

The role of the judiciary in balancing flexibility and security*

Marius van Staden

LLB LLM

Lecturer, Faculty of Law, University of Johannesburg

OPSOMMING

Die Rol van die Regbank in die Balansering van Buigsaamheid en Sekuriteit

In wat volg word die regskeppende bevoegdheids van die hofe ondersoek en drie verskillende maniere gemerk waardeur die hofe kan bydra tot die regulering van die arbeidsmarkte. Eerstens, kan die hofe nuwe regulering skep deur middel van hul vertolkingsmandaat. Tweedens, kan die hofe nuwe regulering skep deur middel van hul remediërende magte na aanleiding van 'n bevinding van ongrondwetlikheid van bestaande reëls en regulasies. Derdens, kan hofe ook verdere regulering deur die wetgewer veroorsaak in hul omgang met en hantering van wetgewing. Daar word gelet op die belang van wetgewing in die algemeen maar ook op die besondere belang van arbeidswetgewing ten opsigte van die regulering van die samelewing en die arbeidsmarkte. Verder word die inherente regskeppende funksie van die hofe beskryf. Daar word gemerk dat sekere begrippe juis vaag en wyd opgestel is ten einde dit aan die hofe oor te laat om die bepalings van sodanige wetgewing te vertolk en inhoud daaraan te gee. Die hofe is dus belangrike akteurs in die buigsaamheid/sekerheid debat aangesien hulle reëls en regulasies "skep" deur middel van hulle vertolkingsmandaat. Daar word egter verder aangevoer dat (as gevolg van die openheid van taal) hierdie verskeinsel nie slegs beperk kan word tot daardie gevalle wat as vaag en wyd bestempel kan word nie. Die vertolkingsbenaderings van onderskeidelik die Hoogste Hof van Appèl en die Grondwetlike Hof, ten opsigte van arbeidsaangeleenthede, word ondersoek. Die hofe kan egter ook reg skep na aanleiding van 'n bevinding van ongrondwetlikheid ingevolge artikel 172(1)(a) van die Grondwet en kan ook verdere ingrypings deur die wetgewer in die arbeidsmark veroorsaak. Hierdie verskeinsel laat vrae ontstaan oor hoe hofe kan bydra tot die buigsaamheid/sekerheid debat en die regulering van die arbeidsmarkte.

"The courts are the capitals of law's empire, and judges are its princes."¹

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1 Dworkin *Law's Empire* (1986) 273.

1 Introduction

German scholars tend to characterise states according to what is taken as the province of their main activity. There is *der Kriegerstaat*, *der Rechtsstaat*, *der Handelstaat*, *der Polizeistaat* and so on.² Seeley³ has noted that we live in a legislation-state, which is a form of state devoted to the business of legislation. Legislation has become an indispensable source of contemporary law, if not the most important source.⁴ Since the adoption of the Constitution,⁵ parliament has adopted a staggering amount of new acts. Between 1997 and 2012 parliament adopted 825 acts as well as 16 constitutional amendments at the rate of about 56 per year. Parliament also embarked upon an overhaul of the legislative landscape of the labour market and many aspects previously left to the common law, or the parties themselves, are now legislatively regulated.⁶ The most important way of addressing deficiencies of the common law effectively is by means of legislation,⁷ and the legislature is also an institution that is capable of responding “quickly and effectively to frequently fluctuating circumstances of a socio-economic nature”.⁸ Labour legislation in South Africa is also described as “allies of the Constitution” and “enjoys a considerable status and has a very special role to play in the fulfilment of crucial constitutional objectives”.⁹

Of course labour markets cannot be said to be solely regulated by legislation,¹⁰ but contemporary debates concerning the regulation of labour markets focus primarily on three actors – government, business

2 Seeley *Introduction to Political Science: Two Series of Lectures* (1896) 140. *Der Kriegerstaat* refers to a state organised for war, *der Rechtsstaat* refers to a state organised around the principle of the rule of law and individual rights, *der Handelstaat* refers to a state devoted to the advancement of trade and *der Polizeistaat* refers to a police-state.

3 146.

4 Du Plessis “The status and role of legislation in South Africa as a constitutional democracy: some exploratory observations” 2011 *PELJ* 92 93.

5 Constitution of the Republic of South Africa, 1996.

6 They include the Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997; the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Unemployment Insurance Act 63 of 2001; the Occupational Health and Safety Act 85 of 1993; the Skills Development Act 97 of 1998; the Public Service Labour Relations Act 105 of 1994; the Education Labour Relations Act 146 of 1993; the Employment Equity Act 55 of 1998 and the various amendments to these pieces of legislation.

