IN THE HIGH COURT OF SOUTH AFRICA, BISHO

CASE NO.92/2000

In the matter between:

CASSIM FREDERICKS & OTHERS APPLICANTS

and

THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR EDUCATION AND TRAINING IN THE EASTERN CAPE PROVINCE AND 2 OTHERS RESPONDENTS

J U D G M E N T

WHITE J: The 56 Applicants are educators in the Department of Education and Training of the Eastern Cape Province (the Department). The First Respondent is the Member of the Executive Council for Education and Training and the Second Respondent is the head of the Department. The Third Respondent is the Minister of Education of the Republic of South Africa. The Applicants apply for an order in the following terms:

"1. Declaring that the decision taken by the First and/or Second Respondents not to grant voluntary severance packages to the Applicants be set aside;

2. Substituting the decision of the First and/or Second Respondents not to approve the Applicants' voluntary severance packages with an order that the Applicants' applications for voluntary severance packages be and are hereby approved:

3. In the alternative to paragraph 2 above, directing the First and/or Second Respondents to properly consider the Applicants' applications for voluntary severance packages on such terms and conditions as the above Honourable Court may deem fit;

4. Directing the First and/or Second Respondents to pay the costs of this application jointly and severally the one paying the other to be absolved, and in the event of the Third Respondent opposing the application, directing the First, Second and Third Respondents, jointly and severally to pay the costs of this Application."

The Application stems from the refusal, or failure, of the Department to grant the Applicants voluntary severance packages, after they had applied therefor in terms of Resolution 3 of 1996 (Resolution 3), which was published in Regulation Gazette 5711 of 31 May 1996. Resolution 3 is an agreement concluded by the Education Labour Relations Council (the Council), which was established by the Education Labour Relations Act, 146 of 1993. Although that Act was repealed by the Labour Relations Act, 66 of 1995 (LRA), the life of the Council was prolonged by virtue of item 16(1), read with item 20(c), of Part D of Schedule 7 of the LRA, and the collective agreements concluded by it remain extant in terms of item 13(2) of Part C of Schedule 7 of the LRA. The Council is now deemed, in terms of section 37(3)(c) of the LRA, to be a Bargaining Council, which is empowered by section 28 to conclude collective agreements. The parties to the Council are the State, represented by, *inter alia*, the Department, and trade unions representing the educators in its employ. Its functions include the task of concluding collective agreements.

When the Minister of Education published Resolution 3 in the Government Gazette, as aforesaid, he, in terms of section 12(6)(a) of the LRA, extended its provisions to all employers and employees defined in the Act. In terms of section 213 an employee is defined as, *inter alia*, "any person ..... who works for another person or for the State and who receives, or is entitled to receive, any remuneration." It follows that all the Applicants are bound by the terms of Resolution 3, irrespective whether they are members of the trade unions who are signatories thereto, or not. Section 23 of the LRA specifically binds the parties of a collective agreement to

its terms.

Although the purpose of Resolution 3 is stated in clause 1.1 thereof to be to "right size" the public service in accordance with government policy and available resources through collective agreements, its provisions clearly relate to educators only. It deals with various aspects of their employment, namely, voluntary severance packages, filling of vacancies, redeployment, remuneration adjustments, restructuring of pension benefits, medical assistance at retirement, etc. The main provision relating to voluntary severance packages reads as follows:

> "1.9(a)(i) Any educator may volunteer for a severance package, as set out in Annexure A, in order to allow educators who prefer to leave the service, to do so and to create room for the absorption of educators who are in excess. The terms and norms according to which this provision shall apply, are as set out in Annexure A."

The Applicants state that the Department approved applications for severance packages till December 1996 and thereafter either failed to consider, or refused *en masse*, the remaining applications, including their own. When the Applicants appealed against the refusal of their applications to the First Respondent, they were informed that the Department had approved sufficient applications to reach the required teacher/learner ratio, or that the province had attained its full quota of severance packages, or that the province is entitled to approve only a certain number of applications. The Applicants therefore contend that the refusal by the Department to grant their applications for severance packages should be set aside on review either because they had a legitimate expectation that the applications would be approved, or because they have been unfairly discriminated against, or because the Department's refusal constitutes an unfair administrative action against them.

