who in terms of ordinary common law tests and the presumption of who is an employee would normally qualify as the "employer" (the client determines the rate of pay through its commercial contract with the labour broker, the nature of work and is responsible for the supervision of the worker) is now considered a "third" party, removed from the primary employment relationship between the labour broker and worker.

Due to this regulation, a fair number of employees have been denied basic labour protection, including job security. This is as a result of the regulation described above, the contracts offered on a standard basis by labour brokers to workers and the interpretation thereof by the Commission for Conciliation, Mediation and Arbitration and the labour court: As the employee is not the client's employee but rather that of the labour broker, a forum will not be able to consider a matter regarding unfair dismissal brought against the client by the worker.

111 The most widespread problem encountered in this regard is illustrated clearly by the following clauses extracted from a contract of employment between a labour broker and an employee:

112 See Vlante / SITA (Pty) Ltd [2008] 5 BALR 486 (CCMA).
1. **ANNEXURE A**

1.1 CEC has entered into a service agreement with the Client Company, as set out in “Annexure A” hereto.

1.2 CEC is not directly in the business of the Client Company and the Employee understands that the employment with CEC has arisen purely as a result of the Client Company’s variable business requirements.

2. NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

2.1.1 The Employee understands and agrees that he/she may be retrenched by CEC should the business relationship between CEC and the Client Company be terminated for whatever reason or in the event that the Client Company’s business requirements no longer require the services of CEC or the specific service of the Employee.

2.1.2 The Employee specifically agrees and understands that this employment agreement is entered into in order to provide CEC with the necessary human resources to render the services to the Client Company which the Client Company may require from time to time from CEC and CEC shall be and is the Employee’s only Employer.

2.1.3 The Employee will not be considered or deemed to be an Employee of the Client Company and consequently not be entitled to participate in the funds, benefits and/or other conditions applicable to Employees of the Client Company.

Clause 2.1.1 purports to provide that the employer (the broker) may terminate the employment of the employee due to the termination of the business relationship between the employer and the client; or should the client no longer require the services of the broker; or should the client no longer require the specific employee’s services. Although this clause does not attempt to avoid the existence of a “dismissal” (this is often done by stating that the contract between the broker and the employee will terminate *ex lege* at the happening of a future event, namely the client’s indication that it no longer wishes to continue with the contract), it does profess to justify a dismissal due to a third party’s business needs, which may be without any objective or rational ground (e.g. the client falsely believes that the employee was guilty of theft at its premises). In order to further undermine this regulation, the contract reiterates this again, in particular clauses 4.2-4.4. Often, the contract will expressly provide that the client’s say-so is sufficient and that no proof of any allegation concerning dissatisfaction with the employee’s services need be given (see clause 4.6 below).

4. **COMMENCEMENT, DURATION and TERMINATION of the EMPLOYMENT:**

4.1 The Employee realizes that the duration of the employment is dependent on, inter alia, the conditions set out in this agreement. The employment shall, in the above context, commence on the date when the Employee reports for duty at the designated location of the Client Company, subject to this agreement having been signed by all the relevant parties.

4.2 The Employee agrees and understands that CEC is not in a position to predict, with any degree of certainty, or to control the business requirements or the satisfaction of the Client Company from time to time and the extent of the services of CEC or the Employee or the lack thereof which the Client Company may require from time to time.

4.3 The Employee agrees and understands that his/her employment with CEC is directly linked to the business requirements of the Client Company and subject to the Client Company requiring the services of CEC through the Employee and/or the Client Company being satisfied with the Employee at all times.

4.4 The Employee agrees and understands that should his/her services to the Client Company rendered through CEC, no longer be required by the Client Company for whatever reason, that the Employee may be terminated by CEC for that reason alone and such reason shall constitute sufficient grounds for such a retrenchment.

4.5 The Employee and the Client Company agree and understand that in the event that the Client Company fails to pay CEC for services rendered to Client Company through the Employee when such payment becomes due and payable, such a failure or default will constitute sufficient reason for CEC to deem the business relationship between the Client Company and CEC to have terminated as far as the Employee is concerned and shall in itself constitute sufficient ground for CEC to commence with the retrenchment process against the Employee.

4.6 A written notice by the Client Company that it no longer require the services of CEC through the Employee or that it is dissatisfied with the Employee will constitute sufficient prima facie proof of that fact to justify CEC to commence with a retrenchment process of the Employee and that the Client Company shall not be required to provide reasons to CEC or the Employee for its decision.

