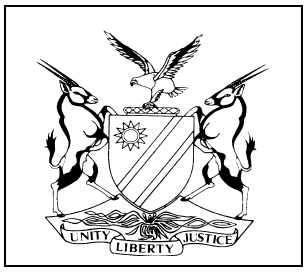

LAIMI DESSA ONESMUS v MINISTER OF LABOUR AND ANOTHER

CASE NO. (P) A 144/2002

2008/07/05

Maritz, J

CONSTITUTIONAL LAW
JURISDICTION
LABOUR LAW

Constitution – Art. 80(2) – confers original jurisdiction on High Court to protect Constitution and fundamental rights –Article creating both the power and duty to exercise such jurisdiction – jurisdiction in those matters not derived from statute – Legislature may not diminish those powers

Constitution – Articles 25 and 78-81 – design of complete constitutional structure for the judicial protection of Constitution and fundamental rights – such jurisdiction of High Court exercised not by licence of Parliament

Constitution – Articles 78 and 83 – Unlike Superior Courts, all other Courts of Namibia established by Acts of Parliament – such Courts by constitutional design "Lower Courts" – Labour Court a Lower Court

Jurisdiction – High Court – original jurisdiction to protect Constitution and fundamental rights – establishment of specialist Courts with "exclusive jurisdiction" by Acts of Parliament, including protection of fundamental rights within area of specialisation – if legitimate, piecemeal assignation of High Court's constitutional jurisdiction may leave Court powerless – such statutory erosion not permissible

Jurisdiction – High Court – original constitutional jurisdiction to protect Constitution and fundamental rights - exclusive statutory jurisdiction of Labour Court, including jurisdiction to make declaratory orders relating to protection of fundamental rights in labour context - effect of s.18(1) of Labour Act purporting to amend High Court's jurisdiction under Art 80(2) by diminishing it – Labour Act not intended to bring about constitutional amendment and not complying in substance or form to that required by Art 132 – High Court to exercise jurisdiction protecting Constitution and

fundamental rights under Art 80(2) as if Labour Act has not been promulgated – Supreme Law to take precedence over statute

Labour law – Labour Act – s.18(1) – effect of Cronje-judgement to accord Labour Court jurisdiction to make declaratory orders regarding protection of fundamental rights in labour context – such therefore by implication falling within "exclusive" jurisdiction of Labour Court – so applied, word "exclusive" in 18(1) diminishing constitutional jurisdiction of original nature vested by Art 80(2) in High Court – effect unconstitutional – Court not finding it necessary to strike out "exclusive" but simply dismissing objection against High Court's jurisdiction by applying Art 80(2)

CASE NO. (P) A144/2002

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LAIMI DESSA ONESMUS **APPLICANT**

versus

MINISTER OF LABOUR **FIRST RESPONDENT**
THE SOCIAL SECURITY COMMISSION **SECOND RESPONDENT**

CORAM: MARITZ, J.

Heard on: 2004-06-04 and 2004-07-07

Delivered on: 2008-07-04

REASONS FOR JUDGEMENT

MARITZ, J: [1] This matter concerns the jurisdiction of the High Court of Namibia. More in particular, it raises the question whether the power vested in it to protect the Constitution and the fundamental rights and freedoms guaranteed thereunder has - or could have - been curtailed in the context of labour disputes by the exclusive jurisdiction conferred on the Labour Court by statute. The first respondent contended that its jurisdiction had been excluded. The applicant contested the contention. The Court found for the applicant. What follows are the reasons for the order made.

[2]The applicant, who had been appointed as Chief Executive Officer of the Social Service Commission, was temporarily removed from office for an indefinite period by the first respondent. He believed her to be guilty of misconduct so serious that she would be unsuitable to continue in her office. Surprised and aggrieved by her summary removal, the applicant sought to obtain the reasons for it from the first respondent. When the reasons were not forthcoming, she launched an application in this Court for the following relief:

> "1. Ordering that the decision taken by the first respondent on or about 25 February 2002 to temporarily remove applicant from her office as chief executive officer of the second respondent, purportedly in terms of Section 6(2), read together with Section 12(3) of the Social Security Act, Act No. 34 of 1994, and in line with Cabinet Decision No. 37 th/04.12.01/008, be reviewed and set aside in terms of Rule of Court 53(l)(a).
>
> 2. Ordering that the said decision be declared to be in conflict with Article 18 of the Constitution and set aside.
>
> 3. Directing the first respondent to pay the costs of the application on an attorney and client basis, and in the event of the second respondent opposing the application, jointly and severally with the second respondent."