7 Basson *et al Essential Labour Law* (2005) 9.

8 *Martin v Murray* 1995 ILJ 589 (C) 601E-H.

9 Du Plessis 2011 *PELJ* 92 95, 97. The LRA was enacted “to give effect to and regulate the fundamental rights conferred by section 27” of the Interim Constitution, but s 27 neither explicitly required nor envisaged legislation amplifying and giving more concrete effect to it. S 23(5) and (6) of the 1996 Constitution do, however, envisage legislation to regulate collective bargaining.

10 The most important ways in which employment relationships are regulated in South Africa are through legislation, collective agreements and the contract of employment – Van Niekerk (ed) *Law@work* (2008) 57.

and labour – and the need espoused by these actors for either more or fewer legislative interventions.¹¹ The role of the judiciary in contributing to this debate has largely been ignored.¹² This may be attributed to an overly narrow view of the separation of powers doctrine and the role of the courts, wherein the regulation of society is properly held to be exclusively the domain of the legislature.¹³ Alternatively, this can be attributed to an overly positivistic view of law where legal change is seen solely as political process.¹⁴ At some stage or another, all law students are taught *iudicis est ius dicere non dare*.¹⁵ In such a view labour law is created by Parliament and applied by the courts. Consider *Du Plessis v De Klerk*, where the Constitutional Court remarked on the function of the courts within a democracy.¹⁶ The court warned that the Constitution does not contemplate a dikastocracy and that the “role of the courts is not effectively to usurp the functions of the legislature”. Courts, it was held, “should not establish new, positive rights and remedies on its own”. Instead judicial function is described as ensuring that legislation does not violate fundamental rights, interpreting legislation in a manner that furthers the values expressed in the Constitution, and ensuring that common law and custom are developed to harmonise with the Constitution.¹⁷

This does not mean to say that the judiciary has no legislative function and that it cannot contribute to the regulation of labour markets.¹⁸ Indeed, it has become trite that “[l]aw making is an inherent and essential part of the judicial process”.¹⁹ In *Matiso v The Commanding Officer, Port Elizabeth Prison* it was stated that judges “invariably ‘create’ law” notwithstanding that “[f]or those steeped in the tradition of parliamentary sovereignty, the notion of Judges creating law, and not

11 This is described as the tripartite character of labour law.

12 Davies “Judicial self-restraint in labour law” 2009 *ILJ* 278.

13 Botha *Statutory Interpretation: An Introduction for Students* (2005) 49.

14 Morrison *Jurisprudence: From the Greeks to Post-Modernism* (1997) 423.

15 It is the province of a judge to expound the law, not to make it.

16 1996 3 SA 850 (CC).

17 Par 181.

18 Regulation, in this context, is to be understood as a wider term than legislation. The OECD defines “regulation” as “imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector”. See <http://stats.oecd.org/glossary/detail.asp?ID=3295> (accessed 2012-07-02). As such regulation is understood to be a wider term than legislation although legislation is understood to be regulation. Davies *Perspectives on Labour Law* (2004) 54 describes “modes of regulation in labour law” as the “different ways in which labour law is created and applied”.

19 *Zinmat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZSC) 832H-I. See Du Plessis *The Interpretation of Statutes* (1986) 143; Labuschagne “Die uitlegvermoede teen staatsgebondenheid” 1978 *TRW* 42 62; Labuschagne “Regsdinamika: opmerkings oor die aard van die wetgewingsproses” 1983 *THRHR* 422; Le Roux “Undoing the past through statutory interpretation: the Constitutional Court and marriage laws of apartheid” 2005 *Obiter* 526 537.

merely interpreting and applying the law, is an uncomfortable one".²⁰ In this article it will be shown that courts can regulate labour markets in three distinct ways. Firstly, the courts can, in effect, create new regulation through their interpretative mandate. Secondly, the courts can create new regulation through their remedial powers, following a finding of unconstitutionality of existing regulation. Finally, courts may also trigger or cause further regulation by the legislature. The purpose of this article is solely to classify and to record this phenomenon and not to pass judgement on it or to comment on the desirability thereof. The article will also not consider other ways in which judges can contribute to the regulation of the labour markets, such as, for example, through the interpretation of collective agreements or the development of the common law, but will instead focus on the way in which judges regulate through interactions with legislation. The realisation that the courts are important actors in the regulation of the labour markets can significantly impact upon our understanding of how labour markets are regulated and as such allow labour lawyers, armed with this realisation, to examine how judges contribute to balancing flexibility and security.