In his Answering Affidavit the Superintendent-General of the Department barely touches on the factual issues of the dispute and it must therefore be accepted that the Respondents do not, for the purposes of this application, dispute the aforesaid facts. He does, however, contend, *in limine*, that this Court does not have jurisdiction to hear the matter and that it falls within the exclusive jurisdiction of the Labour Court.

To decide the issue *in limine* the Court must consider the provisions of the LRA to determine both the nature and extent of the jurisdiction of the Labour Court, and the fora in which this dispute must be heard.

The Labour Court is a creature of statute established by the LRA, which Act, together with certain other Acts, prescribe its jurisdiction. The following sections in the LRA pertaining to the jurisdiction of the Labour Court are relevant to this enquiry:

Section 157(1), (2) and (4)

> "157 (1) Subject to the Constitution and section 173, and except where *this* Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this* Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the Supreme Court-
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> (a) in respect of any alleged violation or threatened violation, by the State in its capacity as employer of any fundamental right entrenched in Chapter 3 of the Constitution; and
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> (b) in respect of any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its

capacity as employer.

(4) (a) The Labour Court may refuse to determine any *dispute*, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the *dispute* through conciliation.

(b) ..... ”

Section 158(1)(g) and (h)

“158 (1) The Labour Court may -

(g) despite section 145, review the performance or purported performance of any function provided for in *this* Act or any act or omission of any person or body in terms of *this* Act on any grounds that are permissible in law.

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;”

I shall first consider the provisions of sections 157(1) and 158(1)(g) and (h), and leave the consideration of section 157(2) till later in the judgment. Section 157(1) provides that the Labour Court shall have exclusive jurisdiction in respect of “all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.” This section simply begs the question of the exact parameters of the Labour Court’s jurisdiction. To determine those parameters a thorough and complete examination of all the provisions of the LRA must be undertaken. Section 158(1)(g) and (h) empower the Labour Court to review any act or omission committed under the LRA.

When considering the provisions of the LRA relevant to this dispute, with a view to determining

which of those provisions afford the Labour Court its jurisdiction, the Court will commence with an examination of the provisions relating to collective agreements. A collective agreement is defined as follows in section 213 of the LRA:

> "'collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade unions*, on the one hand and, on the other hand -
>
> (a) one or more employers;
>
> (b) one or more registered *employers' organisations*; or
>
> (c) one or more employers and one or more registered *employers' organisations*."

Counsel for the Applicants, Advocate Beyleveld, conceded that Resolution 3 is a collective agreement in terms of the LRA. It is quite clearly a written agreement governing the terms and conditions of employment of educators - voluntary severance packages, filling of vacancies, redeployment, pension benefits, medical assistance and remuneration adjustments - concluded between the employer - the Department - and its employees - the educators, who include the Applicants. The Council, which is now deemed to be a Bargaining Council, is empowered by section 28 of the LRA to conclude collective agreements. Section 23 binds the parties to the terms of the agreement and the Minister's notice in the Government Gazette, in terms of section 12(6)(a) of the Education Labour Relations Act, 146 of 1993, also binds those educators who were not parties to the agreement.

Section 24 of the LRA provides for the resolution of disputes concerning collective agreements by means of conciliation, and should that fail, arbitration. The section reads as follows:

> "24 (1) Every *collective agreement* ..... must provide for a procedure to resolve any *dispute* about the interpretation or application of the *collective*

agreement. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration.

(2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if -

(a) the *collective agreement* does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the *collective agreement* is not operative; or

(c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement.*

(3) .....

(4) The Commission must attempt to resolve the *dispute* through conciliation.

(5) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

(6) .....

(7) Any person bound by an arbitration award about the interpretation or application of section 25 (3) (c) and (d) or section 26 (3) (d) may appeal against that award to the Labour Court."

