REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 026/03

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA and others Applicants

and

FRY'S METALS (PTY) LTD Respondent

BEFORE: **MPATI DP, CAMERON, NUGENT, CONRADIE JJA and COMRIE AJA**
HEARD: **22 FEBRUARY 2005**
DELIVERED: **12 APRIL 2005**

Constitution – appellate court structure – section 168(3) – appeal lies from Labour Appeal Court to Supreme Court of Appeal – section 173 – court's inherent power to protect and regulate own process – requirement that special leave to appeal be obtained imposed – Labour Relations Act 66 of 1995 – section 187(1)(c) – automatically unfair dismissals – only those non-reversible dismissals where employer's reason for dismissal is to compel agreement with demand – approach of Labour Appeal Court endorsed – leave to appeal refused

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JUDGMENT

MPATI DP & CAMERON JA:

MPATI DP & CAMERON JA:

[1] Three questions arise in this application for leave to appeal. The first is whether this court has jurisdiction to hear appeals from the Labour Appeal Court (LAC). If it does, the second is whether leave to appeal must be obtained. The third is the substance of the case the applicants seek to bring before us – whether the dismissal or threatened dismissal of the second to fifty-seventh applicants by their employer, the respondent company (the company), after they refused to agree to proposed changes to their terms and conditions of employment in late 2000, qualifies as 'automatically unfair' under the Labour Relations Act 66 of 1995 (the LRA).

[2] The company's primary business is smelting and refining lead from secondary materials. The second to fifty-seventh applicants (the workers) are members of the first applicant, the National Union of Metal Workers of South Africa (NUMSA) (the union). We refer collectively to the union and the workers as 'the union'. They seek leave to appeal against an order of the LAC[1] reversing with costs an order the Labour Court[2] granted *inter alia* interdicting the company from dismissing the workers for their failure to accede to the company's demands regarding the implementation of a two-shift system and the withdrawal of a transport subsidy in

1 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 ILJ 133 (LAC) (Zondo JP, Nicholson JA and Hlophe AJA concurring).
2 *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2001) 22 ILJ 701 (LC) (Francis AJ).

the context of proposed changes to terms and conditions of employment. The company opposes the application for leave to appeal.

[3] The judges of this court who considered the petition for leave to appeal referred it for oral argument.[3] In terms of their order, the parties in two similar applications, Rustenburg Platinum Mines Ltd v CCMA,[4] and Goodyear SA (Pty) Ltd v CCMA,[5] were invited to appear at the hearing and/or to present written argument on the question of appellate jurisdiction. Later further similar applications were lodged. These were postponed pending the outcome of the present matter, with identical invitations. In response, written argument was filed and counsel appeared on behalf of both Algorax (Pty) Ltd [6] and Rustenburg Platinum. A notice of acquiescence was filed on behalf of Goodyear. The Minister of Justice and Constitutional Development and the Minister of Labour (the Ministers) were at their own request joined as interested parties, and were jointly represented by counsel.

[4] Before dealing with the facts, we consider whether this court has jurisdiction.

Does the SCA have jurisdiction to hear appeals from the LAC?

[5] All public power, including the power that is wielded by the courts, emanates from the Constitution. Chapter 8 of the Constitution vests the judicial authority of

3 Section 21(3)(c)(ii) of the Supreme Court Act 59 of 1959.
4 Case no 596/03.
5 Case no 074/04.

the Republic of South Africa in the courts.[7] Section 166 describes the courts in which the judicial authority is vested. It says that these courts 'are':

'(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;

(d) the Magistrates' Courts;

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.'

[6] Section 168(1) states that the Supreme Court of Appeal 'consists of a President, a Deputy President and the number of judges of appeal determined by an Act of Parliament'. Section 168(2) provides that a matter before the Supreme Court of Appeal 'must be decided by the number of judges determined in terms of an Act of Parliament'. Section 168(3) is critical to the resolution of the issues the application raises. It provides:

'(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –

(a) appeals;

(b) issues connected with appeals; and

(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.'

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6 Case number 430/2003.

7 Constitution s 165(1): 'The judicial authority of the Republic is vested in the courts.'

[7] Various provisions of the LRA deal with the appellate jurisdiction of the LAC. Section 157(1) confers, subject to the Constitution and s 173, exclusive jurisdiction on the Labour Court in respect of all matters that elsewhere in the LRA or in terms of any other law are to be dealt with by the Labour Court. Matters within the exclusive jurisdiction of the Labour Court are those which, in terms of the LRA or any other law, 'are to be determined by the Labour Court' (s 157(1)). Section 157(2) provides that the Labour Court has concurrent jurisdiction with the High Court in respect of Bill of Rights violations arising from employment and labour relations and related matters. Section 166(4) provides –

'Subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court.'

[8] Section 167(1) establishes the LAC as a court of law and equity. Sub-sections (2) and (3) provide:

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

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

Section 173(1) determines the jurisdiction of the LAC:

'Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction –

(a) to hear and determine all appeals against the final judgments and orders of the Labour Court;

(b) to decide any question of law reserved ….'

According to this provision, once a litigant in a matter in which the Labour Court enjoys concurrent jurisdiction with the High Court decides to litigate in the Labour Court, the LAC has exclusive jurisdiction to determine an appeal. But because the Labour Court does not have exclusive jurisdiction, s 167(2) of the LRA does not apply and the LAC would not, under that section, be 'the final' court of appeal. Its decision is, however, made final (subject to the Constitution) by s 183:

'Subject to the Constitution and any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court.'