[3]In response, the first respondent gave notice of his intention to raise the point of jurisdiction *in limine*. The notice reads:

> "1. The relief claimed by the applicant in the context of the facts as stated by her in her founding affidavit relates to and concerns:
>
> (a) the setting aside of a decision taken by the first respondent in his capacity as the Minister of Labour and Manpower Development, which decision relates to the administration of the provisions the Labour Act, 1992 (Act 6 of 1992) and/or
>
> (b) is a labour matter or complaint as envisaged in sections 18 and/or 19 of the Labour Act, 1992 (Act 6 of 1992).
>
> 2. In the premises the First Respondent denies that this Honourable Court has jurisdiction to grant the relief claimed by the applicant and the Honourable Court is respectfully requested to dismiss the application with costs."

[4]In support of the point *in limine* Mr Coetzee submits on behalf of the first respondent that the relief prayed for by the applicant falls within the four corners of Labour Court's exclusive jurisdictional powers as defined in s. 18(1) of the *Labour Act, No. 6 of 1992* (the "Labour Act"). *Cadit quaestio*. Mr Corbett, on behalf of the applicant counters that the first respondent's powers to appoint the CEO of the Social Security Commission and to remove the person so appointed from office are derived from the provisions of the Social Security Act, No. 34 of 1994. Whether the first respondent acted fairly and reasonably (as required by Art. 18 of the Constitution) when he removed the applicant from office in the exercise of his public powers must be determined with reference to those provisions - not those with which the respondent was entrusted with under the Labour Act. He contends that, inasmuch as the applicant is seeking constitutional review of the first respondent's administrative decision purportedly taken in terms of the Social Security Act, the application falls within the High Court's jurisdiction as contemplated by sections 2 and 16 of the High Court Act, 1990.

[5]When the application was called, the Court *mero motu* requested counsel to consider, and if they deem it appropriate, to submit argument on the following questions:

> Inasmuch as Article 80(2) of the Constitution provides that the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder and the *causa* of applicants complaint is that her right to administrative justice protected by Art. 18 of the Constitution has been infringed –

(a) should the High Court decline to exercise its constitutional jurisdiction because that issue is justiciable under the exclusive jurisdictional powers of the Labour Court under section 18(1) of the Labour Act;

(b) can s 18(1) of the Labour Act be interpreted and applied in a manner that does not conflict with the Constitution and

(c) if not, is the ousting of the High Courts jurisdiction in those instances by s. 18(1) of the Labour Act constitutional?

[6]The hearing was adjourned for a few weeks and when it resumed counsel for the applicant submitted that the review jurisdiction and constitutional jurisdiction of the High Court had not been ousted by s. 18(1) of the Labour Act but, should the Court find that its review jurisdiction and constitutional jurisdiction had in fact been ousted, then section 18 of the Labour Act, insofar as it purported to do so was unconstitutional. First respondent's counsel, on the other hand, contended that the constitutionality of s.18(1) of the Labour Act had not been raised by the applicant and that the Court should not decide the issue. Until it has been declared unconstitutional, it remained of full force and effect. He further submitted that the Supreme Court had held in the *Cronje*-appeal[1] that the High Court's jurisdiction had been excluded in such matters.

[7]Before I grapple with the jurisdictional nettle from a constitutional perspective, it is necessary to briefly examine the bearing of the Cronje-judgment on this case. It concerns an appeal against a finding made by the Labour Court at the outset of the proceedings that it did not have jurisdiction to entertain an application reviewing the decision of the Municipality of Mariental purporting to terminate the appellant's

[1] Matthys Johannes Cronje v Municipal Council of Municipality of Mariental (Unreported judgement of the Supreme Court dated 1 August 2003 in Case No. SA 18/2002

appointment as town clerk and for a declarator that his appointment be extended. The Supreme Court held that, given the jurisdiction of the Labour Court provided for in s. 18(1)(e), (f) and (g) of the Labour Act, it should have entertained the application. I am bound by[2] – and without reservation accept – the findings of the Supreme Court in so far as they go. Moreover, although the facts in the appeal differ from those under consideration in this application, I am satisfied by parity of reasoning and application of the interpretation accorded by the Supreme Court to s. 18(1) of the Labour Act, that it would have been competent to bring this application in the Labour Court. Although the relief prayed for in the *Cronje*-matter did not expressly refer to the denial of administrative fairness guaranteed by Art. 18 of the Constitution, the Supreme Court nevertheless allowed the appeal, *inter alia* because the Municipal Council acted in breach of the Art. 18-constitutional guarantee.

