THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20819/2014

Reportable

In the matter between:

MOTOR INDUSTRY STAFF ASSOCIATION	**APPELLANT**
and	
IAN ANTHONY MACUN NO	**FIRST RESPONDENT**
MINISTER OF LABOUR NO	**SECOND RESPONDENT**
MOTOR INDUSTRY BARGAINING COUNCIL	**THIRD RESPONDENT**
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**FOURTH RESPONDENT**
RETAIL MOTOR INDUSTRY ORGANISATION	**FIFTH RESPONDENT**
FUEL RETAILERS' ASSOCIATION OF SOUTHERN AFRICA	**SIXTH RESPONDENT**

Neutral Citation: *Motor Industry Staff Association v Macun NO & others* (20819/2014) [2015] ZASCA 190 (30 November 2015).

Coram: Navsa, Lewis, Pillay, Petse & Dambuza JJA

Heard: 12 November 2015

Delivered: 30 November 2015

Summary: High Court and Labour Court – concurrent and exclusive jurisdiction – validity of extension of collective agreement to non-parties – arising out of the Labour Relations Act 66 of 1995 – matter within exclusive jurisdiction of Labour Court.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Phatudi J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Navsa JA (Lewis, Pillay, Petse & Dambuza JJA concurring):

[1] This case raises, for the umpteenth time before a court, the now more than vexed question about the crossroads or divergences between the jurisdiction of the High Court and that of the Labour Court. There is apparently no end to legal representatives contriving to fashion a case to suit a client's choice of forum.

[2] In the court below, the appellant, the Motor Industry Staff Association (MISA), a trade union registered in terms of s 96(7)(*a*) of the Labour Relations Act 66 of 1995 (the LRA), applied for an order in the Gauteng Division of the High Court, Pretoria, declaring that a decision of the first respondent, the Director: Collective Bargaining, Department of Labour, to extend the period of operation of the Motor Industry Bargaining Council's Main Collective Agreement (the Main Agreement) to 31 August 2014 and further to 31 January 2015, was unlawful and invalid. The further orders sought were, inter alia, as follows:

'2. The aforesaid decision of the First Respondent is reviewed and set aside.

3. It is declared that the First Respondent's notice as published in Government Gazette 37247, No 22 of 24 January 2014, to declare that the provisions of Government Notice No R687 of

26 August 2011 be effective from the date of publication of the said notice until the period ending 31 August 2014, is unlawful and invalid.

4. The aforesaid notice is reviewed and set aside.
5. It is declared that the decision of the First Respondent to extend the period of operation on the [Motor Industry Bargaining Council] Administrative Collective Agreement to 31 January 2015 is unlawful and invalid.
6. The First Respondent's decision, as per 5 above, is reviewed and set aside.
7. It is declared that the First Respondent's notice as published in Government Gazette 37247, No 23 of 24 January 2014, namely to declare the provisions of Government Notices No R 1034 of 20 October 2006, R 487 of 8 June 2007, R 1029 of 2 November 2007, R 1035 of 3 October 2008, R 881 of 4 September 2009 and R 56 of 4 February 2011 be effective from the date of publication of the said notice until the period ending 31 January 2015, is unlawful and invalid.
8. The notice referred to in 7 above is reviewed and set aside.'

[3] The Motor Industry Bargaining Council (MIBCO) is the bargaining council established for the motor industry.[1] The basis for MISA's application was as follows: the parties to the Main Agreement, which include MISA, the fourth respondent, the National Union of Metalworkers of South Africa (NUMSA), the fifth respondent, the Retail Motor Industry Organisation (RMI), a registered employers' organisation, and the sixth respondent, the Fuel Retailers' Association of South Africa (FRA), did not conclude a new Main Agreement after the prior Main Agreement (previously extended) had lapsed on 31 August 2013. It was submitted on behalf of MISA that there was no agreement to 'revive' and 'resurrect' the lapsed agreement. Thus, MISA argued, there could be no extension of the collective agreement in terms of s 32(6) of the LRA. Section 32 provides for the extension of collective agreements concluded in bargaining councils. Section 32(1) states that a bargaining council may request the Minister in writing to