This applies in respect of all final judgments and final orders of the Labour Court; questions of law reserved; and decisions of the LAC sitting as a court of first instance. Section 175 provides that the LAC may sit as a court of first instance, in which case it 'is entitled to make any order that the Labour Court would have been entitled to make'.

[9] These provisions undoubtedly constitute a legislative endeavour to vest final appellate powers in the LAC. But they must be interpreted in accordance with the Constitution. They expressly state themselves to be 'subject to the Constitution' (ss 157(1); 166(4); 173(1); 183). Section 167(2) does not; but the exception is only

apparent, since s 3 of the LRA states that its provisions must all be interpreted 'in compliance with the Constitution'.

[10] And indeed the Constitution incontrovertibly qualifies the finality of the LAC's appellate powers. Most obviously in respect of constitutional questions it is not the final court of appeal. For s 167(3)(a) of the Constitution states that the Constitutional Court (the CC) 'is the highest court in all constitutional matters'. The LRA can hardly be read as excluding the CC's final adjudicative power, since that would be plainly unconstitutional;[8] and none of the parties disputed that the statute must to that extent be qualified.

[11] But the point has broader significance. This is because the qualification is nowhere expressly stated in the LRA (nor can the CC's appellate jurisdiction over the LAC derive tangentially, as was suggested in argument, from the fact that s 157(2) of the LRA vests concurrent jurisdiction in the High Court – and thence to the CC – for Bill of Rights violations concerning labour matters). The appellate power is general, and it derives not from its conferral in a statute, but from the Constitution, and the Constitution alone.

[12] The starting point therefore must be that the LRA's provisions conferring finality on the LAC have to be read in conjunction with the appellate powers the

8 The Constitutional Court has asserted its appellate powers over the LAC in respect of constitutional questions arising from the guarantee of fair labour practices (Bill of Rights s 23): *National Education, Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC); *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); *Xinwa v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA (CC); *Western Cape Workers Association v Halgang Properties CC* 2004 (3) BCLR 237 (CC); *Dudley v City of Cape Town* (2004) 25 *ILJ* 991 (CC), 2004 (8) BCLR 805 (CC). Compare *South African Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* 2000 (3) SA 705

Constitution creates: and that premise goes a long way to resolving the question before us. For from it follows that the LRA's provisions must also be read in conjunction with the appellate power the Constitution vests in this court; and this is what the CC has held. In describing its own appellate jurisdiction over the LAC, it has asserted also that of this court. It has found that 'an appeal from the LAC on a constitutional matter does lie to the SCA',[9] and that 'The provisions of the LRA which give the LAC a status equal to that of the SCA and constitute it as the final Court of appeal can have no application in constitutional matters'.[10]

[13] The court left open the validity and application of those provisions in non-constitutional matters,[11] and that is the question that now confronts us. It seems to us that acknowledgement of a constitutionally determined appellate structure superior to the LAC has unavoidably general implications. For if this court has appellate jurisdiction over the LAC, deriving from the Constitution, outside the express terms of the LRA, there can be no reason to limit that power to constitutional cases alone, for the Constitution gives this court such power in both constitutional and non-constitutional matters, and constitutes it the highest court of appeal in regard to the latter.

(CC).

9 *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 22, per Ngcobo J, on behalf of the court

10 *NEHAWU v UCT*, supra, para 20.

11 'Those provisions can apply only to matters that are within the exclusive jurisdiction of the LAC and the Labour Court (whether these provisions are constitutional need not be decided now)' – NEHAWU v UCT, supra, para 20.

[14] Indeed, the CC's reasoning in *NEHAWU v UCT*[12] was based not on the Labour Court's non-exclusive jurisdiction in constitutional matters (s 157(2)), but on the powers emanating from the Constitution itself. Section 168(3) states not only that this court 'may decide appeals in any matter' – a revocation of the position under the interim Constitution,[13] which insulated this court from all constitutional questions[14] – but also that it is 'the highest court of appeal except in constitutional matters'.

[15] There can be no reason to give this provision anything less than its full meaning in relation to both constitutional and non-constitutional matters. Counsel for the Ministers suggested that the phrase 'highest court of appeal' establishes no general appellate jurisdiction in this court, but simply fixes its position in the court hierarchy. But the phrase 'highest court' appears also in s 167(3) of the Constitution, which creates the CC 'the highest court' in all constitutional matters. It was in reliance on this provision that Ngcobo J found that the CC is the highest court in respect of all constitutional matters and that decisions of all other courts on constitutional matters are accordingly subject to appeal to it.[15] It is a long-established principle – based on concern for intelligibility of legislative language – that similar words in an enactment should be taken to carry the same

12 2003 (3) SA 1 (CC). Compare also *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) para 23.
13 Interim Constitution Act 200 of 1993, s 101(5): 'The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.'
14 *Western Areas Ltd v The State* 98/03, unreported judgment dated 31 March 2005, para 9, per Howie P (rejecting the contention that the conferral in s 168(3) of jurisdiction 'to decide appeals in any matter' renders formerly non-appealable matters appealable).

meaning.[16] It thus follows from the CC's reasoning in relation to its own appellate power, and this court's appellate power over the LAC in relation to constitutional issues, that decisions of all other courts on both constitutional and non-constitutional matters are subject to appeal to this court.

