Fredericks and others v MEC Education and Training for the Province of the Eastern Cape (CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693 (4 December 2001)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/01

M FREDERICKS and 47 OTHERS Applicants

versus

MEC FOR EDUCATION AND TRAINING, EASTERN CAPE First Respondent

PERMANENT SECRETARY, EDUCATION,
CULTURE AND SPORT Second Respondent

MINISTER OF EDUCATION Third Respondent

Heard on : 4 September 2001

Decided on : 4 December 2001

JUDGMENT

O'REGAN J:

[1] This case concerns the scope of the jurisdiction of the High Court to determine certain complaints arising out of an employment relationship. The applicants are teachers in the employ of the Department of Education in the Eastern Cape.[1] Towards the end of 1996, they applied to be retrenched voluntarily by the Department but their applications were refused. They sought to

challenge that refusal in the Eastern Cape High Court (the High Court) contending that it constituted a breach of their right to equality in terms of section 9 of the Constitution and a breach of their right to administrative justice in terms of section 33. They sought relief against the MEC for Education and Training in the Eastern Cape (the first respondent), the Permanent Secretary for Education, Culture and Sport in the Eastern Cape (the second respondent) and the national Minister of Education (the third respondent). A full bench of the High Court held that it did not have jurisdiction in the matter, on the basis that on a proper construction of the Labour Relations Act, 66 of 1995 its jurisdiction to consider their claims had been ousted by the relevant provisions of that Act. The applicants then approached this Court for leave to appeal.

[2] The High Court granted a positive certificate in terms of rule 18 of the rules of this Court,[2] thus declaring that the decision in the case concerned a constitutional matter of substance upon which it would be desirable for this Court to make a ruling. The case turns largely on the proper interpretation of the provisions of the Labour Relations Act, and the question of this Court's jurisdiction to adjudicate in this matter needs consideration.

[3] The following provisions of the Constitution are relevant to our determination of this matter. Section 169 provides:

"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."

Section 167(3) of the Constitution provides:

"The Constitutional Court —
(a) is the highest court in all constitutional matters;
(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

This makes it clear that this Court is the final court of appeal in constitutional matters and that it determines in the final instance whether a matter is a constitutional matter or not.

[4] According to the applicants, their claim is based on an infringement of sections 9 and 33 of the Constitution. The respondents contend that this is not in effect a constitutional matter but in reality a labour matter. There are therefore two related questions before this Court. The first is whether the applicants' claim raises a "constitutional matter" as contemplated by sections 167

and 169 of the Constitution. If it does, the second question is whether it is a matter that falls within the jurisdiction of the High Court. The answer to these questions turns on a consideration of the Constitution and an analysis of the provisions of the Labour Relations Act. It will be useful first to set out the facts upon which the applicants based their claim.

[5] After the first democratic elections in 1994 that were accompanied by the amalgamation of a range of educational departments, the national and provincial departments of education realised that they needed to reduce the number of teachers in their employ. To this end, an agreement was reached at the Education Labour Relations Council concerning, amongst other things, a process of voluntary retrenchment whereby teachers would be permitted to apply for voluntary severance packages. This agreement was reached on 30 April 1996 and was referred to by the parties in this Court as "Resolution 3". On 31 May 1996 Resolution 3 was published for notice in *Regulation Gazette* 5711 (published in Government Notice R912 in the *Government Gazette* 17226) in terms of section 12(6) of the Education Labour Relations Act 146 of 1993 by the Minister of Education. On 1 July 1996, the terms of Resolution 3 were extended in terms of the same provision of that Act to all employers and employees covered by that Act.[3] The voluntary severance package arranged was set out in section 1.9(a)(i) of that agreement that provided:

"Any educator may volunteer for a severance package ... in order to allow educators who prefer to leave the service, to do so and to create room for the absorption of educators who are in excess."

[6] The process required applicants to complete an application for voluntary severance that then had to be forwarded to a series of functionaries for approval. The chairperson of the governing body or head of the educational institution in which the applicant worked, the Regional Director of the provincial education department, the director of personnel administration in the provincial education department and finally the second respondent, head of the provincial education department, all had to approve the application.

[7] Initially the applications for voluntary severance packages in the Eastern Cape were granted. From about December 1996, however, the process for the approval of applications was altered and many were refused. The applicants in this case allege that no reason was given for this change in approach, and neither the applicants, nor the trade unions in the Education Labour Relations Council were consulted about the change in procedure. Many applicants appealed the decision to refuse their applications to the first respondent but without success.

[8] The applicants approached the High Court for an order (a) setting aside the decision not to grant voluntary severance packages to the applicants; and (b) ordering the respondents to approve the applications for voluntary severance packages, alternatively, directing them properly to consider the applications for severance packages.

[9] The respondents opposed the application but in their answering affidavit, made by the Superintendent-General of the provincial department of education, barely addressed the facts. The nub of their opposition was based on an argument that the High Court had no jurisdiction to adjudicate upon the claim. For the purposes of this application it must be accepted therefore that

the respondents do not dispute the facts alleged by the applicants.