[1] Section 27 of the LRA provides for one or more registered trade unions and one or more employers' organisations to establish a bargaining council for a sector and area.
Section 28 of the LRA, which deals with the powers and functions of a bargaining council include, among others, the ability to conclude and enforce collective agreements, to prevent and resolve labour disputes, and to establish and administer schemes or funds for the benefit of the parties to the bargaining councils or their members.
Section 31 provides that a collective agreement concluded in a bargaining council binds parties to the bargaining council who are parties to the collective agreement.

extend the collective agreement to non-parties that are within its registered scope. Section 32(2) stipulates that the Minister is obliged to extend a collective agreement within 60 days of receipt of a request from a bargaining council by notice in the Government Gazette. Section 32(3) obliges the Minister to satisfy him or herself that a number of requirements are met before a collective agreement may be extended, including that the request falls properly within the prescripts of s 32(1). For present purposes it is not necessary to consider the other requirements in any greater detail. Section 32(6)*(a)* provides as follows:

'(6)(*a*) After a notice has been published in terms of subsection (2), the *Minister*, at the request of the *bargaining council*, may publish a further notice in the *Government Gazette* –

(i) extending the period specified in the earlier notice by a further period determined by the *Minister*; or

(ii) if the period specified in the earlier notice has expired, declaring a new date from which, and a further period during which, the provisions of the earlier notice will be effective.'[2]

The principal submission on behalf of MISA appeared to be that since the prior Main Agreement had lapsed, the decision to extend it was *ultra vires*. The same argument was the underpinning for the relief sought with regard to a second collective agreement, the MIBCO Administrative Collective Agreement.

[4] At the commencement of proceedings in the court below, the third respondent, MIBCO, raised a point *in limine*, namely, lack of jurisdiction, contending that the propriety of decisions taken by the first and/or second respondent pursuant to the provisions of the LRA fell within the exclusive jurisdiction of the Labour Court.

[5] The court below (Phathudi J) had regard to the provisions of 157(1) and (2) of the LRA, which provide:

'(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

[2] Note that the LRA makes use of italics for defined terms, and this formatting has been retained in quotations from this Act.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, arising from –

(*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

(c) the application of any law for the administration of which the *Minister* is responsible.'

The learned judge also considered conflicting decisions of two different divisions of the High Court, namely, *Valuline CC & others v Minister of Labour & others* 2013 (4) SA 326 (KZP) and *O Thorpe Construction & others v Minister of Labour & others* [2014] ZAWCHC 140.

[6] Phatudi J concluded, in line with the latter decision that the matter sought to be adjudicated, namely, the validity of the extension of a collective agreement to non-parties, fell within the exclusive province of the Labour Court. He took the view that the decisions of the Constitutional Court in *Gcaba v Minister for Safety and Security & others* [2009] ZACC 26; 2010 (1) SA 238 (CC) and *Chirwa v Transnet Ltd & others* [2007] ZACC 23; 2008 (4) SA 367 (CC) were instructive and that the objection to the jurisdiction of the High Court was well founded. Consequently, he dismissed the application by MISA with costs, including the costs attendant upon the employment of two counsel. The learned judge granted leave to this court. Before us, the primary question for determination was whether his conclusion that the issues sought to be adjudicated by MISA fell within the exclusive jurisdiction of the Labour Court, is correct. I proceed to deal first with the reasoning and conclusions of the divergent high court decisions.

[7] In *Valuline*, Koen J dealt with an application, in terms of which a decision of the Minister of Labour to extend a collective agreement, purportedly under the provisions of s 32 of the LRA, to non-parties was sought to be set aside. In para 12 of *Valuline* the following appears:

'12. The crucial issues arising for consideration on the merits of this application are:

(a) Whether the requirements of s 32(3) [of the LRA] were satisfied.

