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THE LABOUR APPEAL COURT'S APPROACH TO THE INTERPRETATION OF LABOUR LEGISLATION

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1 *Introduction*

Since the beginning of time, parties to an employment relationship have been subjected to unfair labour practices, labour law in South Africa is indeed no different. Legislative and judicial interventions have been made in order to regulate fairness in the employment relationship. The Constitution of the Republic of South Africa, 1996 casts a wide net, as will be evident from the wording used in section 23. It grants all workers the right to fair labour practices, the right to strike, the right to form and join a union, the right to bargain collectively.[1] The entrenchment of these rights in the Constitution[2] is a clear recognition of their value to South African workers.[3]"

In order to afford meaning to, and understanding of the section 23 constitutional right, one must interpret the following legislation, namely: the Labour Relations Act 66 of 1995 (the LRA), the Basic Conditions of Employment Act 75 of 1997 (the BCEA). This is so as these aray of statutes are designed to give effect to the constitutional right.

All provisions of the LRA must be interpreted in the context to advance economic development, social justice, labour peace and democratisation of the workplace. One of the key objects of the LRA is to give effect to and to regulate the fundamental rights of the Constitution.[4]

The Constitution, "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"[5]. Section 23 of the Constitution[6] is the quintessence of underlying labour rights. Section 23(1) reads as follows:

> "(1) Everyone has the right to fair labour practices."

The Constitution[7] further encourages an international and foreign law friendly approach.[8] The Constitutional Court has confirmed that conventions and recommendations are a major source of South Africa's public international law obligations.[9] In addition International guidelines play a significant role in the South African legal system. During the 20th century the

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1 Likewise employers enjoy the constitutional protection as s 23(3) grants every employer the right to form and join an employers' organisation and to participate in the activities and programmes of an employers' organization.

2 Constitution of the Republic of South Africa, 1996.

3 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) par 20.

4 See n 2 above.

5 See n 2 above.

6 See n 3 above.

7 See n 3 above.

8 S 39(1)(b) and (c) and s 233.

9 In *S v Makwanyane* 1995 3 SA 391 (CC) the court stated that public international law includes binding and non-binding law.

International Labour Organisation (hereafter referred as the ILO) has played a very important role in developing labour standards and conventions. The ILO adopted the Employment Relations Recommendation, 2006 (No 197), "which provides that member states should clearly define, in their national law and practice, which workers are to be covered and protected by labour laws.[10]

Albeit the above, it has become vital for one to determine the scope of this fundamental right in order to determine the relation between the legislation and the constitutional right and whether there is any scope for a wider interpretation of this right. Statutory interpretation is a complex subject and does not merely involve reading legislation in any which way that one pleases. A problem may arise as a result of the strict application of the principle of Constitutional Supremacy. To answer this question one may ask whether a court should give more weight to the ordinary, grammatical meaning of the legislation or whether the Constitution must apprise the way we interpret labour legislation. To answer the above question a study will be undertaken to examine the approach of the courts when interpreting labour legislation.

I will begin by introducing what exactly is meant by statutory interpretation. This will be done by way of briefly introducing and discussing the theories of statutory interpretation namely, literalism, intentionalism, literalism – cum – intentionalism, contextualism and purposivism. I will illustrate how the courts have interpreted and developed these theories over the years. Further, I will introduce what is meant by constitutional interpretation, briefly cover various sections in the bill of rights and various legislation enacted to give effect to certain fundamental rights. The writer will attempt to clarify how the courts have come to interpret the constitutional guarantees in respect of labour law. Thereafter I will discuss the impact of the constitution on labour law, the impact of the bill if rights on the courts, the interpretation and the limitations of fundamental rights, the section 23 constitutional guarantee and the extent of labour rights as fundamental rights. I will briefly cover which fundamental rights applicable to labour law are covered, whether these fundamental rights are generally enforceable and lastly the supremacy and values underpinning the constitution and the bill of rights.

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[10] A 1 of Recommendation No197.

Finally, this study is limited to the Labour Appeal Court (LAC), and I will discuss the LAC's approach to the interpretation of labour legislation. This will be done by discussing 6 decisions of the LAC, how the court has come to interpret labour legislation and developed the common law. The cases that have been chosen for purposes of this study cover different areas of labour law and it is intended to demonstrate the vast areas of coverage of labour law.

2 *Theories of Statutory Interpretation*

A theory can be defined as a supposition or a system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained.[11] According to Du Plessis, a theory, on the one hand, is an explanation or explication.[12] Scholarly or scientific theories are examples of such explanatory models. Theories of statutory interpretation are explanatory and justificatory at the same time and are, therefore, associated with what may be called approaches to the interpretation of statutes.[13]

Du Plessis goes on to say that:

> "a statutory interpreter's theory of interpretation causes him to relate to the issues of statutory interpretation, with which he may be confronted in a concrete situation, to fundamental questions regarding, amongst others the 'true' nature of the law and the possibility of justice.."[14]

The court in M*atiso v Commanding Officer, Port Elizabeth Prison* held that the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms alongside the fundamental values or principles of the Constitution.[15] De Ville says that the principles for the interpretation of statutes are to be derived from the constitution.[16]

Statutory interpretation is a complex subject and does not merely involve reading legislation in any which way that one pleases. There exist a number of approaches that should be used when interpreting a piece of legislation to understand and comprehend what the drafters had intended and what the legislation's purpose is. The writer will now take a brief look at each theoretical position.

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11 Pearsall *The New Oxford Dictionaryof English* (1998) 1922.
12 Du Plessis *Bill of Rights Compendium* (1998) 2c - 53.
13 In legal parlance, "theory" is sometimes also used as a synonym for "rule" or percept. The "expedition theory" in the law of contract is, for instance in essence a rule prescribing that a contract concluded by mail comes into existence the moment the written acceptance of an offer is posted. Hosten Edwards Bosman Church *Introduction to SA Law and Legal Theory* 2 (1995) 704.
14 See n 12 above.
15 1994 4 SA 592 (SE) 597 G.
16 De Ville *Constitutional and Statutory Interpretation* (2000) 60.

According to Du Plessis there are 6 theories of statutory interpretation which have developed in England but spread to South Africa,[17] namely, Literalism, Intentionalism, Literalism – cum – Intentionalism. The first 3 theories represent conventional thinking. Further we have Contextualism, Purposivism and Objectivism, these theories became more prominent after 1994. Prior to 1994 they played second fiddle to Literalism – cum – Intentionalism.

2.1 *Literalism*

According to literalism, it is assumed that language as it stands, on the condition that it is clear and unambiguous, is a reliable expression of meaning.[18] It is therefore a good starting point to scrutinise the written text as embodiment of the parties' common intention albeit it might be altered by external factors at a later stage.[19] Clear language, which clearly communicates the parties' common intention, are terms which are interchangeable with the terms plain or ordinary language.[20] The ordinary meaning approach, the primary rule of interpretation follows that, if the meaning of the words is clear, it should be put in effect. The plain meaning approach follows that, if the meaning of the words is ambiguous, vague or misleading, whereby the literal meaning would lead to absurdity than the court may deviate from the literal approach to avoid absurdity.[21] The language is clear in the sense that a normal speaker of a language will understand it.[22]

This approach to interpretation stems from the English use of the clear meaning rule. The meaning needs to be extracted from the exact words of the parties and other considerations should be left for later.[23] In *Grey v Pearson* Lord Wensleydale said:

> "[t]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther."[24]

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17 Du Plessis *Re – interpretation of Statutes* (2002).
18 Dias *Jurisprudence* 5 (1985) 171.
19 Devenish *Interpretation of Statutes* (1992) 26.
20 Maxwell *The Interpretation of Statutes* 12 (1976) 239.
21 *Venter v R* 1907 TS 910 914 the court held , "[w]hen to give the plain words of the statute their ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context and such other considerations as a Court is justified to take into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."
22 Cross Bell Engel *Statutory Interpretation* 3 (1995) 200.
23 *East London Municipality v Abrahamse* 1997 4 SA 613 (SCA) 632G.
24 *Grey v Pearson* (1857) 6 HL Cas 61 106.

If the court deviates from the literal approach due to the Golden Rule, the court will turn to secondary aids to find the intention of the legislature.[25]

In *S v Zuma & Others,* the first judgement of the Constitutional Court, the court held that,

> "while we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single objective meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . . Even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to values the result is not interpretation but divination . . . I would say that a constitution embodying fundamental rights should as far as its language permits be given a broad construction."[26]

In *S v Mhlungu*, the court in its minority judgment held, "*Zuma* means that, however important it may be not to ignore fundamental concerns or the spirit and tenor of the Constitution, a court's interpretive conclusion may never amount to rewriting of the written constitutional text."[27] The majority, on the other hand, after identifying constitutional objectives beyond the ordinary meaning of the constitutional text of the provision in question, was comfortable to fill in gaps in the wording of section 241(8).[28]

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* an undivided Constitutional Court per Ngcobo J identified itself with the "emerging trend in statutory construction to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."[29] The court referred with approval to *Thoroughbred Breeders' Association v Price Waterhouse* and voiced concern about an interpretive approach that pays too much attention to the ordinary language of the words ....it ignores the colour given to the language by the context.[30] That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole.[31]

[25] Botha *Statutory Interpretation: An Introduction for Students* (2014) 91.
[26] 1995 4 BCLR 401 (SCA) par 17.
[27] 1995 7 BCLR 793 (CC).
[28] See n 27 above.
[29] 2004 7 BCLR 687 (CC) par 90.
[30] 2001 4 SA 551 (SCA) par 12.
[31] See n 26 above par 92.

