Here's hoping the Constitutional Court **gets it right!**

The Constitutional Court was recently approached to interpret a provision in the Labour Relations Act relating to the transfer of businesses. ***Marisa Van der Haar*** *and* ***Jeannine Bednar*** *analyse the arguments that were presented in the Constitutional Court.*

On 17 September 2002, the Constitutional Court heard argument in the case of National Education Health and Allied Workers Union v University of Cape Town and Others. The Court was called upon to examine the constitutionality of the Labour Appeal Court's interpretation of section 197 of the Labour Relations Act (the LRA).

The case arose when the University of Cape Town (UCT) outsourced the jobs of most of its lowest paid workers, primarily gardeners and cleaners. Nehawu challenged the outsourcing in terms of section 197 of the LRA, which deals with the transfer of employment contracts when a business is transferred as a 'going concern'. The Labour Court held that the outsourcing did not fall within section 197, and Nehawu appealed the case to the Labour Appeal Court (the LAC).

LAC Judgments

The majority in the LAC held that section 197 of the LRA only applies where a business is transferred and the seller and purchaser of the business agree that employment contracts will be transferred as part of the business. In other words, the majority judgement makes the application of section 197 dependent on an agreement by the seller and the purchaser that employment contracts will be transferred. The majority held that the purpose of section 197 is to facilitate the sale of a business. (Employers in the Constitutional Court supported this view.)

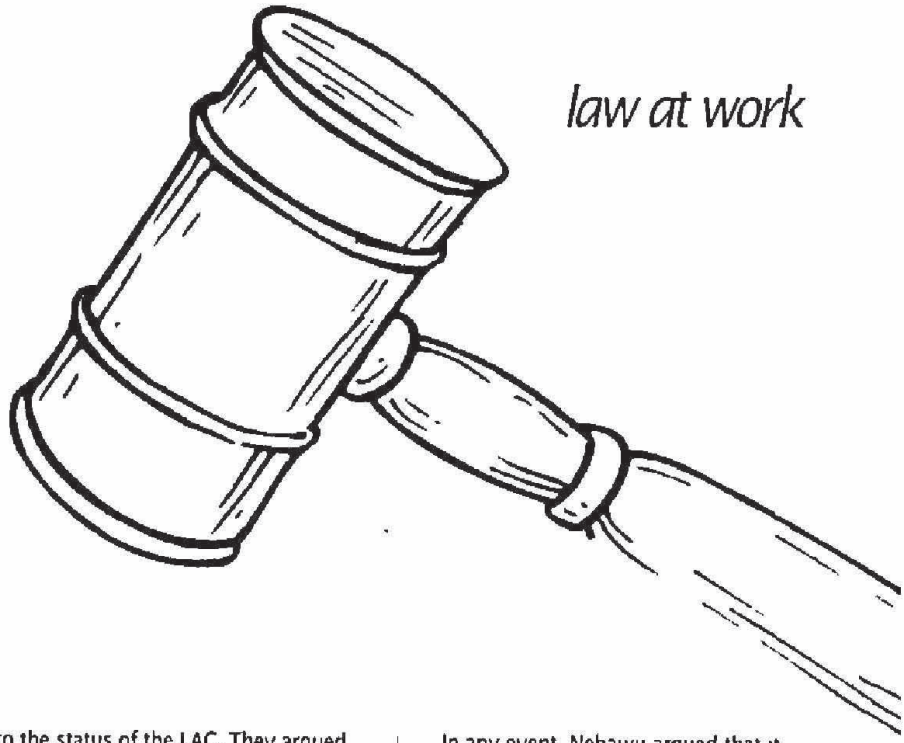
In this case, it was common cause that there was no agreement between UCT and the outsourcing companies to transfer the employees' contracts. The LAC, therefore, concluded that section 197 did not apply and the employment contracts were not transferred from UCT to the new companies.

In a minority opinion, Zondo JP held that the purpose of section 197 is to protect employees against loss of employment when there is a transfer of a business.

Zondo JP held that a transfer as a 'going concern' encompasses more than situations where agreement has been reached between employers to transfer the employees. The transfer of employment contracts occurs automatically, regardless of whether or not there is agreement between the parties that the employees are included in the sale.