[10] As this Court observed in *S v Boesak* 2001(1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 13, the Constitution provides no definition of "constitutional matter". What is a constitutional matter must be gleaned from a reading of the Constitution itself:

"If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."[4]

[11] In this case, the applicants have alleged an infringement of their rights under sections 9 and 33 of the Constitution. The respondents who are alleged to have infringed the rights are all bound to observe the provisions of the Bill of Rights in terms of section 8(1) of the Constitution.[5] The applicants do not allege a breach of any specific term of Resolution 3 nor do they rely on the common law of contract for the purposes of their claim.[6] In essence, their section 33 claim is that the state acting in its capacity as employer did not act procedurally fairly in the administration of Resolution 3, and in particular, in the consideration of their applications for voluntary retrenchment. Their challenge is based on their right to administrative justice. The section 9 challenge is based on the differential treatment afforded to them compared to the treatment afforded to employees who had earlier applied for and been granted voluntary retrenchment in terms of Resolution 3. Whether the applicants' claim has merit or not can have no bearing on whether their claim raises a constitutional matter. What is clear is that this case stands or falls on the reliance on section 9 and section 33 and is not founded on any express contractual undertaking stipulated in Resolution 3. The applicants are alleging that conduct of the respondents is in conflict with the Constitution and invalid because of an infringement of the Bill of Rights. Such a claim raises a constitutional matter that will fall, in the final instance, to be determined by this Court. The next question for consideration is whether the High Court has jurisdiction in respect of this claim or not.

[12] This question raises the issue of the jurisdiction of the High Court to determine a constitutional matter. The High Court's jurisdiction over constitutional matters is conferred by section 169 of the Constitution which constitutionally entrenches the High Court's jurisdiction to entertain constitutional matters. That jurisdiction is not absolute — the High Court has no jurisdiction in circumstances where this Court has exclusive jurisdiction to decide a constitutional matter, nor does it have jurisdiction where Parliament has assigned the determination of the constitutional matter to another court of similar status to the High Court. However, it is clear that Parliament may only restrict the jurisdiction of the High Court where it

assigns the relevant constitutional jurisdiction to a court of similar status to a High Court. Whether the restriction on the jurisdiction of the High Court complies with section 169 or not will always raise a constitutional matter. Given the express constitutional provision conferring jurisdiction to determine constitutional matters upon the High Court, the question of the ambit of the restriction of the High Court's jurisdiction in terms of section 169 in constitutional matters is therefore also a constitutional matter. The question of whether the Labour Relations Act has by virtue of section 169 restricted the High Court's jurisdiction to determine a constitutional matter is therefore a constitutional question that falls within the jurisdiction of this Court.

[13] It will now be helpful to outline the reasoning of the court below. White J held that the High Court had no jurisdiction to hear the case because Resolution 3 constituted a collective agreement as contemplated by section 24 of the Labour Relations Act. That section requires all collective agreements to contain a procedure for the resolution of disputes arising out of their interpretation or application.[7] Section 24 also provides that if a collective agreement does not contain a dispute procedure, any party to a dispute about the interpretation or application of that agreement may refer that dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA).[8] The CCMA is then required to resolve the dispute through conciliation. If the dispute remains unresolved, the section provides that any party may refer the dispute to arbitration by the CCMA.[9] A review lies to the Labour Court in respect of the arbitration.[10]

[14] White J held that the provisions of section 24 are mandatory and that "they oust the jurisdiction of the courts to deal with such disputes." He relied on a High Court judgment *IMATU v Northern Pretoria Metropolitan Substructure and Others* 1999 (2) SA 234 (T) that held that a High Court had no jurisdiction to adjudicate a dispute arising from the interpretation or application of a collective agreement. The question whether the High Court's jurisdiction to determine a constitutional matter had been ousted by section 24 was not considered in *IMATU*'s case. White J concluded therefore that the High Court had no jurisdiction to entertain the claim and dismissed their application.

[15] Before deciding whether the High Court was correct in concluding that section 24 of the Labour Relations Act ousted its jurisdiction, it is necessary to decide whether the provisions of that Act had any application to the dispute in this case. In order to decide this question, we must consider the provisions of the Labour Relations Act and, in particular, the transitional provisions contained in schedule 7 of the Act. Item 12 (2) of that schedule provides that –

"An agreement promulgated in terms of section 12 of the Education Labour Relations Act and in force immediately before the commencement of this Act remains in force for a period of 18 months after the commencement of this Act or until the expiry of that agreement, whichever is the shorter period, as if the provisions of that Act had not been repealed."

This provision covers Resolution 3 which was an agreement in terms of section 12 of the Education Labour Relations Act that was promulgated by the Minister in July 1996 before the commencement of the Labour Relations Act on 11 November 1996 and was therefore in force before the commencement of that Act. What is the effect of this transitional provision on disputes that arise in relation to Resolution 3?