2.2 *Intentionalism*

The intentionalist theory claims that the paramount rule of statutory interpretation is to determine and give effect to the real intention of the legislature. Instead of averring that a provision means X or Y, a court will typically assert that the legislature intended X or Y.[32]

This approach was further developed in *Joubert v Enslin* by Innes JA, when he stated that the golden rule applicable to interpretation is to ascertain and to follow the intention of the legislature.[33] "Over the years the courts came to regard the clear, literal meaning as identical to what the legislature intended."[34] "In cases such as *Union Government v Mack* and *Farrar's Estate v CIR* it was held that the intention of the legislature should be deduced from the words used in the legislation;[35] in other words, the plain meaning of the text in an international disguise."[36]

In *Bhyat v Commissioner for Immigration* Stratford JA held "the cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended."[37]

In *Swanepoel v Johannesburg City Council* the Appellate division held "the rules of statutory [exegesis] are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought."[38]

In *Commissioner, SARS v Executor, Frith's Estate* the Supreme Court of Appeal reiterated, "the primary rule in construction of a statutory provision is (as is well established) to ascertain the intention of the legislator and (as is equally well established) one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it."[39]

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[32] See n 12 above 2c - 56.
[33] 1910 AD 6 37.
[34] See n 25 above 93.
[35] 1917 AD 731; 1926 TPD 501 508.
[36] See n 25 above 93.
[37] 1932 AD 125 129.
[38] 1994 3 SA 789 794B.
[39] 2001 2 SA 261 (SCA) 273.

"Intentionalism cannot be understood in isolation from its alliance with literalism and purposivism."[40] Intentionalism originated from parliamentary sovereignty and intention signifies a subjective state of a person's mind.

2.3 Literalism -cum- intentionalism

According to Du Plessis, literalism-cum-intentionalism has dominated the South African judicial landscape.[41] "This theory is a combination of literalist and intentionalist theories and has traditionally been the dominant theory of statutory interpretation in South Africa especially prior to 1994, however the SCA in particular continues to apply it."[42] "Determination of the intention of the legislature is said to be the real object of interpretation, assuming that the legislature meant to express its intention in words or language."[43]

In *Venter v R* the court held, "by far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect."[44]

First, the literalist and ordinary meaning should be given to words if clear and unambiguous, then intentionalist, where if words are unclear and ambiguous. It is only necessary to refer to secondary aids other than language to determine what the intention of the legislature is.

In *Bertie v Van Zyl (Pty) Ltd v Minister of Safety and Security* Judge Mokgoro states that the purpose of the statute plays an important role in establishing a context that clarifies the scope and effect of the words contained therein.[45] The learned Judge goes on to state that a contextual approach should remain faithful to the actual wording of the statute.[46]

In conclusion the principal purpose of interpretation is said to be determining the intention of the legislature and when the words used are clear and unambiguous, their literal, grammatical meaning must prevail and will convey the true intention of the legislature.

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40 See n 12 above 2c – 56.
41 See n 17 above 92.
42 See n 17 above 92.
43 See n 12 above 2c – 57.
44 See n 21 above 913.
45 2008 SA 562 (T) 10 par 21.
46 See n 45 above 11 par 22.

2.4 Contextualism

Contextualism holds that the meaning of a provision can be determined by a reading of its words, language or the provision itself in its context or background conditions.[47] There are some versions of contextualism which oppose literalism and some versions which seek to enrich it.

In *Hoban v ABSA Bank Ltd t/a United Bank* classical contextualism was given a new label by Judge Cameron namely 'language in context'.[48] This use of the term 'language in context' was thereafter also applied in *Jaga v Donges; Bana v Donges* where this approach to interpretation in context was expounded by Schreiner JA in his minority judgment.[49] The learned Judge concluded that context encompasses more than the language of the legal document and includes the purpose, scope and background of the document in question.[50]

"Context and text must be determined at the same time from the beginning, the interpreter may take wider context into consideration with initial text. Once the meaning of text and context is determined, 'it must be applied', irrespective if not the legislatures intention."[51] The interpretation should not be restricted by any excessive scrutiny of the language to be interpreted without sufficient attention to the context.[52] Factors which should be taken into consideration, firstly, Provision in the statute, secondly, purpose of the statute, thirdly, practical effect of different interpretations and lastly, background history of the provision.

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2.5 Purposivism

This theory implies that a meaning will be determined in light of the purpose or meaning it was designed to achieve. Where clear language and purpose are at odds, the purpose should have

47 *S v Makwanyane* 1995 6 BCLR 665 (CC) par 10.
48 1999 2 SA 1036 (SCA) 1045B.
49 *Jaga v Dönges; Bhana V Dönges,* 1950 4 SA 653 (A) 664.
50 See n 17 above 113 where Du Plessis paraphrased the Judges dictum as follows:

a) The statement that words and expressions used in a statute should be interpreted in the light of their context carries the same weight as the often repeated statement that they should be interpreted according to their ordinary meaning. 'Context' does not merely denote the language of the rest of the statute but includes its matter, apparent purpose and scope and, within limits, the background.
b) The recognition of the relevance of context allows for two possible avenues of approach to language in relation to context and vice versa. According to the first approach the interpreter begins by concentrating on the 'clear ordinary meaning' of the language and appeals to the the context only in instances where the language appears to admit of more than one meaning. According to the second approach context and language are taken together from the outset.
c) The result arrived at should in both instances always be the same, since the object to be attained is unquestionably the ascertainment of the meaning of the language in its context and the difference in approach is probably mainly for emphasis.

51 See n 49 above.
52 See n 49 above.

the upper-hand. The purposive approach normally runs second best to literalist-cum-intentionalist approach and only vague and ambiguous language may play second fiddle to the statutory purpose. This form of interpretation is particularly prevalent in the area of constitutional interpretation, as can be seen from the from the dictum of Mokgoro J in *Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security*,[53] where the honourable judge says that the Constitution requires a purposive approach to interpretation.

According to the common law the so called 'mischief rule' is used when it is assumed that the prime purpose of enacted law is to suppress 'mischief'. The mischief rule is a rule of statutory interpretation that attempts to determine the legislator's intention. It's main aim is to determine the "mischief and defect" of the statute. The mischief rule was established in *Heydon's Case* where it was held that the mischief rule should only be applied where there is ambiguity in the statute. Under the mischief rule the court's role is to suppress the mischief and advance the remedy.[54] What this means is the mischief rule is a certain rule that judges can apply in statutory interpretation in order to discover Parliament's intention.[55] The mischief rule implies that the true intention of the legislature is to remedy mischief and the purpose of the Act can hardly be at odds. Therefore, the intention and purpose can hardly be at odds.

In *Hleka v Johannesburg City Council* it was held, "it holds that the previous constitutional system of this country was the fundamental 'mischief' to be remedied by the application of the new constitution."[56]

Purposivism is fast becoming a substitute for clear language. It is increasingly becoming a preferred alternative to literalism-cum-intentionalism. It is important to remember that the intention of the legislature has been toppled by the supremacy of the constitution.

In *African Christian Democratic Party v Electoral Commission and Others* held that Constitutional and legislative purpose can nonetheless pilot endeavours and outcomes decisively.[57] "The process is too complex to capture in one single process and the purpose can only be established through interpretation."[58]

[53] 2008 SA 562 (T) 10 par 21.
[54] 1584 76 ER 637.
[55] It defined the mischief rule and declared for the true interpretation of a statute, a court when interpreting a provision, must ask 4 questions, namely: What was the common law before the enactment of the provision? What the mischief and defect was for which the common law did not provide? What remedy did Parliament resolve and appointed to fix the problem? What is the true reason for the remedy?
[56] 1949 1 SA 842 (A).
[57] 2006 3 SA 305 (CC).
[58] See n 57 above.