Standard agreements often goes further than this by providing that in the event of a client’s failure to pay the labour broker (in terms of the commercial contract concluded between the broker and the client) such breach of contract will constitute “sufficient ground” to commence with a retrenchment process against the employee (see clause 4.5). In addition, a clause stipulating that the labour broker is exempted from having to pay any retrenchment monies due on the failure of the client to pay such monies to the broker (in terms of the commercial contract) is also rather common.

In *Khumalo v ESG Recruitment CC (Mecha Trans)* 14 the arbitrator was willing to find that the broker, as the applicant’s employer: “had an obligation to ascertain why the applicant’s services were terminated by its client and to deal with it in terms of a dismissal for misconduct, incapacity or operational requirements and inform the applicant accordingly”. The same arbitrator held in *NUMSA obo Majoro v Purple Moss*

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14 [2008] JOI 21490 (MEIBC). It must be noted that the arbitrator made its finding based on the fact that the individual contract of the applicant was invalid as it was not in compliance with the MEIBC Main Agreement, which regulates both temporary employment services and limited duration contracts.
that a broker is not permitted to rely simply on a contract of service stating that employment will automatically terminate if a client no longer requires employees' services or that employees were employed on a limited duration contract. In such circumstances the broker is obliged to find alternative posts or to retraining employees.

The arbitrator also stated in the Khumalo case that employment contracts can only be of a permanent or temporary nature – for a temporary contract to be such an expected end date must be specified in the contract, and if no such end date is specified there would be no way to distinguish between a permanent and limited duration contract of employment, which would imply that such a contract is of a permanent nature. The arbitrator held, quite correctly it is submitted, that employees on an "indefinite term limited duration contract" have no security of employment and are unable to manage their affairs:

"Worse than this, it undermines their constitutional right to fair labour practices as it allows an employer to terminate their contract for any fair or unfair reason at his whim. Every employee has the right to know why his employment has been terminated in order to know whether it was for a fair reason. ... An employee informed at the outset that his employment will only last for a specified period is able to make provision in advance for possible unemployment and seek further employment ... also able to manage his personal affairs accordingly."

In both these matters the arbitrator made reference of the constitutional court's judgment in Sidumo v Rustenburg Platinum Mines Ltd. In that judgment the court said that:

"... security of employment is a core value of the Constitution which has been given effect to by the LRA. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies."

Not all comparable situations have, however, been approached with express reference to our constitutional framework. In April v Workforce Group Holdings (Pty) Ltd &/a The Workforce Group, the labour broker entered into a written contract with the applicant for the hire of her services as a checker to one of its clients, a branch of a national retail chain. Clause 4.4 of the employment contract provided that "should the client, for any reason whatsoever, advise the employer that it no longer wished to make use of the employee's services" the contract would terminate. The broker advised the applicant that the client no longer wished to use her services and that the contract had terminated whereupon the applicant claimed to have been unfairly dismissed. The broker denied that there had been a dismissal, and argued that the contract had terminated automatically. The arbitrator followed a contractual approach and stated that:

"It is a sound principle of law that a person, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature (per Innes CJ in Burger v SA Railways 1903 TS 571 at 578). When a person is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature..."

The arbitrator was satisfied that there was no misrepresentation in casu, and that the applicant did in fact understand the content of the clause. There was, however, a measure of discomfort expressed: "Clause 4.4 definitely leaves one with a sense of uneasiness. At the very least it seems unfair. It also appears to be an attempt to exploit loopholes and grey areas in the LRA." Nevertheless, a contractual approach results in the scales tipping in favour of the drafter of the contract in this instance:

"Unfairness of a contractual condition is not necessarily sufficient for striking down the condition. Freedom of contract is a well established principle in our law. Innes CJ expressed this principle as follows: "We heard much during the arguments about public policy. This is an expression of vague import; but surely public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters. The general interest of the community may and does in certain cases require the abridgement of this right. But language [in legislation] enforcing such abridgement should be narrowly regarded and strictly construed." (Law Union & Rock Insurance Co v Carmichael's Executor 1917 AD 593 at 598.)

"No doubt the condition is hard and onerous; but if people sign conditions they must in the absence of fraud, be held to them. Public policy so demands. If there is one thing which more than another policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts." (Wells v SA Aluminate Co 1927 AD 69 at 73.)