2 Interpretation as Regulation

Labour legislation is often drafted in relatively general terms.²¹ It is then left to the courts to interpret the provisions of such legislation and the courts therefore become important actors in the flexibility/security debate as they "create law" or regulate labour through their interpretative mandate.²² Consider, for example, the vague concept "unfair labour practice" as contained in section 23 of the Constitution.²³ When the concept was first introduced in South Africa it was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice".²⁴ In effect the old industrial court was therefore given

20 1994 3 SA 592 (SE) 5971-598B. In *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) the Constitutional Court warned that "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution" (par 37). The Court did however stress that separation of powers concerns, although important, "cannot be used to avoid the obligations of a court to prevent the violation of the Constitution" (par 200).

21 *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) par 34.

22 Du Plessis *Re-Interpretation of Statutes* (2002) 97-98; Du Plessis (1986) 143; Labuschagne "Die uitlegvermoede teen staatsgebondenheid" 1978 *TRW* 42 62; Labuschagne "Regsdinamika: opmerkings oor die aard van die wetgewingsproses" 1983 *THRHR* 422; Le Roux "Undoing the past through statutory interpretation: the Constitutional Court and marriage laws of apartheid" 2005 *Obiter* 526 537.

23 S 23(1) Constitution reads as follows: "Everyone has the right to fair labour practices."

24 S 1(f) Industrial Conciliation Amendment Act 94 of 1979.

extensive discretion to decide for itself what conduct amounted to unfair labour practices and what did not and this leeway, according to some, “amounted to a licence to legislate”.²⁵ Later interventions by the legislature to introduce more specific definitions could also not produce the intended certainty and produced general and open-ended definitions requiring the court to use its own discretion in interpreting it.²⁶ In *National Education Health and Allied Workers Union v University of Cape Town*, the Constitutional Court found it “neither necessary nor desirable” to define this concept as it is currently contained in the Constitution.²⁷ Instead the court preferred the concept to be left to gather meaning within the courts.²⁸ The definition of “employee” as currently contained in labour legislation may also be described as open-ended.²⁹ Recall that the protection extended by labour legislation, generally applies only to those persons who are defined as “employees”.³⁰

In the United Kingdom, labour law is also fraught with terms that may be said to be general or vague.³¹ “Reasonableness” in the context of unfair dismissals and implied terms in the contract of employment,³² and “proportionality” with regards to discrimination law and cases arising under the United Kingdom Human Rights Act, 1998 are two such examples.³³ The definition of “employee” as contained in section 230(1) of the Employment Rights Act, 1996 may also be said to be vague.³⁴ In Germany the Civil Code (*Bürgerliches Gesetzbuch*), the Protection against

25 Thompson & Benjamin *South African Labour Law* (1997) A-60.

26 Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (2005 thesis University of Pretoria) 301 available at <http://upetd.up.ac.za/thesis/available/etd-11082005-142503/unrestricted/00front.pdf> (accessed 2012-07-02) with reference to Thompson & Benjamin *op cit*. The definition was amended by s 1(h) Labour Relations Act Amendment Act 95 of 1980, s 1(h) Labour Relations Act Amendment Act 83 of 1988 and s 1 Labour Relations Act Amendment Act 9 of 1991.

27 2003 2 BCLR 154 (CC) par 33.

28 Par 34.

29 S 213 LRA defines an “employee” as “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer”.

30 Van Niekerk (ed) (2008) 57; Grogan *Workplace Law* (2009) 34. Contrast with s 23 of the Constitution which affords “everyone” protection from unfair labour practices, and every “worker” the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. According to Cheadle “Labour relations” in *South African Constitutional Law: The Bill of Rights* (eds Cheadle, Davis and Haysom) (2006) 18-3 the use of the term “everyone” in s 23(1) Constitution should not be interpreted to extend beyond the employment relationship, as the boundaries of the right are circumscribed by the reference to labour practices. In *SA National Defence Union v Minister of Defence* 1999 ILJ 2265 (CC) par 25 the court held that the term “worker” as utilised in s 23(2) Constitution is broader than the concept “employee”.

31 Davies 2009 ILJ 278.

32 *Iceland Frozen Foods v Jones* 1983 ICR 17.