(b) If not, whether the decision is reviewable on the principle of legality.

(c) Whether the court has the jurisdiction to entertain such review.' (footnotes omitted.)

[8] In adjudicating the challenge to the High Court's jurisdiction on the basis that the matter was one that fell within the exclusive jurisdiction of the Labour Court in terms of s 157(1) of the LRA, Koen J concluded 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. The learned judge appeared to place emphasis on the fact that the basis for the application was the principle of legality.[3] He had regard to s 1*(c)* of the Constitution which provides that the Republic of South Africa was founded, inter alia, on the supremacy of the Constitution and the rule of law. That, he reasoned, is 'the foundation for the legality principle' (para 15). Thus, he concluded, any review of a power performed by the Minister of Labour 'in accordance with the principle of legality would constitute a "constitutional matter"' (para 16). Koen J turned to examine s 169 of the Constitution which then provided:[4]

'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 similar status to a High Court; and

(*b*) any other matter not assigned to another court by an Act of Parliament.'

[9] The court in *Valuline* considered the provisions of s 169 alongside para 35 of the decision of the Constitutional Court in *Fredericks & others v MEC for Education and Training, Eastern Cape & others* [2001] ZACC 6; 2002 (2) SA 693 (CC), which reads as follows:

'Having concluded that s 24 of the Act does not oust the jurisdiction of the High Court in constitutional matters and that the applicants in this case raise a constitutional matter, it follows that the High Court was not correct when it concluded that s 24 of the Labour Relations Act

[3] See para 13 of *Valuline*.

[4] The amendments are not material to this dispute.

deprived it of jurisdiction to determine the dispute. It is now necessary to consider whether the High Court has jurisdiction to determine the dispute. In particular, we must determine whether Parliament has conferred the jurisdiction to determine this dispute upon the Labour Court in such a manner that it either expressly or by necessary implication has excluded the jurisdiction of the High Court.'

I pause to record that the challenge in *Fredericks* by teachers whose application to be retrenched voluntarily had been refused by the Department of Education in the Eastern Cape, was based on an alleged infringement of their right to equality, in terms of s 9 of the Constitution and their right to just administrative justice in terms of s 33.

[10] Koen J, with reference to the decision of this court in *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & another* [2009] ZASCA 151; 2010 (2) SA 333 (SCA), rightly noted that there is a long line of authority that the High Court would be slow to incline towards holding that its jurisdiction was ousted (para 19). The learned judge went on to consider the provisions of s 157 of the LRA set out above and then proceeded to examine s 158(1) of the LRA, which then provided:[5]

'**158 Powers of Labour Court**

(1) The Labour Court may –

(*a*) make any appropriate order, including –

(i) the grant of urgent interim relief;

(ii) an interdict;

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

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in *this Act*;

(vi) an award of damages in any circumstances contemplated in *this Act*; and

(vii) an order for costs;

(*b*) order compliance with any provision of *this Act*;

(*c*) make any arbitration award or any settlement agreement an order of the Court;

[5] The amendments are not material to this dispute.

(*d*) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(*e*) determine a *dispute* between a registered *trade union* or registered *employers' organisation* and any one of the members or applicants for membership thereof, about any alleged non-compliance with –

(i) the constitution of that *trade union* or *employers' organisation* (as the case may be); or

(ii) section 26(5)*(b)*;

(*f*) subject to the provisions of *this Act*, condone the late filing of any document with, or the later referral of any *dispute* to, the Court;

(*g*) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;

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

(*i*) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and

(*j*) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.'