[16] According to our common law, provisions of a statute do not, unless the contrary is stipulated, have retrospective effect. They do not affect vested rights or obligations. However, provisions that regulate procedural rather than substantive matters ordinarily have immediate effect on all disputes even if they arose prior to the enactment of the legislation. In *Curtis v Johannesburg Municipality* 1906 TS 308 at 312 Innes CJ held that:

"Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective. Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose."[1][1]

It is not always easy to tell whether a statutory provision is purely procedural in effect or not.[1][2] To avoid confusion, therefore, many statutes that repeal other statutes expressly regulate their transitional effect. Schedule 7 to the Labour Relations Act is titled "Transitional Arrangements" and item 12(2) should be read and understood in this context.

[17] A similar (but not identical) provision to item 12(2) is item 12(1)(a) of the same schedule. It relates not to education sector agreements but to industrial council agreements promulgated by the Minister in terms section of 48 of the former Labour Relations Act, Act 28 of 1956. It provides as follows:

"Any agreement promulgated in terms of section 48, any award binding in terms of sections 49 and 50, and any order made in terms of section 51A, of the Labour Relations Act and in force immediately before the commencement of this Act, remains in force and enforceable, subject to paragraphs (b) and (c) of this subitem, and to subitem (5B), for a period of 18 months after the commencement of this Act or until the expiry of that agreement, award or order, whichever is the shorter period, in all respects, as if the Labour Relations Act had not been repealed."

[18] The meaning of this provision was recently considered by the Supreme Court of Appeal in the case of *Coin Security Group (Pty) Ltd v Minister of Labour and Others*.[1][3] In that case, the Supreme Court of Appeal was concerned with a demarcation dispute arising out of an industrial council agreement that had been promulgated in terms of section 48 of the 1956 Labour Relations Act. One of the questions before the court was which statutory dispute procedure should be followed in relation to disputes arising from the agreement — that provided in the 1956 Labour Relations Act or that provided in the 1995 Labour Relations Act. Streicher JA, on behalf of a unanimous court, held that item 12(1)(a) meant that the dispute procedures of the 1956 Labour Relations Act must be followed.

[19] A similar conclusion was reached by the Labour Appeal Court in *Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of Southern Africa and Others* (1999) 20 ILJ 1695 (LAC) at para 20 where Ngcobo AJP held:

"In seeking the answer to the question presented here, the general policy of the LRA [Labour Relations Act] cannot, therefore, be overlooked. That policy was that insofar as the industrial council agreements are concerned everything was to continue exactly as before and all provisions applicable to the industrial council agreements were to continue to operate during the transitional period. If that was the intention of the legislature, it would be going against that intention to hold that the legislature did not intend to preserve the enforcement mechanisms provided for in the repealed Act during the transitional period ...".

Both the Supreme Court of Appeal and the Labour Appeal Court have therefore concluded that item 12(1)(a) means that the enforcement mechanisms under the repealed legislation must be followed for the transitional period and not the procedures set out in the new Labour Relations Act.

[20] The terms of items 12(1)(a) and 12(2) are very similar. They both provide that agreements promulgated remain "in force" as if the repealed legislation has not been repealed. There are several key differences however. The first is that item 12(1)(a) includes the phrase "and enforceable" but item 12(2) does not. A second is that item 12(1)(a) is concerned with industrial council agreements promulgated under the 1956 Labour Relations Act, while item 12(2) is concerned with agreements concluded by the Education Labour Relations Council and promulgated in terms of the Education Labour Relations Act.

[21] Item 12(2) states simply that promulgated agreements shall remain "in force" as if the provisions of the Education Labour Relations Act had not been repealed. The *Concise Oxford English Dictionary* (1990 edition) states that "in force" means "valid" and "effective". On its face, therefore, the subitem provides that the agreements shall remain effective as if the Education Labour Relations Act had not been repealed. As such, item 12(2) could be interpreted in two ways: it could be interpreted to mean simply that the legal efficacy of promulgated agreements is preserved despite the repeal of the legislation in terms of which they were promulgated; or it could mean both that their legal efficacy is preserved and the method of their enforcement shall remain unchanged. This was the meaning the SCA attributed to item 12(1)(a) in the *Coin Security* case (see paragraph 18 above).

[22] Determining the effect of item 12(2) is by no means an easy exercise in interpretation. There are conflicting indications in the schedule as to the meaning that should be attached to it. I have concluded, however, for several reasons that the narrower of the two meanings is the proper one. First, the exclusion of the words "and enforceable" from item 12(2) renders a meaning narrower than that borne by item 12(1)(a) more appropriate to the plain language of the provision. I am mindful that both the Supreme Court of Appeal and the Labour Appeal Court have expressly stated that the inclusion of the words "and enforceable" in item 12(1)(a) adds nothing to the meaning of 12(1)(a).[1][4] However, in both cases the courts were not concerned with and did not consider the differences in wording between item 12(1)(a) and item 12(2) but were concerned

with other arguments not relevant to the present matter. The fact that different language was used for the two provisions is a powerful suggestion of a different legislative purpose sought to be achieved. If the legislature had intended to achieve the same purposes by items 12(1)(a) and 12(2) — which are, indeed, all but neighbouring provisions — it would have been a simple matter to have adopted the same language in both provisions. Instead, the legislature chose not to include the words "and enforceable" in item 12(2) although the phrase has been used in item 12(1)(a). The absence of the direct reference to enforceability in item 12(2) is a strong indication that the purpose of 12(2) was different from that of item 12(1)(a). In item 12(2), the legislature sought to regulate validity only and not enforcement.