33 Davies 2009 ILJ 278.

34 Refer to *Express and Echo Publications Ltd v Tanton* 1999 IRLR 367 (CA).

Dismissal Act (*Kündigungsschutzgesetz*), and the Works Constitution Act (*Betriebsverfassungsgesetz*) also contain general principles rather than specific rules, inevitably drawing the courts into a creative role as they “create” regulation through their interpretive function.³⁵

The creative role of the courts cannot be limited to only those cases in which legislative provisions may be said to be vague or drafted in general terms. The openness of language has always produced a proliferation of meanings and this has only been exacerbated by the so-called linguistic or hermeneutical turn in legal interpretation that has been enhanced by the advent of constitutional democracy in South Africa.³⁶ The linguistic or hermeneutical turn describes a situation in which “[m]eaning is not discovered in (and retrieved from) a construable text, but is made in dealing with the text”.³⁷ Prior to the adoption of a justiciable constitution in South Africa, statutory interpretation proceeded in terms of the now famous *dictum* in *Venter v R*.³⁸ In terms of this “golden rule” the aim of interpretation was “to ascertain the intention which the legislature meant to express from the language which it employed”.³⁹ In this very case Innes CJ stated that “no matter how carefully words are chosen there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances go beyond it, and when applied under other circumstances fall short of it.”⁴⁰ Accordingly, as early as 1950 Van Heerden AJ observed in *Sachs v Dönges NO* that judges “while purporting merely to expound and apply the law sometimes make law in the process”.⁴¹ Indeed, according to Walker “[h]ardly any form of words can be thought of which is not in some circumstances, ambiguous and requiring interpretation”.⁴² Donaldson J explained this as follows in the British case *Corocraft v Pan-American Airways*:

In the performance of this [interpretative] duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue mathematically correct answers. The interpretation of statutes is a craft as much as a science, and the judges as craftsmen, select and apply the appropriate rules as tools of the trade. They are not legislators but finishers and polishers of legislation which comes to them in a state requiring various degrees of further processing.⁴³

35 Berger & Neugart “How German labor courts decide: an econometric case study” 2011 *German Econ R* 56.

36 Du Plessis “Interpretation” in Woolman *et al* (eds) *Constitutional Law of South Africa* (eds Woolman *et al*) (2008) 32-44, 32-84.

37 *Supra*.

38 1907 TS 910.

39 914-915.

40 *Supra*.

41 1950 2 SA 265 (A) 312.

42 *The Oxford Companion to the Law* (1980) 644.

43 1968 2 All ER 1059 1071.

Even the most enthusiastic advocates of positivism therefore concede that the courts have a creative role when legislative intention is unclear from the text of the legislation.⁴⁴

Following the toppling of the notion of the “intention of the legislature” by constitutional supremacy in South Africa “broad” purposive interpretation is slowly supplanting (or has already supplanted, some may claim) the old “golden rule” of statutory interpretation as described above.⁴⁵ Section 39(2) of the Constitution states that anyone “[w]hen interpreting any legislation must promote the spirit, purport and objects of the Bill of Rights”. Botha declares that “[t]he fundamental principle of statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purport and objects of the Bill of Rights in the Constitution”. It is striking that this principle endorses the purposivist approach whilst qualifying it at the same time.⁴⁶ This method of statutory interpretation is generally referred to as “teleological interpretation”,⁴⁷ a “value-activating strategy”,⁴⁸ or the “value-coherent theory” of statutory interpretation.⁴⁹ It has become commonplace in South Africa for this principle to guide the interpretation of legislation and has been endorsed by the Constitutional Court,⁵⁰ although reliance is still regularly placed on other theories of statutory interpretation.⁵¹ It

44 Dias *Jurisprudence* (1976) 464-466.

45 Du Plessis (2008) 32-52.

46 Botha (2005) 10, 66, 75.

47 Botha (2005) 59. The word “teleological” is derived from the Greek word “telos” meaning “[t]he end of a goal-oriented process” – see www.thefreedictionary.com/telos (accessed 2012-07-10).

48 Devenish *Interpretation of Statutes* (1992) 40.

49 Devenish (1992) 39.

50 *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

51 The Supreme Court of Appeal has continued to rely on the old “golden rule” of statutory interpretation. Refer to *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 1 SA 98 (SCA) 107A-B; *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) 942I-J; *Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA) 185B-C; *Commissioner, SA Revenue Service v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273G-I; *Bastian Financial Services v General Hendrik Schoeman Primary School* 2008 4 All SA 117 (SCA) par 16 (although the court also endorsed interpreting provisions contextually). In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) the Constitutional Court rejected the Supreme Court of Appeal’s continued reliance on literalism as is the command of s 39(2) of the Constitution that every court “must promote the spirit, purport and objects of the Bill of Rights” when interpreting any legislation and that “[i]mplicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation” (par 72). In addition it was held that “[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous” (par 90).

should be noted that some have lamented this development.⁵² The approach was best described (although not explicitly endorsed) in *African Christian Democratic Party v Electoral Commission*:

[I]n approaching the interpretation of provisions of ... legislation, courts ... must understand those provisions in the light of their legislative purpose within the overall ... [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.⁵³

According to Le Roux this:

[b]roader [read purposive] approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that 'understands' [read promotes] its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.⁵⁴