Issues raised in the Constitutional Court

Nehawu argued before the Constitutional Court that the majority in the LAC failed to interpret section 197 of the LRA so as to' promote the spirit, purport and



objects of the bill of rights,' as required by section 39(2) of the Constitution, in that it failed to give effect to the right to fair labour practices in terms of section 23(1) of the Constitution. UCT and Supercare Cleaning (Pty) Ltd (the respondents) argued that the majority judgement was correct and even if it was not correct, the judgement did not give rise to a constitutional issue.

The respondents raised a number of preliminary procedural issues. In particular, they argued that:

- provisions in the LRA establishing the LAC as a final court of appeal in labour matters were constitutionally invalid,
- Nehawu used the incorrect procedure in appealing to the Constitutional Court;
- Nehawu should have approached the Supreme Court of Appeal (SCA) before approaching the Constitutional Court.

Status of the LAC and procedure for appealing from the LAC to the Constitutional Court

The difficulty faced by Nehawu was that the Constitutional Court Rules do not expressly deal with appeals to the Constitutional Court from the LAC. As the LRA (section 169) provides the LAC has equivalent status to the SCA. Nehawu used the rule that governs appeals to the Constitutional Court from the SCA (rule 20) rather than the rule that governs appeals from a High Court (rule 18). The respondents argued that this was the wrong procedure and that the application should be dismissed as it was 'fatally flawed'. They also argued that Nehawu should have appealed to the SCA before applying for leave to appeal to the Constitutional Court.

The respondents' arguments that the wrong procedure had been followed and that an appeal should have been filed with the SCA, were based on a challenge to the status of the LAC. They argued that in terms of the Constitution, the SCA is the highest court of appeal in all matters except constitutional matters and consequently that the LAC cannot be the final court of appeal in labour matters as this is in conflict with the Constitution. They argued that to the extent that provisions in the LRA seek to oust the jurisdiction of the SCA in labour appeals, those provisions are in conflict with the Constitution and should be declared invalid. Alternatively, those provisions should be interpreted as allowing for an appeal from the LAC to the SCA.

Nehawu disputed that these provisions are in conflict with the Constitution and pointed out that if the respondents' arguments are correct it will also mean that provisions establishing the Competition Court and the Small Claims Court may be declared invalid, as these courts are also final courts of appeal.

Nehawu also argued that as the LRA does not allow for an appeal to the SCA from the LAC, rule 18 was not applicable[1]. The purpose of rule 18 is to regulate direct appeals from the High Court to the Constitutional Court, in order to avoid the need for intermediate appeals to the SCA. The need to avoid intermediate appeals is not present in an appeal from the LAC, because all other avenues of appeal to other courts have already been exhausted.

In any event, Nehawu argued that it was appropriate in this case for it to be given direct access to the Constitutional Court and to the extent that the incorrect rule may have been followed, condonation should be granted.

It is unlikely that the Constitutional Court will find that these procedural issues prevent it from dealing with the merits of the main application. At the hearing, Chief Justice Chaskalson indicated an unwillingness to declare sections of the LRA unconstitutional when the Department of Labour was not present as a party. The judges also appeared to accept that using rule 18 or approaching the SCA instead of the Constitutional Court would have raised practical and procedural difficulties for Nehawu. None of the judges suggested that using rule 20 was inappropriate or, that if a mistake was made as a result of the practical and procedural difficulties, that it could not be condoned.

Interpretation of section 197(1)(a) and 2(a) of the LRA

The parties discussed the interpretation of section 197 of the LRA as it stood before the recent amendments, which came into force on 1 August 2002.

Nehawu argued that section 197 provides for the automatic transfer of employees' contracts of employment in circumstances where the whole or any part of a business, trade or undertaking is transferred as a going concern. (This

was the interpretation given to the section by the LAC in the Foodgro case[2]. This case also held that the purpose of the section was to protect employees in the event of a transfer of a business.) Nehawu also argued that if there is a going concern transfer neither the consent of the employees or the agreement of the seller or purchaser of the business is required.