[11] Koen J considered the contention by the respondents in *Valuline* that the provisions of s 158(1)(*g*) indicated that the Labour Court had exclusive jurisdiction to determine the propriety of the Minister's decision to extend the collective agreement to non-parties. He contrasted the wording of matters that 'are' to be determined exclusively in terms of s 157(1) of the LRA, with the wording, at the commencement of s 158(1), that the Labour Court 'may' make orders in respect of the matters listed thereunder (para 26). Paras 27–29 of *Valuline* bear repeating:

'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 reviews is not ousted and jurisdiction of the labour court therefore not exclusive.

The interpretation of the provisions of s 158(1)*(e)* do not arise in this application, except to the limited extent that it might affect the proper interpretation to be given to s 158(2)*(g)*. Section 158(1)*(e)*, in referring to "determine a dispute", might be closer to complying with the requirement of s 157(1) conferring exclusive jurisdiction on the labour court in respect of matter

that “are” to be determined by the Labour Court, as contended for by the respondents. Nevertheless, I am not persuaded that it does. The correct interpretation of s 158(1) is simply that it confers enabling powers on the labour court. Section 158 does not provide for matters of substantive jurisdiction.

What s 158(1)*(g)* does is to provide and place it beyond any doubt that, where the labour court has jurisdiction in a particular matter, whether exclusive or in a situation of concurrent jurisdiction with the high court, and the subject-matter of such dispute entails a review and relief consequent upon a review, the labour court will have the power to review the performance or purported performance of any such function.’ (footnotes omitted.)

[12] Paragraph 31 of *Valuline* also bears repeating, as it appears to have been strong motivation for the court concluding as it did, as set out in para 7 above:

‘If the respondents’ interpretation of s 158(1)*(g)*, that 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. An exception to the express provisions of s 169 of the Constitution should not be inferred that readily and can certainly not be implied by any considerations of necessity.’

[13] It is necessary to record the following brief reference in a footnote in *Valuline* to the judgments by the Constitutional Court in *Gcaba* and *Chirwa* (fn 24 para 29):

‘As contemplated in s 157(2) relating to the violation of a fundamental right entrenched in ch 2 of the Constitution. In [*Gcaba*] the Constitutional Court held that 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 area which have been created for it by the LRA and which are covered by s 157(2)*(a)*, *(b)* and *(c)*. Any reliance on the decision in *Gcaba* supra or

[*Chirwa*] as decisive of the issue of jurisdiction, seems in my view misplaced in the context of the present matter. Both involved conduct held not to constitute administrative action but dealt with entirely different matters, namely non-promotion and dismissal in an employee relationship, and were in respect of different labour issues than the issue of legality before this court.'

[14] In *O Thorpe Construction* Davis J disagreed with the reasoning and conclusions of Koen J in *Valuline*. He commenced by stating that, as reflected in the preamble to the LRA, the legislature clearly envisaged a category of cases in respect of which the exclusive power of adjudication was bestowed on the Labour Court. The learned judge considered the following passage of the concurring majority judgment of Ngcobo J in *Chirwa* to be instructive (para 123):

'While s 157(2) remains on the statute 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 narrow 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 constitutional 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.' (footnote omitted.)

[15] The issue before Davis J in *O Thorpe Construction*, as in *Valuline* and the present matter, concerned a decision to extend a collective agreement to non-parties within its registered scope. That decision was challenged on the basis that there had been non-compliance with the prescripts of s 32 of the LRA. At para 24 of *O Thorpe Construction,* the following appears: 'The very act of extension of a collective agreement to non-parties in the building industry constitutes the performance of functions provided for expressly in the LRA.' In this regard Davis J quoted paras 70 – 72 of *Gcaba*, which read as follows:

'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.

Section 157(2) confirms that the Labour Court has concurrent jurisdiction with 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. The purpose of this provision is to extend the jurisdiction of 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 of 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.

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)*.' (footnotes omitted.)

After considering these passages, the court in *O Thorpe Construction* said the following (para 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.'

