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Developing the Jurisprudence of Constitutional Remedies for Breach of Fundamental Rights in South Africa: An Analysis of *Hoffman* and Related Cases

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ABSTRACT

In order to accomplish its objectives of extensively regulating rights and obligations, the 1996 Constitution of South Africa provides for the enforcement of those rights by the courts. In turn, it has, in its enforcement provisions, invested in the courts enormous discretionary powers to enable them to deal effectively with breaches of the entrenched fundamental rights as well as all violations of constitutional rights. That the Constitutional Court has purposefully interpreted and made optimum use of the expressions 'appropriate relief' and 'just and equitable' order in developing the constitutional remedies jurisprudence is crystal clear from a wealth of available case law. It is also not in doubt that the contributions of Justice Ngcobo (later Chief Justice) in this regard are intellectually gratifying. This article singles out for discussion and analysis the judgment of Ngcobo J in *Hoffman v South African Airways* 2001 (1) SA 1 (CC), which not only typifies judicial activism at its acme, but has also introduced into the South African public and labour laws the novel remedy of 'instatement'. Apparently drawn from the analogy of the labour-law remedy of reinstatement, 'instatement' is akin to the remedy of *mandamus* in public law and specific performance in the law of contract. This article moves from the premise that this innovation is one of its kind in contemporary common-law jurisprudence and one that courts in common-law jurisdictions will no doubt emulate one fine day.

Keywords: constitutional remedies; enforcement of rights; instatement; jurisdictional powers; appropriate relief

Introduction

The Constitution of the Republic of South Africa, 1996 introduced a Bill of Rights that, when juxtaposed with other constitutions within the Commonwealth, contains

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an exhaustive list of rights hitherto absent in those other Constitutions.[1] Quite apart from the usual civil and political rights which often form the bulk of the fundamental rights provisions in many constitutions,[2] human rights instruments and legislation,[3] the Constitution of South Africa entrenches, most remarkably: social and economic rights,[4] labour rights,[5] environmental rights,[6] educational rights[7] and children's rights.[8] Again, apart from those equally entrenched rights such as the right to equality before the law,[9] the right of access to information[10] and the right to administrative justice[11]—which were soon followed by national legislation that further amplifies the scope and the necessary intendment of those rights and providing for remedies in the event of breach—the Constitution makes these provisions in broad terms. Granted that the Constitution guarantees the right of access to the courts for the settlement of any dispute capable of being resolved by the application of the law,[12] then what remedy or relief should the complainant of breach or infringement of any of the rights request the courts to grant him or her? Of course, the Constitution guarantees the individual the right to approach the High Court to enforce any infringement or threatened breach of their entrenched rights. In this regard, the Court is empowered to grant 'appropriate relief', including a declaration of rights.[13] In the same vein, when deciding a constitutional matter, the Court is obliged to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency; and, in the process, it may make an order that is 'just and equitable'.[14] In this latter instance, the Constitution was more forthcoming than in the case of the enforcement of the rights in the Bill of Rights, because it is a little more specific when it speaks of the Court making an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[15]

1 Sections 7–38, Constitution of the Republic of South Africa, 1996.
2 See, for example, Chapter II, ss 3–16, Constitution of Botswana 1966; Chapter 1, ss 1–20, Constitution of the Kingdom of Lesotho 1966 now replaced by Chapter II, ss 4–24, Constitution of Lesotho, 1993; Chapter 3, arts 5–25, Constitution of Namibia 1990; Chapter II, ss 1–19, Constitution of the Kingdom of Swaziland 1966 now replaced by Chapter III, ss 14–39, Constitution of the Kingdom of Swaziland 2005; Chapter III, ss 11–26, Constitution of the Republic of Zimbabwe 1980, now replaced by Chapter 4, ss 44–85 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
3 See New Zealand Bill of Rights Act 1990; UK Human Rights Act 1998, Schedule 1, arts 1–18.
4 Sections 26–27.
5 Section 23.
6 Section 24.
7 Section 29.
8 Section 28.
9 Section 9. See also Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
10 Section 32. See also Promotion of Access to Information Act 2 of 2000 (PAIA).
11 Section 33. See also Promotion of Administrative Justice Act 3 of 2000 (PAJA).
12 Section 34.
13 Section 38.
14 Section 172(1)(*a*) and (*b*).
15 Section 172(1)(*b*)(i) and (ii).