[16] We conclude that the Constitution vests this court with power to hear appeals from the LAC in both constitutional and non-constitutional matters, and that the provisions of the LRA that confer final appellate power on the LAC must be read subject to the appellate hierarchy created by the Constitution itself. This follows from the subordination to the Constitution that the LRA itself mandates. It does not entail that any provisions of the LRA are unconstitutional any more than the recognition of the appellate jurisdiction of the CC and of this court in constitutional matters required a finding of unconstitutionality.

[17] This conclusion conforms with the reasoning in *Chevron Engineering (Pty) Ltd v Nkambule*.[17] The applicant there sought leave to appeal to this court against an order of the LAC dismissing its appeal against a judgment of the industrial court ordering it to reinstate dismissed workers. When the LRA came into effect on 11 November 1996 the dispute was already pending in the industrial court, which functioned under the Labour Relations Act, 28 of 1956 (the old LRA). The LRA repealed the old LRA, but the proceedings in the industrial court continued by virtue

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15 *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 21.

16 *Minister of the Interior v Machadodorp Investments (Pty) Ltd* 1957 (2) SA 395 (A) 404D; *More v Minister of Cooperation and Development* 1986 (1) SA 102 (A) 115C.

of item 22 of Schedule 7 of the LRA. Sub-item (6) provides that despite any other law 'but subject to the Constitution no appeal will lie against any judgment or order' of the Labour Appeal Court given on appeal from the industrial court.

[18] The question was whether, on a proper interpretation of item 22(6), an appeal lay to this court from all decisions of the LAC given on appeal to it from the industrial court. The applicant argued that item 22(6) should be read so as to be consistent with the provisions of s 168(3) of the Constitution. Farlam JA held that '[i]f it were not for the inclusion of the words "subject to the Constitution", the wording would impel one to the conclusion that the drafters did not intend to permit such appeals, which would raise squarely the question whether the provision could withstand constitutional scrutiny, given the clear wording of s 168(3) of the Constitution' (para 15). Given the qualification, however, this court held that the applicant was entitled to appeal against the LAC's decision.

[19] The union rightly contended that the core of *Chevron* was the reasoning in regard to s 168(3), with the result that there is no distinction between an appeal to this court originating in the old industrial court and one emanating from the Labour Court. We come later to the second question in *Chevron*, namely whether leave to appeal is a prerequisite. For now we observe that although the existence of a

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17 2003 (5) SA 206 (SCA); merits of appeal from LAC determined: 2004 (3) SA 495 (SCA).

procedure for lodging and prosecuting an appeal might indicate that a right to appeal exists, its absence does not necessarily mean there can be no appeal.[18]

[20] Counsel for the Ministers contended that s 168 of the Constitution is merely 'declaratory'; that the section as a whole describes this court's composition, its quorum and its place in the hierarchy, but confers no authority at all; that the provision establishes this court's structure but does not define its particular function or jurisdiction, and that it simply confirms the outer limits of its jurisdiction and its place as a final court of appeal except in constitutional matters. He did not flinch from the implications of this reasoning – that this court would have jurisdiction to entertain an appeal only if statute (most notably the Supreme Court Act)[19] confers it: the phrase 'in any matter' in s 168(3) must be interpreted, he said, to mean 'in any matter in which national legislation confers jurisdiction on the Supreme Court of Appeal. He invoked item 16 of Schedule 6 to the Constitution, dealing with transitional arrangements, in terms of which when the Constitution came into effect this court continued 'to function and to exercise jurisdiction in terms of the legislation applicable to it'. He cross-linked this to s 171 of the Constitution, which provides that 'all courts function in terms of national legislation'. His suggestion was that this court's constitutional jurisdiction derives not from s 168(3) – which, on his argument, is declaratory only of statutorily derived powers – but from s 169, which confers on the High Courts jurisdiction to decide 'any constitutional matter' except

18 Cf *S v Botha* 2002 (1) SACR 222 (SCA); *S v Viljoen* 2002 (2) SACR 550 (SCA) para 26.

those reserved for the CC (s 169(a)(i)). The upshot of the argument was that this court exercises constitutional jurisdiction through the Supreme Court Act, which gives it jurisdiction to decide appeals from judgments or orders of the High Court (s 21).

[21] But this is far too convoluted. And it does the clarity of the constitutional language no justice. It ignores the plain meaning and structure of the provisions that create appellate court powers, and overlooks the clear difference in phraseology between the opening provisions of s 168(3) – which is unqualified – and that of s 168(3)(c) (which provides that apart from appeals and issues connected with appeals, this court may decide 'any matter that may be referred to it in circumstances defined by an Act of Parliament'). It does not take into account that item 16(1) of Schedule 6 to the Constitution is made 'subject to consistency with the Constitution'. If s 168(3) of the Constitution confers jurisdiction on this court, the item cannot remove it. Section 166 of the Constitution recognises other courts 'established or recognised in terms of an Act of Parliament'. Item 16(1) of Schedule 6 was therefore necessary to ensure their continued functioning.

[22] And the contention that the conferral of appellate jurisdiction 'in any matter' must mean 'in any matter in which national legislation grants jurisdiction' gives no

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19 Act 59 of 1959.

interpretative weight to the fact that the very next provision, s 169, expressly subjects the constitutional and ordinary jurisdiction of the High Courts to exception by Act of Parliament,[20] whereas s 168 contains no such reservation.