[8]What the Supreme Court did not decide in the *Cronje*-appeal is that the Labour Court's jurisdiction excluded that of the High Court in labour disputes involving the interpretation, implementation and upholding of the fundamental rights and freedoms guaranteed under the Constitution or that the High Court did not have constitutional jurisdiction in such matters. These issues were neither brought nor argued before the Supreme Court and it was not necessary for the Supreme Court to make any findings on them. They are issues before this Court and falls to be decided without judicial precedent in Namibia.

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[2] In terms of Art. 81 of the Constitution a "decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted."

[9]I am also dismissive of Mr Coetzee's contention that, given the cautionary remarks made by the Supreme Court in *Kauesa*'s case on deciding only what is necessary in constitutional cases[3], this Court should not decide the issue of constitutional jurisdiction because it was not initially raised (although later embraced) by the applicant. I fully agree with and respectfully endorse the sentiments expressed by the Supreme Court in that appeal. It is a salutary practice consistently applied in many jurisdictions. However, the context in which the admonitory statement was made by the Supreme Court was entirely different to that which applies in this case. In *Kauesa*'s case, the Court *a quo* raised and decided constitutional issues not advanced (sometimes not even relied on or argued) by any of the litigants; issues which were not necessary to decide in the adjudication of the dispute between the litigants (including the constitutionality of sections of a statute which did not have application in that case but had been expressly raised and were pertinent in another prominent case pending in the High Court).

[10]In this case, by contrast, the only issue is the High Court's jurisdiction. The main thrust of the first respondent's attack on the Court's jurisdiction in labour related matters is based on the contended ousting of its jurisdiction by s.18(1) of the Labour Act. There is "a clear and cogent presumption that the Legislature does not intend to

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[3] *Per* Dumbutschena AJA in *Kauesa v Minister of Home Affairs,* 1995 NR 175 at 184 *in fine* – 185A: "Before leaving this aspect of the appeal we consider it appropriate to refer to what was said by Bhagwati J (as he then was) in M M Pathak v Union (1978) 3 SCR 334 in relation to the practice of the Supreme Court of India:
'It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case.'
We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the Courts of this country. Constitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time."

oust the jurisdiction of the Supreme Court"[4] and "Courts should not … be astute to divest themselves of their judicial powers and duties".[5] Albeit in a different context, this has also been the approach of the constitutional predecessor of this Court.[6] Referring to these and other authorities in *Williamson v Schoon*[7], Navsa J concluded with reference to the South African Constitution: "It can be no less appropriate for Courts operating under the present Constitution to be slow to divest themselves of jurisdiction"[8]. More importantly, Judges are sworn to "defend and uphold the Constitution … as the Supreme Law"[9]. This solemn commitment includes the obligation to "defend and uphold" the jurisdictional powers of the High Court as defined in Art 80 (2). Most importantly though: Jurisdiction is "the power vested in a court by law to adjudicate upon, determine and dispose of a matter"[10]. Article 80(2) therefore also circumscribes the constitutional powers of the High Court. It not only expressly includes the "interpretation, implementation and upholding" of fundamental rights and freedoms in the High Court's jurisdiction, but, by also charging it with the duty to uphold the Constitution, the High Court has been vested with both the power and the duty to protect the jurisdiction conferred upon it by the Constitution.

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[4] *Per* Levy AJ in *Reid v Ropat Investment CC*, 1988 (4) SA 26 (W) at 28I—J. Compare also: *Minister of Law and Order and Others v Hurley and Another,* 1986 (3) SA 568 (A) at 584A-C: "It is a well recognised rule in the interpretation of statutes, it has been stated by this Court, 'that the curtailment of the powers of a Court of law is, in the absence of an express or clear implication to the contrary, not to be presumed.'… The Court will, therefore, closely examine any provision which appears to curtail or oust the jurisdiction of courts of law."