It further provides that a court which makes an order of constitutional invalidity

> may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court to confirm or vary an order of constitutional invalidity of that Act or conduct.[16]

Soon after the Constitution came into operation, the critical question which the courts began to grapple with as disputes poured in for resolution, raising all forms of novel issues in the new constitutional environment, was the 'appropriate relief' to grant, and the 'just and equitable' order to make in each circumstance they were faced with. Taking advantage of the enormous discretion invested in it in this regard, the Constitutional Court developed a range of remedies that, in addition to the declaratory relief, the temporary interdicts and the power to suspend the declaration of invalidity in the case of unconstitutionality of legislation, enabled it to strike down legislation and executive conduct for unconstitutionality. Consequently, the Court has granted relief it has considered effective in the circumstances of each case. This it has done by way of constructive judicial ordering and by deploying certain techniques of constitutional interpretation, most of which are alien to the English common-law principles of statutory interpretation. Indeed, judicial activism in South Africa is more pronounced in contemporary constitutional adjudication in that the Constitutional Court has not only 'forged new tools' but it has also 'shaped innovative remedies'[17] in responding to breaches of fundamental rights where the common law, in its rigid splendour, would have left the victim without a remedy.

It is evident that the argument of lack of democratic authority and accountability in favour of judicial restraint and against creativity on the part of judges[18] would not hold where, as in the constitutional structure adopted in South Africa, the Constitution itself mandates the courts to exercise discretion in such an elastic manner. A perusal of the following provisions of the Constitution of South Africa will put the matter beyond guesswork. First, in applying the Bill of Rights to juristic and natural persons in terms of section 8(3), the court is empowered to, 'if necessary, develop the common law to the extent that legislation does not give effect to [the] right' in question. The Court may, in the process, limit the right concerned insofar as it takes into account the limitation clause in section 36(1) of the Constitution.[19] Second, section 39(2) of the Constitution expressly states:

16 Section 172(2)(*b*).

17 C Okpaluba, 'Of "Forging New Tools" and "Shaping Innovative Remedies": Unconstitutionality of Legislation Infringing Fundamental Rights Arising from Legislative Omissions in the New South Africa' (2001) 12(3) Stellenbosch LR 462; C Okpaluba, 'Extraordinary Remedies for Breach of Fundamental Rights: Recent Developments' (2002) 17(1) SAPL 98.

18 M Kirby, 'Courts and Policy: The Exciting Australian Scene' (1993) Commonwealth Law Bulletin 1794 at 1798.

19 Section 8(3).

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Third, by virtue of section 173 of the same Constitution, the granting of the inherent power to the courts in South Africa does not stop with the traditional inherent powers of the courts to protect and regulate their own processes; indeed, it further mandates them 'to develop the common law, taking into account the interests of justice'. Surely these provisions and those discussed below are mandatory; moreover, a court, in these circumstances, cannot shy away from this constitutionally induced innovative and creative spirit in favour of the anachronistic ground that, at common law, a court is not expected to create or make law. And since constitutional provisions, express or implied, or even legislative enactments can override the common law without any prior procedural requirement(s), it is in the nature of constitutional imperative that the dictates of the Constitution must be carried out by the organ to which it is directed. The Court, therefore, cannot be an exception.

Scope of This Enquiry

'Constitutional remedies' is in itself a very wide topic, because in literally every case where a finding of the unconstitutionality of legislation or the conduct of a government agency has been pronounced to be invalid, the issue of remedy or remedies naturally follows. However, both the present project and title of this article by definition delimit the scope of this enquiry, which is confined to the contributions of Ngcobo J while he was a member of the Constitutional Court Bench and later the Chief Justice of South Africa. In that twelve-year period, the learned Judge sat in many cases, including those instances where the Court delivered a single judgment, as in *Minister of Health v Treatment Action Campaign (2)*[20] involving the right of access to healthcare, and a leading example of a situation where the Court constructed structural interdicts to direct how the illegality should be cured. Then there are unanimous judgments of the Court delivered by other Judges[21] in which Justice Ngcobo was a member of the Court. A good illustration is the important case of *Carmichele v Minister of Safety and Security,*[22] where the Constitutional Court directed the courts below to develop the common law of delict in terms of section 39(2) of the Constitution. Or those where Ngcobo J concurred in a unanimous judgment, as in *Pharmaceutical Manufacturers Association, In re: Ex parte, President of the Republic of SA*,[23] where the Court confirmed an order of the High Court and took the opportunity to lay down the principles of legality and rationality as the cornerstone of judicial review in the constitutional state. Of course,

20 2002 (5) SA 721 (CC).

21 See also *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

22 2001 (4) SA 938 (CC).