[23] It is true that in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*,[21] Hefer JA said that the jurisdiction of the Appellate Division 'derives from the Supreme Court Act and other statutes'. This conformed with the interim Constitution, which was then in force.[22] This court does not have original jurisdiction: its jurisdiction derives from the Constitution.[23] It is also correct that at common law a court has no automatic jurisdiction to hear an appeal from another court: 'An appeal can only lie by virtue of some statutory provision.'[24] Yet Chapter 8 of the Constitution superseded both the common law and the interim Constitution. It subsumed the common law powers of this court, and not only conferred jurisdiction in constitutional matters on it,[25] but constituted it the highest court of appeal in all matters except constitutional matters.[26] It did so in unqualified

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20 Constitution s 169: 'A High Court may decide –
(a) any constitutional matter except a matter that –
(i) only the Constitutional Court may decide; or
(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
(b) any other matter not assigned to another court by an Act of Parliament.'

21 1996 (3) SA 1 (A).

22 Interim Constitution s 101(2): 'Subject to this Constitution, the Supreme Court [which then included the Appellate Division] shall have the jurisdiction, including the inherent jurisdiction, vested in the Supreme Court immediately before the commencement of this Constitution, and any further jurisdiction conferred upon it by this Constitution or by other law.'

23 *Pharmaceutical Society of South Africa v Minister of Health* [2005] 1 All SA 326 (SCA) para 19, per Harms JA.

24 *Minister of Labour v Building Workers' Industrial Union* 1939 AD 328 at 330, per Stratford CJ, applied in *S v Pennington* 1997 (4) SA 1076 (CC) para 20 (pointing out, by contrast, that the CC was established under the interim Constitution and its authority as a court recognised and reaffirmed by the 1996 Constitution).

25 *S v Pennington* 1997 (4) SA 1076 (CC) para 8, per Chaskalson P: 'This was changed by the 1996 Constitution which gave the Supreme Court of Appeal jurisdiction to decide appeals in respect of any matter.'

26 Compare *S v Basson* 2005 (1) SA 171 (CC) paras 103-105, per Chaskalson CJ (s 168 provides the legal framework

terms, and those terms are now the source of this court's jurisdiction.[27] They must, we consider, be given their full effect in interpreting the provisions of the LRA.

[24] As pointed out earlier, s 166 of the Constitution lists the courts comprising the Republic's judicial system. It says that those courts 'are':

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

The argument that final appellate power can be vested in a court other than this court (subject only to the CC) requires that s 166(b) be read thus: 'The Supreme Court of Appeal, *or any similar court of appeal that may be established by an Act of Parliament*'. This encrustation on the clear form and wording of s 166 is neither possible nor necessary.[28] The constitutional typology of final appellate courts is exhaustive. It does not envisage other appellate courts with authority equivalent to that of this court or of the CC.

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within which the powers of the SCA must be determined: 'Basically, subject to the provisions of the Constitution, it adopts and continues the legal framework that existed before the interim Constitution was adopted').

27 *S v Basson* 2005 (1) SA 171 (CC) paras 109, per Chaskalson CJ (SCA has no jurisdiction to hear an appeal against a decision of another court *unless conferred on it by the Constitution* or by statute).

28 *Rennie NO v Gordon NO* 1988 (1) SA 1 (A) 22F, adopted in *Bernstein v Bester* 1996 (2) SA 751 (CC) para 105: Words cannot by implication be read into a statute – or the Constitution – unless the implication is necessary in the sense that without it effect

[25] Read in the light of the Constitution, as it must be, s 167(3) of the LRA thus merely describes an equivalence of 'authority, inherent powers and standing' between this court and the LAC in relation to matters within their respective jurisdictions, without depriving this court of its role and function as 'the highest court of appeal except in constitutional matters', having power to 'decide appeals in any matter', including both constitutional and non-constitutional appeals from the LAC.

[26] The implications of the contrary conclusion must be emphasised. If, despite the provisions of s 168(3), the LRA creates a final court of appeal in labour-related matters to the exclusion of this court's appellate powers, it would have to follow that the legislature could create final courts of appeal also in other areas –crime, welfare, environment, land, personal injuries, contract, commerce, landlord and tenant, company law, family law and administrative matters. The list is theoretically endless. The entire jurisdiction of this court could on this approach be assigned piecemeal or wholly to one or more other appellate tribunals of similar authority.

[27] We do not think that the Constitution envisages this. Final appellate courts other than this court and the CC are not contemplated in the court hierarchy the Constitution itemises. 'Our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution'.[29] That includes a coherent appellate structure, laid out in the Constitution, in which this court takes its

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cannot be given to the enactment as it stands.

29 *National Education, Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) para 16, per Ngcobo J.

place as the court of appeal with authority that is final in all matters, barring constitutional matters.[30]

[28] What distinguishes the ambit of this court's powers from those of the CC, which has both original and appellate jurisdiction,[31] is that this court may decide only appeals (s 168(3)(a)). The precondition to the exercise of this court's jurisdiction is thus a right of appeal. It was suggested in argument that if legislation cannot validly preclude a general right of appeal from the LAC to this court, it must follow that legislation cannot preclude appeals in any matter. Examples cited included judgments of the small claims courts,[32] and arbitration awards,[33] in both of which appeals are expressly barred. It was suggested that the conclusion reached above would entail that appeals must lie as of right to this court also in such matters.

[29] But this is to confuse the existence of appellate jurisdiction with the question whether a right of appeal exists at all. The scope of institutional authority is one thing; the question whether and under what conditions it can be invoked is quite another. Differently stated, a general right of appeal from all other appellate bodies to this court does not entail that every determination of a justiciable right must be appealable.

