IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 9380/2013

In the matter between:

O THORPE CONSTRUCTION	First Applicant
C M STODDART t/a GC STODDART & SON	Third Applicant
TOPAZ LAKE t/a JVR CONSTRUCTION (PTY)	Fourth Applicant
RG PAVING CC	Fifth Applicant
G & H ONTWIKKELINGS t/a HJH KONSTRUKSIE BK	Sixth Applicant
DESHELF 26 CC t/a LIGHTHOUSE CONSTRUCTION	Seventh Applicant
DRIES LE ROUX KONSTRUKSIE CC	Eight Applicant
BETTY'S BAY BUILDERS t/a HENNIE HENN CONSTRUCTION	Ninth Applicant
AMAKAYA CONSTRUCTION CC	Tenth Applicant
DELLE DONNE (PTY) LTD t/a EXCLUSIVE WORKS	Eleventh Applicant
TOMMY OCTOBER BOUERS	Twelfth Applicant
L & M CARPENTERS	Thirteenth Applicant
GT PROJECTS	Fourteenth Applicant
DIRK ROMIJN & SEUNS KONSTRUKSIES BK	Fifteenth Applicant
WALKER BAY DECKING CC	Sixteenth Applicant
THETYER PROPERTY DEVELOPMENTS (PTY) LTD t/a TPD CONSTRUCTION	Seventeenth Applicant
CHARLES TAYLOR CONSTRUCTION	Eighteenth Applicant

And

THE MINISTER OF LABOUR	First Respondent
THE BARGAINING COUNCIL FOR THE BUILDING INDUSTRY (CAPE OF GOOD HOPE)	Second Respondent
BOLAND MEESTER BOUERS & VERWANTE BEDRYWE VERENIGING	Third Respondent
MASTER BUILDERS AND ALLIED TRADES ASSOCIATION, CAPE PENINSULA	Fourth Respondent
BUILDING CONSTRUCTION AND ALLIED WORKERS UNION	Fifth Respondent
THE BUILDING WOOD AND ALLIED WORKERS UNION OF SOUTH AFRICA	Sixth Respondent
THE BUILDERS WORKERS UNION	Seventh Respondent

NATIONAL UNION OF MINE WORKERS (NUM)	Eighth Respondent
EMPLOYEES OF FIRST APPLICANT	Ninth Respondent
EMPLOYEES OF SECOND APPLICANT	Tenth Respondent
EMPLOYEES OF THIRD APPLICANT	Eleventh Respondent
EMPLOYEES OF FOURTH APPLICANT	Twelfth Respondent
EMPLOYEES OF FIFTH APPLICANT	Thirteenth Respondent
EMPLOYEES OF SIXTH APPLICANT	Fourteenth Respondent
EMPLOYEES OF SEVENTH APPLICANT	Fifteenth Respondent
EMPLOYEES OF EIGHTH APPLICANT	Sixteenth Respondent
EMPLOYEES OF ELEVENTH APPLICANT	Seventeenth Respondent
EMPLOYEES OF TWELFTH APPLICANT	Eighteenth Respondent
EMPLOYEES OF THIRTEENTH APPLICANT	Nineteenth Respondent
EMPLOYEES OF FOURTEENTH APPLICANT	Twentieth Respondent
EMPLOYEES OF FIFTEENTH APPLICANT	Twenty First Respondent
EMPLOYEES OF SIXTEENTH APPLICANT	Twenty Second Respondent
EMPLOYEES OF SEVENTEENTH APPLICANT	Twenty Third Respondent
THE REGISTRAR OF LABOUR RELATIONS	Twenty Fourth Respondent
THE DEPARTMENT OF LABOUR	Twenty Fifth Respondent

JUDGMENT: 09 September 2014

DAVIS J

Introduction

[1] The applicants seek an order setting aside a decision of the first respondent to extend a collective agreement concluded in the Building Industry Council for the Building Industry Cape of Good Hope (BIBC) to non-parties within its registered scope, including those located in the Overstrand Region for the period 27 December 2012 to 31 October 2013 (‘the Ministers decision’).