The Commission referred to in the section is the Commission for Conciliation, Mediation and Arbitration, which I shall for the sake of convenience refer to as the CCMA.

The provisions for conciliation and arbitration in section 24 are mandatory and they oust the

jurisdiction of the courts to deal with such disputes. This question was dealt with in detail by van Dijkhorst J in Imatu v Northern Pretoria Metropolitan Substructure 1999(2) SA 234 (T), where the Court held that it had no jurisdiction to adjudicate upon the interpretation and application of a collective agreement concluded in terms of the LRA. I do, with respect, agree with the following extract at 239B of the judgment:

> "I need, however, not decide this case on the narrow basis of a consensual collective agreement with a statutorily incorporated arbitration clause. In my view, wherever the Act provides for dispute resolution by arbitration, that concept in the context of the Act excludes resort to the ordinary courts of law for dispute resolution. I say so for the following reasons. It was the clear intention of the Legislature that a specialised set of *fora* should deal with labour-related matters. To this end it established an interlinked structure of *inter alia* trade unions, employers' organisations, a variety of councils, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour and Labour Appeal courts. The Act also creates procedures designed to accomplish the object of simple inexpensive and accessible resolution of labour disputes. In this the role of the CCMA and the exclusive jurisdiction of the Labour Courts are important features. Generally the scheme of the Acts is that the Labour Court does not itself hear disputes as a court of first instance but neither does the Act confer exclusive jurisdiction on the CCMA *vis-à-vis* the Labour Court in all matters pertaining to labour disputes. For example the Labour Court acts as court of first instance in matters referred to in ss 9, 26, 59, 63, 66, 68, 69, 77, 103, 104, 105, 141, 142, 191 (in many of these cases after conciliation has been unsuccessful). The Act therefore creates a two stream labour dispute resolution system which is all-embracing, leaving no room for intervention by another court."

This conclusion is strengthened by section 157(4) of the LRA, which is set out above, which stipulates that the Labour Court may refuse to determine any dispute, other than an appeal or review, if it is not satisfied that an attempt has been made to settle it by conciliation.

It is therefore clear that no High Court can adjudicate on a dispute concerning the interpretation and or application of a collective agreement concluded in terms of the LRA, and that the dispute must follow the process of conciliation and arbitration referred to in section 24, irrespective whether such procedure is provided for in the agreement, or not.

Once that process has been completed the Labour Court can, in terms of section 145 of the LRA, review the resultant arbitration award on limited grounds. Section 145(1) reads as follows:

> "145 (1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award -
>
> (a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves corruption; or
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> (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
>
> (2) A defect referred to in subsection (1), means -
>
> (a) that the commissioner -
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

(3) .....

(4) If the award is set aside, the Labour Court may -

(a) determine the *dispute* in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the *dispute*."

This power of the Labour Court to review arbitration awards is similar to that afforded a High Court in terms of the Arbitration Act, 42 of 1965, which Act does not, in terms of section 146 of the LRA, apply to any arbitration under the auspices of the LRA. As section 145(1), read with section 157(1), grants exclusive jurisdiction to the Labour Court to review arbitration awards under the LRA, it follows that a High Court has no jurisdiction in such matters.

As Resolution 3 does not contain dispute resolution procedures as required by sub-section 24(1) of the LRA, the procedure specified in sub-section 24(2) and the following sub-sections, will apply to the dispute now before the Court concerning the interpretation and application of Resolution 3.

Mr Beyleveld has submitted that in view of the provisions of sub-sections 41(2) and (10) of the Basic Conditions of Employment Act, 75 of 1997, the Labour Court does not have jurisdiction over this dispute. These sub-sections read as follows:

"41(2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount."