[5] *Per* Van den Heever JA in *In R v Pretoria Timber Co (Pty) Ltd and Another,r* 1950 (3) SA 163 (A) at 181H--182A. See also:

[6] *Katofa v Administrator-General for South West Africa and Another,* 1985 (4) SA 211 (SWA) at 220I; *Akweenda v Cabinet for the Transitional Government for South West Africa and Another,* 1986 (2) SA 548 (SWA) at 552A-B

[7] 1997(3) SA 1053 (T)

[8] At 1068B

[9] Article 82(1) read with Schedule 1 to the Constitution

[10] *Per* NienaberJA in *Ewing McDonald & Co Ltd v M&M Products*, 1991 (1) SA 252 (AD) at 256G. Compare also: *Graaff-Reinett Municipality v Van Ryneveld's Pass Irrigation Board*, 1950 (2) SA 420 (A) at 424 and *Veneta Mineralia Spa v Carolina Colleries (Pty) Ltd*, 1987 (4) SA 883 (A) at 886.

[11]Moreover, after the Court had raised the relevance of Art. 80(2) to the jurisdictional issue between the litigants, counsel for the applicant adopted the view that that the Court's review jurisdiction and constitutional jurisdiction had not been ousted by s. 18 of the Labour Act. Counsel were accorded sufficient time to consider the position of the litigants and to submit additional heads of argument. The issue was also extensively addressed in oral argument. These considerations and circumstances differ entirely from those in the Kauesa-case which gave rise to the cautionary remarks of the Supreme Court. Hence, the constitutional jurisdiction of the High Court was aptly raised, properly canvassed and, ultimately, the Court was well placed to consider and apply it in handing down the judgement on the point *in limine*.

[12]The applicant is seeking, amongst others, an order that the decision of the first respondent to temporarily remove her from office "be declared to be in conflict with Article 18 of the Constitution and set aside". Article 18 of the Constitution guarantees the fundamental right to administrative fairness in the following terms:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

I must note in passing that Article 18 distinguishes itself from the other Articles guaranteeing fundamental rights and freedoms by being the only one incorporating in the body of the text thereof the right of aggrieved persons to "seek redress before a competent Court or Tribunal". The enforcement of fundamental rights and freedoms

generally is dealt with in Article 25 of the Constitution. Sub-Article (1) thereof provides, *inter alia*, in that the "… Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred …, and any … action in contravention thereof shall to the extent of the contravention be invalid". Sub-Article (2) confers the right on aggrieved persons who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed "to approach a competent Court to enforce and protect such right or freedom." Unlike Article 18, this Sub-Article does not refer to a "Tribunal". It may well be that the right to seek redress was expressly included in Article 18 to allow for the establishment of one or more Tribunals to enforce or protect the right to administrative justice – in addition to the jurisdiction of a competent "Court" to do so under Art. 25. The Labour Court being a "Court" (and not a "Tribunal"), it is not necessary to decide the significance of the distinction for purposes of this case.

[13]What is clear, however, is that the High Court is a "competent Court" as contemplated by both Articles 18 and 25 of the Constitution. It has not only been so interpreted and applied by both the High Court[11] and the Supreme Court,[12] but it is also evident from the express provisions of Article 80(2) of the Constitution. It reads:

> "The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts."

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[11] *S v Heidenreich*, 1995 NR 234 (HC) at 238f-g

[12] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial,* 2002 NR 235 (SC)at 247C

[14]The constitutional vesting in the High Court of "original jurisdiction" cannot be glossed over – it is of particular significance, also in this application. The Court does not only have the jurisdiction to deal with cases brought before it on appeal[13] regarding the "interpretation, implementation and upholding of th(e) Constitution and the fundamental rights and freedoms guaranteed thereunder", it also has the power to do so as a Court of first instance.