After two comments – firstly, that although employees and employers cannot be regarded as parties with equal bargaining positions courts tend to respect freedom of contract and do not rewrite contracts for parties; and, secondly, that exploiting loopholes in legislation is not necessarily invalid – the clause was held to be valid and binding:

"Although it is generally accepted that one cannot contract out of the LRA ... clause 4.4, despite exploiting loopholes and grey areas in the Act, does not appear to be in direct

110 [2008] 4 BALR 342 (MEIBC). Here also the MEIBC collective agreement was applicable.
111 s 29(1)(m) of the Basic Conditions of Employment Act requires an end date for a contract to be included in the written particulars of employment.
contravention of any specific provision in the LRA. Nor does it specifically exclude or contract out of any provisions of the LRA. One must in any event be very careful before making any finding that a transaction or agreement is invalid on the mere basis that it is circumventing legislation, because not every contractual provision which has the effect of circumventing legislation is necessarily invalid.

The next question — whether there was a dismissal — was therefore also answered in the negative:

"Where a condition in a contract provides for dissolution of the contract after interim operation upon the happening of an uncertain future event, the condition is resolutive (see R v Katz 1959 (3) SA 408 (C) at 417). Clause 4.4 is an example of such a resolutive condition. If a resolutive condition is fulfilled, the law regards the whole transaction between the parties as if the contract had never existed." 126

Consequently, the arbitrator held that the effect of clause 4.4 read together with section 186(1)(a) of the act was that when Shoprite Checkers indicated that it no longer wanted to make use of the applicant's services, the contract automatically terminated. 127 This finding is vulnerable to critique, as a purposive interpretation may have resulted in a wholly different conclusion. The circumstance of protective social legislation should not be possible. 128

In Mphuthi / Aixtenas Placements CC 129 the applicants were employed as postmen in terms of a contract with a labour broker (the respondent). They rendered service to the SA Post Office, and after reducing their hours of work due to changing operational requirements at the post office, the post office informed the labour broker that their services were no longer required. Thereupon the respondent cancelled the applicants' contracts. The employment contract between the labour broker and employees provided that the contracts would expire "at the end of the assignment" for

which they were engaged. As employees bear the onus to prove that a "dismissal" occurred, 130 the arbitrator found that the dispute was purely "contractual" and therefore the commission lacked jurisdiction to entertain the matter. This of course seems strange, as the commission does have jurisdiction to determine whether there was a dismissal, but the arbitrator referred to a line of cases that previously held that the commission does not have the jurisdiction to pronounce on the validity of "such agreements." 131 This includes the April case. 132 The arbitrator held that the contract terminated automatically once the service provider's services were terminated. 133 However, after referring to the decision of the labour appeal court in the LAD Brokers case — that the cancellation of a contract by a client of a labour broker that led to the loss of work by a hired employee amounts to a dismissal by the broker in terms of sections 186 and 191(1) of the LRA — the arbitrator continued that to determine the dispute properly he must also consider whether the termination of the contracts of employment were procedurally fair accepting that the contracts expired ex legere for a substantive reason. The "dismissal" was then held to be procedurally unfair due to the lack of notice. It seems problematic that the complex regulation of dismissal or termination of employment in terms of labour broker contracts ends up at the commission, where arbitrators do not need to have a legal qualification.

The labour courts have, in general, been consistent in frowning upon the contracting out of other general protective provisions relating to unfair dismissal, payment of severance benefits and so forth. Ironically enough, our courts have, for example, ignored agreements purporting to designate (sophisticated) employees as "independent contractors" based on the substance-over-form rule. 134

126 Par 33. The arbitrator also highlighted the difficulty of the CCMA to determine matters concerning contracts.

127 Par 39.

128 For a critique of this case, see Bosch "Contract as a barrier to ‘dismissal’: The plight of the labour broker’s employed" (2008) 29 ILJ 813. He summarises the complexity of the issues involved as follows: "The issues thrown up in those cases are important given that they highlight the often difficult interplay between the common law and labour legislation, between freedom and sanctity of contract and the proper protection and realization of employers’ rights, and between an employer’s legitimate regulation of its human resources and the prevention of employee exploitation" (814).