3 Constitutional Interpretation

In *National Education Health & Allied Workers Union v University of Cape Town* the Constitutional Court held that:

> "Our Constitution is unique in constitutionalizing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is not capable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of employers that is inherent in labour relations. Indeed what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept."[59]

The Constitution in section 1 provides;

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[60]

"This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[61] Section 2 must be read with section 7 of the Constitution, which states, inter alia, that the Bill of Rights is the cornerstone of the South African democracy, and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8(1), which states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state and section 8(2), which provides that the Bill of Rights applies to both natural and juristic persons. If all these provisions are read together, one principle is indisputable the Constitution is supreme.[62] This means that the Constitution cannot be interpreted in the light of the Interpretation Act or the

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[59] 2003 24 ILJ 95 (CC) 110.
[60] See n 2 above.
[61] See n 2 above section 2.
[62] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) 313, Chaskelson CJ remarked as follows, '[c]ounsel for the applicants . . .contended that courts are ill equipped to deal with economic matters and ought not to sit in judgment on what are essentially political decisions taken by the executive in making regulations. I do not agree that a court should refrain from examining the lawfulness of the dispensing fee simply because the decision as to what it should be involves economic and political considerations. The exercise of all public power is subject to constitutional control and it is the duty of courts if called upon to do so to determine whether or not power has been exercised consistently with the requirements of the Constitution and the law."

common law.[63] Everything and everybody, all law and conduct,[64] all traditions[65] and rules[66] and methods of interpretation are qualified by the Constitution.

In 1992 Devenish expressed the reasons for a new interpretative paradigm in a future South African constitutional democracy as follows, "The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism, and the political hegemony of Afrikaner Nationalism have greatly influenced the methodology and theory of interpretation in South Africa."[67]

The Constitution contains no provision prescribing how it should be interpreted. It is silent on the theories of interpretation.[68] However, in section 39 it throws some light on how its Bill of Rights should be interpreted.[69] In view of the supremacy of the Constitution in general, and section 39(2) in particular, the traditional and orthodox common law based methodology of interpretation must necessarily be adapted to be in line with the new constitutional order. Two systems of interpretation in South Africa (ie a flexible value-based methodology for constitutional interpretation, and an orthodox textual methodology based on the sovereignty of parliament) cannot be justified. Although the difference between constitutional interpretation and the interpretation of "ordinary" legislation must be acknowledged, it must be stressed that the two methodologies of interpretation should in principle be based on the supremacy of the Constitution. Unfortunately not all the courts in South Africa hold this view, and continue to follow a literalist approach to interpretation, without reference to the supreme Constitution and its values.

In *Commissioner, SARS v Executor, Frith's Estate* the Supreme Court of Appeal reiterated the well-known traditional rule of interpretation: The primary rule in construction of a statutory provision is to ascertain the intention of the legislator and one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless

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63 See n 12 above.

64 Cameron J (as he then was) put it very succinctly in *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) 863, "[t]he Constitution has changed the 'context' of all legal thought and decision- making in South Africa."

65 In *Kalla v The Master* 1995 1 SA 261 (T) 269 Van Dijkhorst J held that the traditional rules of interpretation still formed part of the 'law of the land' and that they were not affected by the supreme (1993) Constitution. In *Swanepoel v Johannesburg City Council* 1994 3 SA 789 (A) 794 the Appellate Division referred with approval to the orthodox 'plain meaning' approach to statutory interpretation: "[T]he rules of statutory [exegesis] are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought."

66 Smalberger JA held in *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) 934, "[i]t must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not Seek to Challenge it."

67 See n 19 above 290. See also *Daniels v Campbell* 2003 9 BCLR 969 (C) 985 where the court referred to the "…'new' method of interpreting statutory provisions ushered in by the enactment of first the interim Constitution and, later, of the Constitution of the Republic of South Africa, 1996."

68 See n 2 above section 2 .

69 See n 12 above.

to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it.[70]

However, the interpretation clause in the supreme South African Constitution requires more than mere passing reference to the Constitution. Section 39(2) of the Constitution (the interpretation of statutes in general) provides, "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In *Fourie and Another v Minister of Home Affairs* Cameron JA explained the effect of the Constitution in the development of the common law.[71] He noted that the Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account the interests of justice. He stated that section 8(3) of the Bill of Rights provides that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right and that when developing the common law, a court must promote the spirit, purport and objects of the Bill of Rights (s 39(2)). He said that taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice, and where the common law is deficient, the courts are under a general obligation to develop it appropriately. He remarked that development of the common law entails a simultaneously creative and declaratory function in which the Court perfects a process of incremental legal development that the Constitution has already ordained. Once the Court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process, nor, in fulfilling that function, does the Court intrude on the legislative domain.[72]

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[70] 2001 2 SA 261 (SCA) at 273. See also, *Azisa Pty Ltd v Azisa Media CC* 2002 4 SA 377 (C) 385J and *Geyser v Msunduzi Municipality* 2003 5 SA 19 (N) 32 where it was emphasised that 'the primary rule of interpretation is that the courts must give effect to the literal or grammatical meaning of the legislation, and that deviation from this rule will only be allowed in exceptional circumstances.'

[71] 2005 3 SA 429 (SCA).

[72] See n 70 above par 40 and 41, ' It is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the Judiciary. . . . Section 8(3) envisages just the situation this appeal presents - that legislation to give effect to a fundamental right is absent. In this circumstance, the Constitution deliberately assigns an imperative role to the court. Subject to limitation, it is obliged to develop the common law appropriately. And this role is particularly suited to the Judiciary, since the common law and the need for its incremental development are matters with which lawyers and Judges are concerned daily. In this case the equality and dignity provisions of the Bill of Rights require us to develop the common law. This is because legislation 'does not give effect' to the rights of same-sex couples . . . In such a situation the incremental development that the Bill of Rights envisages is entrusted to the courts. It will be rarely, if ever, that an order pursuant to such incremental development can or should be subjected to suspension.'

The Constitution does not expressly prescribe a specific methodology or approach to the interpretation of legislation. Section 39(2) is a peremptory provision, which means that all courts, tribunals and forums must review the aim and purpose of legislation in the light of the Bill of Rights: plain meanings and so-called clear, unambiguous texts are no longer sufficient. Moreover, interpreters do not have a choice or discretion in the matter. Even before a particular legislative text is read, section 39(2) requires the interpreter to promote the fundamental values underlying the Bill of Rights. This inevitably means that the interpreter is consulting extra-textual factors before the legislative text is even considered. Factors and circumstances outside the legislative text are immediately involved in the interpretation process. In short, interpretation of statutes must start with the Constitution, and not with the legislative text.

Froneman J illustrated this influence of the supreme Constitution on statutory interpretation in *Matiso v Commanding Officer, Port Elizabeth Prison*, 'The interpretive notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature.'[73] This essentially means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994.

In *Zondi v MEC for Traditional and Local Government Affairs* was whether provisions of the Pound Ordinance of KwaZulu-Natal were capable of being read as being consistent with the Constitution.[74] Also at issue was the validity of provisions allowing for immediate seizure and impoundment of trespassing animals by a landowner, without notice to the livestock

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73 See n15 above.

74 2005 3 SA 589 (CC) 95, where Ngcobo J noted that the Electoral Act, and that the reference to the Electoral Act was deliberate and intended to ensure the exclusion of black people from assessing damages. The alternative qualification for assessment of damages in terms of the Ordinance was land ownership which clearly discriminated against those who are landless. "But the discrimination was not just against the landless; it was against landless black people. Landless white persons were eligible for appointment because they still would qualify under the franchise requirement. By contrast landless black people could not qualify, as they were hit by the franchise requirement. Thus white people could always qualify under the section, whether as landowners or voters, while black people could not. The object and effect of the qualifications in s 29(1) were to exclude black people from the scheme of the ordinance. The franchise requirement in my view gives up the game. If it had been intended to allow all races to be eligible for the assessment of damages, the franchise requirement would not have been included in the provision. Section 29(1) is therefore manifestly and fundamentally racist in its purpose and effect. Its purpose and effect are to discriminate on the basis of race, a ground listed in s 9(3) of the Constitution. Its purpose cannot be reconciled with our Constitution, in particular, our Bill of Rights. A provision such as this, the object of which is manifestly racist, is incapable of being read in conformity with our Constitution. The object of the section is a function of the intent of those who drafted and enacted the provision at the time. The section carries the stamp of its time. Section 29(1) therefore limits the right to equality as guaranteed in s 9(3) of the Constitution. Such a limitation can hardly be reasonable or justifiable under our new constitutional order. It follows therefore that s 29(1) of the ordinance read together with, and Seen against the backdrop of the impounding scheme of which it is an integral part, perpetuates an impounding scheme that is inconsistent with the right to equality guaranteed by s 9(3) of the Constitution."

owner; and assessment of damages only by those with the right to vote under the repealed Electoral Act 45 of 1979 or by landowners.

Ngcobo J remarked as follows in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* where allocations of fishing quotas in terms of the Marine Living Resources Act of 1998 were at issue,

> "I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words have regard to. It ignores the colour given to the language by the context. That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities. The Act recognises that it is insufficient merely to eliminate causes of past unfair discrimination but also that there is a need to redress the imbalance caused by such discrimination. As one reads on, therefore, one finds provisions that plainly show a commitment to redressing the historical imbalance and to achieving equality."[75]

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* Langa DP explained the constitutional foundation of the new interpretation methodology as follows,

> "Section 39(2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[76]

In *Baloro v University of Bophuthatswana* Friedman J explained these constitutional dynamics as follows,

> "This Constitution has a dynamic tension because its aims and purport are to metamorphose South African society in accordance with the aims and objects of the Constitution." It is in this regard it cannot be viewed as an inert and stagnant document. It has its own inner dynamism, and the Courts are charged with effecting and generating changes.[77]

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[75] 2004 4 SA 490 (CC) 92.
[76] 2001 1 SA 545 (CC) par 21.
[77] 1995 4 SA 197 (B) 241B.