[15]Moreover, it does not draw on any statute for those powers, it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament[14]. This, in my view, follows from the broader constitutional structure which the Founders of the Constitution put in place to protect the Constitution and the fundamental rights and freedoms guaranteed thereunder: Although one and all and every organ of State and agency thereof bear responsibility to uphold and protect the Constitution, the Superior Courts (with the Supreme Court at the apex thereof) are the ultimate legal guardians thereof. In the effective discharge of their onerous responsibilities to maintain and protect the Constitution's supremacy, (which may necessitate the need to review Acts of Parliament or the actions of the Executive or its agencies), the Superior Courts cannot depend on a statutory licence from Parliament to do so – lest its only gets one only in truncated form or not one at all! Hence, the need to establish and empower the

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[13] Compare for instance the position of the Supreme Court of Appeals in South Africa: *Pharmaceutical Soc of SA v Tshabalala-Msimang NNO; New Clicks SA (Pty) Ltd v Minister of Health*, 2005 (3) SA 238 (SCA) at 253D (Also reported in: 2005 (6) BCLR 576) and [2005] 1 All SA 326)

[14] Parliament has only limited powers to determine "the jurisdiction of the High Court with regard to appeals" from Lower Courts. (See: Art. 80(3) of the Constitution).

Superior Courts in the Constitution itself;[15] to provide for the appointment and removal of Judges presiding over them[16] and to create a self-contained constitutional mechanism for the judicial protection of the Constitution and the fundamental rights and freedoms guaranteed thereunder.

[16]All courts in Namibia, other than the Supreme and High Courts, are Lower Courts: Article 78(1), which vests the judicial power of State in the Courts of Namibia, provide that the Courts of Namibia shall consist of:

> "(a) a Supreme Court of Namibia;
> (b) a High Court of Namibia
> (c) Lower Courts of Namibia."

Unlike the Superior Courts (which have been established by the Constitution), Lower Courts are established by Acts of Parliament. Their jurisdiction, their procedures and the appointment of their judicial officers are all prescribed by Acts of Parliament and regulations made thereunder. [17] The use of the indefinite article "a" before "High Court" and "Supreme Court" in Article 78(1)(a) and (b) also precludes the possibility that other parallel "Superior" Courts may be established by Parliament. All Courts established by Acts of Parliament, are therefore by constitutional design categorised as "Lower Courts".

[17]This proposition includes the Labour Court. It was established by s. 15(1) of the Labour Act. Although the president of the Court is "a judge of acting judge of the

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[15] Articles 78 - 81 of the Constitution.
[16] Articles 82 and 84 of the Constitution.
[17] Article 83 of the Constitution.

High Court designated by the Judge President for that purpose"[18], it does not, from a constitutional perspective, elevate the status of the Labour Court beyond that of a "Lower Court". Neither does the amendment of s. 21(1)[19] which now allows for appeals on questions of law to proceed directly to the Supreme Court (and I express no view on the constitutionality of the amendment against the backdrop of the High Court's constitutional jurisdiction "to hear and adjudicate upon appeals from Lower Courts"[20]). It is and remains a "Lower Court". Its jurisdiction is defined in section 18(1) of the Labour Act. It has no inherent jurisdiction[21] although, I hasten to add, it has been accorded "exclusive" and extensive jurisdiction in labour related matters. The extent of its jurisdiction, I have earlier accepted on the authority of the *Cronje*-case, includes by implication jurisdiction to "enforce or protect" fundamental rights or freedoms in a labour context. But does it exclude the jurisdiction of the High Court in the latter instances?

[18]The ostensible purpose of the Legislature in the establishment of the Labour Court was to create a specialist court dealing authoritatively with labour appeals and other labour related issues as a Court of first instance. The objective is clearly legitimate and, arguably, laudable. However, were Parliament to set up a plethora of specialist courts with exclusive jurisdiction in various areas of law, the "entire jurisdiction of this Court could on this approach be assigned piecemeal or wholly to one or more other …tribunals …" – to borrow the words from Mpati DP and Cameron JA in *NUMSA and Others v Fry's Metal (Pty) Ltd*, 2005(5) SA 433 (SCA) at 446C-D. May

[18] S. 16(1) of the Labour Act.
[19] By sec 7 of Act 10 of 2001
[20] Article 80(2) of the Constitution.
[21] See: *Cronje*-case, *supra*, at p 35

Parliament, without a constitutional amendment, establish a specialist constitutional Court with exclusive and final appellate jurisdiction in constitutional matters, thereby defeating the constitutional jurisdiction of the Superior Courts – or, for that matter, establish a "specialist" court with final and exclusive jurisdiction to adjudicate a particular constitutional issue which Parliament anticipates in advance is likely to result in a finding by the Superior Courts adverse to Parliament's interests on that issue? These questions only need to be posed for the answers to be apparent.