[23] A further difference between item 12(1)(a) and 12(2) is that the former provision is concerned with industrial council agreements promulgated in terms of section 48 of the 1956 Labour Relations Act while the latter is concerned with agreements promulgated in terms of the Education Labour Relations Act. Industrial Council agreements are specifically excluded from the definition of "collective agreement" by item 13(1)(b) of schedule 7 while education council agreements are not.[1][5] On the other hand, agreements concluded at the Education Labour Relations Council and promulgated by the Minister are not excluded from the definition of "collective agreement" in the same fashion. This is another factor that indicates that the legislature sought a different manner of enforcing education agreements in the transitional period to that adopted for industrial council agreements.

[24] A final factor that tips the balance in favour of a narrow interpretation is the fact that the schedule provides separately for the manner in which pending disputes should be dealt with. Item 21 in Part E of schedule 7, subtitled "Disputes and courts" provides that disputes that arose before the commencement of the Labour Relations Act must be dealt with in terms of the appropriate legislation repealed by the new Act.[1][6] The implicit corollary is that disputes that arise after the new Act came into force, in other words after 11 November 1996, should be dealt with in terms of the procedures provided for in the new legislation. The omission of the words "and enforceable" in item 12(2) suggests that the general provisions regulating pending disputes should regulate the enforceability of education sector agreements while the inclusion of those words in item 12(1)(a) indicates that the enforceability of industrial council agreements shall continue to be regulated under the old law. The dispute in the current case arose in early 1997 and therefore after the new Act was in force. Item 21 provides that the cut-off for the old dispute procedures was to be determined by the date upon which the dispute arose. If it arose before the new legislation, the old procedures should continue to be followed. If it arose after the new legislation, the new procedures should be adopted. This interpretation was given to item 12(2) by the Labour Court in the case of *Adonis v Western Cape Education Department* [1998] 6 BLLR 564 (LC) at paras 23-5.

[25] I accordingly conclude that the narrower interpretation is more in accordance with the overall purpose of the 1995 Labour Relations Act. Disputes having some basis in Resolution 3 must therefore follow the procedures that are provided in the new Labour Relations Act.

[26] White J held that Resolution 3 constituted a "collective agreement" as contemplated by section 24 of the Labour Relations Act and that therefore disputes relating to its interpretation or application had to be considered by the CCMA as required by section 24.

[27] “Collective agreement” is defined in section 213 of the Act as follows:

“‘Collective agreement’ means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other hand,—
(a) one or more employers;
(b) one or more registered employers’ organisations; or
(c) one or more employers and one or more registered employers’ organisations.”

Resolution 3, as stated above, was entered into before the Act came into force. Item 13(1) of schedule 7 defines “agreement” for the purposes of item 13 as excluding “an agreement promulgated in terms of section 48 of the Labour Relations Act”. No mention is made in the schedules of agreements promulgated in terms of other labour legislation. This leaves the precise status of Resolution 3 somewhat uncertain. There are strong indications, however, that Resolution 3 is to be deemed a collective agreement for the purposes of the new Act. First, it was an agreement entered into in the Education Labour Relations Council (“the Council”) on 30 April 1996. The Council was an institution established for the purposes of collective bargaining whose members were employer and employee organisations.[1][7] Resolution 3 certainly regulated matters of mutual interest to employers and employees in that it provided for the “right-sizing” of the number of teachers in the employ of the Department of Education and for the establishment of a learner-educator ratio throughout the Department’s schools. It therefore fell within the broad ambit of the definition of “collective agreement” provided in section 213 of the Labour Relations Act.
[28] A counter-indication is the fact that Resolution 3 was extended by the Minister of Education to all employers and employees governed by the Education Labour Relations Act in terms of section 12(6)(a) of that Act on 1 July 1996[1][8] before the Labour Relations Act came into force.[1][9] Section 12(6)(a) is closely modelled on section 48 of the 1956 Labour Relations Act that also permitted the extension of the provisions of collective agreements to non-parties.[2][0] The procedure whereby collective agreements concluded at bargaining councils may be extended to other employees in an industry by the Minister of Labour has been a feature of South African labour law since 1923.[2][1] It was well-established in our law that once an agreement was promulgated in this way, its status and binding force derived from the fact that it became a form of delegated legislation.[2][2] In the *Coin Security* case,[2][3] the Supreme Court of Appeal stated that an industrial council agreement promulgated in terms of section 48 of the 1956 Labour Relations Act is not a collective agreement for the purposes of the new Act.[2][4] As noted above, industrial council agreements promulgated in terms of section 48 of the old Labour Relations Act are expressly excluded from the definition of “collective agreement” by item 13(1)(b). However, no similar exclusion applies to education agreements. Indeed, item 13(2) provides that all agreements in force at the time the new Act came into operation shall be deemed to be collective agreements for the purposes of that Act. There is accordingly much to be said for the view that Resolution 3 should be deemed a collective agreement for the purposes of the new Act. However, it is not necessary to decide this complex question finally for even if Resolution 3 does constitute a collective agreement, the dispute in this case is not a dispute that must be resolved by arbitration in terms of section 24 of the Labour Relations Act as I now explain. I shall assume,