The Constitutional Court has also expressly endorsed this approach with regards to labour matters in *National Education Health and Allied Workers Union v University of Cape Town (NEHAWU)*⁵⁵ and most recently in *Aviation Union of South Africa v South African Airways (Pty) Ltd (Aviation Union)*.⁵⁶ These cases ironically considered the interpretation of the very same section of the Labour Relations Act (LRA): section 197.⁵⁷ The

52 Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law: *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC)" 2006 *SAPL* 382 384: The author argues that the court in *African Christian Democratic Party* "too quickly sacrificed the formal integrity or letter of the legislative text in favour of an overconfident appeal to its organic or dynamic substance, purpose or spirit". Refer to Fagan A "In defence of the obvious – ordinary language and the identification of constitutional rules" 1995 *SAJHR* 545; and Fagan E "The longest erratum note in history" 1996 *SAJHR* 79; and the response thereto by Davis "The twist of language and the two Fagans: please sir may I have some more literalism!" 1996 *SAJHR* 504. In addition some have also argued that purposive interpretation has to potential of turning into a rather unruly horse. Refer in general to Du Plessis (2008) 32-54, 32-56.

53 2006 3 SA 305 (CC) par 34. The court therefore concluded that "[t]he purpose of section 14 ... is to ensure that a deposit is paid by a political party [so as] to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid. In my view, to interpret section 14 ... in a manner which prohibits [payment in Pretoria] would be to read the provision unduly narrowly and to misunderstand its central purpose" (par 27).

54 Le Roux 2006 *SAPL* 382 386.

55 Par 62.

56 2012 1 SA 321 (CC).

57 The facts of the case may be summarised as follows: SAA transferred that part of its business concerned with facilities management to LGM. Seven years later, SAA cancelled the agreement and notified LGM that it had to prepare a hand-over plan. SAA had the right to buy back or re-acquire all assets and inventory and the use of all property that had been conferred on

purpose of section 197 of the LRA is to protect the employment of workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers.⁵⁸ This section has caused challenging interpretative difficulties for South African courts.⁵⁹ Section 197(1)(b) of the LRA defines “transfer” as follows: “the transfer of a business *by* one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern.”⁶⁰ In *NEHAWU* the Constitutional Court held that the interpretation of section 197 of the LRA in particular and labour matters in general was to proceed as follows:

The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses.⁶¹

It is generally accepted that section 197 applies to most cases of outsourcing, but the application of the section to second-generation outsourcing has been more problematic precisely because of the definition of transfer as contained in section 197(1)(b) of the LRA and the use of “by” therein.⁶² This problem was perhaps best explained in *COSAWU v Zikhethele Trade (Pty) Ltd*:

A mechanical application of the literal meaning of the word ‘by’ in section 197(1)(b) would lead to the anomaly that workers transferred as part of first generation contracting-out would be protected whereas those in second generation scheme would not be, when both are equally needful and deserving of the protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine. ... I am in agreement ... that section 197(1)(b) might be better interpreted to apply to transfers ‘from’ one employer to another, as opposed to only those effected ‘by’ the old employer.⁶³

57 LGM when the lease was entered into. SAA contended that this would not be a transfer of business within the meaning of the LRA and that it was not obliged to take over the LGM employees involved in the business that had originally been transferred.

58 *National Education Health and Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) par 54.

59 Refer to *South African Municipal Workers’ Union v Rand Airport Management Co Ltd* 2005 3 BLLR 241 (LAC); *Crossroads Distributions (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd* 2008 6 BLLR 565 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union v Print Tech (Pty) Ltd* 2010 31 ILJ 1850 (LC); *Zikhethele Trade (Pty) Ltd v COSAWU* 2008 2 BLLR 163 (LAC).

60 Emphasis added.

61 Par 62.

62 Van Niekerk (2008) 335: “Second-generation contracting occurs when a new contractor (which may but not necessarily have been the service provider to whom a business function was initially outsourced) replaces the incumbent contractor.”

63 2005 26 ILJ 1056 (LC) par 29.