Section 77 of the Basic Conditions of Employment Act grants the Labour Court exclusive jurisdiction to try matters arising from, *inter alia*, section 41 of that Act. Mr Beyleveld's submission is that as section 41(2) refers to "an employee who has been dismissed", it does not relate to the Applicants as the approval of their severance packages would not have entailed their dismissal. That being so, the Labour Court does not, in terms of section 41, have exclusive jurisdiction over the matter and this Court does have the necessary jurisdiction to hear the dispute. Whether this submission is correct will depend on the meaning afforded the word "dismissed" in the section. In Pest Control (Central Africa) Ltd v Martin 1955(3) SA 609 (SR) at 611E, Tredgold CJ considered the meaning of that word in the following extract from his judgment:

> "The first point taken by the respondents is that they were "dismissed" within the meaning of this clause, which has in consequence ceased to bind them. No doubt "dismissal" in its widest sense covers any termination of employment by the master and this is borne out by the Irish case quoted in *Words and Phrases* - vol. 2, p. 106, but it seems to me that, in connection with the relationship of master and servant, the word is ordinarily used in a narrower and more specialised sense and that it is usually associated with summary dismissal.". In each case, however, the word must be construed in the context of the document in which it is found."

This Court's *prima facie* view is that as section 41 is intended to benefit the employee who loses his employment due to "operational requirements", therefore the word "dismissed" therein must be given an extended meaning. If this were not the case, an employee who consented to leave due to the "operational requirements" of the employer would not be protected by the section. This issue need not, however, detain the Court any longer for it is of the opinion that even if Mr Beyleveld's submission is correct, and the Labour Court does not have jurisdiction in terms of section 41 of Act 75 of 1997, it clearly does have exclusive jurisdiction over this matter in terms of the provisions in the LRA relating to collective agreements and unfair labour practices.

The Court therefore finds that, in view of the provisions of section 24 of the LRA, and the other sections referred to above, the Applicants are compelled to follow the conciliation and arbitration procedure set out in that section and that they cannot approach a court of law on the merits of the present dispute until that procedure has been finalised. They may then, in terms of section 145, approach the Labour Court on review to remedy any defects in the arbitration proceedings specified in that section. They may also, in terms of sections 158(1)(g) and (h), approach the Labour Court, prior to the conclusion of the aforesaid conciliation and arbitration procedure, on any one or more of the usual grounds of review concerning defects in the said process. That Court will then, however, have to consider whether section 145 excludes any further right of review in respect of the particular conciliation and arbitration process. The latter issue need not delay this Court as it is manifest that the Labour Court has exclusive jurisdiction in terms of sections 145 and 158 over the conciliation and arbitration procedure, and that therefore this court has no jurisdiction whatsoever over any issues concerning that procedure.

I turn now to consideration of the provisions of the LRA relating to unfair labour practices. The

first issue for the Court to decide is whether the present dispute does arise from an alleged unfair labour practice. The Respondents aver that it does, the Applicants that it does not. An unfair labour practice is defined in item 2(1) of Part B of Schedule 7 of the LRA, as follows:

> "(2)(1) For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and employee, involving -
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground .....
>
> (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee."

Mr Beyleveld has submitted that the only possible section of the definition under which the facts of this case could resort, and consequently be termed an unfair labour practice, is the phrase: "relating to the provision of benefits to an employee." As "benefits" do not, however, refer to remuneration, so the submission continues, a severance package will not fall within the meaning of that word, and therefore also not within the definition. The Court does not, for two reasons, agree with these submissions by Mr Beyleveld. The first is that the definition covers a far wider scope than that submitted by Mr Beyleveld, and in item 2(1)(a) specifically includes any unfair discrimination against an employee on arbitrary grounds. That is precisely what the Applicants allege, namely, that their applications for severance packages were unfairly dismissed by the Department on arbitrary grounds. The second is that the voluntary severance package is a composite package relating to numerous benefits, namely, the amount to be paid, the severance of employment, future pension benefits and medical assistance. It is certainly not confined to the payment of money or remuneration only. The Court therefore accepts that the dispute does relate

to an alleged unfair labour practice as defined in the LRA.