23 2000 (2) SA 674 (CC).

space constraints would not permit revisiting all the developments that had taken place in this regard or to spend much time discussing the cases where one cannot readily pinpoint the contributions of the Judge whose contributions are the central theme of this project. Although a good number of Judge Ngcobo's contributions in the sphere of judicial remedies[24] could be investigated further from those cases where the Judge wrote the judgment of a unanimous court[25] or concurred in a unanimous judgment;[26] wrote a

24 Another example is the majority judgment of the Constitutional Court in *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC) paras 804–811, where in concurring in the judgment of Yacoob J, the majority held that reg 5(2)(*c*) of the intensely contested Ministerial Regulations relating to a Transparent Pricing System for Medicines and Scheduled Substances of 2004, which related to the determination of the SEP, was not void for vagueness, but that the words 'single exit' had to be severed from Appendix A of the regulations wherever they appeared. Yacoob J explained his reasoning for so holding: 'there is a difference between reg. 5(2)(*c*), which refers to the core price and not the single exit price, and those parts of Appendix A which refer to "the" single exit price. The analysis of reg 5(2)(*c*) in relation to Appendix A shows that the words "single exit" are wholly inconsistent with the scheme of the regulations in relation to the single exit price.' That same judgment of the Constitutional Court (paras 496–498) illustrates the Court's application of the technique of reading in not only outside those legislation discriminatory on the ground of sexual orientation but also of the over intrusive approach of Ngcobo J in one instance as against the less intrusive attitude adopted by the Court in two other instances. Ngcobo J had held that reg 8(3) of the impugned Ministerial Regulations was void for vagueness as it could not be reconciled with reg 5(2)(*a*), to which it was subject. He explained that what the scheme of reg 8 had in mind was that whatever increase that was made by manufacturers, such increase should not go beyond the increase determined by the Minister in terms of reg 8(1), unless such increase was authorised by the Minister in terms of reg 9(1). For that reason, reg 8(3)(*i*) was void for vagueness. The Judge then set out to provide a cure for the defect 'by deleting the words "as first published" and inserting the words "amount of increase determined by the Minister in terms of reg 8(1) as being the extent to which", in front of the words "single exit price of the medicine or scheduled substance", and inserting the words "may be increased" in front of the words "in that year". With the deletion and insertions, the outcome was that reg 8(3)(*i*) would then read: "such increase does not *exceed the amount of increase determined by the Minister as being the extent to which* the single exist price of the medicine or scheduled substances may be increased in respect of the year".' On the other hand, the unanimous judgment of the Court in the same case in respect of reading in was not as intrusive as that of Ngcobo J's. In *New Clicks,* the Court unanimously concurring in the judgment of Chaskalson CJ, resorted to that remedy in two instances. As much as the Court reversed the order of the SCA for setting aside the regulations as a whole, it considered that the individual regulations could be salvaged from invalidity by considering a wide range of remedial options, including reading in. It held that reg 5(1) was invalid in that it omitted the words 'and VAT' and that the defect could be cured by reading the words 'and VAT' into the regulation after 'logistics fee'. In the next illustration, the Court had held that the failure of the regulations to make any provision for the publication of the logistics fee was inconsistent with the requirement of transparency in the Medicines and Scheduled Substances Act 101 of 1965. It proceeded to cure the omission by reading in the words 'and in the case of the information referred to in reg 21(2)(*d*) must' before the words 'publish or otherwise communicate, or require' in reg 21 (see paras 263 and 304).

25 *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

26 In *Jeftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC) paras 52–64, the Court which included Ngcobo J unanimously allowed the appeal and declared s 66(1)(*a*) of the Magistrates' Courts Act 32 of 1944 unconstitutional for failing to provide judicial oversight over sales in execution against immovable property of the judgment debtor. It was in violation of s 26(1) of the

majority judgment[27] or concurred in a judgment delivered by another member of the court, dissented outright from a majority judgment[28] or concurred in a lead dissenting judgment;[29] or where there is a partial dissent and partial concurrence with the majority judgment, such an investigation is excluded from this contribution owing to space constraints.

This enquiry ostensibly discusses Judge Ngcobo's interpretation of the remedial jurisdictional powers of the Court embedded in the phrase 'appropriate relief' and, to some extent, the expression 'just and equitable' order. In effect, the discussion that follows is based on the orders made by the Judge as appropriate relief where he held that there was a breach of the fundamental right(s) entrenched in the Constitution.