In *Aviation Union* the Supreme Court of Appeal was unwilling to accept that such “abuse” (as the court termed it) of the plain meaning of the section was warranted.⁶⁴ The approach of the Supreme Court of Appeal was decidedly reminiscent of outdated modes of statutory interpretation which has been debunked in South Africa. The following *dictum* serves as a textbook example of the old “golden rule” of statutory interpretation with its roots in both literalism and intentionalism:

The choice of language in section 197 is plain and unambiguous. By the deliberate use of the word ‘by’, the legislature showed that it intended section 197 to apply to a situation where there are at least two positive actors in the process. The ordinary meaning of the word ‘by’ requires positive action from the old employer who transfers the business to the new employer.⁶⁵

What is surprising here is that the Supreme Court of Appeal shows not only contempt for contemporary developments in statutory interpretation in South Africa, but also for established law on how this very section of the LRA was to be interpreted as enunciated in *NEHAWU*.⁶⁶ This is not to say that the role of text becomes suddenly irrelevant and the Supreme Court of Appeal might have been right in its refusal to substitute the meaning of one word with that of another. As Rosenau puts it, “[t]he reader may construct the text, but the text in turn controls the encounter”.⁶⁷ The difficulty here relates to the amount of control that the text exercises upon a construction. It is perhaps for this reason that both the majority of the Constitutional Court per Yacoob J and the minority per Jafta J held in *Aviation Union* that it is “unnecessary to equate the word ‘by’ with ‘from’”.⁶⁸ But even though the court could not read “by” to mean “from” it would be wrong to categorise its mode of interpretation as literalist. In fact the court held that section 197 of the LRA does apply to second generation outsourcing. What the court does is to read the provision purposively as they are obligated to do in terms of *NEHAWU* but also within the context of the whole provision:

Determining the operation of the section with reference to a single word is not the correct approach to its interpretation. The whole section must be read in its proper context. Reading section 197 as a whole in the context of where

64 *South African Airways (Pty) Ltd v Aviation Union of South Africa* 2011 3 SA 148 (SCA) par 32.

65 Par 31.

66 Two further points of criticism can also be noted against the approach of the SCA. Firstly, it may be said that the SCA commits the error of “dis-integration” where the court “turns a blind eye to the systematic interconnectedness of text-components and tries to understand them in splendid isolation from one another”. Additionally the SCA may be criticised for its excessive peering at an individual word or words - See Du Plessis “Interpretation of Statutes and the Constitution” in *Bill of Rights Compendium* (2012) par 2C37, 2C40. It may however be argued that these points are logical manifestations of the courts continued reliance on literalism and intentionalism.

67 *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (1992) 25.

68 Par 81.

it is located in the LRA and paying sufficient attention to its purpose and the objects of the LRA, reveal that it applies to any transaction that transfers a business as a going concern.⁶⁹

In the process the court attached a meaning to the provision which may not have been the first meaning that springs to mind when reading the provision, but the words are still reasonably capable of bearing that meaning.⁷⁰

The Supreme Court of Appeal has recently had occasion to rethink its continued reliance upon outdated interpretive modes in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁷¹ “Interpretation”, said the court:

[i]s the process of attributing meaning to the words used ... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.⁷²

The court also showed why continued deference to the intention of the legislature was inappropriate.⁷³ The court acknowledged that “[m]ost words can bear several different meanings or shades of meaning” and that the idea of an ordinary grammatical meaning of words is therefore a misnomer.⁷⁴

3 Remedies as Regulation

Prior to the advent of constitutional democracy in South Africa, no judicial review of legislation was possible except to the extent that delegated legislation was capable of review against the standards of administrative law.⁷⁵ Section 172(1)(a) sets out the powers of courts in constitutional matters and maintains that “[w]hen deciding a constitutional matter within its power, a court *must* declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.⁷⁶

69 Par 55.

70 By this means the court can be said to pass the test of O’Regan J in her dissenting judgement in *South African Police Services v Public Servants Association* 2007 5 BLLR 383 (CC) par 94.

71 2012 2 All SA 262 (SCA).

72 Parr 18, 19: “This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”

73 Parr 20-24.

74 Par 25.

75 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) parr 27, 28.

76 Emphasis added. Compare to s 4 United Kingdom Human Rights Act, 1998, which provides that a court “may make” a declaration of incompatibility when the Court is satisfied that a legislative provision cannot be read and

In *Van Rooyen v The State*⁷⁷ the Constitutional Court explained how constitutional challenges to legislation must be dealt with. Firstly, all law must be interpreted (“read down”) to avoid inconsistency with the Constitution. Secondly, if this is not possible the law (or at least the offending parts thereof) must be declared unconstitutional and invalid. Thirdly, the court may remedy the unconstitutionality by means of severance, reading in or notional severance. If this is not possible then the ultimate remedy must be granted in declaring the law (completely) invalid. In addition, the Constitution also empowers the courts to limit the impact of the order of invalidity by suspending or limiting the retrospective effect of the order.⁷⁸ The Constitutional Court has also, on several occasions, allowed an interim remedy of notional or actual severance, or reading in during a period of suspension to diminish the effects of the continued violation of rights.⁷⁹

A declaration of invalidity to the extent of the inconsistency is the default remedy following a finding of inconsistency and will only be departed from if a more limited order (such as reading in, notional or actual severance, suspending or limiting the retrospective effect of the order, or a combination of these) will provide a better outcome.⁸⁰ There

given effect to in a manner compatible with the European Convention on Human Rights.