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30 Compare the judgment of Chaskalson CJ in *S v Basson* 2005 (1) SA 171 (CC) paras 90 and 103.
31 Constitution s 167(6); *S v Pennington* 1997 (4) SA 1076 (CC) para 11.
32 Small Claims Courts Act, 61 of 1984 s 45: 'A judgment or order of a court shall be final and no appeal shall lie from it.'
33 Arbitration Act, 42 of 1965 s 28: 'Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

[30] The access to courts provision in the Bill of Rights (s 34) provides that –

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[31] Counsel for the company submitted that this right must in principle include access to all courts of appeal from the court or forum of first instance. We do not agree. The provision does not explicitly include a right of appeal.[34] In this it stands in pronounced contrast to s 35(3)(o), which expressly entrenches within an accused's person's right of fair trial a right of appeal or review to a higher court.[35] We do not consider that s 34 by necessary implication entails the same right;[36] and even if it did, it would be capable of reasonable and justifiable limitation:[37] all such decisions are in any event subject to the principle of legality, and thus to constitutional review. The suggestion that the assertion by this court of a general appellate jurisdiction entails the appealability of all justiciable rights can therefore not be maintained.

34 *Pharmaceutical Society of South Africa v Minister of Health* [2005] 1 All SA 326 (SCA) para 30, per Harms JA.
35 Bill of Rights s 35(3): 'Every accused person has the right to a fair trial, which includes the right – … (o) of appeal to, or review by, a higher court.'
36 See *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 335 (CC) para 10, per O'Regan J for the court (though not necessary for decision, 'some doubt' expressed as to whether comparable provision under interim Constitution necessarily entailed a right of appeal.
37 Bill of Rights s 36.

[32] The question before us is in any event not whether all constitutionally recognised rights are intrinsically appealable, but whether a provision that purports to restrict a litigant's right of appeal to a hierarchy of specialised courts, to the exclusion of this court, complies with the Constitution. We find only that once appellate jurisdiction falls to be exercised, this court is empowered to exercise it finally (apart from the CC), since final appellate tribunals with authority similar to this court are not envisaged in the Constitution. We add only the obvious corollary: that the conferral on this court of general appellate power does not render all judgments and orders immediately appealable.[38]

[33] It follows that this court has jurisdiction to decide appeals from the LAC also in matters within the exclusive jurisdiction of the Labour Court. This conclusion makes it unnecessary to consider whether the case the union seeks to bring raises constitutional issues.

Is leave to appeal to this court necessary?

[34] The second question in *Chevron* was whether the applicant required leave to appeal. Farlam JA pointed out that 'leave is not a prerequisite in the Constitution or the [LRA] and there is also no provision in the Supreme Court Act 59 of 1959 which requires such leave: it would be different if the LAC were a division of the

38 *Western Areas Ltd v The State* 98/03, unreported judgment dated 31 March 2005, paras 6-17, per Howie P

High Court because ss 20 and 21 of Act 59 of 1959 would then apply'.[39] The conclusion reached in *Chevron* was that the applicant neither needed nor was entitled to an order granting it leave to appeal against the LAC judgment. That conclusion, in its terms, was clearly right. But we now face a different question: whether, in the light of our conclusion that all matters are appealable from the LAC to this court, we should not develop a requirement that leave to appeal must be obtained; and, if so, on what terms.

[35] Strong considerations suggest that the path from the LAC to this court should not be untrammelled. The first is the benefit of institutional expertise. The second is the imperative of expedition. The third (and only last in order of importance) is the workload of this court, which is already such as to burden its members very considerably, without a new inundation of cases. Nothing more need be said about this consideration,[40] and we turn to the first two.

[36] In the LAC the legislature created a specialist tribunal, functioning in a specialised area of law. Their special expertise, as Ngcobo J has pointed out, itself conduces to expedition:

'The LAC and the Labour Court were established by Parliament specifically to administer the LRA They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and the development of labour relations policy and precedent. Through

39 *Chevron Engineering (Pty) Ltd v Nkambule* 2003 (5) SA 206 (SCA), para 19.
40 In 2004, this court heard and disposed of 200 appeals and 434 petitions for leave to appeal.

their skills and experience, Judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily.

By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily by experts appointed for that purpose.'[41]

[37] These considerations led the CC to conclude that it would be 'slow to hear appeals from the LAC unless they raise important issues of principle'. They impel us to the same conclusion. And the Constitution provides for regulation to that end. In the case of the CC, the Constitution requires that national legislation must grant direct access to it only 'when it is in the interests of justice and with the leave of the Constitutional Court' (s 167(6)). In the case of this court, the Constitution does not require that the legislature must enact access-regulating measures. That is no doubt because, while the CC was a new court, the Constitution's provisions concerning this court have 'a significant background history'[42] featuring legislation that already regulated appeals from the High Court. But, as *Chevron* recognised, that legislation could not take account of specialist intermediate appellate tribunals such as the LAC because they did not then exist.

41 *National Education, Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) paras 30-31, re-emphasised in *Dudley v City of Cape Town* (2004) 25 *ILJ* 991 (CC) para 9.
42 *Western Areas Ltd v The State* 98/03, unreported judgment dated 31 March 2005, para 9, per Howie P (read with paras 10-17).