therefore without deciding, that Resolution 3 does constitute a collective agreement.

[29] The next issue that arises is whether section 24 ousts the jurisdiction of the High Court to determine disputes that raise constitutional matters that are connected with collective agreements. This could only have been done constitutionally if the determination of such disputes had been assigned to another court of equivalent status. This is because the High Court's jurisdiction over constitutional matters is conferred and entrenched by section 169 of the Constitution.[2][5] That jurisdiction may be restricted by an Act of Parliament only where it assigns the determination of the relevant constitutional matter to a court of similar status to a High Court.

[30] White J held that section 24 ousted the jurisdiction of the High Court to adjudicate upon any dispute arising out of the interpretation or application of a collective agreement, apparently even where the claim is founded on a breach of constitutional rights. It appears however that the provisions of section 169 were not drawn to the High Court's attention, nor were they debated before the Court. It is quite clear from the provisions of the Labour Relations Act that the CCMA is not a court, and, in particular, not a court of equivalent jurisdiction to the High Court.[2][6] If section 24 requires that all disputes concerning the interpretation or application of collective agreements, even where those disputes are founded on an alleged infringement of constitutional rights, not only be conciliated by but arbitrated before the CCMA, and are accordingly not justiciable by a High Court or a court of equivalent status, section 24 would be inconsistent with section 169 of the Constitution.

[31] Section 169, as quoted above in paragraph 3, provides that the High Court "may decide any constitutional matter" other than a matter that falls within the exclusive jurisdiction of the Constitutional Court or a matter "assigned by an Act of Parliament to another court of a status similar to a High Court". In this context, "assigned" means taking jurisdiction away from the High Court and conferring it on another court of similar status. The Act does contemplate that the arbitration proceedings conducted in terms of section 24 before the CCMA will be subject to review before the Labour Court,[2][7] but a power of review is not a power to determine a dispute. It is a power to correct irregularities in a previous process. If upon review the Labour Court does not agree with the decision of the CCMA, it is not able to substitute its decision for the decision of the CCMA unless there is some reviewable error. Section 24 of the Act therefore does not provide for the Labour Court to determine disputes based on constitutional rights arising from a collective agreement. Whatever the nature of the CCMA's jurisdiction might be, such jurisdiction cannot under section169 of the Constitution oust the jurisdiction of a High Court to decide a constitutional matter, for the simple reason that, as already indicated, the CCMA is not a "court of a status similar to a High Court". This inevitably leads to the conclusion that section 24 of the Labour Relations Act does not "assign to another court of a status similar to a High Court" a constitutional matter that the High Court would otherwise have power to decide.

[32] As stated above,[2][8] the applicants in this case have alleged an infringement of their rights under sections 9 and 33 of the Constitution. Their claim is not based on contract. It is based on their constitutional rights to administrative justice and equal treatment. They allege that the state acting in its capacity as employer did not act procedurally fairly in the administration of Resolution 3, and in particular, in considering their applications for voluntary retrenchment. To decide this matter it is not necessary for us to consider the merits of their claim or the extent to

which the state acting in its capacity as employer is obliged to comply with the dictates of section 33 or section 9. What is clear, however, is that the applicants' claim does not arise only from the provisions of Resolution 3 itself. It arises from the special duties imposed upon the state by the Constitution.

[33] The applicants raise a constitutional matter. Section 24 does not oust the jurisdiction of the High Court to determine that dispute because the institution responsible for the resolution of disputes in terms of section 24 is not a court of similar status to the High Court. The effect of these conclusions is not however that a person who has a constitutional complaint arising out of the interpretation or application of a collective agreement may not take that matter to the CCMA. Nor does it mean that the CCMA should not consider the provisions of the Constitution in the exercise of its powers. Indeed, like all organs of state it is obliged to seek to give effect to constitutional commitments. What we do conclude, however, is that the legislature may not oust the jurisdiction of the High Court to consider constitutional matters unless it assigns that jurisdiction to a court of similar status, even if at the same time, it confers a similar, though not exclusive, jurisdiction upon another tribunal or forum. The High Court therefore erred in concluding that the dispute in this matter concerned the interpretation or application of a collective agreement as contemplated by section 24.