77 2002 5 SA 246 (CC) par 88.

78 S 172(1)(b).

79 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); *Janse van Rensburg v Minister of Trade and Industry* 2001 1 SA 29 (CC); *Booyesen v Minister of Home Affairs* 2001 4 SA 485 (CC); *Volks v Robinson* 2005 5 BCLR 446 (CC); *Moseneke v The Master of the High Court* 2001 2 SA 18 (CC); *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2006 8 BCLR 901 (CC); *C v Department of Health and Social Development* case no 55/11 (CC) (unreported). Note however that in *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC) par 22 it was held that “[w]here the appropriate remedy is reading in words [or severance or notional severance] in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the legislature need not be given an opportunity to remedy the defect, which has by definition been cured. In the present case, the effect of the order is not to leave a lacuna but to remedy the constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended.” Bishop “Remedies” in *Constitutional law of South Africa* (eds Woolman *et al*) (2008) 9-125, defends the practice on the ground that, when a court awards this hybrid remedy it has already concluded that reading in, notional or actual severance is an inappropriate permanent measure but requires a “stop-gap measure” until the legislature gets around to deciding how to cure the defect.

80 Currie & De Waal *The Bill of Rights Handbook* (2005) 199.

are cases where immediate and fully retrospective invalidity was found to be the only workable remedy.⁸¹

Reading in is predominantly used when the inconsistency is caused by an omission, and it is necessary to add words into the statutory provision to cure it.⁸² Severance (or actual severance) is the corollary remedy in terms of section 172 of the Constitution. Section 172(1)(a) provides that a court must declare that any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Thus, a court is required to strike down only unconstitutional parts of the law. This may be a particular section, subsection or parts thereof.⁸³ Notional severance, like actual severance, involves removing offending parts from the legislative text whilst leaving other words and provisions intact. No actual words are deleted or removed from the law. “Instead the

81 See for example *S v Makwanyane* 1995 3 SA 391 (CC); *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 754 (CC); *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC); *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC). Note that, although in terms of s172(2)(a) any court may declare a statute invalid, declarations of invalidity of national or provincial legislation have no force unless they are confirmed by the Constitutional Court. Constitutional court rule 16(4) provides: “A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.”

82 Currie & De Waal (2005) 204. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 75 the Constitutional Court laid down the following requirements which should be considered before this remedy is granted: “In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.”

83 Currie & De Waal (2005) 200-210. *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth* 1995 4 SA 631 (CC) par 16 qualified the use of the remedy as follows: “Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?”

unconstitutional reach of the provision is identified by limiting the cases to which the law can apply or by making its valid operation subject to a condition.”⁸⁴

When a court utilises one of these remedies it is obvious that they create law and they do so unashamedly because the Constitution requires of them to do so. The Constitutional Court has recently had occasion to remind actors in the debate regarding the appropriateness of judicial law making that the courts are not “the ultimate word on pronouncing on the law” as Parliament may always amend the remedy through its legislative power. “Instead”, said the court, “it initiates a conversation between the legislature and the courts.”⁸⁵

4 Triggering New Regulation

A recent economic study by Hefeker and Neugart has empirically found that uncertainty in the way the courts interpret labour legislation will cause government to opt for more regulation.⁸⁶ To demonstrate how the courts may contribute to the adoption of new regulation, the link between inflexible labour markets and unemployment will be considered. Of course it is well established that this link exists.⁸⁷ The authors’ findings may be summarised as follows.⁸⁸ If government was the only internal actor it would decide upon an appropriate trade-off between flexibility and security that it deems appropriate to protect workers and create jobs, and regulate the market as such. Political consequence would be its own. However, government is not the only actor who can regulate the market, as the courts also possess a limited law making function, as described above, and this influences government’s decision to adopt new regulations or not. Governments will, for example, not intervene in the labour market to provide security for workers and be willing to take on the political cost of this decision if it can be certain that the courts will do the other part of the job in providing security for workers. If, conversely, government is sure that the courts will tend to favour job creation, government will not embark upon costly reforms to create flexibility in the labour market, but will leave this to the courts. By leaving it to the court to take the necessary steps, there will be no need for the government to take the blame for unpopular policy measures. Therefore, governments will be more likely to intervene in the labour market if they are confronted with a judicial system where the courts are vested with the discretion to follow their own preferences in interpreting the provisions in labour legislation.