The procedure to resolve an unfair labour practice is set out in item 3 of Part B to Schedule 7 of the LRA, which reads as follows:

> "3 **Disputes about unfair labour practices**
>
> (1) Any party may refer a dispute about an alleged unfair labour practice in writing to -
>
> (a) a *council*, if the parties to the *dispute* fall within the *registered scope* of that *council*; or
>
> (b) the Commission, if no *council* has jurisdiction.
>
> (2) .....
>
> (3) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.
>
> (4) If the *dispute* remains unresolved -
>
> (a) any party to the *dispute*, if the *dispute* is about an act or omission referred to in item 2(1)(a), may refer the *dispute* to the Labour Court for adjudication;
>
> (b) any party to the *dispute*, if the *dispute* is about an act or omission referred to in item 2(1)(b), (c) or (d), may request that the *dispute* be resolved through arbitration."

It is evident from this item that in the case of unfair labour practices the LRA once again refers the dispute to conciliation, arbitration and the Labour Court. As in the case of collective agreements, these provisions clearly oust an unfair labour practice dispute from the jurisdiction of

the High Court.

The exclusive power of review which the Labour Court enjoys in terms of sections 145 and 158(1)(g) and (h), referred to above in respect of collective agreements, also relates to the process of conciliation and arbitration in respect of disputes concerning unfair labour practices. These sections, when applied to these practices, appear once again, subject to the reservations already expressed by this Court, to be a further bar to this Court having jurisdiction in this matter.
The Court is therefore satisfied that because the dispute relates to an unfair labour practice within the provisions of the LRA it must follow the conciliation and arbitration process referred to in item 3 of Part B of Schedule 7 of the LRA. As in the case of collective agreements, the Labour Court has exclusive jurisdiction to review any actions taken during that process or concerning the arbitration finding.

The main thrust of Mr Beyleveld's submission that this Court does have jurisdiction to hear the matter is that the Department's refusal to grant severance packages to the Applicants, after it had already granted such packages to other educators, was a violation of the rights of the Applicants to equal treatment before the law, and to lawful, reasonable and fair administrative action, as spelt out in sections 9 and 33 of the Constitution, respectively. Therefore, so he contends, this is a constitutional matter in respect of which section 169 of the Constitution has bestowed jurisdiction on the High Courts. As the Respondents have not disputed the factual allegations made by the Applicants, the Court must accept that the facts could represent a contravention of the Applicants' Constitutional rights.

Section 157(2) of the LRA, referred to earlier in this judgment, affords the Labour Court

concurrent jurisdiction with the High Court in respect of any violation by the State as employer of any fundamental right entrenched in Chapter 3 of the Interim Constitution (now Chapter 2 of the Final Constitution, Act 106 of 1996). The question that this Court must decide is whether an issue which is manifestly a labour dispute that falls squarely within the provisions of the LRA and the jurisdiction of the Labour Court, should be tried by a High Court, simply on the grounds that the dispute also embraces certain violations of the employees constitutional rights.

In Mgijima v Eastern Cape Appropriate Technology Unit and Another 2000 (2) SA 291 (TKH) the Court had to decide this issue. In that case the Applicant contended that the High Court had jurisdiction to decide and set aside his dismissal, which he alleged was an unfair labour practice, despite the fact that it fell within the ambit of the LRA, on the grounds that it infringed his constitutional right to fair labour practices and just administrative action. The Court found that although it did have jurisdiction to hear the dispute, the Legislature could not have intended that it do so when the matter fell within

the terms of the LRA. Van Zyl J gave the following reasons for the Court's finding at 308F of the judgment:

> "It must be accepted that the same set of facts in any given matter may give rise to separate and distinct causes of action which may overlap. It is also true that a litigant may in certain cases have a choice of procedures available to him in pursuing his cause of action. As stated earlier, the grounds relied upon by the applicant in the present matter for the setting aside of the first respondent's decision to terminate his employment falls within the ambit of an unfair dismissal as defined in the Act. These very same grounds