[34] It is important to note that in this case, the applicants expressly disavow any reliance on section 23(1) of the Constitution, which entrenches the right to fair labour practices. The preamble to the Labour Relations Act makes it plain that the purpose of the Act is to give statutory effect to this right. The question therefore does not arise in this case whether a dispute arising out of the interpretation or application of a collective agreement gives rise to a constitutional complaint in terms of section 23(1). That question raises difficult issues of constitutional interpretation that we need not address now.

[35] Having concluded that section 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 section 24 of the Labour Relations Act 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.

[36] Section 157 of the Labour Relations Act provides as follows:

"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
(2) The Labour Court has concurrent jurisdiction with the 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, and arising from –
(a) employment and 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 proper interpretation of sections 157(1) and (2) has been the subject of extensive consideration in the High Courts.[2][9] The starting point for the enquiry must be section 157(1) which provides that the Labour Court shall have exclusive jurisdiction over all matters that "are to be determined" by it in terms of the Labour Relations Act or other legislation.[3][0]

[37] To the extent that exclusive jurisdiction over a matter is conferred upon the Labour Court by section 157, or any other provision of the Labour Relations Act or other legislation, the jurisdiction of the High Court to adjudicate such matter is ousted. There can be no constitutional objection to such an ouster, as section 169 of the Constitution makes it plain that a constitutional matter over which the High Court has jurisdiction may be assigned by an Act of Parliament to another court of a status similar to a High Court. The Labour Court is such a court. Section 151 of the Labour Relations Act provides:

"(1) The Labour Court is hereby established as a court of law and equity.
(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.
(3) The Labour Court is a court of record."

[38] Section 157(1) therefore has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act provides otherwise. Deciding which matters fall within the exclusive jurisdiction of the Labour Court requires an examination of the Labour Relations Act to see which matters fall "to be determined" by the Labour Court. It is quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. As Nugent JA held in *Fedlife Assurance Ltd*:

"... s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees."[3][1]

[39] Instead the Act provides for a careful and complex division of responsibilities between bargaining councils, the CCMA and the Labour Court and Labour Appeal Court. It is also important to note that generally the Act requires that disputes be first referred to a conciliation or mediation process before being referred to an agency for adjudication. Some disputes are resolved by conciliation, followed by arbitration that may be followed by review in the Labour Court and some disputes are resolved by conciliation, followed by adjudication in the Labour Court. So, for example, disputes about organisational rights,[3][2] the interpretation of collective agreements[3][3] and many disputes concerning unfair dismissals[3][4] are to be referred to conciliation generally by the CCMA and then to arbitration. On the other hand, disputes about

rights of freedom of association,[3][5] and certain specified disputes concerning unfair dismissal[3][6] must first be conciliated and then referred to adjudication to the Labour Court.

[40] As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction will only be ousted in respect of matters that "are to be determined" by the Labour Court in terms of the Act. The *Concise Oxford English Dictionary* (1990 edition) defines "determine" so as to include "to settle", "to decide", and "to fix". Adopting this definition, a matter to be determined by the Labour Court as contemplated by section 157(1) means a matter that in terms of the Act is to be decided or settled by the Labour Court. I am fortified in this conclusion by the use of the word "determine" in section 19(1)(a) of the Supreme Court Act, 59 of 1959 which provides that:

"A provincial or local division shall ... have power –
(i) to hear and determine appeals from all inferior courts within its area of jurisdiction;
(ii) to review the proceedings of all such courts;
(iii) in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."[3][7]

[41] There is no express provision of the Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as employer, other than section 157(2). That section provides that challenges based on constitutional rights arising from the state's conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with the High Court. Whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.

[42] It might be argued that section 158(1)(h) of the Act is broad enough to confer such a power on the Labour Court. That provision states:

"158 Powers of Labour Court
(1) The Labour Court may —
(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;".

[43] Whatever the precise ambit of section 158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the state acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by section 157(2), it would be a strange reading of the Act to interpret section 158(1)(h) read with section 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by section 157(2). Section 158(1)(h) cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient,

when read with section 157(1), to exclude the jurisdiction of the High Court.

[44] In the absence therefore of a specific provision of the Act conferring a jurisdiction to determine disputes arising out of constitutional matters upon the Labour Court that could be said to give rise to an exclusive jurisdiction in terms of section 157(1) of the Act, I must conclude that this dispute is not excluded from the jurisdiction of the High Court.

[45] In the circumstances, the High Court was incorrect to conclude that it did not have jurisdiction to entertain this matter. The application for leave to appeal should therefore be granted and the appeal upheld. It would not be appropriate to accede to the suggestion on behalf of the applicants that this Court make an order affording the applicants the substantive relief they sought in the High Court. It is for that Court to decide the matter, including the question of costs in that Court, now that the constitutional issue has been resolved. This Court should do no more than refer the matter back to the High Court for determination on its merits. As the applicants have succeeded before this Court, they are entitled to their costs here, which should include the costs of two counsel.