Every interpreter of legislation is obliged to ensure that the purpose and spirit of the Bill of Rights are actively promoted during the interpretation and application of legislation, where the legislation can be interpreted in more than one way the reasonable interpretation that does not conflict with the Constitution must be followed.[78]

It is a regrettable fact that not all courts, forums and tribunals in South Africa fully understand the impact of section 39(2) on everyday interpretation (own emphasis). Section 39(2) should not be mere window-dressing,[79] it has changed the way we think about legislative texts and their interpretation. Since the 1996 Constitution is a particularly transformative document.

4 *Impact of the Constitution on Labour Law*

Both the Interim Constitution[80] and the final Constitution[81] contain provisions which have an important bearing on the individual and collective employment relationship. These provisions are to be found in the chapter dealing with fundamental rights, in other words in the part of the Constitution which describes the inalienable rights of the individuals who live in the country. According to Khan-Fruend, "experience elsewhere has shown that the impact of constitutional provisions on labour law and industrial relations, in particular those provisions embodied in a Bill of Fundamental Rights, should not be underestimated."[82]

According to Olivier there is no doubt that labour law and labour relations are areas which will be the subject of continual constitutional interpretation and challenge, if the number of decided cases where the impact of the present Bill of Rights on aspects of labour law came into play is anything to go by.[83]

These cases cover a fairly wide range of issues, such as whether constitutional labour rights can be enforced in the private and public sector labour relationship, the impact of the Bill of Rights on tribunals and courts and the way in which they function, the interpretation and limitation of labour law fundamental rights, the extent to which the labour law rights enshrined

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78 Rautenbach Malherbe *Constitutional Law* (1999) 48.
79 See n 56 above 606, 'where the court referred to section 35(3) of the interim Constitution that the interpretation clause in the Constitution is "… not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values.'
80 200 of 1993.
81 See n 51 above.
82 Kahn - Freund *The impact of constitutions on labour law* (1976) 240; Beatty Constitutional Labour Rights: Pros and Cons 1993 ILJ 1 8.
83 Olivier *Fundamental rights and labour law: some recent developments* 1996 De Rebus 59 668.

in the Constitution may be limited, and the manner in which some of the constitutionally entrenched rights operate in the labour law sphere.

There are various reasons why it is necessary to have regard to the impact of our Constitution on labour law and labour relations. Firstly, the Constitution itself makes it abundantly clear that the Constitution is the supreme law of the country,[84] while the Bill of Rights contained in chapter 2 thereof is said to apply to all law and to bind the legislature, the executive, the judiciary, and all organs of State.[85] Secondly, the Constitution enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.[86]

Thirdly, section 23 of the Constitution guarantees a number of extensive labour rights as fundamental rights, which will certainly provide a court, tribunal or forum with the basis for interpreting legislation in the labour sphere, collective agreements, principles relating to the contract of employment, and the common law.

Finally, the Labour Relations Act[87] (hereafter referred to as the LRA) explicitly states it as one of its objects to give effect to and regulate the fundamental rights conferred by the Constitution, and obliges any person interpreting the LRA to do so in compliance with the Constitution.[88]

Du Plessis says that there is a growing body of subsidiary constitutional legislation which has been designed to amplify and give more concrete effect to significant provisions of the Constitution and the Bill of Rights since 1994. The Constitution explicitly anticipates, authorises and indeed requires the enactment of subsidiary statute law in many cases. Some examples of this are, section 9(4), which obliges the national legislature to enact legislation 'to prevent or prohibit unfair discrimination' while section 33(3) in a mandatory way, enjoins the national legislature to pass legislation to give specific effect to rights and procedures associated with just administrative action.[89]

The LRA was enacted to give effect to and regulate fundamental rights in section 27 of the interim Constitution.[90] However, section 27 neither explicitly required nor envisaged legislation amplifying and giving a more concrete effect to it. Sections 23(5) and 23(6) of the

84 See n 2 above section 2.
85 See n 2 above section 8(1).
86 See n 2 above section 39(2).
87 66 of 1995.
88 See n 2 above sections 1(a) and 3(b).
89 *The Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA) and the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) were enacted to comply with the constitutional obligations in sections 9(4) and 33(3) respectively.
90 See n 80 above.

1996 Constitution on the other hand does envisage and authorise, in a permissive vein, legislation to regulate collective bargaining and recognise union security arrangements contained in collective agreements..[91]

4.1 Fundamental rights applicable to labour law and labour relations which are covered

Certain labour law rights are specifically protected as fundamental rights, such as section 23:[92] The right to fair labour practices, the right of workers to form and join a trade union and to participate in the activities and programmes of a trade union; as well as the right of employers to form and join an employers' organisation and to participate in the activities and programmes of an employers' organisation, the right to organise and to engage in collective bargaining and the right to strike. Although the right to freedom of association has been guaranteed by section 23, the same cannot necessarily be said of the right not to associate.

4.2 The enforceability of labour law fundamental rights

It is sometimes argued that labour rights are so-called second-generation or socio - economic rights and that they place a duty upon the state to act in a positive manner. They have to be contrasted with rights that protect an individual against undue interference by the state (e.g. the right to life, which is seen as a so-called first-generation right). Due to the peculiar nature of labour rights as socio-economic rights it is said that they cannot be enforced by the courts without intruding upon the terrain of the legislature and/or the executive branch of government. The truth, however, is that some labour rights, such as the right to associate freely and the right to strike, do not essentially differ from other classical human rights and may be enforced in like manner.

The South African Constitution in its Bill of Rights recognises both so-called Second and third generation fundamental rights. The Constitution further adopts an innovative approach by placing a specific duty on the State to take positive measures in order to give effect to some of the rights, in particular the second - and third - generation rights. The programmatic nature of giving effect to some of the rights which have effect in the labour relations field as well is sometimes mentioned. In some cases a specific time frame for adopting appropriate national

[91] See n 2 above.
[92] See n 2 above.

legislation is set. (See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Employment Equity Act 55 of 1998 (equal opportunities)).

4.3 Supremacy of and values underpinning the Constitution and the Bill of Rights

As mentioned earlier, the Constitution is the supreme law of the country,[93] while the Bill of Rights is said to apply to all and to bind the legislature, the executive, the judiciary, and all organs of state.[94] The Bill of Rights in principle binds natural and juristic persons.[95] In fact, the supremacy of the Constitution replaces the notion of parliamentary sovereignty, in terms of which parliament could enact laws which discriminated against people and allowed for serious human rights abuses.

In Coetzee v Government of the Republic of South Africa and Others the constitutional court stated: "[T]he difference between the past and the present is that individual freedom and security no longer fall to be protected solely through the vehicle of common law maxims and presumptions which neither the legislature nor the executive may abridge."[96]

Therefore, it is clear that the Constitution has its aim to decisively break with the past human rights abuses, discrimination and suffering often sanctioned by the legislative enactments in the area of labour law and labour relations. It has done this by introducing constitutionalism by allocating supreme status to the Constitution on the one hand and creating an entrenched Bill of Rights on the other hand.

The Constitutional court has often reiterated that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses, and that the constitution endeavours to bring about reconciliation and reconstruction.[97]

> "The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a Bill of Rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction...to treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and

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93 See n 2 above section2.
94 See n 2 above section 8(1).
95 See n 2 above sections 8(2)-(3).
96 1995 10 BCLR 1382 (CC). See also *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 4 SA 639 (CC).
97 See n 27 above par 7.

purpose of the Constitution as a purely technical, positivist and value free approach to the post-Nazi constitution in Germany.[98]

South African courts have consistently held, also in the area of employment, that there is close correlation between the right to equality and the protection of a person's dignity.[99] At the heart of the prohibition of unfair discrimination is the recognition that under the Constitution all human beings, regardless of position in society, must be accorded equal dignity.[100] In Hoffmann the Court found the policy of South African Airways in denying employment to the applicant due to his HIV status to be unconstitutional and infringing his human dignity. This caused the Court to afford the most comprehensive remedy to the applicant, namely that of instatement.

> "Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement. Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution."[101]

In *Parry v Astral Operations Ltd, the court held,* that in South Africa, an added consideration is the elevation of labour rights to a constitutional right. Thus party autonomy and self-regulation persist, as that is what the Constitution and LRA encourage through collective bargaining, but within the limits allowed by the Constitution and the legislation." [102]

It is therefore clear that in accordance with the constitutional mandate to develop the common law, the courts have where necessary made significant inroads in traditional common law perspectives relevant to labour law.