Nehawu pointed out, most pertinently, that the majority judgement in the LAC, which said that the purpose of section 197 was to facilitate the sale of the business raises the question why, in a statute designed to give effect to the right of workers to fair labour practices, and in particular, the right not to be unfairly dismissed, there is a single provision purportedly to facilitate sales of businesses and the interests of the buyer and seller. It is notable that section 197 falls in Chapter VIII of the LRA, entitled 'Unfair Dismissal and Unfair Labour Practice'.

Nehawu argued that it is justifiable to remove the freedom of choice of employees to choose who their employer is and to provide for compulsory transfers of contracts of employment, where the tradeoff is security and continuity of employment. If, however, the purpose of the section is to facilitate the sale of a business, to the detriment of the workers' security of employment, it is not justifiable to take away the employee's right to choose his or her employer, a right which Lord Atkin stated was the distinguishing mark between a free citizen and a slave?[3] The potential for exploitation of workers is grave.

Nehawu asserted that the purpose of section 197 is to protect employees from exploitation by employers engaging in restructuring. Employees are often retrenched during restructuring and are then offered employment by the new employer, on different, and usually less favourable terms and conditions of employment – which is what happened at UCT. This means that employees are faced with an invidious choice either to accept employment on far less favourable terms, or become unemployed. Nehawu argued that section 197, properly interpreted, is meant to prevent this kind of situation whereas the interpretation of the majority judgement in the LAC will perpetuate these kinds of situations.

Nehawu also argued that if the purpose of section 197 is to facilitate the sale of businesses, then there was no need to include the section in the LRA, as in terms of the common law, contracts of employment automatically terminate when a business is sold.

Is there a 'Constitutional matter'?

Nehawu argued that the majority in the LAC in its interpretation of section 197 failed to comply with the mandatory obligation in the Constitution when interpreting statutes and the common law to 'promote the spirit, purport and objects of the Bill of Rights'[4], and in particular, the right to fair labour practices in section 23(1) of the Constitution. Security of employment, in the form of the right not to be unfairly dismissed, 'constitutes at the very least the lowest common denominator of the right to fair labour practices in section 23(1) of the Constitution'[5].

The Constitutional Court has jurisdiction over any 'constitutional matter.' 'Constitutional matter' is a broad concept, which is not restricted to the invocation of the rights in the Bill of Rights, but can also include a challenge that the judiciary has not complied with its constitutional obligations to interpret legislation to promote the spirit, purport and objects of the Bill of Rights.

At the hearing, the Court appeared unanimous that an interpretation of a section of an Act, when that section itself is not being challenged, may raise a constitutional matter. Further, when that section purports to give effect to a right in the Bill of Rights, its interpretation necessarily raises a constitutional matter and consequently the Constitutional Court has jurisdiction.

Conclusion

Substantial amendments to section 197 have made it clear that the purpose of the section is to protect employees against loss of employment when there is a transfer of a business 'as a going concern'. This was the appellant's interpretation of section 197 and it is suggested that this interpretation most appropriately gives effect to the right to fair labour practices as set out in section 23(1) of the Constitution.

As a postscript, it is important to note that the interpretation given to the section by the majority judgement in the LAC will continue to have influence on the interpretation given to the amended section because both the amended section and the earlier section make use of the term 'going concern'. The majority judgement defined a going concern transfer as necessarily including the transfer of the workforce. Unless the Constitutional Court overturns the LAC finding in this regard, the LAC judgement will continue to be binding on the Labour Court with, it is suggested, potentially disastrous effects for employees. ■

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1 *Section 157(2) read with section 167(2) This approach was supported by the LAC in its judgment in Kem-Lin Fashions v Brunton & Another (2002) 23 ILJ 882 (LAC)*

2 *Foodgro (A Division of Leisurenet) v Keil [1999] 9 BLLR 875 LAC, see also Schutte & Others v Powerplus Performance (Pty) Ltd and Another (1999) 20 ILJ 655 (LC)*

3 *Nokes v Doncaster Collieries [1940] 3 All E R 549 (HL), at 552H, 556G, and 559G-H, cited by the appellants in its heads of argument*

4 *As required by section 39(2) of the Constitution*

5 *Heads of argument on behalf of Nehawu*