Order

1. The application for leave to appeal to this Court is granted.

2. The appeal is upheld and the order made by the High Court in the Eastern Cape is set aside.
3. The matter is referred back to the High Court.
4. The respondents are to pay the costs of the application for leave to appeal and the appeal jointly and severally, such costs to include the costs consequent upon the employment of two counsel.

Chaskalson CJ, Langa DCJ, Ackermann J, Kriegler J, Madala J, Mokgoro J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of O'Regan J.

For applicants: A Beyleveld SC and P N Kroon, instructed by Smith, Tabata, Loon and Connellan Inc., King William's Town.

For respondents: P J De Bruyn SC, B J Pienaar and T Norman, instructed by the State Attorney, King William's Town.

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[1] There were 48 applicants for leave to appeal in this Court. When the proceedings were originally launched in the Eastern Cape High Court, there were 44 applicants (all but six of whom are still applicants in this Court), 12 were then added during the proceedings in that Court and eight of the High Court applicants fell out of the proceedings before application for leave to

appeal was launched, including the original first applicant Mr Cassim Fredericks. The first applicant is now M Fredericks.

[2] Rule 18(6) provides:
"(a) If it appears to the court hearing the application made in terms of subrule (2) that –
(i) the constitutional matter is one of substance on which a ruling by the Court is desirable; and
(ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence; and
(iii) there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given,
such court shall certify on the application that in its opinion, the requirements of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, which of such requirements have been satisfied and which have not been so satisfied."

[3] R1086 published in *Government Gazette* 17300 of 1 July 1996. Resolution 3 was amended by Resolution 5 of 1996 published for notice in R1003 of 14 June 1996 *Government Gazette* 17262 and then extended to all employers and employees falling within the scope of the Labour Relations Act, 1995 by the Minister of Education in R1438 published in *Government Gazette* 17396 of 28 August 1996.

[4] Para 14 (footnotes omitted in the quotation).

[5] Section 8(1) provides that: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[6] See *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

[7] Section 24(1).

[8] Section 24(2).

[9] Section 24(5) read with sections 136 and 137 of the Labour Relations Act. See also section 127(2)(b) which prohibits the accreditation of private accreditation agencies for resolving disputes contemplated by section 24(2) to (5).

1[0] See section 145 and 158(1)(g) of the Labour Relations Act and the consideration of these sections in *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC); 1999 (3) SA 304 (LAC) and the recent reconsideration of that judgment in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 ILJ 1603 (LAC).

[1]1 See also section 12(2) of the Interpretation Act, 33 of 1957.

1[2] See *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 65.

1[3] 2001 (4) SA 285 (SCA).

[1][4] See para 11, footnote 1, of *Coin Security* cited above n 13. See the judgment of the Labour Appeal Court in *Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of Southern Africa and others* (1999) 20 ILJ 1695 (LAC) at paras 14-15 where Ngcobo J held that the words "and enforceable" add nothing to the meaning of item 12(1)(a) and were added *ex abundante cautela.*
[1][5] Item 13(1) provides:

"For the purposes of this section, an agreement –
(a) includes a recognition agreement;
(b) excludes an agreement promulgated in terms of section 48 of the Labour Relations Act;
(c) means an agreement about terms and conditions of employment ore any other matter of mutual interest entered into between one or more registered trade unions, on the one hand, and on the other hand –
(i) one or more employers;
(ii) one or more registered employers' organisations; or
(iii) one or more employers and one or more registered employers' organisations."

[1][6] Item 21 provides:

"Disputes arising before commencement of this Act
(1) Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed."
See also item 22 that provides
"Courts
(1) In any pending dispute in respect of which the industrial court or the agricultural labour court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the industrial court or agricultural labour court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The industrial court or the agricultural labour court may perform or exercise any of the functions and power that it had in terms of the labour relations laws when it determines the dispute.
(2) Any dispute in respect of which proceedings were pending in the industrial court or agricultural labour court must be proceeded with as if the labour relations laws had not been repealed."

[1][7] See section 6 of the Education Labour Relations Act, 146 of 1993.
[1][8] See R1086 of 1 July 1996 published in *Government Gazette* 17300 of that date. Section 12(6)(a) provided as follows:

"The Council may transmit to the Minister any agreement contemplated in this section, and the Minister may, if he deems it expedient, and at the request of the Council either at the time of such transmission or at any time thereafter —
(i) by notice in the *Gazette*, and from time to time, declare that from a date and for a period fixed by him in that notice, all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon employers and employees, other than those referred to in section 12(3), in any area likewise specified;

(ii) in a notice under subparagraph (i) or by notice in the *Gazette* at any time thereafter and from time to time declare that from a date and for a period fixed by him in that notice, all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon the employers and employees or upon a specified class or classes of employers and employees in an area additional to the area referred to in subparagraph (i):
Provided that before publishing a notice under this paragraph, the Minister shall cause to be published in the *Gazette* a provisional notice setting forth the purport of the notice he proposes to publish under this paragraph and calling upon all interested persons who have any objections to the proposed notice or the proposed provisions thereof, to lodge such objections with an officer and at an address stated in the notice, within a specified period but not less than 30 days from the date of the publication of the provisional notice."