[38] Despite the novelty of the problem, the Constitution does not leave us bereft of solutions. That seems to us to lie in s 173, which provides that –

'The Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

[39] In *S v Pennington*,[43] the CC confronted a not wholly dissimilar problem. The legislature had not yet enacted the legislation required to fulfil the direct access-regulating requirement. Did that mean that litigants were entitled without more to bring constitutional matters before the CC? No, said Chaskalson P. Section 167(6) made it clear on what terms the legislature was required to regulate access. But until the legislation was enacted, s 173 gave the CC the inherent power to regulate access to it along the lines the Constitution envisaged. The fact that the litigants had already had the benefit of an appeal to the Supreme Court of Appeal was relevant to determining the breadth of that access.[44]

[40] The same principles apply here. Although the Constitution spells out no principles on which access to this court should be regulated, we consider that this court's inherent power to regulate its own process, 'taking into account the interests of justice', empower it to lay down the requirement that prospective appellants from the LAC apply for special leave to appeal. While it is true that this court's inherent power to protect and regulate its own process is not unlimited – it does not, for

43 1997 (4) SA 1076 (CC), paras 11-28, per Chaskalson P on behalf of the court.
44 *S v Pennington* above para 24.

instance, 'extend to the assumption of jurisdiction not conferred upon it by statute'[45] – the inherent regulatory power the Constitution confers is broad and unqualified. The CC has recently emphasised the ambit of this power, and the importance of interpreting it so as to enhance 'the SCA's autonomous regulations of its own process'.[46] We consider it broad enough to deal with the situation here.

[41] As in *Pennington*,[47] leave to appeal from the LAC is necessary to protect the process of this court against abuse by appeals from the LAC that have no merit, and it is in the interests of justice that the requirement of special leave be imposed, for if appeals were allowed without trammel, the expeditious resolution of labour disputes would be unconscionably delayed, and the justified objects of the LRA impeded.

[42] We therefore hold, exercising this court's constitutional power to protect and regulate its own process, that applications for leave to appeal from the LAC must be on petition to this court, in accordance with the existing application procedure from the High Court.[48] We hold further that applicants must show not merely that the appeal has reasonable prospects of success, but that there are special considerations why, having already had an appeal before a specialist tribunal, there should be a further appeal to this court.[49]

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45 *Moch v Nedtravel(Pty) Ltd t/a American Express Travel Service* 1996 3 SA 1 (A) 7F.
46 *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) para 23.
47 1997 (4) SA 1076 (CC) para 26.
48 Supreme Court Act 59 of 1959 ss 20 and 21.
49 Explained by Corbett CJ in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 560F-565E.

[43] The procedures for applying for leave to appeal, and the factors relevant to obtaining special leave, are well-established. They are set out in the Supreme Court Act 59 of 1959 and in the decisions of this court, including *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*.[50] The criterion for grant of special leave to appeal is not merely that there is a reasonable prospect that the decision of the LAC will be reversed – but whether the applicants have established 'some additional factor or criterion'.[51] One is '[w]here the matter, though depending mainly on factual issues, is of very great importance to the parties or of great public importance'.[52] No doubt every appeal is of great importance to one or both parties, but this court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that labour disputes be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasise that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that.

50 Above pages 564H-565E.
51 *Westinghouse* 1986 (2) SA 555 (A) 561E-F 563E.
52 *Westinghouse* 1986 (2) SA 555 (A) 565B.

[44] As also in *Pennington*,[53] the petition for special leave in accordance with the existing High Court procedure will require this court to consider the merits of the appeal. Considering the petition is therefore itself an exercise of the appellate jurisdiction vested in this court.[54]

[45] In this case we have a full application for leave to appeal, which was referred for oral argument on the merits together with the full record of the proceedings in the courts below. We can therefore now consider whether leave should be granted on the basis of the above principles.

The merits of the application for leave to appeal: should leave be granted?

[46] The first question is whether the union has reasonable prospects of success. If not, we need not consider whether it has established the 'additional factors' required for special leave.

[47] With this in mind, we consider the facts. These are comprehensively set out in the judgment of the LAC.[55] A brief summary will place the issues in perspective. In mid-2000 a firm of consultants the company had appointed produced a report reviewing the company's production methods and suggesting ways of increasing productivity. Meetings took place between management and shopstewards. The company wished to introduce operational changes that necessitated alterations to the workers' terms and conditions of employment. Among these was a radical

53 1997 (4) SA 1076 (CC) para 27.
54 Compare *S v Rens* 1996 (1) SA 1218 (CC); *S v Steyn* 2001 (1) SA 1146 (CC).
55 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 *ILJ* 133 (LAC) paras 3-17.

change in the shift system and the withdrawal of a transport allowance. The company hoped to negotiate a collective agreement on the proposed changes and so tried to convince the workers that the changes would ensure an increase in productivity, resulting in its continued viability and consequently enhanced job security. But no agreement was reached. The proposed changes in the shift system and the withdrawal of the transport allowance were a particular sticking point.

[48] At a meeting in late September 2000 management announced that workers who were prepared to accept the intended changes would be retained in their positions, while those who refused 'may be retrenched'. In early October the company distributed notices informing the affected workers of their impending retrenchment on 13 October 2000. The workers rejected the notices. On 18 October 2000 the company issued letters of dismissal. The union responded with an urgent application in the Labour Court. The basis for the application, which the Labour Court upheld, was that the intended dismissals were sought to be effected to compel them to agree to the proposed changes to their terms and conditions of employment, contrary to the provisions of s 187(1)(c) of the LRA:

'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 [which protects those exercising union rights] or, if the reason for the dismissal is –

(a) . . .