129 See Bosch: "What is important is that the effect, the substance, of the clause was to limit the rights conferred on the applicant by the LRA and the Constitution. It is submitted that the effect of the relevant clause was the same as if it had specifically stated that the parties agree that the provisions of the Labour Relations Act regulating the fairness of dismissals will not apply if the client no longer wants to utilize the services of the employee. And if the parties were not expressly contracting out of the coverage of the LRA the employee was indirectly waiving the protection of the LRA and agreeing to the limitation of her right to fair labour practices. It is debatable whether and when parties to the employment relationship may contract out of the provisions of labour legislation given that the primary function of that legislation is to provide protection to employees in the context of a relationship where there is a power imbalance" (820-821).


131 S 192 of the Act: In terms of section 77 of Act 75 of 1997 the labour court has concurrent jurisdiction with the high court to adjudicate a matter regarding a contract of employment.

132 Par 5.2.3.

133 n 121.

134 Par 5.2.4. It is, however, arguable that the end of the assignment was not ascertainable enough to result in the automatic termination of the contract — the labour broker as the employer still had the duty to terminate the contract fairly on the basis of operational requirements.

135 See, e.g., Parry v Astral Operations Ltd (2005) 26 ILJ 1479 (LC) par 58: "Public policy norms governing employment relationship, which cannot be excluded by contract, include provisions that prescribe minimum terms and conditions of employment and the protection against unfair discrimination, dismissal and labour practices."

136 See EMS Support Services (Pty) Ltd v Briggs (1998) 19 ILJ 273 (LAC), where Briggs had set up a CC with the express purpose of reducing her tax burden. A "consultancy contract" had been entered into between the applicant company and the CC in terms of which the latter undertook to provide the services of the respondent at an agreed hourly rate for which invoices were submitted on a monthly basis in the name of the CC Briggs indicated to the Receiver that she was a "freelance" and that her remuneration consisted of "fees". Briggs claimed that she had been unfairly dismissed after the company terminated the consultancy contract. The labour appeal court did not agree with the court a quo that the relationship was a sham and held that the respondent had made an intelligent and deliberate election to enjoy the advantages of a contractual arrangement through a CC and to forfeit the advantages of an employee (277A-H). This decision has not been followed since — Dennel (Pty) Ltd v
appropriate forums have a duty to interpret both statutes and contracts in such a manner so as to protect the vulnerable and unequal parties of a relationship. Labour brokers and client companies have a duty to treat employees fairly and to provide these often vulnerable employees with decent work.

5.3 Second-generation outsourcing

5.3.1 Background

The constitutional court has held that security of employment is a right that is essential to the constitutional right to fair labour practices. To this end it seeks to ensure "the continuation of the relationship between the worker and the employer on terms that are fair to both."137

When a whole undertaking is transferred, it is relatively easy to determine who the persons who worked there are and who will transfer to the transferee. However, when only a part of an undertaking gets transferred, it becomes more difficult to determine whether or not a relevant transfer has occurred (in other words, the transfer of a business, trade, undertaking or service as a going concern) and whose contracts, if any, are transferred.

Some of the most difficult cases concern the effects of privatisation, sub-contracting, the transfer of staff within the public sector and other forms of outsourcing. Once it has been determined that there has been a transfer of a business, trade, undertaking or part thereof, the next enquiry relates to whether or not the transfer of the undertaking was effected as a going concern. Only after it is found that a business, trade, undertaking or service (or part thereof) was indeed transferred, as a going concern, will the legal effect of such a transfer be the transfer of contracts of employment to the transferee. The legal effect of a relevant transfer should not influence the decision that must be reached regarding the existence or not of a relevant transfer. South African labour law does not contain a precise definition of the notion of a "going concern", and since this is one of the main determining factors in provisions that regulate the transfer of undertakings, it is of crucial importance to give more content to this term and to have certainty regarding how a court will decide whether or not a business or part thereof has been transferred as a going concern.

In the European Union the Acquired Rights Directive141 applies to any transfer of an undertaking, business, or part of an undertaking or business, to another employer as a result of a legal transfer or merger.142 It is clear that there must be a transfer to another employer. Although the European court of justice has not adopted a consistent approach on this point, the decision in Barto143 suggests that two distinct enquiries should occur: first, was there a legal transfer within the meaning of the Directive? Secondly, if so, was there a transfer of an undertaking as a going concern on the facts? A similar enquiry must take place under section 197 of the Labour Relations Act.144

The European court of justice's test for whether or not a transfer has occurred concerns the key criterion of whether there is a transfer of an economic entity retaining its identity.145 This approach was also followed in Nehawu v UCT:

In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.146

Conventionally, a "typical" transfer has been confined to a traditional takeover by way of the transfer of a business from one employer (often corporate) to another employer in exchange for payment.147 However, it is evident that economic activity and the labour market have significantly changed during the last decade or two and...
"atypical" transfers are now common ways of disposing of operations. "Outsourcing" is defined as:

"The policy of hiring outside consultants, trainers, technicians and other professionals to take over the complete function of a particular department (e.g. human resources) of an enterprise, rather than employing full-time personnel. This often involves non-core activities such as catering, communications and data processing."