[16] According to Davis J (para 31), 'the implication of the judgment in [*Valuline*], is that s 157(1) of the LRA has a very narrow scope and that almost all matters of a labour nature are potentially, at least, subject to the concurrent jurisdiction of the High Court

and the Labour Court.' The court in *O Thorpe Construction* considered that the conclusion reached in *Valuline* 'compromise[d] the very purpose of s 157(1) of the LRA' and stood 'in stark contrast to two critical judgments which Koen J did not canvass in the [*Valuline*] case, namely the Constitutional court judgments in *Chirwa* and *Gcaba* . . . .'

[17] I now turn to consider which of the approaches in the High Court judgments referred to above is correct. The starting point is to consider what the Constitution envisaged in respect of a regulatory regime to ensure protection of the rights to fair labour practices and collective bargaining. Section 23(1) of the Constitution entrenches the right to fair labour practices. Section 23(4) gives every trade union and every employers' organisation the right to determine its own administration, programmes and activities, and to organise and to form and join a federation. Section 23(5) and (6) of the Constitution provide:

'(5) Every trade union, employers' organisation and employer has the right to engage in the collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1).'

[18] The LRA was enacted, inter alia, to 'change the law governing labour relations', to 'give effect to s 23 of the Constitution', and to 'promote and facilitate collective bargaining at the work place and sectorial level'.[6] As noted by Ngcobo J at para 123 of *Chirwa* (quoted in para 13 above), section 157(2) of the LRA, which deals with where the Labour Court and the High Court have concurrent jurisdiction, has to be construed in the light of the primary objectives of the LRA. The Constitutional Court has put it beyond doubt that the primary objective of that Act was to establish a comprehensive

[6] See the long title of the LRA. See also Chapter 2 of the LRA, dealing with the freedom of association and general protections and Chapter 3, which, inter alia, regulates collective agreements and bargaining councils.

legislative framework regulating labour relations. An allied objective expressly stated in the preamble to the LRA was to 'establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to *decide matters arising from the [LRA]*'. (My emphasis.)

In *Chirwa*, Ngcobo J indicated that in the light of what is set out above, s 157(2) has to be narrowly construed and that it should be confined to issues where a party relies directly on the provisions of the Bill of Rights.

[19] The Constitutional Court, in *Gcaba*, considered the tensions that might arise in relation to the interpretation of s 157 of the LRA and related provisions. Van der Westhuizen J noted the principle that 'legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of Constitutional rights' (para 55). Alongside that, however, is the consideration that 'the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law' (para 56). The following paragraph in *Gcaba* is significant:

'. . . Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.' (footnotes omitted.)

[20] The approach to be followed, in summary, is as follows: The LRA is legislation envisaged by the Constitution. In construing the provisions of the LRA the two objectives referred to above must be kept in mind. Section 157(2) of the LRA was enacted to extend the jurisdiction of 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. The

Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the Constitutional provision itself.

[21] I agree that *Valuline* did not pay sufficient attention to what is set out in the preceding paragraph. It will be recalled that s 157(2) provides for concurrent jurisdiction in the face of an allegation of a violation or threatened violation of a fundamental right. In the present case, unlike *Fredericks*, there was no allegation of a violation or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution. The court in *Valuline* allowed itself to be distracted by the submission that the challenge to jurisdiction was based on 'the principle of legality'. In adjudicating any matter properly within its province the Labour Court would, in any event, be astute to ensure that its decision was one that complied with the principle of legality, which is all-embracing and which permeates our entire constitutional scheme. One cannot assert the 'right' to the principle of legality in vacuum. In essence, the complaint by the appellant is that the Minister, in purporting to extend the collective agreement to non-parties, acted beyond the powers conferred upon him in terms of s 32 of the LRA. The protections, both procedural and substantive, that exist in relation to collective bargaining are to be sourced in the LRA and not in the 'principle of legality'. In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders and others* 2005 (3) SA 280 (CC), the Constitutional Court said the following (para 21):

'The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves This is clear from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights.'