[19]It stands to reason that, to the extent an enactment purports to reserve exclusively for a Lower Court jurisdiction which would otherwise have fallen within the ambit of the High Court's jurisdiction, the notional effect of the enactment would be to amend the Constitution – at least to the extent that the High Court would no longer have jurisdiction in matters it previously had under the Constitution. The entrenchment of fundamental rights and freedoms by Art. 131 aside, Art. 132 prescribes that a "bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments" and will have to be passed with two-thirds majorities in both Houses of Parliament. The Labour Act does not resemble or even aspire to be such an Act. It cannot indirectly achieve what is reserved for Acts specifically intended and designed to bring about an amendment to the Constitution.

[20]By conferring "original jurisdiction" on the High Court in matters involving the interpretation, implementation and upholding of the Constitution and the fundamental

rights and freedoms guaranteed thereunder, the Founders precluded a statutory erosion of the Court's powers. The constitutional design devised by them for the enforcement and protection of the Constitution and the fundamental rights and freedoms guaranteed thereunder, allows aggrieved persons who claim that their fundamental rights or freedoms have been infringed or are being threatened direct access to seek protection from the High Court.

[21]This is what the applicant has done. The Court is bound by the Constitution to consider her claim that the decision she is seeking to set aside infringes upon her fundamental right to administrative fairness guaranteed by Art. 18 of the Constitution. Parliament cannot diminish or defy that right by the establishment of a Lower Court with exclusive jurisdiction to adjudicate cases of that nature. If it nevertheless purports to do so, the statutory enactment will remain subordinate to the Supreme Law of Namibia[22]. In such instances, the Constitution must prevail[23] and the constitutional powers vested in the High Court will remain unaffected. It is on this basis that the first respondent's objection to the jurisdiction of the Court has been dismissed.

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[22] The power of the National Assembly to make laws is "subject to the Constitution" (See: Art. 63(1)of the Constitution).

[23] Compare the reasoning of Fagan J in *Natal Provincial Administration v Buys,* 1957(4) SA 646 (AD) at 655A-C regarding a conflict between an Act of Parliament and an Ordinance: "The two enactments, however, are not of equal force; they spring from different legislative bodies of which the one is subordinate to the other, and in so far as the operation of the Ordinance, which is a later enactment, would be repugnant to the provisions of the Act, the Ordinance must give way (vide sec. 86 of the South Africa Act). I need not stop, therefore, to consider whether the one enactment can rightly be called special and the other general. All I need ask is whether, in the case before us, there is a conflict. An attempt to apply the prescriptive provision in the Ordinance in the present case would seem to me to be in clear conflict with sec. 11 (2) of the Act; I do not see how a four months' and a two years' period of prescription can stand together in respect of the same claim. It follows that in this conflict the enactment of the sovereign Legislature must prevail."

[22]I am of the view that the Court could have done so without the need to strike out the word "exclusive" in s. 18(1) of the Labour Act. The issue and arguments presented to the Court in essence invited it to apply either Article 80(1) of the Constitution (on the submissions of the applicant's counsel) or s.18(1) of the Labour Act (as the first respondent's counsel urged the Court to do). For the reasons given earlier in this judgment, it is evident to me that s. 18(1) did not amend Article 80(1) and therefore does not preclude the High Court from exercising the original constitutional jurisdiction it had in relation to the protection of fundamental rights and freedoms before the promulgation of the Labour Act.

[23]I must add as a footnote, that, unable to read the expression "exclusive jurisdiction" in s.18(1) of the Labour Act to apply only to Courts of equal or lower statutory status as the Labour Court and, given the Supreme Court's implicit finding that a declarator relating to a person's right to administrative fairness in an employment environment falls within the jurisdiction of the Labour Court, I would have been inclined to find that the unqualified use of the expression in the subsection is repugnant to the provisions of the Constitution had it been necessary. The matter being of an important constitutional nature, I did not understand the parties to argue that costs should follow the result.

[24]It is for these reasons that the Court issued the following order immediately after the hearing on the preliminary point:

> "1. The point *in limine* is dismissed.

2. Each party bears his/her/its costs occasioned by the point taken *in limine*."

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MARITZ, J

ON BEHALF OF THE APPLICANT: Adv A Corbett

Instructed by: Dammert Law Chambers

ON BEHALF OF THE 1ST, 2ND RESPONDENTS: Adv G Coetzee

Instructed by: Government-Attorneys