[2] To this end the applicants have raised the following grounds of review:

1. The Minister failed to extend the agreement to non-parties within 60 days of BIBC requesting her to do so in terms of s 32 (2) of the Labour Relations Act 66 of 1995 ('LRA')
2. The Minister did not herself determine the date for commencement of the extension notice published in the Government Gazette as required in terms of s 32 (2) of the LRA.
3. The extension date is rendered invalid by reason of the fact that the notice published by the Minister in the Government Gazette which was intended to cancel the previous extension notice but ing in fact cancelled the wrong notice; and
4. The Minister could not reasonably have satisfied herself that the employer representativeness requirements of s 32(3) of the LRA were met.

[3] Mr Stelzner, who appeared together with Ms McChesney on behalf of the applicants, did not press the third of these points but relied on the remaining grounds to justify the relief which applicants seek from this court. Apart from these questions, the second respondent ('the Bargaining Council') raised on limine point, namely that the application fell to be dismissed on the basis that this court lacked jurisdiction to hear the matter. A further in limine point was raised with regard to an argument that the review application was brought after an unreasonable delay.

[4] Manifestly if either of these in limine points is good, the merits of this application falls to be dismissed. I turn therefore to deal with the question of jurisdiction.

Jurisdiction

[5] In a most instructive argument Mr Freund, who appeared for second respondent together with Ms Cronje, developed his argument in a series of stages each of which requires a careful analysis of certain provisions of the LRA; in particular s 157 (1) and (2) which, in his view, must be interpreted through the prism of the LRA read as a whole. The preamble to the LRA provides, inter alia, that the purpose of the Act is, 'to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.' Section 3 (a) of the LRA provides that any person applying this Act must interpret its provision to give effect to its primary objects.

[6] The importance of these provisions was emphasised by Ngcobo J (as he then was) in Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC) at para 110 – 111:

> 'The objects of LRA are not just textual aids to be employed with the language which is ambiguous. This is apparent from the interpretive injunction of s 3 of LRA which requires anyone applying the LRA to give effect to its primary objects and the constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where interpretation of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not a court must prefer the one which effectuate the primary objects of the LRA… When enacting the LRA Parliament … went on to entrust the primary interpretation application with rules to specific and specially constituted tribunals and forums and prescribed particular procedure for resolving disputes arising under the LRA.'

[7] This analysis is vital when a court is required to interpret the key section which will unlock this dispute, namely s 157 of the LRA. This section reads thus insofar as it is relevant to this dispute:

> Jurisdiction of Labour Court. - (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 provides or in terms of any other law are to be determined by the Labour Court.
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> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenchment in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
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> (a) employment and from labour relations
>
> (b) 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 an employer, and
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> (c) the application of any law for the administration of which is the Minister is responsible.

[8] A further important provision is s 158 entitled 'Powers of the Labour Court'. Section 158(1)(g) provides that the Labour Court may, subject to s 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law. According to Mr Freund, this section is a jurisdictional conferring provision and should be contrasted, for example, to s 158(1)(a) which provides that the Labour Court may make any appropriate order including inter alia;

> (i) granting of urgent interim relief

(ii) an interdict

(iii) an order directing a performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act

All of these powers appear to be focussed on a menu of relief options that the court might grant. This is to be contracted with s 158 (1)(g), or for example, s 158(1)(h) which provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law.

[9] These latter sections were read by Ngcobo J in Chirwa, supra at para 119 as follows:

'The objective to establish a one-stop court for labour and employment relations is apparent in other provisions of the LRA. Section 157(3) confers on the Labour Court jurisdiction to review arbitrations conducted under the Arbitration Act, 1965 'in respect of any dispute that may be referred to arbitration in terms of the [the LRA]'. The Labour Court has the power to review the performance of any function which is provided for in the LRA; and to review any decision taken or any act performed by the State in its capacity as an employer. All these provisions are designed to strengthen the power of the Labour Court to deal with disputes arising from labour and employment relations.