[98] See n 27 above par 111.
[99] Hoffmann v SA Airways 2000 21 ILJ 2357 (CC); See also Larbi-Odam v Member of the Executive Council for Education (North-West Province) and the Minister of Education 1997 BCLR 1655 (CC).
[100] See n 99 above.
[101] See n 99 above par 52.
[102] 2005 10 BLLR 989 (LC) par 53.

5 *Labour Appeal Court's approach to the interpretation of labour legislation*

5.1 *Nehawu v UCT*[103]

A dispute arose between the appellant and the respondents regarding the interpretation and application of the LRA,[104] section 197. The University of Cape Town, after long-drawn-out internal discussions and after unsuccessful consultations with NEHAWU, outsourced certain of its non-core activities as well as cleaning, gardening and sports grounds maintenance, etc. Four different contracts were awarded to the second, third, fourth and fifth respondents who are experts in their fields. UCT retrenched 267 employees and paid them severance benefits. Most of these employees were employed by the contractors but some were not. NEHAWU sought an interdict in the Labour Court. The court found that the outsourcing did not constitute a transfer of the whole or a part of a business as contemplated by section 197 of the LRA and refused the relief. NEHAWU appealed against the decision to the Labour Appeal Court.

The majority of the Labour Appeal Court held that s 197 of the LRA commences with a restatement of the common-law rule that a contract of employment may not be transferred without consent of both parties. But the section immediately creates an exception to this rule in one instance only, the transfer of the whole or a part of a business, trade or undertaking as a going concern. In such a case the consent of the employee is not necessary. This drastic inroad upon the common-law rule evidences an intention on the part of the legislature that transfers of businesses as going concerns be facilitated. The legislature then spelt out the consequences. The court remarked that the key to the interpretation of the section is the fact that the section deals with the transfer of contracts without the consent of the employees and is silent about the agreement of employers inter se. Each case must therefore be assessed on its own merits in making such a determination. The phrase "as a going concern" does not entail agreement that the workforce will be taken over by the new employer.

The court considered the judgment in *Foodgro (A Division of Leisurenet) v Keil.*[105] In *Foodgro* it was held that it did not stand in the way of a finding that s 197(1) is to be interpreted so as to limit its scope to cases where the transfer follows upon an agreement between seller

[103] 2002 4 BLLR 311 (LAC).
[104] See n 87 above.
[105] 1999 20 ILJ 2521 (LAC).

and purchaser defining the subject-matter of the sale as the business as a going concern including employees.

According to Zondo JA, "Before one can attempt to establish the correct interpretation of ss(2)(a) of s 197, it is important to bear in mind the constitutional and statutory context in which s 197(2)(a), like any other provisions of the Act, must be interpreted. In this regard certain provisions of both the Constitution and the Act are relevant."[106] He goes on further and states that, Sec 23(1) of the Constitution, which is part of the Bill of Rights in the Constitution provides that "(e)veryone has the right to fair labour practices". Sec 39(2) of the Constitution provides that "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[107] Sec 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Sec 233 deals with the application of international law. It reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[108]

In the learned Judges view the provisions of s233 of our Constitution is critical in the interpretation of any legislation in our country where there are two possible interpretations to provisions of an Act one of which is reasonable and consistent with international law. The importance of s233 lies in the fact that it enjoins courts to prefer such an interpretation over any other interpretation that is inconsistent with international law. The Judge states further that it seems that through s 233 our Constitution seeks to ensure that our behaviour and practices are aimed at meeting international standards.[109]

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[106] See n 102 above par 7.

[107] See n 102 above par 8.

[108] See n 103 above par 9 and Judge Zondo continues at par 11 that the, "The provisions of s1 and s3 of the Act must also be taken into account in interpreting s 197. Section 1 of the Act states the purpose of the Act. It provides that the purpose of the Act is "to advance economic development, social justice, labour peace and the democratisation of the workplace". It seeks to achieve this purpose by fulfilling the primary objects of the Act. Those include giving effect to and regulating the fundamental rights conferred by s 23 of the Constitution- which includes the right to fair labour practices. Those objects also include giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation. Another primary object of the Act is the promotion of employee participation in decision making in the Workplace," and Par 12 states that Section 3 of the Act provides as follows: "Any person applying this Act must interpret its provisions: (a) to give effect to its primary objects; (b) in compliance with the Constitution; (c) in compliance with the public international law obligations of the Republic". It is within the above constitutional and statutory context that the Act must be interpreted.

[109] See n 103 above par 10.

The learned Judge further states that:

> "It is accepted by now that the Act must be interpreted purposively. Against this background I proceed to attempt to interpret s 197(2)(a) which, of course, must be read within the context of the whole section and the Act as a whole."[110]

In conclusion the Labour Appeal Court found that Mlambo J in the Labour Court was correct in his interpretation of the section that consensual transfer of contracts of employment is a prerequisite for its operation and the appeal was dismissed with costs.

5.2 *Wyeth SA (Pty) Ltd v Manqele*[111]

The appellant made a written offer of employment to the employee (M), who accepted the offer. Preceding the offer being made and accepted, the M was requested to find a new car for a set price. M found a car but, on inspection, it was found to be second hand. The company once again asked M to select a new car and, believing he had done so, the company made a written offer of employment to M on 14 March A 2000, which he subsequently signed on 15 March 2000. The commencement date was 1 April 2000. However, before that date, the company became aware that the second car selected by M was also not new as allegedly represented by M. The company viewed this misrepresentation in a serious light, and before 1 April, terminated the contract on the grounds that 'the parties had been unable to reach consensus as to the condition of the car as stipulated in the letter of employment'. M nevertheless reported for work on 1 April, and was refused entry to the premises. He referred an unfair dismissal dispute in terms of s 191(1) of the LRA 1995 to the CCMA. In the CCMA at the arbitration ruling, M was found to be an employee as defined in terms of section 213 of the LRA and that M had become an employee the moment he accepted the offer of employment. The appellant made an application for review of that decision on review, the Labour Court confirmed that M was an 'employee' for purposes of the LRA and the application was dismissed by the Labour Court.

In arriving at a dicision Nkabinda AJA, referred to *Xaba v Portnet Ltd,* where Zondo AJP remarked that "[t]here is a limit to which the wording of a statute or rule may be disregarded in the process of an application of purposive interpretation".[112] He considered that 'such limit

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[110] See n 103 above par 12.
[111] 2005 6 BLLR 523 (LAC).
[112] 2000 21 ILJ 1739 par 3.22.

is necessary if we are to heed the unanimous warning of the Constitutional Court given in *S v Zuma.*[113]

On appeal, two questions were considered by the Labour Appeal Court: (1) whether or not a contract was concluded between the parties, and (2) whether or not provisions of the LRA are available to a person whose contract of employment was terminated prior to the commencement of employment, specifically whether the definition of 'employee' included a person such as M.

Nkabinda AJA, then referred to the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town* where Ngcobo J remarked that:

> "The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the workplace'. This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. …".[114]

Nkabinda therafter referred to *NUMSA v Bader Bop (Pty) Ltd* where at the Constitutional Court, O' Regan J remarked that if the Act:

> "…is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the Legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution".[115]

The court was of the opinion that the words in the definition of 'employee' in s 213 of the LRA, when given their ordinary and grammatical meaning, become ambiguous and inevitably result in manifest hardship and absurdity when read in conjunction with other provisions, for example the words in the definition of 'dismissal' in s 186.[116]

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[113] 1995 2 SA 642 (CC).

[114] 2003 3 SA 1(CC) par 41.

[115] 2003 24 ILJ 305 (CC) par 37.

[116] See n 111 above par 45, "Given the resultant gross hardship, ambiguity and absurdity in the adoption of the literal interpretation, I am of the view that this Court is thus entitled to depart from such a literal and ordinary construction and extend the literal construction of the definition as including a person who has concluded a contract of employment which is to commence at a future date. Common sense, justice and the values of the Constitution would, in my view, best be served by extending the literal construction to include such a person. That interpretation will be in line with the meaning of 'dismissal' in s 186 (1) (a)".

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It will also avoid limiting the constitutional right to 'unfair labour practice' to a person who works or has rendered services and is entitled to remuneration. The focus in s 186 is on the 'termination of a contract of employment'.

In Conclusion, it was held that an employment contract did come into existence. The next question is whether the first respondent was an employee or not an employee as he had not yet started work. A literal interpretation of the statutory definition of employee in section 213 of the LRA was inadequate and led to ambiguity and absurdity. The court therefore departed from this interpretation and extended the literal construction of the definition as including a person who has concluded a contract of employment which is to commence at a future date.[117] It was accepted that a purposive and more expansive interpretation should be given to the definition of employee and that it should be extended rather than limited. The appeal was dismissed.

5.3 *Equity Aviation Services (Pty) Ltd V SATAWU*[118]

The appellant is an aviation logistics company which provides services on the ramps and runways of South African airports. The first respondent is a trade union, and the majority union for the appellant's employees.