and the conclusion that his dismissal was unfair also form the basis of his argument that his dismissal amounted to a violation of the fundamental right to fair labour practices. Whether the applicant's case is viewed as a dispute about an unfair dismissal or as a violation of a fundamental right, it has its origin in precisely the same right, ie the right to fair labour practices as enshrined in s 23 of the final Constitution. It is clear from the provisions of the Act that the concept of fair labour practices is central to both the purpose and the substance of the Act. As the long title as well as s 1 of the Act clearly shows, the purpose and intent of the Legislature was to give effect and content to the right to fair labour practices. In doing so the Legislature has seen it fit to create a specialist Court for that purpose and to provide for certain procedures. It was clearly not the intention to merely provide employees with a different procedure in another Court. The Act creates a new, separate and distinct regime and the procedures and remedies available have their origin in the same right. In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter under the provisions of s 157(2) of the Act. In my view it would run counter to the purpose and objects of the Act with which I have dealt earlier in this judgment. To conclude otherwise would mean that the High Court is effectively called upon to determine a right which has been given effect to and which is regulated by the Act. To hold otherwise would be to ignore the remainder of the provisions of the Act and would enable the astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the Act. This may give rise to 'forum shopping' simply because it is convenient to do so or because one of the parties failed to comply with the time limits laid down by the Act as contended by the first respondent in the present matter.

> I am of the view that for purposes of s 157(2) of the Act the substance of the dispute between the parties should in every case be determined. What is in essence a labour dispute as envisaged by the Act should not be labelled a constitutional dispute simply by reason of the fact that the facts thereof and the issues raised could also support a conclusion that the conduct of the employer complained of amounts to a violation of entrenched rights in the Constitution and should be declared as such. In every case it should rather be determined if the facts of the case giving rise to the dispute and the issues between the parties are to be characterise a 'matter' provided for in the Act, and if that 'matter' is in terms of s 157(1) to be determined by the Labour Court, the High Court is precluded from exercising jurisdiction."

The learned Judge also referred to the following extract from the judgment of Miller J in Mcosini v Mancotywa and Another (1998) 19 ILJ 1413 (Tk), at 1417C:

> "An unfair suspension of an employee by an employer may well, in addition to violating the employee's right to fair labour practices, violate other fundamental rights of the employee, such as the right to just administrative action, the right to have his or her dignity respected and protected and the right to equality. The fact that these actions of an employer in suspending an employee may violate various of the employee's fundamental rights does not alter the nature of the matter or the *causa* of action which, certainly in this matter, remains a labour matter with the *causa* being the suspension of the applicant. The exclusive jurisdiction of the Labour Court cannot be avoided or side-stepped by alleging that a fundamental right, other than the right to fair labour practices, has been breached."

Mr Beyleveld has, in support of his submission on this issue, relied heavily on the decisions in Runeli v Minister of Home Affairs and Others 2000(2) SA 314 (TK HC) and Mbayeka and Another v MEC for Welfare, Eastern Cape 2001(1) All SA 567 (TK). In the Mbayeka case the Court rejected the purposive approach adopted in the Mgijima case, and stated as follows in paragraph 19:

> "(19) I respectfully disagree with the interpretation preferred in the Mgijima case. It is quite clear that the Court in that matter adopted a purposive approach in construing section 157(2) and felt obliged to accept the meaning which would give effect to the objects of the Act, even though it seems to me that the Legislature intended different consequences to follow. Firstly, it appears to me that the court in Mgijima approached the question of interpretation as if section 157(2) granted jurisdiction to the High Court and not to the Labour Court. It is significant to note that the High Courts retain the constitutional jurisdiction given to them by the Constitution itself and the Labour Court was merely permitted in terms of the section to enjoy limited constitutional jurisdiction under the circumstances set out therein. One of the prerequisites for the Labour Court to exercise constitutional jurisdiction is that the dispute must arise from employment and labour related matters. If this condition does not exist the Labour Court would have no constitutional jurisdiction to hear a matter relating to the violation of a basic right in Chapter 2 of the Constitution. So, the presence of the labour content in a dispute cannot be used as a basis for excluding the jurisdiction of the High Court by simply defining it as a labour dispute. Concurrent jurisdiction exists only where the dispute arises from employment agreements. It further appears to me that all prerequisites must collectively be proved to exist before the

> Labour Court can begin to enjoy the jurisdiction to deal with labour disputes which have constitutional content. In my view the provisions of section 157(1) are irrelevant to the proper construction of section 157(2) simply because the two subsections provide for separate and incompatible notions. It may be said that they are mutually destructive. Therefore there is no need for limiting the wide language of subsection (2) to the actual constitutional substance of the dispute between the parties before the provisions of section 157(2) can be invoked. The purpose of the section, in my view, was not to deprive the High Court of its jurisdiction but to grant the Labour Court additional constitutional authority."