Viewed in this context, the primary purpose of s 157 (2) was not so much to confer jurisdiction on the High Court to deal with labour and employment relations disputes, but rather to empower the Labour Court to deal with causes of action that are founded on the provisions of the Bill of Rights but which arise from employment and labour relations. The constitutional authority of the legislature to confer that

power on the Labour Court is found in s 169(a)(ii) of the Constitution. That provision authorises Parliament to assign any constitutional matter 'to another court of a status similar to a High Court' and to deprive the High Court of the jurisdiction in respect of a matter assigned to another court.'

[10] This reading leads to an investigation of the meaning of s 157 (2) of the LRA which is relied upon by the applicants in their submission that this court does have the necessary jurisdiction. In this connection Ncgobo J gave content to the wording of s 157 (2) of the LRA when at para 123 of his judgment in Chirwa, supra he said:

'While s 157 (2) remains on the statue book it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of s 157(2) and harmonise them with those of s 157(1) and the primary objects of the LRA is to give s 157(2) a marrow meaning. The application of s 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle that we have recently reinstated, namely, that 'where legislation is enacted to give effect to a conditional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'.

[11] In the present case, applicants contend that this Court has jurisdiction to determine their application, which rests on allegations of failure by the Minister to properly apply the provisions of s 32 of the LRA which reads, insofar as its text is relevant to the present dispute:

> '(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council-
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> (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
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> (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.
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> (2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.'

[12] Putting these provisions together, Mr Freund contended, particularly on the basis of the interpretation given to s 157 by the Constitutional Court in Chirwa, that it was clear that disputes which turned on a specific provision of the LRA, such as s 32 of the LRA, were disputes relating to matters which fell directly within the LRA. In other words, the present dispute was a matter which turned exclusively on a provision of the LRA and hence it was

the Labour Court which was clothed with exclusive jurisdiction to determine the dispute. So much, in Mr Freund's view, was clear from the dicta which I have cited of Ngcobo J in Chirwa.

[13] By contrast, Mr Stelzner contended that there were areas of concurrent jurisdiction which were to be sourced in s 157(2) of the Act. Thus, when an employee brings a contractual claim, she can elect to proceed to the High Court or the Labour Court for the purposes of enforcing her contractual claim. This proposition finds support in s 77 (3) of the Basic Conditions of Employment Act 5 of 1997. Mr Stelzner further submitted that, in a case where the Minister acts contrary to the principle of legality, this principle is so fundamental a constitutional value underlying the very basis of law that it must follow that the High Court would have jurisdiction to enforce this core principle. In the present case he contended that the case brought by the applicants turned on the principle of legality, that is the Minister had failed to comply with the law and accordingly the High Court was possessed of the requisite jurisdiction. In particular, s 157(2) of the LRA provides expressly for concurrent jurisdiction where the applicants seek to invoke s 33 of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') or the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to sustain its case.

[14] Mr Steltzner also referred to the decision of the Constitutional Court in Gcaba v Minister for Safety and Security and others 2010 (1) SA 238 (CC), in particular at para 53:

> 'It is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora, it speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal

> offence, violate equality legislation, breach a contract, give rise to the actio iniuriarum in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided.'

Further, Mr Stelzner suggested that the Court in para 66 in Gcaba sought to confine the dicta in Chirwa as follows:

> 'In Chirwa Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as 'public' or 'private' cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.'

Mr Stelzner also referred to para 71 of Gcaba to sustain his argument that s 157 (2) of the LRA would confirm jurisdiction on this court, insofar as this dispute was concerned. This paragraph from the judgment reads thus:

> 'Section 157 (2) confirms that Labour Court has concurrent jurisdiction with
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> the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Ch 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as employer and the application of any law for the administration of which the minister is responsible.'

See also Freedom Under Law v DPP 2014 (1) SA 254 (GNP) at para 229.