In November 2003, the union referred a wage dispute to the CCMA. Conciliation did not succeed and on 15 December 2003, the CCMA issued a certificate that the dispute remained unresolved. The union issued a strike notice to the appellant on the same day. A prolonged strike then ensued, the lawfulness of which was accepted as the union had complied with the requirements of section 64(1)(b) of the LRA. Employees who were not members of the union also participated in the strike. As no required notice had been given in respect of such employees, the appellant regarded their strike as unlawful and dismissed them for unauthorised absenteeism during the strike. The employees referred a dispute to the Labour Court, about the lawfulness of their dismissal. The question for determination was whether the dismissed

[117] See n 111 above par 52, "The ultimate conclusion this Court arrives at is that the definition of employee in s 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates. The construction which counsel for the appellant seeks to place on s 213 is, in the circumstances, is untenable as it leads to manifest ambiguity, absurdity and hardship".

[118] 2009 10 BLLR 933 (LAC).

respondents were required to be members of the union in order to participate in the strike lawfully.

The Labour Court found that the dismissed employees were indeed members of SATAWU at the time of the strike and that, even if they were not, they were entitled to participate. The Labour Court accordingly ruled their participation was held to have been lawful and their dismissal automatically unfair, and ordered the appellant to reinstate them. The appellant appealed against the whole of the judgment.

On appeal, the Labour Appeal Court According to Zondo JP stated that,

> "[B]efore one can attempt to establish the correct interpretation of sec 64(1)(b), it is important to bear in mind the constitutional and statutory context in which sec 64(1)(b), like any other provisions of the LRA, must be interpreted. In this regard certain provisions of both the Constitution and the LRA are relevant".[119]

The Court found no evidence to support the finding by the court *a quo* that the respondent employees had taken the steps prescribed by the union's constitution to obtain membership. All they had done was hand membership application and stop order forms to the appellant before the strike commenced. The Court held that by finding that submission of the forms was sufficient to prove union membership, the court *a quo* had lost sight of the pre-trial minute. This required the union to prove that the employees had taken all steps necessary to acquire membership. SATAWU had accordingly failed to discharge the onus of proving its claim that the employees were its members.

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On appeal, the Labour Appeal Court held that where a union has given the requisite notice on behalf of its members, and has embarked on a strike, other employees who are not members of that union are not also required to give notice in order for their strike action to be lawful. The Court decided unanimously that the relief granted by the Labour Court should be set aside and that the dismissed respondents had not been members of the union when they participated in the strike. It found also that the notice issued by the union had not referred to the dismissed respondents, but that the latter had not been required to refer a separate dispute to conciliation.

[119] See n 118 above Par 34.

Zondo JP further states that, “It has been held that the approach that must be adopted in construing any provisions of the LRA is purposive construction”.[120] “The fact that purposive construction is the approach to interpretation that must be used each time a provision of the LRA is interpreted means that there must be a clear understanding of: (a) what purposive construction is? (b) how purposive construction differs from other theories of statutory interpretation. (c) what the rules are which govern purposive construction, and, (d) what the scope of application of purposive construction is?[121]

The learned judge referred to two Constitutional Court cases in which, in his view the Court quite clearly applied purposive construction in cases relating to the interpretation of the LRA are *NEHAWU v University of Cape Town* as well as *NUMSA v Bader Bop (Pty)Ltd*. Both judgments in Bader Bop quite clearly applied purposive construction.[122]

The LAC held that one of the objects of the Labour Relations Act is to provide a framework for, and promoting, orderly collective bargaining and promoting the effective resolution of labour disputes. Section 64(1)(b), which provides for the giving of notice for a proposed strike, is designed for just that purpose. The Labour Court was divided on the issue raised before it. The sole point of difference between the majority judgments and the dissenting judgment was whether the dismissed respondents were required to issue a separate strike notice to Equity, or whether the union’s notice was sufficient to make the strike action by the non-union members lawful. The respondents’ stance was based on the premise that the right to strike should be limited as little as possible. The Court found the respondents’ argument to be flawed. The requirement of notice is not a limitation of a right. It is a procedural requirement for the exercise of the right to embark on strike action. Requiring all employees to serve such a notice does not impinge on their rights.

The Court held further (Zondo JP dissenting) that a constitutional right conferred without express limitation should not be restricted by reading into it implicit limitations. If the Legislature had intended to distinguish between the rights of different categories of employees, it would have done so in express terms. There was accordingly no basis for inferring that the respondent employees acquired a right to strike only if they served separate notices on their employer.

[120] See n 118 above par 43; BSA v COSATU 1997 18 ILJ 474 (LAC) 479A.
[121] See n 118 above par 44.
[122] 2003 3 SA 1 (CC); 2003 24 ILJ 305 (CC); See n 115 above; par 46.

The Court held further (Zondo JP dissenting) that the Legislature could not have contemplated that individual employees who wished to join a strike called by a union to which they did not belong would be required to issue their own strike notices. The employer's concession that each individual is not required to issue a strike notice contradicted its argument that somebody acting on their behalf must do so.

The cases on purposive construction suggest that purposive construction is concerned with giving a sensible or reasonable interpretation to statutory provisions or contract or other documents.[123]

The Labour Appeal Court concluded by stating that,

> "... we hold a firm view that there is no legal basis for reading into section 64(1), limitations upon the right to strike of non – unionised employees which are not expressly provided for in the Act. In our view, where the majority union has referred a dispute for conciliation and the dispute directly affects other non-unionised employees and/ or members of minority unions in the bargaining unit, it is not necessary for the latter to refer that dispute for conciliation separately. The construction contended for by the Appellant would impose limitations on a constitutional right for which the legislature did not intend. Such a construction would amount to treating employees of the same employer differently on issues which are at the heart of collective bargaining and may sow the seeds of both disorders which the primary object of the Act seeks to obviate."[124]

Further the majority court concluded that, on a proper construction of s 64(1), all employees, including non-unionized employees and/or members of minority unions, are entitled lawfully to participate in industrial action as soon as the majority union has referred the strike for

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[123] See n 118 par 64 Zondo JP referred to the Constitutional Court in *S v Zuma* where Kentridge AJ quoted what Dickson J said in *R v Big M Drug Mart Ltd* 198518 DLR 4th 321 at 395-6. There Dickson J said: "In *Hunter v Southam Inc*… this court expressed the view that the proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ...be placed in its proper linguistic, philosophical and historical contexts." 1986 SALJ 615 620; Zondo JP quotes Mureinik: "It is true, of course, that purposive interpretation is generally superior to a mechanical application of the ordinary grammatical meaning of words. The essence of the argument why it is true can perhaps be captured by saying that literal interpretation aspires to no more than making sense of a fragment of a statute; but purposive interpretation enjoins the reader to prefer the construction that makes sense, or makes the best sense, of the statute as a whole: Purposive interpretation seeks the construction that makes the statute most coherent." See n102 par65 where Zondo JP states, "When there are two possible interpretations of a statutory provision or contract or other document one of which is within the literal terms of the statute or other document but does not give effect to or promote the purpose of the statutory provision or other document and the other promotes or gives effect to or promotes such purpose, even though it is not strictly within the literal terms of the relevant statutory provision or contract or other document, the latter interpretation must be preferred."

[124] See n 118 Par 170.

conciliation in terms of s 64(1)*(a)* and a s 64(1)*(b)* notice has been issued by the majority union. On a proper construction of s 64(1)*(b)*, the employer is only entitled to notice of the commencement of the strike and is not entitled to be informed of the identity of the employees who will participate in the strike. The majority court accordingly confirmed the finding of the court below that the dismissal of the employees was automatically unfair in terms of s 187(1)*(a)*. The court set aside the relief order which had been erroneously granted by the court below.

5.4 *Aviation Union of South Africa v SAA*[125]

In March 2000, the first respondent SAA concluded a collective agreement with the applicant union and two other unions in terms of which SAA's Infrastructure and Support Services departments were transferred as going concerns to the second respondent LGM.

The transfer agreement provided, that LGM would perform services until 2010, with SAA retaining the option to renew for an additional further five years, and the employment contracts of affected employees will transfer to LGM in terms of section 197 of the LRA. The 62 individual appellants were all either transferred in terms of the agreement or employed by LGM. After a change in the ownership of LGM, SAA cancelled the agreement and advertised for tenders for the services that were being provided by LGM. However, SAA did not require any of the tenderers to employ LGM's staff. Faced with the possibility of retrenchment by LGM, the appellants launched an urgent application for orders, declaring that the termination of the LGM contract and the appointment of a new service provider constituted, or would constitute, a transfer of the undertaking or services provided by LGM to SAA, declaring that the termination of the employees' employment would constitute an automatically unfair dismissal, restraining SAA from itself performing any of the services provided by LGM or permitting any other party to do so until the employees were transferred to SAA or to any new service provider, and restraining LGM from dismissing the employees until their transfers had been effected.

The Labour Court dismissed the application on the basis that section 197 of the LRA contemplates only "first generation" outsourcing. The appellants argued that the court *a quo*

[125] 2010 1 BLLR 14 (LAC).