[1][9] The Labour Relations Act, 66 of 1995 came into force on 11 November 1996.
[2][0] Section 48 (at the time of its repeal in 1995) provided as follows:

"(1) Whenever an industrial council transmits to the Minister any agreement such as is referred to in section 24, entered into by some or all of the parties to the council, the Minister may, if he deems it expedient to do so, at the request of the council made either at the time of such transmission or at any time thereafter —
(a) by notice in the *Gazette* declare that from a date and for a period fixed by him in that notice, all the provisions of the agreement, as set forth in that notice, shall be binding upon the employers who and the employers' organizations and trade unions which entered into that agreement and upon the employers and employees who are members of those organizations and unions;
(b) in a notice published under paragraph (a) or by notice in the *Gazette* at any time thereafter and from time to time declare that from a date and for a period fixed by him in that notice all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon all employers and employees other than those referred to in any relevant notice published under paragraph (a), who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates, in the are or any specified portion of the area in respect of which the council is registered;
(c) in a notice published under paragraph (a) or (b) or by notice in the *Gazette* at any time thereafter and from time to time declare that from a date and for a period fixed by him in that notice all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon all employers and employees or upon a specified class or classes of employers and employees engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates, or in a specified section of portion thereof, in an area additional to that in respect of which the council is registered: Provided that —
(i) before publishing a notice under this paragraph the Minister shall cause to be published in the *Gazette* a provisional notice setting forth the purport of the notice he proposes to publish under this paragraph and calling upon all interested persons who have any objections to the proposed notice or the proposed provisions thereof, to lodge such objections with an officer at an address stated in the notice within a specified period of not less than 30 days from the date of the publication of the provisional notice;..."

2[1] See section 9 of the Industrial Conciliation Act, 11 of 1924 and the brief commentary thereon in Thompson and Benjamin *South African Labour Law* (Juta, Cape Town) A1-23.
[2]2

See *S v Prefabricated Housing Corporation (Pty) Ltd* 1974 (1) SA 535 (A) at 540B.

2[3] Above n 13.

2[4] Ibid. The SCA based its reasoning on *S v Prefabricated Housing Corporation (Pty) Ltd* (above n 22), and not on item 13(1)(b) referred to in the text. What is clear is that agreements promulgated under section 48 of the old legislation do not constitute "collective agreements" for the purposes of the new Act.

2[5] Above para 3. See also para 12.

2[6] See chapter 7 of the Act which establishes and regulates the CCMA.

2[7] See para 13 above.

2[8] Above para 11.
2[9] See, for example, *Kilpert v Buitendach* (1997) 18 ILJ 1296 (W); *Mondi Paper v PPWAWU* (1997) 18 ILJ 84 (D); *Mcosini v Mancotywa* (1998) 19 ILJ 1413 (Tk); *SAPPI Fine Papers v PPWAWU* (1998) 19 ILJ 246 (SE); *Coin Security Group v SANUSO* (1998) 19 ILJ 43 (C); *Kritzinger v Newcastle Plaaslike Oorgangsraad* (1999) 20 ILJ 2507 (N); *Fourways Mall v SACCAWU* 1999(3) SA 752 (W); *Claase v Transnet* 1999 (3) SA 1012 (T); *CWU v Telkom* (1999) 20 ILJ 991 (T); *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T); *IMATU v North Pretorian Metropolitan Substructure* 1999 (2) SA 228 (T); *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA 291 (Tk); *Minister of Correctional Services v Ngubo* 2000 (2) SA 668 (N); *Louw v Acting Chairman of the Board of Directors, Northwest Housing Corporation* (2000) 21 ILJ 482 (B); *Runeli v Minister of Home Affairs*ng2057 (2000) 21 ILJ 910 (Tk); *TGWU v Kempton City Syndicate* (2001) 22 ILJ 104 (W); *Eskom v* NUM (2001) 22 ILJ 618 (W); *Naptosa v Minister of Education, Western Cape* 2001 (2) SA 112 (C); *Mbayeka and another v MEC for Welfare, Eastern Cape* [2001] 1 AllSA 567 (Tk). See also the Labour Appeal Court decision *Langeveldt v Vryburg TLC* (2001) 22 ILJ 1116 (LAC).

3[0] See the recent decision of the Supreme Court of Appeal – *Fedlife Assurance Ltd v Wolfaardt* case 450/99 as yet unreported decision of the Supreme Court of Appeal dated 18 September 2001.

3[1] Ibid para 25.

3[2] See section 22 of the Act.

[3]3 See section 24 of the Act.

3[4] See section 191 of the Act.

[3][5] See section 9 of the Act.

[3][6] See section 191(5)(b) of the Act.

[3][7] See also the use of the word “determine” in section 46(9)(a) of the Labour Relations Act, 28 of 1956, the predecessor to the legislation under consideration in this case.