As set out in para 7 above, Koen J had regard to s 1(*c*) of the Constitution which provides that South Africa is a sovereign democratic State founded on the Constitution and the rule of law. The 'principle of legality' is an incident of the rule of law. As set out in the Constitutional Court dictum referred to earlier in this paragraph, a founding value in itself does not give rise to a discreet and enforceable right. A founding value gives substance to all the provisions of the Constitution. The court in *Valuline* did not take this into account.

[22] Section 32 of the LRA is located in Part C of Chapter 3, which deals with collective bargaining. It sets certain preconditions for the extension of a collective agreement concluded in a bargaining council. The question whether there has been compliance with the provisions of s 32 of the LRA is one that pre-eminently arises out of the LRA

[23] It is unhelpful to contrast, as was done by Koen J, the word 'may' in the introductory part of s 158 with the word 'are' in the latter part of s 157 of the LRA in order to determine the question of jurisdiction. The powers and functions of the Labour Court set out in s 158 of the LRA may, depending on the power, be exercised both in respect of its exclusive jurisdiction, as provided for in s 157(1), or in respect of its concurrent jurisdiction with the high court, as provided for in s 157(2). So, for example, an interdict as provided for in s 158(1) or a declaratory order, may issue in respect of a purely labour related matter or in respect of a case brought before the labour court premised on the alleged or threatened violation of a right entrenched in Chapter 2 of the Constitution. The provisions of s 158(1)(*g*) on their own are not decisive. In the present case the question that should rightly be asked is whether the basis of the challenge to the decision to extend the collective agreement is one that arises out of the LRA. The obvious answer is that it does.

[24] Koen J, in expressing his concern in para 31 of his judgment, quoted in para 11 above, that the necessary implication of a conclusion contrary to that reached by him, would be to confer exclusive jurisdiction on the Labour Court in all matters that came

before it, overlooked the dicta in *Gcaba* and *Chirwa*, that the purpose of s 157(2) was to extend the jurisdiction of 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. I agree with Davis J that the implication of the judgment in *Valuline* is that s 157(1) of the LRA has a very narrow scope and that almost all matters of a labour nature are potentially, at least, subject to the concurrent jurisdiction of the high court and the Labour Court. I also agree that the conclusion reached in *Valuline* compromised the objectives of the LRA and stand in stark contrast to the judgments of the Constitutional Court in *Chirwa* and *Gcaba*.

[25] Had it not been for the precedential potential of the present case, it might well have been liable to be dismissed in terms of s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 on the basis that it would, in the circumstances of the present case, have no practical effect. The extensions of the agreements in question have run their course. The relief sought by the appellant would ordinarily serve no purpose. MISA sought to overcome this hurdle by submitting that although the extended agreements had lapsed, the notices published in relation thereto remain extant until set aside and that it was entitled to seek the relief referred to above. We were not told whose rights in respect of the expired agreements might have been violated or what litigation might emanate from the alleged unlawful agreements. However, because the decision in the appeal is one which extends beyond the facts of the present case the route of dismissing it on the basis of s 16(2)(*a*)(i) of the Superior Courts Act was not followed.[7]

[26] The appeal is dismissed with costs.

[7] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and another* 2005 (4) SA 319 (CC), para 22.

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M S Navsa

Judge of Appeal

APPEARANCES:

For Appellants	:	G Ebersöhn Instructed by: Gerrie Ebersöhn Attorneys, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For First and Second Respondents:		P G Seleka Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For Third Respondents:		G C Pretorius SC Instructed by: Cliffe Dekker Hofmeyr Inc. c/o Gildenhuys Malatji Inc., Pretoria Matsepes, Bloemfontein
For Fourth Respondents:		P Kennedy SC Instructed by: Haffegee Roskam Savage Attorneys c/o Macrobert Inc., Pretoria Webbers, Bloemfontein