Such "atypical" transfers are understood to include contracting out in particular, and, more specifically, first-generation contracting out, the changeover of contractors (second-generation contracting out) and bringing the service back in-house. Although a considerable amount of reluctance was initially shown in accepting that these atypical transfers were also covered by the Directive, the Transfer of Undertakings Protection of Employment regulations in the United Kingdom and other instruments, the European court of justice followed a broad approach in terms of which the following "atypical" transfers were included under relevant transfers:

- a changeover of lessees running a restaurant (Daddy's Dance Hall);
- a reversion of a tavern to the proprietor from a lessee (Ny-Malle Kro);
- the forfaiture of a sale of a business under a conditional sale agreement (Besselsen);
- the switching by a local authority of a grant from one charitable foundation to another (Dr Sophie Redmond);
- the outsourcing of the management of a canteen facility (Rask);
- the outsourcing of the function of cleaning the premises of a branch of a bank (Schmidt); and
- the switching by a motor manufacturer of car dealerships within the same municipality (Merckx).

Throughout these judgements the European court of justice had stated that the test of a transfer was to be found in Spijkers v Geb Abbattoir CV. It is thus clear that the one area where the Directive will not apply is in those circumstances where the economic entity has lost its identity. The international approach is highlighted due to our statutory provision's noticeable similarities, the constitutional injunction to take account of international and foreign law and the long history of this provision there, compared to the relatively young age of our own section 197.

5.3.2 The labour court's interpretation of the scope of section 197

In South Africa the labour court has used the Spijkers' case as an approach, as later found in the Nehawu case in the constitutional court, in order to determine whether or not a business (or part thereof) has been transferred as a going concern. Early on, in SAMWU v Rand Airport Management Co Ltd, the court held that the outsourcing of the gardening and security functions of the company to private contractors was possible, since such functions were capable of being transferred in terms of section 197 as they constituted a "service" for the purposes of section 197 (as amended). The methodology of the court has been questioned:

"The Labour Appeal Court's Rand Airport judgment can be criticised for confusing form and substance – the relevant enquiry is into the existence or otherwise of a discrete economic entity. This requires a court to enquire into the existence or otherwise of the variety of components that make up a business, amongst others the following: assets, goodwill, a workforce, management staff, the way in which its work is organised and performed, operational resources available to it, and so forth." Even though the reasoning of the court may have been less than theoretically perfect, the conclusion was arguably correct. It therefore appears as if most instances of outsourcing will (depending on the particular facts) fall within the scope of section 197. This is, however, not true for second-generation outsourcing.

150 The new Transfer of Undertakings (Protection of Employment) Regulations 2006 in reg 3 now extends the definition of a relevant transfer to cover service provision changes, which includes not only the initial contracting out of a service but also any re-tendering to a new service provider and any in-sourcing back to the original employer. A transaction will thus fall within the ambit of the regulations if there is an organised grouping of employees whose principal purpose is to carry out the service on behalf of the employer, the employer intends those who transfer to carry out the same activities after the service provision change on an ongoing basis, and the activities are for the supply of services rather than for goods. The government intended greater certainty about commercial transactions and less litigation about outsourcing.

151 As conveniently listed in McMullen (in 140) 289: Foreningen af Arbejdslædere i Danmark v Daddy's Dance Hall/1988 ECR 739 (EC); Berg v Besselsen 1988 ECR 2559 (EC); Redmond Stiching v H Bartol 1992 ECR 1389 (EC); Rask and Christiansen v IET Kantineorganisation A/S 1982 ECR 2211; Schmidt v Spar und Leihkasse der früheren Amter Bordesholm, Kiel und Cronshagen (1994) RLR 302 (EC); Merckx and Nehawu v Ford Motor Co Belgium SA 1996 ECR 1323 (EC).