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erred by interpreting section 197 too narrowly. The respondents sought leave to introduce fresh evidence relating to payment of severance pay to LGM employees and to the appellant's acceptance of their retrenchment by LGM.

The Labour Appeal Court referred to Section 3 of the LRA which provides as follows:

> "Any person applying this Act must interpret its provisions:
>
> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution;
>
> (c) in compliance with the public international law obligations of the Republic".[126]

It is within the above constitutional and statutory context that the LRA must be interpreted. It is accepted by now that the LRA must be interpreted purposively. Against this background I proceed to attempt to interpret s197 which, of course, must be read within the context of the whole section and the LRA as a whole.[127]

Zondo JP when enquiring as to the purpose of S197, referred to *NEHAWU v UCT* where the Constitutional Court said through Ngcobo J:

> "The concept of fair labour practice must be given content by the legislature and thereafter left to gather a meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of the unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance."[128]

The Court took cognisance of the fact that the purpose of section 197 is to protect employment, which is deemed to be a core value of the LRA, in addition to facilitate transfers of business.[129] While purposive construction is desirable where legislation lends itself to an interpretation consonant with the objectives of the legislation, it does not license the courts to re-write legislation. But where the purpose of legislation is clear, as is the purpose of section

[126] See n 87 above.
[127] See n 125 above par 16.
[128] See n 116 par 34.
[129] See n 125 par 22, "There are also those who take the view that the use of purposive interpretation ensures that sec 197 is interpreted in a manner that renders sec 197 applicable to the situation such as the one we are dealing with here."

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197, and a literal interpretation frustrates that purpose, then a meaning harmonious with the purpose must be adopted.[130]

The Court held that the case raised the question whether section 197 applies to so-called "second-generation" outsourcing arrangements. The court *a quo* had interpreted the definition of the word "transfer" in section 197(1)(b) – ie the transfer of business "by one employer ('the old employer') to another employer ('the new employer') as a going concern" – to apply only to transfers by the "old" to the "new" employer, not to more isolated transactions such as those planned by SAA.

The Court held that the many meanings attached to the word "by" do not all support this interpretation. The "purposive" interpretation adopted by the Court in *COSAWU v Zikhethele Trade (Pty) Ltd* was to be preferred because it served to prevent the kind of abuse that could subvert section 197.[131] The approach adopted by Murphy AJ holds the compelling attraction that it serves to prevent the kind of abuse that would subvert the very purpose of the section.[132]

The agreement between SAA and LGM provided that SAA could cancel the agreement. Once that right was invoked, the business would be transferred by LGM ("the old employer") to a third party or to SAA (in either case "the new employer"). The Court held that nothing in the wording of section 197 prevents its application in such a case. The initial transferee becomes the new employer after the first transfer; pursuant to the contract that caused the initial transfer, the new employer is obliged to transfer the business to another party, which in turn becomes the new employer. Second-generation transfers accordingly fall within the scope of section 197. In any event, the contract was such as to compel LGM to transfer the business,

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[130] See n 125 par 27 where the learned judge states, "I am of the view that the rule that you do not depart from the ordinary meaning of a word in a statute unless giving that word its ordinary meaning would result in an absurdity or anomaly is a rule that falls under the literal theory of interpretation. It is not necessarily a rule of the purposive theory of statutory interpretation. On my understanding of the theory of purposive interpretation of statutes – which is the one that must be applied in the interpretation of the LRA and, therefore, sec 197, and not the literal theory of interpretation – it is permissible to depart from the ordinary meaning of a word or provision in a statute where to give the word or statutory provision its literal or ordinary meaning would clearly defeat or undermine the clear purpose of the statutory provision concerned."

[131] See n 125 above par 57 Murphy AJ (as he then was) in Cosawu v Zikhethele Trade (Pty) Ltd 2005 26 ILJ 1056 LC at 1066 par 29, said: "I am persuaded that a less literal and more purposive approach is justified in the context of s 197. As stated earlier, the section is intended to protect the employees whose security of employment and rights are in jeopardy as result of business transfers. A mechanical application of the literal meaning of the word 'by' in s197 (1)(b) would lead to the anomaly that workers transferred as part of first generation contracting-out who is protected whereas those of the second generation scheme would not be, when both are equally needful and deserving of the protection. The possibility of abuse and circumvention of the statutory protections by unscrupulous employees is easy to imagine. As in this case, the danger exists that the employees may not only lose their continuity of their employment but also their severance benefits, for the reason that the old employer having lost its business to the new employer lacks the means to pay its debts."

[132] See n 125 above par 58.

meaning that the transfer was in part effected "by" SAA. The Court accordingly concluded that the court *a quo* had erred by not granting at least the declaratory relief sought by the appellants

The Court granted an order dismissing the application for an interdict, but declaring that section 197 would apply when the contract between SAA and LGM ended, and that the services provided by LGM would transfer to SAA or to any other party contracted by SAA to provide those services. The appeal was upheld.

5.5 *University of Pretoria v Commission for Conciliation, Mediation & Arbitration*[133]

After serving on a series of fixed term contracts for three years from 1 February 2004 to 30 November 2007, the respondent employee applied for one of several permanent positions which the applicant was seeking to fill. She was unsuccessful, but was offered a further fixed term contract, which she declined to accept and she refused the offer.

The employee referred a dispute to the CCMA, claiming that she had been unfairly dismissed in terms of section 186 (1)(b) of the LRA.[134] She contended that she had reasonably expected to be appointed on a permanent basis and contended that the failure to appoint her constituted a dismissal in terms of section 186(1)(b). The appellant contended that the employee had not been dismissed within the meaning of that term in section 186(1)(b) of the LRA. The respondent commissioner held that if the employee could prove a reasonable expectation of permanent employment, she could claim to have been dismissed.

Both the second respondent CCMA commissioner and the Labour Court, on review, accepted the employee's contention and found that she had been dismissed in terms of s 186(1)*(b).* The university appealed, seeking an order declaring that the employee had not been dismissed and that the CCMA had no jurisdiction to entertain the dispute. At arbitration, the university raised a point in *limine,* that the first respondent did not have jurisdiction to deal with the dispute, as the third respondent had not been dismissed in terms of the concept of dismissal as defined in the Act. However, the arbitrator found for the third respondent.

[133] 2012 2 BLLR 164 (LAC).
[134] See n 87 above.

The critical question raised in this appeal is not dependent on a factual dispute, the facts being essentially common cause, but whether, in terms of the LRA, a reasonable expectation of indefinite employment meets the requirements of s186(1)(b), which would then mean that, properly proved on the facts, the third respondent could have been dismissed in terms of the LRA.[135]

By contrast, the employee's representative contended that the very purpose of s 186(1)*(b)* was to prevent employers from concluding a series of short-term contracts with employees that could be brought to an end without reason, so denying employees a range of protections enjoyed by employees on indefinite contracts, including the constitutional right to fair labour practices. The interpretation of the section should therefore be informed by this purpose. Both representatives had reference to authoritative writings and decided case law in support of their submissions.[136]

It was held on appeal that the question was whether, in terms of the Act, a reasonable expectation of indefinite employment meets the requirements of section 186(1)(b), which would then mean that, properly proved on the facts, the third respondent could have been dismissed in terms of the Act.

The Court noted that it was unclear from the record precisely why the employee had refused a further fixed term contract, but was prepared to accept that the reason was that she expected an offer of permanent employment. However, the case did not turn on any factual dispute. The critical issue was whether a reasonable expectation of indefinite employment fell within the terms of section 186(1)(b).

The court noted that the words employed in s 186 envisage two requirements that must be met in order for an employer's action to constitute a dismissal. Firstly, there must be a reasonable expectation on the part of the employee that the fixed-term contract will be renewed on the same or similar terms, and secondly, the employer must fail to renew the contract on the same or similar terms, or fail to renew it at all. These words did not carry the meaning urged by the respondent employee.[137]

[135] See n 133 above par 9.
[136] See n 133 above par 10-17.
[137] See n 133 above par 18.

The critical phrase in section 186(1)(b) was that the employee had to reasonably expect renewal of a fixed term contract "on the same or similar terms". This indicated that the legislature contemplated the renewal only of fixed term contracts. The implication of the employee's argument was that once an employee has established a reasonable expectation of renewal of a fixed term contract, the employer is obliged to renew this contract indefinitely on the same or similar terms, subject to there being no fair reason for refusing to do so.

This would mean that once a contract has been renewed because there was a reasonable expectation of a renewal, this expectation creates an obligation to renew indefinitely and, in this fashion, the employee acquires a right to permanent employment.

The Court held that the wording of section 186(1)(b) is not consistent with this view. The distinction between fixed term and indefinite contracts has a clear economic rationale, which must have been recognised by the legislature. This was supported by the 2010 Labour Relations Amendment bill which, if adopted, would expressly permit employees to claim a reasonable expectation of renewal of a fixed term contract *or* of permanent employment.[138] The employee's own conduct illustrated this distinction when she chose to apply for a permanent appointment. Had she not been offered a further fixed-term contract she might be entitled to proceed in terms of s 186(1)*(b).*

The court found that the words chosen by the legislature, without an amendment to the legislation, covered a restrictive set of circumstances, namely, a reasonable expectation of the renewal of a fixed-term contract which had previously been enjoyed. The court held that the CCMA commissioner and the Labour Court erred in concluding that there could be a dismissal, in that there was a reasonable expectation of permanent employment, and the university was entitled to the declaratory order sought.