Counsel for the Respondents, Advocate de Bruyn SC, has submitted that the construction placed on section 157(2) in the Runeli and Mbayeka cases, *supra*, is incorrect. In the first instance, so the submission continues, that construction would lead to an absurdity and a total negation of the intention of the Legislature that labour issues be decided in the fora specified in the LRA. The fact that in virtually every labour dispute a constitutional issue can be raised, could lead, on that interpretation, to the majority of labour dispute cases being heard in the High Courts. Mr de Bruyn has therefore submitted that the decision in the Mgijima case, *supra*, is correct and that the purposive interpretation applied by the court in that case is the correct approach when constructing the meaning of section 157(2). He has submitted that the purposive approach to the construction of a statute has become an accepted part of our law, and he has referred to the undermentioned authorities in support of this contention.

In Driedger on the Construction of Statutes, Third Edition, by Sullivan, at p64, the learned author states:

"In current practice, the purpose of legislation is taken into account in every case and at every stage of interpretation, including determination of the ordinary meaning."

The learned author then refers to McBratney v McBratney (1919) 59 SCR 550 at 561, and concludes:

"In this passage Duff CJ asserts two principles that govern judicial reliance of purposive interpretation:

(1) Where the ordinary meaning of legislation is ambiguous or otherwise unclear, the interpretation that best accords with the purpose of the legislation should be adopted.

(2) Where the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted."

The following extract from Jaga v Dönges NO and Another 1950 (4) SA 653 AD at 662G, was quoted with approval in Mckelvey and Others v Deton Engineering (Pty) Ltd and Another (1997) 3 All SA 569 AD at 575:

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, it's apparent scope and purpose, and, within limits,

it's background."

In S v Mhlungu and Others 1995 (3) SA 867 (CC), Sachs J held as follows:

At 914H

"The preferred approach, as I have indicated, is not to search for what is general and what is specific, but rather to seek out the essential purposes and interest to be served by the two competing sets of provisions, and then, using a species of proportionality, balance them against each other."

At 915I

"By emphasising the way in which context can modify the plain meaning of words, it conforms to overwhelming international practice."

At 916E

"Whatever Anglo-centric legal tradition might be, contemporary Anglo-centrism would in fact support rather than undermine a context-based, purposive approach. Membership of the European Union has had its effect on English Judges. Lord Denning explained the approach of European Judges in the following terms:

'(They) adopt a method which they call in English by strange words - at any rate they were strange to me - the "Schematic and teleological" method of interpretation. It is not really so alarming as it sounds. All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by

looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply : what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation. They lay down the law accordingly."'

At 917F

"Realise that the approach I am suggesting is relatively new in South Africa and involves a utilisation of proportionality that is a little different from its normal employment in other countries. Yet I find it particularly helpful in dealing with cases such as the present."

These findings are apposite to the apparent contradictions in sub-sections 157(1) and (2) of the LRA.

In Stopforth v Minister of Justice and Others (1999) 4 All SA 383 (AD) at 391D Olivier JA stated:

"In analysing the jurisdiction of the Amnesty Committee it is clear that a purposive interpretation should be given to the TRC Act. In Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd. 1965 (1) SA 897 (A) at 903 Ogilvie Thompson JA made it clear that:

'Even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction'."

Lastly in High School Carnarvon v MEC for Education (1999) 4 All SA 590(NC) at 601 the Court held as follows:

> "It is a recognised canon of construction that the Act as a whole must be looked at when interpreting a particular section. Even when the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction."