152 Even in the case of Schmidt, the principle of an economic entity could well be understood to have been used. In the case of Rygaard, the court did find that the transfer of an individual from one sub-contractor to another (where the purpose of changeover of sub-contractor was to continue and complete the construction of a building, and the identity of the activity in which the sub-contractor's employees were employed remained the same after transfer) was not a transfer of a stable economic entity whose activity was not limited to performing one specific work contract. However, this has generally been viewed as a case that was decided on its own peculiar facts. It is also believed that the Court did not rule out the possibility of a transfer with a view to completing a specific works contract if the transfer enabled the transferee undertaking to carry on in a stable way. Smit, Labour Law Implications of the Transfer of an Undertaking (BAU 2001/02) ch 6 (refer to the discussion in par 6.2.3 regarding Schmidt & Staanen as well). The latter case did not preclude the finding of a relevant transfer in instances involving second-generation contracting out, but the judgment did indirectly limit the working of the Directive, as two "preconditions" (the transfer of assets and/or employees) for it being applicable were stated. See the evaluation of this case in par 6.2.3.3.

154 For an earlier case that had already held outsourcing to fall within (the original) s 197 refer to Schutte v Powersplus Performance (Pty) Ltd (1999) 20 IJ55 (CC).
155 Van Niekerk et al (8) 304.
156 In the Nehawu case the constitutional court had held that outsourcing is a transaction that could potentially fall within the scope of s 197. The court did not however make a decision on the facts of that case.
In the first case that dealt with such a set of facts, Zikhethele Trade (Pty) Ltd v LGM SA Facility Managers and Engineers (Pty) Ltd, the labour court held that the transfer did fall within section 197.14 The court reached this conclusion by expressly endorsing a purposive interpretation of the statutory provision concerned. The court held that the requirement that there be a transfer of a business by one employer to another should be read as a reference to a transfer from one employer to another. The court was satisfied that such interpretation ensured the application of section 197 to a second and subsequent contracting out.15 This would be the case as there is inevitably a transfer of the responsibility for the operation of the undertaking from the first contractor to the second contractor upon the assumption by the second contractor of its (contractual) obligations to the client. The court was satisfied that there was a legal entity that did in fact retain its identity after the transfer.

The labour court did not follow the approach of the Zikhethele case in subsequent cases with comparable facts. In Aviation Union of South Africa v South African Airways (Pty) Ltd, LGM SA Facility Managers and Engineers (Pty) Ltd16 the first respondent (in March 2000) concluded a collective agreement with the applicant union and two other unions in terms of which the respondent's infrastructure and support services departments were transferred as a going concern to the second respondent ("LGM"). The transfer agreement provided, inter alia, that LGM would perform these services until 2010, with the first respondent retaining an option to renew for a further five years. The contracts of affected employees would transfer to LGM in terms of section 197 of the LRA. The 62 individual applicants were all either transferred in terms of the agreement or subsequently employed by LGM, and the first respondent reserved the right to cancel the agreement if there was a change of ownership in LGM. After a change in the ownership of LGM, the first respondent cancelled the agreement and advertised for tenders for the services that had been provided for LGM. However, the first respondent did not require any of the tenderers to employ LGM's staff. Faced with the possibility of retrenchment, the applicants launched an urgent application for orders, inter alia, declaring that the termination of the LGM contract or the appointment of a new service provider constituted, or would constitute, a transfer of the undertaking or services provided by LGM to the first respondent, declaring that the termination of the employees' employment "...did constitute an automatically unfair dismissal in terms of section 187(1)(g) of the act and restraining LGM from dismissing the employees until their transfers had been effected.

In the Aviation Union of South Africa case the court declared that it preferred a purposive interpretation of section 197,16 but ultimately held that the wording of section 197 was not ambiguous or unclear and therefore regard must be had to the plain wording of section 197(1)(b).17 Consequently the court was not willing to grant relief to the applicants. The court did accept that if the services were to have been transferred back to South African Airways (sometimes referred to as "insourcing") section 197 would apply,18 secondly, the court also stated that the Zikhethele case is authority for the proposition that where the second business is so closely aligned to the first business that it is fact identical, section 197 may be applicable in a second-generation contracting out.19 This interpretation requires some fraudulent conduct to trigger the application of section 197. The fact that it was LGM's change in ownership which was the trigger for the contract to be put out to tender again played no role in the court's decision.