(b) . . .

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;

. . . .'

[49] After management's September letter, a further meeting was held on 10 October 2000, where the discussion centred on the change to the proposed two-shift system. Still no agreement could be reached. The last meeting was held on 17 October 2000. The letters of dismissal issued to the workers on 18 October 2000 set the date of dismissal at 20 October 2000.

[50] In the founding affidavit (to which Mr Johannes Maboya, a shopsteward, deposed) the union alleges that 'the proposed dismissals would be unfair'; that the company 'is proposing to dismiss the [workers] as a result of their failure to agree to changes to their terms and conditions of employment'; that this 'constitutes a step to compel a demand, and if implemented such dismissals would be automatically unfair dismissals in terms of s 187(1)(a)'. Mr Gideon Viljoen, the company's human resources manager, responded in the answering affidavit that it needed to introduce a two shift system for economic (higher productivity), health and environmental reasons. He denied that the retrenchments were 'a step to compel a demand', insisting that the proposed change in the shift system was an operational requirement. The heading to the first paragraph of the letter of retrenchment reads:

'NOTICE TO RETRENCHED EMPLOYEES

Because you have rejected the new two-shift system operationally required by the company, you have been given notice of your retrenchment and your employment will terminate on 20 October 2000.'

In reply, the union states that it disputed that the company had established 'that a two-shift system will definitely reduce lead-blood concentration levels or that productivity will improve', and that 'the dispute over the failure to reach agreement on the new shift system and associated matters is a dispute over a matter of mutual interest which ought to be dealt with by the dispute procedure governing such dispute'.

[51] The complexity in the matter stems from the fact that the LRA permits employers to make changes justified by 'operational requirements' (ss 67, 188, 189). These are defined as requirements 'based on the economic, technological, structural or similar needs of an employer' (s 213). Though it requires the employer to prove fairness, the statute permits dismissals based not only on an employee's conduct or capacity, but also on the employer's 'operational requirements' (s 188(1)(a)(ii)). Even during a protected strike, an employer is not precluded from fairly dismissing an employee for an operational requirements reason (s 67(5)). Thus the employer's leeway.

[52] On the other hand, the statute is at pains to erect a system that scrupulously protects and encourages collective bargaining between workers and employers, so

as to facilitate the conclusion of collective agreements, which are defined as written agreements 'concerning terms and conditions of employment or any other matter of mutual interest' (s 213). It is in this setting that s 187(1)(c) renders automatically unfair dismissals whose reason is 'to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee'. On them it imposes significant procedural and other penalties, including the possibility of interdictory relief, as the union obtained in this case.

[53] In an influential article, Professor Clive Thompson[56] argued that dismissal can never be a permissible form of leverage in the bargaining process. An operational requirements dismissal falls outside the area of collective bargaining, since it involves a claim that the employer has the right to dismiss the employee. That can never occur, he suggested, in disputes about 'the wage-work bargain': it is permissible only in disputes over business restructuring where viability is at issue. The difficulty his argument sought to reconcile is not only that the two categories of dispute manifestly overlap, since wage-work issues may ultimately affect viability, but that 'viability' is itself a imprecise concept. When, therefore, will it be permissible for the employer to invoke operational requirements to dismiss employees? He suggested a flexible court-scrutinised test: such a dismissal would pass muster if the employer could show 'a demonstrably sensible business

56 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' (1999) 20 *ILJ* 755.

analysis that has been probed in the consultative process, is not unreasonable in context nor disproportionate in the trade-off between gains and hardships'.[57]

[54] Prof Thompson acknowledges that 'the world of work and business defies sharp categorisation'. To deal with the apparently over-lapping categories the LRA creates, he suggested that the courts would have to determine on a case-by-case basis when a employer/employee dispute had permissibly 'migrated' from the bargaining domain (where matters of mutual interest cannot legitimately trigger dismissals) to the 'legal domain' (where the employer is permitted to dismiss for operational reasons). The core difficulty with this argument is that the dichotomy between matters of mutual interest and questions of 'right' do not in our view form the basis of the collective bargaining structure that the statute has adopted. The unavoidable complexities that arise from the supposed 'migration' of issues from matters of mutual interest to matters of 'right' demonstrate in our view that the dichotomy does not form the basis of the statutory structure, and s 187(1)(c) cannot, accordingly, be interpreted as if the legislation proceeds from that premise.

[55] In the LAC, Zondo JP implicitly – and in our view correctly – rejected the 'migration' approach. He considered that the construction of s 187(1)(c) should start with the meaning of 'dismissal' as it appears in s 186(1)(a). Section 186(1) defines 'dismissal' as meaning, *inter alia*, that

57 (1999) 20 *ILJ* 755 at 770.

‘(a) an employer has terminated a contract of employment with or without notice’.

The learned Judge-President concluded that there was a difference between a dismissal as defined in s 186(1) and a dismissal as contemplated by s 187(1)(c). The two categories do not overlap. A s 187(1)(c) dismissal must be effected ‘for the specific purpose given in s 187(1)(c) and that purpose is absent in an ordinary dismissal such as is defined in s 186(1)(a)’. Zondo JP expanded (para 31):

‘… there is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer’s demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions to meet the employer’s requirements.’