This Court, with respect, agrees with the finding and approach in the Mgijima case, and declines to follow the Runeli and Mbayeka cases. It agrees with the submission by Mr de Bruyn that the purposive canon of interpretation must be applied in deciding the meaning and extent of section 157(2). Reading the LRA as a whole it is manifest that the Legislature intended to establish the Labour Court as a specialist court to hear and resolve labour disputes. It follows that the Legislature must have intended that the provisions of section 157(2) afforded the Labour Court exclusive jurisdiction not only in respect of labour disputes, but also in respect of the constitutional issues which are part and parcel of those disputes.

The Court therefore rejects Mr Beyleveld's submission that this Court has jurisdiction in terms of section 157(2) to hear the present dispute.

The Court therefore finds that because the dispute in this matter is founded on a collective agreement between an employer and its employees, and also relates to possible unfair labour practices, it resorts under the provisions of the LRA and the sole jurisdiction of the Labour Court and that this Court has no jurisdiction to hear the dispute. It must firstly be referred, in terms of section 24(2) of the LRA, to conciliation and, if that is unsuccessful, to arbitration. If any issue arising from this procedure must be taken on review, the Labour Court has exclusive jurisdiction to hear the case.

Due to the Court's finding that it has no jurisdiction to hear the dispute, the application must be dismissed. The Respondents are the successful parties and there is no reason why they should not be awarded costs in the case.

In conclusion the Court wishes to refer to the following extract from its judgment in Nelson v MEC for Education in the Eastern Cape, handed down on 26 April 2001:

> "In conclusion this Court must express its surprise at the failure of the Executive to take steps to have the Legislature amend the LRA and thereby bring clarity to the present vague and inconclusive provisions prescribing the jurisdiction of the Labour Court. Section 157(1), which is presumably the defining section on the said jurisdiction, simply begs the question. To ascertain the parameters of the Labour Court's jurisdiction a litigant must closely examine an Act - the LRA - consisting of 214 sections and ten lengthy schedules. This is an impossible task for a legal novice and a daunting one for a legal practitioner. It is therefore not surprising that cases relating to the jurisdiction of the Labour Court are fast becoming legion. One would expect that a court bearing the stature of the Labour Court, which has Judges with special expertise hearing cases in the ever burgeoning field of labour law,
>
> would have its jurisdiction more simply and precisely defined than is presently the case."

Since writing that judgment this Court has had the opportunity of reading the judgment of Zondo JP in WRJ Langeveldt v Vryburg Transitional Local Council and Others Labour Appeal Court, 28.02.2001,in which the learned Judge remarked on the uncertainty of the extent and parameters of the jurisdiction of the fora which must decide labour matters, and, in paragraph 66, stated as

follows:

> "(66) To my mind, to allow this state of affairs to continue is illogical and makes no sense, especially as our country does not have an abundance of human and financial resources. As a country we should use our resources optimally. There should only be a single hierarchy of courts which have jurisdiction in respect of all employment and labour matters. If such disputes are required to be dealt with by a superior court of first instance, the appropriate court to deal with them is the Labour Court. If they are not required to be dealt with by a superior court, they should be dealt with by one or other of the specialist institutions which have been specially created by the legislature to deal with employment and labour disputes."

This judgment by the Labour Appeals Court simply underscores the remarks made by this Court in its previous judgment concerning the undesirable uncertainty pertaining to the parameters of the jurisdiction of the Labour Court.

The Court therefore makes the following order:

1. The Application is dismissed.
2. The Applicants are ordered to pay, jointly and severally, the one paying the other to be absolved, the Respondents costs, which shall include the costs of two counsel,.

DATED at **BISHO** this **3rd MAY 2001**

C S WHITE
JUDGE OF THE HIGH COURT, BISHO

I concur

JUDGE Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

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Attorneys for the Respondents	:	State Attorney KING WILLIAM'S TOWN
Date heard	:	24 April 2001
Date Judgment delivered	:	3 May 2001