[15] The decisions in Chirwa and Gcaba received the attention of the Supreme Court of Appeal in Makhanya v University of Zululand 2010 (1) SA 62 (SCA) a judgment relied upon heavily by applicants. In that case the appellant claimed that he had been employed by the respondent under a contract of employment. The respondent purported to terminate the contract in breach of its terms. Notwithstanding the cancellation, appellant continued to render services or at least tendered to do so. However, respondent had not paid his remuneration and other monies to which the contract entitled him. He therefore claimed orders compelling it to do so.

[16] The question of the jurisdiction of the High Court was raised by the respondent. Nugent JA found that the employment of the appellant terminated, as in Chirwa, and that it had given rise similarly to a potential claim to enforce a right under the LRA. Nugent JA went on to say that in Makhanya the claim also fell within the ordinary powers of the High Courts to enforce contractual claims and in Chirwa the claim likewise fell within the ordinary powers of the High Court to enforce a constitutional right conferred upon the High Court in terms of s 157 (2) of the LRA. The question which then arose in Makhanya's case was whether the decision in Chirwa bound the Court and compelled it to hold that the High Court had no jurisdiction to hear the case. After a careful analysis of Chirwa, Nugent JA concluded thus:

> 'To summarise, I am driven to conclude that the ratio for the order that was made in Chirwa (both of the minority and the majority, but for Skweyiya J) was that the termination of an employment contract in the circumstances in which it occurred in that case, does not constitute 'administrative action', and for that reason the claim was bad in law and it was dismissed on that ground. The further views of the

majority that the High Court had no jurisdiction to consider the claim was not the ratio for the order that it made and what was said by various members of the court in that regard is thus not binding upon us. In those circumstances we are free to dispose of this appeal on conventional principles.' (at para 94)

[17] Accordingly the court held that, as the claim in Makhanya was for the enforcement of a common law right of a contracting party to exact performance of the contract, it was a claim which fell within the ordinary powers of the High Court and accordingly the jurisdictional objection stood to fail.

Evaluation

[18] In my view, even if this approach can be sustained by a narrow view of the ratio in Chirwa, it does not appear to accord any weight to the clear statement of Ncgobo J at para 124 a, passage which is so important that it bears comprehensive reproduction:

'Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'. What is in essence a labour dispute as envisaged in the LRA should

not be labelled a violation of a constitutional right in the Bill of Rights simply because the issue raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.'

[19] Clearly, when confronted by the judgment in Makhanya and by this dictum in Chirwa, this court needs to reconcile these two passages, to the extent that it is possible as it is bound by the jurisprudence of the higher courts. But the problem was easily solved in that case. The essence of Makhanya's case was that if there was a contractual claim, a High Court has jurisdiction to hear this claim. But in the present case, the factual matrix upon which the application rests differs markedly. Accordingly, the finding in Makhanya is manifestly distinguishable. In brief, in Makhanya, supra, the case was essentially about an employee who had unsuccessfully pursued an unfair dismissal claim before the CCMA. It was argued that he had no right to pursue a contractual common law claim before the High Court. The SCA dismissed this argument, with respect correctly. It held that separate causes of action arising from the same incident could coexist and that the fact that the LRA had created a cause of action falling within the jurisdiction of the Labour Court did not mean that contractual remedies before the civil courts had been destroyed. This has little, if anything to do with the present dispute.

[20] I therefore do not have to engage with the implications of the omission by Nugent JA to consider the weight of the passage in Chirwa set out at para 124 and further whether this formed part of the ratio for the order that was made in Chirwa, however interesting a debate that might prove.

[21] There is an exclusive power which is granted to the Labour Court. So much is clear from s 157 (1) of the LRA. Furthermore in para 123, the court in Chirwa clearly indicated that s 157(2) had to be confined to instances 'where a party relies directly on the provisions of the Bill of Rights. This of course is subject to constitutional principle that …where legislation is enacted to give effect to a constitutional right to, the litigant may not bypass that legislation relied directly on the constitution without challenging that legislation as falling short of the constitutional standard.'