In conclusion the Court held further that had she not been offered that contract, she would have been entitled to bring a claim under section 186(1)(b). In respect of the appellant's failure to offer a permanent position, she was not. Without an amendment to the legislation, the

[138] See n 133 above par19.

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wording of section 186(1)(b) applies only to the non-renewal of fixed term contracts.[139] The appeal was upheld and the commissioner's jurisdictional ruling set aside.

5.6 *Mondi Packaging (Pty) Ltd v Director-General, Labour*[140]

The respondent employees lodged a complaint with the Department of Labour they alleged that their employer, the appellant, refused to pay them for working overtime on Sundays. They state the reason for the employer's refusal is that they were earning above the threshold of R115572 per annum which is determined by the minister in terms of s 6 of the Basic Conditions of Employment.[141] They argued however that it was only because the employer included overtime in its calculation of their earnings and therefore their earnings exceeded the determined threshold.

The inspector agreed with the employees and had ruled that the overtime should not be included in the calculation of gross pay for the purpose of determining whether the employees fell within the threshold of R115,572 per annum. The inspector issued a compliance order in terms of which the appellant was ordered to pay the employees specified amounts. The compliance order was confirmed by the director general.

The appellant appealed to the Labour Court, which upheld the director general's interpretation. In a further appeal to the Labour Appeal Court the appellant contended that the words 'gross pay' in the definition of 'earnings' in the ministerial determination had to be given their ordinary, literal and grammatical meaning in terms of which 'gross pay' included overtime pay. On this interpretation of 'gross pay', the appellant submitted, the conclusion that the employees were excluded from the benefits or protection of s 16 of the BCEA was inevitable. Counsel for the appellant relied on what was said by Smaberger JA who wrote for the majority in *Public Carriers v Toll Road Concessionaries (Pty) Limited* that:

> "The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it … Subject to this proviso, no problem would normally arise where the words in question are only susceptible to one meaning: effect must be given to such meaning. In the present instance the words 'an alternative road'

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[139] See n 133 above Par 22 the court stated," Given that this court has found that both the second respondent and the court *a quo* erred in concluding that there could be a dismissal, in that on facts properly shown, there was a reasonable expectation of permanent employment, second respondent's decision falls to be reviewed and set aside."

[140] 2010 11 BLLR 1131 (LAC).

[141] Act 75 of 1997.

are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a literal interpretation, capable of bearing the different meanings ascribed to them by the applicants, on the one hand, and the respondents, on the other. Both interpretations being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to resolve the ambiguity, it is in my view appropriate to have regard to the purpose of s 9(3) in order to determine the Legislature's intention."

Smalberger JA stated further that:

> "Mindful of the fact that the primary aim of the statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity. … it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its' application results in ambiguity and one seeks to determine which one of more than one meaning was intended by Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective."

The respondents submitted that this interpretation would result in injustice, unfairness and absurdity, and that the gross pay referred to in the determination referred to gross pay earned by an employee in respect of his or her ordinary hours of work.

The court found that, like the LRA, the BCEA has to be interpreted purposively.[142] The court also found that as the ministerial determination is subordinate legislation made under the BCEA, it too has to be interpreted purposively.[143] Under purposive interpretation, legislation has to be interpreted in the light of its purpose or objects at all times and not only if there is an ambiguity.

The court found that the appellant's interpretation of 'gross pay' brought about uncertainty and led to an absurdity. Neither the employer nor the employee would know in advance how much overtime the employee would work in a given year and thus, if the employee worked on a particular Sunday, no one would know whether the employer would be obliged to pay him at the rate prescribed by section 16 or not. However, if one took 'gross pay' to mean gross pay in respect of ordinary working time, excluding overtime, this uncertainty would not arise and the employee's gross pay per annum would be easily ascertainable at any time of the year. In addition, there was statutory support for this meaning of 'gross pay' in other sections of the BCEA. Zondo JP states that:

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[142] See n 140 above Par 22.

[143] See n 140 above par 22 where the court stated: Its purpose is set out in sec 2 as being "to advance economic development and social justice by fulfilling the primary objects of this Act which are –
(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution-
(i) by establishing and enforcing basic conditions of employment; and
(ii) by regulating the variation of basic conditions of employment; to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation." Since the Ministerial determination under consideration is subordinate legislation made under the BCEA, it, too, must be interpreted purposively.

> "I have previously expressed the view that under purposive construction or interpretation it is not necessary that there be ambiguity in the meaning of a statutory provision which is sought to be interpreted before one can have regard to the purpose of such statutory provision or the purpose of the Act of Parliament of which the provision is part."[144]

Zondo JP further states that:

> "the statement that one must have regard to the purpose of a statutory provision sought to be interpreted only if there is ambiguity which forms part of the literal theory of interpretation and is not a necessary element of purposive interpretation. Under purposive interpretation, legislation must be interpreted in the light of its purpose or objects at all times."[145]

In the learned judges view this approach to interpretation is consistent with the statements made in *Chirwa v Transnet Ltd* by the Constitutional Court in the context of section 3 of the LRA, through Ngcobo J, (as he then was):

> "The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects."[146]

The court said that although the BCEA does not have a provision such as s 3 of the LRA, two of its primary objects, which it shares with the LRA, are "to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution" and to give effect "to obligations incurred by the Republic as a member state of the International Labour Organisation." (Sec 2 of the BCEA).[147] The court referred to *NEHAWU v UCT* where it was held that the LRA must be purposively construed in effect because sec 3 thereof enjoins that it be interpreted in compliance with the Constitution and South Africa's international obligations.[148]

In conclusion the court held that in the Ministerial determination the word "earnings" is defined as "gross pay before deductions". The court had to give a purposive construction to the provisions of the statute and concluded that the term "gross pay" in the Ministerial determination meant gross wage or gross pay in respect of ordinary hours of work and, therefore, excluded overtime. The court consequently dismissed the appeal with costs.

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144 See n 140 above par 23; 2009 30 ILJ 1997 (LAC) par 63.
145 See n 140 above par23.
146 2008 4 SA 367 (CC) par 110.
147 See n 140 above par 25.
148 See n 103 above par 41.

5 Conclusion

In conclusion it is submitted that recent developments in South African case law which indicates a shift from a rigid application of the law, which was prevalent before 1994. If the LRA is intended to give expression to fair labour practices, the Labour Court, Labour Appeal Court and statutory arbitrators must protect employees who are particularly vulnerable to exploitation since they are economically and socially weaker than their employers.

The Labour Appeal Court in *National Education Health and Allied Workers Union v University of Cape Town through* Zondo JA stated that:

> "It is accepted by now that the Act must be interpreted purposively. Against this background I proceed to attempt to interpret s 197(2) (a) which, of course, must be read within the context of the whole section and the Act as a whole."[149]

The Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town* Ngcobo J, stated that-

> "The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the workplace'. This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. …".[150]

In *NUMSA v Bader Bop (Pty) Ltd 2003 24 ILJ 305 (CC)* O' Regan J remarked that if the Act-

> "…is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the Legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution".[151]

In *Equity Aviation Services (Pty) Ltd V SATAWU,* Zondo JP stated that,

[149] See n 103 above par 12.
[150] See n 114 above par 41.
[151] See n 115 above par 37.

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> "the cases on purposive construction suggest that purposive construction is concerned with giving a sensible or reasonable interpretation to statutory provisions or contract or other documents."[152]

In Aviation Union of South Africa v SAA Zondo JP stated that,

> *"*On my understanding of the theory of purposive interpretation of statutes – which is the one that must be applied in the interpretation of the LRA and, therefore, sec 197, and not the literal theory of interpretation – it is permissible to depart from the ordinary meaning of a word or provision in a statute where to give the word or statutory provision its literal or ordinary meaning would clearly defeat or undermine the clear purpose of the statutory provision concerned." [153]

Taking into consideration the commitment of the Constitution to equality, human dignity and reconciliation, it is interesting to note that the decisions in the above cases illustrates that the constitution must inform the way legislation is interpreted. The interpretation of the *Labour Relation Act* provisions in the above cases, was not limited to the ordinary, grammatical meaning of the legislation. The court took into account the underlying values and the purpose of the legislation. It can be concluded that, as held by the court in *Equity Aviation Services (Pty) Ltd V SATAWU* amongst others that the approach that must be adopted in construing any provisions of the LRA is purposive construction".[154]

It is my final submission that it is clear from the above cases discussed in this study that the LAC's approach to the interpretation of labour legislation requires a purposive approach.

[152] See n 118 above par 64.
[153] See n 125 above par 27.
[154] See n 118 above par 43.

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