The most outstanding of the judgments of Judge Ngcobo in connection with this issue is *Hoffman*.[30] Here, judicial activism was at its pinnacle, with the result that the remedies lexicon in both the employment-law and the public-law spheres has been greatly enriched by the emergence of 'instatement' as a constitutional remedy that has since become part and parcel of South African law.

1996 Constitution to the extent that it allowed execution against the homes of indigent debtors, where they lose their security of tenure. Since s 66(1)(*a*) of the Act was not justifiable and could not be saved, to the extent that it allowed for such executions where no countervailing considerations in favour of the creditor justify the sales in execution. Accordingly, the Court ordered that in order to remedy that defect, s 66(1)(*a*) of the Act was to be read as though the words 'a court, after consideration of all relevant circumstances, may order execution,' appeared before the words 'against the immovable property of the party'. See also Judge Ngcobo's concurring judgment in *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC) paras 50, 57–58 and 60.

27 See in *Matatiele Municipality v President of the Republic of SA (2)* 2007 (6) SA 477 (CC) paras 85, 87, 91, 95–96 and 98–99, where failure by the provincial legislature of KwaZulu-Natal to facilitate public involvement violated not only s 118(1)(*a*) but also s 74(8) and it was held that that part of the Constitution Twelfth Amendment Act of 2005 which purported to transfer the area that previously formed the local municipality of Matatiele as published in the *KwaZulu-Natal Provincial Gazette* from the province of KwaZulu-Natal to the Eastern Cape province was adopted in a manner that was inconsistent with the Constitution. In considering what would be a just and equitable order to make having regard to the particular circumstances of this case, Ngcobo J, for the majority, had to take into account the (*a*) potential prejudice that could be sustained if an order of invalidity were not suspended; (*b*) interests of the parties as well as those of the public; (*c*) need to promote the constitutional project and prevent chaos; (*d*) consequences of the order of invalidity on the elections; (*e*) powers of parliament to alter provincial boundaries, and (*f*) the responsibility of the provinces in relation to an amendment which alters their boundaries. Considering the adverse effects that a declaration made with immediate effect would have on service delivery and municipal elections on the part of the municipality affected by it, the majority held that justice and equity militated against such an order. Rather, suspending the order of invalidity would allow parliament to remedy the constitutional defect and adopt a new constitutional amendment after complying with the relevant provisions of the Constitution. The order declaring that part of the Constitution Twelfth Amendment Act of 2005 that concerned the province of KwaZulu-Natal was suspended for eighteen months.

28 *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

29 *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC).

30 2001 (1) SA 1 (CC); discussed extensively by Okpaluba in 'Extraordinary Remedies' (n 17) 111–117.

With that in mind, this discussion is therefore anchored on two broad themes. The first is the investigation of Judge Ngcobo's contributions with regard to appropriate relief, with the *Hoffman* case as the tip of the iceberg. This is coupled to an evaluation of the effect the *Hoffman* case has had on subsequent matters. The second is concerned with this question: What would have been the appropriate relief had the spy chief in *Masetlha* been able to convince the Court that the president had acted unlawfully or irrationally? Focusing on the remedy aspect of the *Masetlha* judgment means that the whole chunk of the other issues decided in that case—such as the illegality of the presidential conduct and whether the manner of removing the spy chief from his post as the director-general of the NIA was procedurally unfair—are omitted in the present article.

Here also, the dissenting judgment of Judge Ngcobo is as important as his strong dissent on the question of the dismissed spy chief's right to a prior hearing before dismissal. Finally, the investigation also takes into account the learned Judge's pronouncements on what the appropriate relief was in *Bel Porto School Governing Body v Premier, Western Cape*, where the Court had invalidated administrative conduct as a result of procedural defect.

The Case of the Cabin Attendant

The *Hoffman* litigation did not concern a challenge of the constitutionality of legislation. It involved a discriminatory practice by a quasi-public authority, a public corporation, by which it refused employment to an applicant living with the HIV virus. Yet that practice was as much a violation of the Constitution as legislation could be of the equality, dignity and non-discrimination protections guaranteed the applicant by the 1996 Constitution. Meanwhile, the consideration of what constitutes the appropriate relief to remedy the breach of a fundamental right, whether it arose from legislative infraction or was caused by executive conduct, does not make any difference; it depends on the same consideration of whether the relief granted is just and equitable in the circumstances of the case.