84 Bishop (2008) 9-102. Refer to *Ferreira v Levin, Vryenhoek v Powell* 1996 1 SA 984 (CC); *Islamic Unity Convention v Minister of Telecommunications* 2008 3 SA 383 (CC).

85 *C v Department of Health and Social Development* 2012 2 SA 208 (CC) par 57.

86 “Labor market regulation and the legal system” 2010 *Int Review Law and Econ* 218 255.

87 World Bank *Doing Business in 2006 – Creating Jobs* (2006).

88 Hefeker & Neugart 2010 *Int Review Law and Econ* 218.

In a sense, it may be argued that lawyers have always been aware of this phenomenon. The abolition of the death penalty in South Africa by the Constitutional Court in *S v Makwanyane*, for example came at a time when it was accepted that the majority of South African's were against the abolition thereof.⁸⁹ In allowing this decision to be taken by the Constitutional Court, government could avoid what would have been a costly political decision. In the same way it is also clear that inconsistency in the way that labour courts and tribunals have interpreted certain provisions have caused the legislature to act.⁹⁰ On the other hand consistency in the way other provisions were interpreted has not necessitated any costly political intervention by parliament.⁹¹ The question that arises is if the approach of the South African judiciary can be described as "uncertain" and one in terms of which "the courts are vested with the discretion to follow their own preferences in interpreting the provisions in labour legislation". Perhaps this is true in the sense that the Supreme Court of Appeal has continued to rely on certain modes of interpretation whilst the Constitutional Court has relied on others such in the case of *Aviation Union*.⁹² But neither of these approaches may be said to be "certain" precisely because the nature of language is not certain. It can also not be said that a court follows its "own preferences" when it interprets a provision purposively in the light of the values enshrined in the Constitution. In any event it may be argued that that which is certain to labour lawyers might seem less so to labour economists and the point should rather be that the judiciary contributes to the regulation of the labour market not just when it interprets legislation but also in how it interprets those provisions.

5 Conclusion

A claim of judicial law-making in judicial dealing with legislation is by its very nature controversial. It moves against some of the basic tenants the legal profession holds dear. Sir Otto Kahn-Freund, in reflecting upon the desirability of the inclusion of labour rights within a justiciable

89 1995 3 SA 391 (CC) par 88.

90 It may, for example, be argued that the inconsistency with which the South African labour courts and tribunals have dealt with temporary employment services has forced parliament's hand as it necessitated legislative intervention. The judiciary was not effective in providing sufficient protection to workers employed by temporary employment services notwithstanding the fact that these workers were also subject to the constitutional guarantees envisaged in s 23 Constitution. Refer to *Vilanel SITA (Pty) Ltd* 2008 5 BALR 486 (CCMA).

91 It may also be argued that the judiciary's protection of illegal workers such as in the case of illegal immigrants and sex-workers has freed up parliament from taking costly political decisions as to the formal regulation of these workers. Refer to *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 4 SA 383 (LAC); *Discovery Health Limited v Commission For Conciliation, Mediation and Arbitration* 2008 7 BLLR 633 (LC).

92 *South African Airways (Pty) Ltd v Aviation Union of South Africa* 2011 3 SA 148 (SCA).

constitution, warned of the possibility that judges would “read their own notions of policy into the bill of rights ... shifting the function of law reform from Parliament ... to the Bench and to the Bar”.⁹³ But, as Smit records, “the judiciary has through its power of interpretation the ability to substantially increase the rights, protection and freedom of people”.⁹⁴ Perhaps the time has come for labour lawyers to realise that, as the Constitutional Court explained in *NEHAWU*, “the courts and the legislature act in partnership to give life to constitutional rights”.⁹⁵ In any event, a refusal to admit that courts do contribute to the regulation of the labour markets is not helpful. The realisation that courts impact directly upon the regulation thereof allows us to re-examine question of labour law and to re-assess traditional responses to these questions. Responses to the changing nature of work cannot come solely from government, business and labour. If the courts can be seen to be important actors in the regulation of the labour markets then labour lawyers must also ask how the judiciary may be part of the solution to such problems. If a labour market is said to be overregulated, then it must be questioned how the judiciary has contributed to such a situation. As pressure from neo-economists and their political followers to deregulate increases, courts should not be allowed to stand on the side-lines of questions and debates, but, in embracing its creative role, must actively contribute to workable solutions to these pressures.

93 Kahn-Freund “The impact of constitutions on labour law” 1976 *Camb LJ* 270. See also Beatty “Constitutional labour rights: pros and cons” 1993 *ILJ* 1.

94 Smit “Towards social justice: an elusive and challenging endeavour” 2010 *TSAR* 1 11.

95 Par 14.