In Crossroads Distribution (Pty) Ltd v Kweli Transport v Clover SA (Pty) Ltd20 the court also held that section 197 did not apply to the facts. The court endorsed the interpretation in the Aviation Union case that the section had to be read to include only a transfer by one employer to another and not from one employer to another. The court thus held that where a principal concludes a new contract with a new service provider after a previous service provider cancelled the contract the new contract does not constitute the transfer of a business as contemplated by section 197 of the act.21 It seemed as if semantics would prevent protection of the most vulnerable workers in these circumstances and that unions would probably fare better by approaching the legislator rather than the labour court in this regard. Outsourcing usually takes place in the service sector, which more often than not involves poorly qualified and vulnerable workers (for example cleaning, security and retail). It has previously been argued that the principled or general exclusion of second and subsequent outsourcing instances from the scope of section 197 leads to unequal

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14 [2005] 3 BLR 924 (LC).
15 "At the outset, I must point out that I am of the view that, if regard is had to the purpose of the section 197 of the LRA which is to protect the work security of employees when a business is transferred as a going concern (although I am not ignoring the right and legitimate need employers have in promoting the efficiency or productivity of their businesses), that preference should be given to a more liberal interpretation rather than a conservative or narrow interpretation of section 197 and that the interpretation applied to section 197 should lean in favour of protecting the rights of employees affected by the often harsh effects of a transfer as a going concern." (par 28).
16 See also Zikhethele Trade (Pty) Ltd v COSATU Obo members [2008] 2 BLLR 163 (LC).
17 "Although I am in agreement with the sentiment expressed that section 197 should be read so as to protect the work security of employees affected by a business transfer, I am of the view that it is clear from section 197 of the LRA that the legislature had only contemplated a transfer from the old employer to the new employer and nothing else (the so-called first generation transfer). The intention of the legislature appears to be to readily apparent from the clear wording of section 197(1)(b). Consequently I am of the view that there does not appear any necessity to read into section 197 words that are not there" (own emphasis) (par 31). Contrary to the express finding that the wording does not allow such interpretation, the court must relies to s 197(1)(b) as providing for a transfer from the new employer to the old employer, and not a transfer from the old employer to the new employer, on several occasions in the judgment, e.g. at par 24: "Section 197 will apply where a 'business' is 'transferred' from one employer to another employer 'as a going concern' (own emphasis).
18 See par 27.
19 This would be a situation "akin to the so-called piercing of the corporate veil" (par 32).
21 See also Solladelis and Amazulu Football Club (2009) 20 ILJ 228 (ARB), where the effect of a 197 was also limited to first-generation transfers only.
protection between different groups of employees as well as dissimilar restrictions on classes of employers.164

Although these decisions now seem to represent the view of the labour court, it is submitted that the matter cannot be viewed as closed since regard should be had to the purpose of the statutory provision and that another interpretation may lead to a different result. In the event of a client putting a contract out to tender again the first service provider has the choice to submit a tender or not. For the employment of the employees not to be transferred the submission of a tender is a conditio sine qua non. Here, it may therefore be argued that the old service provider is in fact the transferor, as its decision not to tender results in a transfer "by" it of the service previously rendered by it. In the event of a tender being submitted but not being accepted by the client it may be argued that although the client's decision may be the proximate cause for the transfer, the outsourced function is regulated in terms of a commercial contract that was concluded between the client and first service provider. Such contract provides for a fixed-term contractual arrangement whereby the client is empowered to put the contract out to tender again and when a new service provider's tender is accepted the previous service provider together with the client must enable the subsequent service provider to undertake and perform the service as agreed upon between that entity and the client. It is submitted that this could be the case without putting undue strain on the meaning of the words of the provision and having regard of the "mischief" it seeks to avoid.

Recently the labour appeal court settled this question in favour of the interpretation adopted in the Zikethele case and the court did so purely on a purposive approach having regard of the purpose of section 197 and holding that a literal interpretation of the section "would render sec 197 for all practical purposes worthless since any employer who wishes to transfer his business without the workers as a going concern could do so by dumping the workers with another party through an outsourcing or lease arrangement and thereafter transfer his business as a going concern to someone else without the workers".165 The ultimate question whether judges can "rewrite" a statutory provision was answered positively by the labour appeal court having regard

164 Van Niekerk et al (n 8) 311: "When the literal wording of the section is applied, the result is that employees involved in the second transfer have less protection than those involved in the first transfer. This also has commercial ramifications, as the replacement or second contractor bidding for the new contract is in a much better position than the potentially outgoing contractor – the bidder is not bound by section 197 transfer provisions and so can save employment-related costs that the first contractor could not avoid. The first contractor will also be liable for severance pay and statutory notice payments. All in all, it seems to be an unsatisfactory result for the employees as well as the outgoing contractor.