[22] The animating idea captured herein is the recognition of the principle of constitutional subsidiarity. The dictum further eschews an argument that would so expand the range of constitutional litigation, otherwise constrained by the ambit of s 157(1), with the result that parallel jurisdiction would invariably be created. In almost any case, in which the LRA applied, an applicant could then argue that there was a breach of legality; that is of a provision of the LRA and by extension of the Constitution. In short, a breach of legality would occur in almost every case where it was alleged that there was a breach of or non-compliance with a provision of the LRA.

[23] In Makhanya, supra Nugent JA sought to resolve this potential problem by mandating Courts to examine the nature of the cause of action or claim which is before the Court. This examination is critical to the determination of whether a Court may hear the particular case. Nugent JA appears to take issue with the incisive analysis of Chirwa by Professor Halton Cheadle (2009 (30) ILJ 741) for reasons which are not entirely clear to me. When Cheadle at 754 writes that the Court in Chirwa characterised the decision to terminate Ms Chirwa's employment as a labour practice rather than as administrative action, he confirmed the key point that a Court is required to examine upon what the applicant bases

her claim and this finding in turn unlocks the door to the dilemma of jurisdiction. Cheadle at 745-746 makes the further important point which supports the approach I have adopted in this judgment, namely that the LRA was passed in response to the design of s 23 of the Constitution which envisaged a designated, carefully calibrated legislative system to deal with labour law and to give content to the rights set out in s 23 of the Constitution.

[24] In the present case, the claim made by the applicants was that the Minister failed to comply with the LRA and, in particular with s 32; hence the relief sought by the applicants was for an order reviewing and setting aside the decision made by the Minister, pursuant to s 32 of the LRA. The very act of extension of a collective agreement to non-parties in the building industry constitutes the performance of a function provided for expressly in the LRA. The Constitutional Court in Gcaba, supra, far from adopting a different approach to that set out by Ngcobo J in Chirwa, reinforced this conclusion, as is apparent from the following passages at para 70 – 72:

> '[70] Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under s 145. Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and s 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.
>
> [71] Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged of threatened violations of fundamental rights entrenched in Ch. 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as employer and the

application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction or the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, s 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power if the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.

[72] Therefore, s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s 157 (2) (a), (b) and (c).'

[25] It follows from this holding that, if as in this case, the cause of action concerns an alleged breach of a provision of the LRA, it is a matter which falls within the exclusive jurisdiction of the Labour Court.

[26] It remains for me to canvass the one judgment which directly favours the applicants, namely Value Line CC and others v Minister of Labour and other (2013) 34 ILJ 1404 (KZP).

[27] In Valueline Koen J adopted the approach that the High Court did have jurisdiction to review and set aside a decision of the Minister to extend a collective bargaining agreement to non-parties. To the extent that I understand the learned judge's approach it may be set out as follows: Relying on the Constitutional Court decision in Fredericks and others v MEC for Education and Training, Eastern Cape and Others 2002 (2) SA 693 (CC), in was held that s 157 (1) of the LRA 'does not purport to confer exclusive jurisdiction upon the Labour Court generally in respect of employment related matters' (at para 25).

[28] The express requirement in s 157, that the subject matter of the dispute must be one of a range of 'matters' which stands to be determined by the Labour Court, is to be contrasted to powers conferred on the Labour Court in which it may exercise jurisdiction. Thus, s 158 (1) (b) does not provide expressly that such a review is a matter which is to be determined by the Labour Court but merely that it is a matter that 'the Labour Court may' review. Thus, Koen J finds: 'as the provisions of the LRA do not expressly or by necessary implication, provide that such a review is to be determined by the Labour Court, the jurisdiction of the High Court to determine such a review is not ousted and the jurisdiction of the Labour Court is therefore not exclusive'. (at para 27)

[29] For Koen J, s 158 (1) (g) provides that where the Labour Court has jurisdiction in a particular matter, whether in terms of exclusive or concurrent jurisdiction with the High Court and the dispute concerns a review and relief which follows upon this review, the Labour Court is granted the power to review the performance or purported performance of any function which is the subject of the review. Koen J then continues:

> 'If the respondent's interpretation of s 158(1)(g) of the granting of the permissive power to review contained in s 158(1)(g) constitutes a direction that any matter