[56] The LAC’s solution to the conundrum of the statutory concepts was thus to assign a distinctive meaning to ‘dismissal’ in s 187(1)(c), and then to restrict this category of automatically unfair dismissals to those effected for the purpose of inducing employees to change their minds regarding the employer’s demand. On this approach, only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer – irreversibly – ‘has terminated’ the employment contract. Dismissals

intended to be and operating as final – not, in other words, reversible on acceptance of the demand – can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair. In such cases, the only factual inquiry confronting a court is the employer's reason for effecting the dismissal: once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further inquiry into the nature or categorisation of the demand is required.

[57] Mr Tip for the union subjected the approach of the LAC to careful criticism, urging us to find that the LAC had misinterpreted s 187(1)(c). He sought to interpret s 187(1)(c) within the context of a collective bargaining structure premised on the dichotomy we have described and which we have rejected. He proceeded from the premise that the structure of the statute requires disputes of mutual interest to 'migrate' to the 'rights' sphere. He submitted further that because of the 'complicated interface' characterising this case, it was insufficient to embark on an examination solely of whether the company intended the dismissals as final. Indeed, he argued, it had never been the union's case merely that the dismissals themselves were intended to induce the workers to change their minds. Its case was that the threat of dismissal during collective bargaining and up to implementation was calculated to force the workers to accept the company's demands: correspondingly, the dismissals, if implemented, would have been because the employees had not changed their minds.

[58] Of central significance, Mr Tip therefore contended, was an enquiry into whether the dispute on the proposed change to the shift system was or was not a 'matter of mutual interest'. He submitted that a change in a shift system is a material change in conditions of employment and once accepted it becomes a term of employment and an enforceable right. Where an employer seeks to change its position, this must be pursued in collective bargaining. It was in this context that he invoked the concept of 'migration' – had it been shown that the dispute had 'migrated' from the 'matters of mutual interest' category (which must be resolved by collective bargaining) to the 'operational requirements' category (which entitles the employer to dismiss); and if so at what stage? The company, he said, had not been able to show that the dispute had 'migrated', and the dismissals were thus prohibited.

[59] In our view neither s 187(1)(c) nor the collective bargaining structure of the statute as a whole contemplates the 'migration' of disputes from one part of the LRA's taxonomy to another. Nor can we accept the union's contention that the category of dismissals protected by s 187(1)(c) must be more expansively construed than the LAC found.

[60] The conceptual impasse that the concept of 'migration' of disputes creates drives us to the solution the LAC embraced. For the reasons fully set out in the LAC judgment, it seems clear to us that the particular legislative history of the concept of dismissals designed to induce agreement to an employer's demand illuminates

the distinctive nature of the protection accorded to those dismissals that are truly designed to make employees change their minds in a dispute with an employer on matters of mutual interest.[58] Only they are prohibited as automatically unfair. If the dismissal lacks the proscribed statutory purpose – and we agree with the LAC that 'reason' in s 187 must in the context of sub-para (c) mean the same as 'purpose' – the dismissal is not automatically unfair, and the sole inquiry is whether the employer can establish under s 188 that the dismissal was based on its operational requirements.

[61] The cogent reasoning and exposition of the LAC disposes of the legal contentions raised; but the union sought to attack the LAC's finding on another ground as well. This concerns the LAC's assessment of what facts were before it. As will be recalled, the LAC found that the union had failed to establish that the dismissals were not based on the company's operational requirements. That the company initially sought to have the issue of the proposed shift change negotiated and only later withdrew it from the table on the basis that it was not a matter of mutual interest but an operational requirement made no difference.

[62] Zondo JP observed (para 35) that in the founding affidavit the union did not substantiate its averment that the dismissals constituted 'a step to compel a demand, and, if implemented such dismissals would be automatically unfair'. The answering affidavit categorically denied that the dismissals constituted a step to

58 (2003) 24 ILJ 133 (LAC) paras 24-25.

compel a demand and asserted that they were necessitated by economic, health and environmental factors. The union's replying affidavit merely disputed that the company had established that a two-shift system would improve productivity. This impelled the learned Judge President to conclude that there was a material dispute of fact before the Labour Court, which had wrongly failed to apply the well-known formula for motion court fact determination in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[59]

[63] Before us the union contended that the LAC inappropriately elevated a denial asserted as a conclusion to a dispute of fact that could be resolved only by oral evidence, and that the true difference between the parties is a matter of the correct construction of the facts: these, it urged, were almost entirely common cause when regard is had to the history of the parties' dealings. The union submitted further that the matter could not be determined on the basis of the 'mere say-so' of the parties, the test being objective in the light of all the relevant facts and circumstances.

[64] We emphasise that it will be seldom that the LAC's approach to the resolution of factual issues will be sufficient to constitute the 'special circumstances' that we have laid down are required for leave to appeal, bearing in mind the experience the LAC has of the setting in which the often complex factual inquiry falls to be assessed. We see no reason in this case to interfere with the LAC's approach in arriving at its factual findings or with the findings themselves.

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59 1984 (3) SA 623 (A) at 634H-635C, per Corbett CJ.

[65] There are thus no proper grounds for allowing the union to appeal. We make the following order:

(a) The application for condonation for the late filing of the application for leave to appeal is granted. The applicants are ordered to pay the costs.

(b) The application for special leave to appeal is dismissed with costs.

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MPATI DP
CAMERON JA

CONCUR:

NUGENT JA

CONRADIE JA

COMRIE AJA