165 Aviation Union of South Africa (n 85) par 28. The court per the judgment of Davis JA did hold that an examination of the word "by" linguistically does not justify an assertion that the literal interpretation of s 197 precludes any possible extension of protection to second-generation transfers. The judge argued that the wording of s 197 "does not necessarily and inevitably support the exclusive connotation that the transferor has to play an immediate, positive role in bringing about the transfer" (par 56). The original contract between LCM and SAA did in case constitute positive action on the part of the old employer even if the word "by" was indeed taken at face value and the section was interpreted narrowly (par 61).
As illustrated earlier, some commentators prefer to hold the view that negotiated labour legislation represents a compromise which should not be lightly interfered with \[116\] and that the role of the high court should be limited so as to come as near as possible to a "one-stop shop" for all employment-related matters. This approach is based on policy reasons.

In *Vuyo Jackson Gcaba v Minister of Safety and Security*, the ghost of the *Chirwa* case was for the most part put to rest. \[106\] The court recognised that an applicant may have more than one course of action.

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[116] E.g., the *Mohlaka* case and *Pretorius and Myburgh* "A dual system of dismissal law: Comment on Boxer Superstores *Mathatha & Another v Mbonya* (2007) 28 ILJ 2172 (SCA)" (2007) 28 ILJ 2172. However, see the *Mogotho-case*: "In determining the nature and extent of the mutual obligation of fair dealing as between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed over the years. If any 'dual stream' jurisprudence emerges as a consequence and if this represents an undesirable outcome from a policy perspective, that is a matter for the legislature to resolve" (par 30).

[106] (2009) ZACC 26 (7 Oct 2009). The court had to decide whether the high court was correct in holding that it did not have the jurisdiction to entertain the application to review and set aside the decision of the South African Police Service not to appoint Mr Gcaba as station commissioner in Grahamstown.
"First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the action in remuneration in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided."**181**

However, the court stated that another principle or policy consideration is that the constitution recognises the need for specificity and specialisation in a modern and complex society. Different kinds of relationships between citizens and the state and citizens among each other are dealt with in different provisions of the constitution and the legislature is sometimes specifically mandated to create detailed legislation for a particular area, including just administrative action and labour relations. The court reaffirmed the sentiment expressed earlier in the *Chirwa* case that: "Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system."**182** The court warned that if litigants are at liberty to relegate the finely-tuned dispute resolution structures of the Labour Relations Act, a dual system of law could fester in cases of dismissal of employees. The court therefore stated that forum shopping is not desirable and that once a litigant has chosen a particular course of action, the litigant is married to that course for better or for worse.**183** As far as the high court's jurisdiction based on the Promotion of Administrative Justice Act was concerned, the court neatly came to the conclusion that if there is no administrative action, the issue of overlapping jurisdiction will not be raised.**184** The court then continued to state that where the state acts as employer and its action has little or no effect on the public, it will not constitute administrative action. The court read section 157(1) as confirming that the labour court has exclusive jurisdiction over any matter that the act prescribes should be determined by it, which includes, *inter alia*, reviews of the decisions of the CCMA under section 145 of the act. Accordingly, section 157(1) should be given an expansive interpretation to protect the special status of the labour court, and section 157(2) should not be read to permit the high court to have jurisdiction over these matters as well.**185** The latter section must rather be interpreted to mean that the labour court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the act. As far as contractual disputes are concerned the court held that:

"Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngobobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts."**186**

Ultimately, jurisdiction is determined on the pleadings and not on the substantive merits of a case. This seemed to bury the ghost of *Ms Chirwa*, however, the court then concluded that "If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction."**187**

This is a perfect example of how imperfect contextual and purposive reasoning may be where there is more than one plausible and compelling interpretation. In this instance it seems as if the approach taken in most of the judgments before the case of *Gbaba* will not reduce any employment protection of workers, rather the opposite. What that approach will do for a supposedly expedient, cheap and specialised labour dispute resolution system remains to be seen. This is also true for the impact of those developments on employers, employees and their representatives. The question whether duality of causes of action is now fully recognised in the employment relationship appears to be settled merely pending the courts being faced with suspicious pleadings which they then need to interpret "properly" having regard of the constitution's structure and recognition of specialised dispute resolution systems.

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181 par 53.
182 par 56.
183 par 57.
184 "Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action" (par 64).
185 See par 70.
186 par 73.
187 par 75.