> involving a review 'is to be determined' by the Labour Court , whether express or by necessary implication, as contemplated in s 157(1), thus conferring exclusive jurisdiction on the Labour Court, then by parity of reasoning, any dispute in respect of which 'any appropriate order' may be granted would also confer exclusive jurisdiction on the Labour Court. That would entail exclusive jurisdiction being conferred on the Labour Court in probably almost all matters that could conceivably come before it with reference to the kind of relief that may be granted, rather than with reference to the cause of action relied upon.' (at para 31)

[30] In summary therefore, the reasoning adopted by the learned judge appears to be the following: If s 158 (1) (g) which grants a power of review to the Labour Court as read together with s 157 (1), in the manner contended for by second respondent in this case, then in any dispute, any appropriate order which may be granted would be subject to the exclusive jurisdiction of the Labour Court, notwithstanding the cause of action upon which the applicant relied.

[31] By contrast, the implication of the judgment in Valueline is that s 157 (1) of the LRA has a very narrow scope and almost all matters of a labour nature are potentially, at least, subject to the concurrent jurisdiction of the High Court and the Labour Court. This conclusion follows from the statement in the Valueline judgment that s 157 (1) 'does not confer exclusive jurisdiction generally in respect of employment related matters'. (para 24)

[32] Not only does this conclusion compromise the very purpose of s 157 (1) of the LRA as I have outlined it but it stands in stark contrast to two critical judgments which Koen J did not canvass in the Valueline case, namely the Constitutional Court judgments in Chirwa and Gcaba, supra, to which extensive reference has been in this judgment. In addition, the

idea that s 158(1)(g) is a jurisdiction conferring provision appears to have been ignored. This section needs to be read together with s 157 (1). If s 158 (1) (g) did not exist, the question would arise as to how the Labour Court would possess jurisdiction to review a ministerial decision which the judgment in Valueline accepts it does have, albeit concurrently with the High Court (see in particular para 32 of Valueline).

[33] In summary, in my view, the decision in Valueline is not in accordance with Constitutional Court jurisprudence and therefore can be rejected for the purposes of this judgment.

Conclusion

[34] The conclusion to which I have arrived renders it unnecessary to deal with the remaining point in limine dealing with unreasonable delay and, in particular, the significant argument raised by the second respondent that delay in this case was unreasonable, not only before of noncompliance with the 180 day period provided for in s 7 (1) of the Promotion of Administrative Justice Act 3 of 2000 but because of an absence of a basis to condone a delay which exceeded 180 days. In this connection, the argument was raised that the period of operation of the extension of the collective agreement was from 17 December 2012 to 31 October 2013. Applicants brought the application about six months into its operation and about four months before it was due to expire. It is common cause that the entire industry arranges its affairs, including wage rates in accordance with extensions to the collective agreement from time to time. Accordingly a lengthy delay of the kind which was alleged in this case by second respondent, would constitute an unreasonable delay.

[35] There is also no reason to examine the various grounds of review which has been raised by the applicants in that, absent the necessary jurisdiction this court cannot deal with the merits thereof, neither is there a need to address with the interesting question as to the implications of the judgment of the Constitutional Court in Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others 2014 (1) SA 604 (CC) at para 28, that an irregularity must be legally evaluated to determine whether it amounts to a justifiable ground of review under PAJA and the further question of whether this legal evaluation must take into account the materiality of any deviation from any legal requirements. The Court suggests that this be done by linking the question of compliance to the purpose of the relevant provision before concluding that the review ground has been established. That is not a determination to be undertaken by this Court.

[36] It is important to emphasise the following: the conclusion to which I have arrived does not deprive a litigant of a remedy. Its claim does not fall away merely because this is a matter which is to be heard in the Labour Court. The finding of this Court is to assert that a clear purpose of the LRA was to create a specialist court; that is the Labour Court being of similar status to the High Court which is required to deal with all matters arising from the LRA in terms of claims which are based thereon.

[37] For all of these reasons therefore, the application is dismissed with costs, including the costs of two counsel.

DAVIS J