In the *Hoffman* situation, the applicant having successfully scaled through the employer's selection and screening processes for the position of cabin attendant, the employer later declined to employ him when it discovered that he was HIV positive. Having reversed the trial court's judgment and holding that the denial of employment on the ground that the appellant[31] was living with HIV impaired his dignity constituted unfair discrimination and violated his right to equality under section 9 of the Constitution,[32]

31 Applicant in the court below and appellant in the Constitutional Court.

32 The trial judge had held in *Hoffman v South African Airways* 2000 (2) SA 628 (WLD) that no breach of the plaintiff's right to equality had occurred through the corporation's policy, which was a result of careful and thorough research and was consistent with international trends; and that even if the corporation's policy constituted unfair discrimination, it was justified within the meaning of s 36 of the Constitution.

the next question was the appropriate relief. Ngcobo J reiterated the Court's avowedly purposive approach to the construction of section 38 and held that

> appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate ... Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.[33]

Thus, it does not go into a consideration of what is just and equitable in any given case to speculate on the effect it would have on all those previously denied employment by the particular employer on the same ground—the usual floodgate argument. Ultimately, in its discretion to choose the appropriate form of relief, the Court 'must carefully analyse the nature of a constitutional infringement and strike effectively at its source.'[34] The other implications of fairness and justice are the consideration of 'the interests of those who might be affected by the order.' In the context of unfair discrimination, this includes, first, the interests of the community, as can be garnered from the Preamble to the Constitution; second, in the employment sphere, that of the employer and the employee and, third, the balancing of all the interests that would be affected by the remedy. Such a balancing process must be guided by the following four objectives:

- To address the wrong occasioned by the infringement of the constitutional right;
- To deter future violations;
- To make an order that can be complied with; and
- Fairness to those who may be affected by the relief.[35]

Research into what could possibly be the appropriate remedy in these circumstances reveals that the only known remedy that restores fully the employment rights where they are unfairly terminated is reinstatement, but this restores the parties to the *status quo*. The Court could not have ordered reinstatement in a case such as *Hoffman*—because it is a statutory remedy for unfair dismissal—since in the circumstances there was neither a dismissal nor a *status quo* to restore. Reinstatement primarily contemplates a restoration to the employee's previous position at the same place of work on terms and

33 *Hoffman* (n 25) para 42.

34 *Per* Kreigler J in *Fose v Minister of Safety & Security* (1997) 2 BHRC 434 (CC) para 96, cited with approval by Ngcobo J in *Hoffman* (n 25) para 45.

35 *Hoffman* (n 25) para 45, applied in *Simelela & Others v Member of the Executive Council for Education, Eastern Cape & Another* (2001) 22 *ILJ* 1688 (LC) 1705 para 66, where Francis AJ held that the appropriate relief to the applicants whose constitutional rights to fair administrative action and fair labour practice were violated by the employer was an order of reinstatement. Relying on *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) and *SACCAWU & Others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 1302 (LAC), the Court rejected as inapplicable the so-called parity principle in coming to the conclusion that reinstatement was the appropriate remedy in the circumstances of that case.

conditions no less favourable than those previously enjoyed by the employee.[36] Even where it is accepted that reinstatement may include restoration to a lesser position,[37] what is significant is that there were terms and conditions already in existence or agreed upon by the parties. In the circumstances of the applicant cabin attendant in *Hoffman*, no terms had been agreed or finalised; he was yet to be employed. Strictly speaking, although the contract was near conclusion, this does not confer the status of employee on the applicant such that he or she could lodge a claim under the law ordinarily regulating employment.[38] In accordance with the development of employment law prior to the *Hoffman* judgment, the court may award the applicant damages at common law where it finds that a contract of employment duly concluded has been repudiated by the employer before it takes effect.[39]

The Novel Remedy of 'Instatement'

'Instatement' is not a term used or recognised anywhere in the South African Labour Relations Act or, indeed, in any other labour legislation anywhere in the Commonwealth jurisdictions.[40] As a remedy in South Africa's labour law, it entered the labour glossary through the landmark judgment of the Constitutional Court delivered by Ngcobo J in *Hoffman.*[41] Ordinarily, a refusal to employ, for whatever reason, does not give rise to a cause of action either in contract or tort at common law.[42] And, if reinstatement could not, under that legal regime, be awarded to the unlawfully dismissed employee on any ground whatsoever, it is unimaginable that instatement of a person wrongfully denied employment could ever be contemplated. The situation is, however, different

36 See, for example, the form of order made in *Mbayeka v Member of the Executive Council for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) at para 31; *Simelela* (n 35) para 64.

37 See the discussion by C Okpaluba, 'Reinstatement in Contemporary South African Law of Unfair Dismissal: The Statutory Guidelines' (1999) 116 SALJ 815, especially footnote 2.

38 An applicant for employment was not an 'employee' under the old LRA, 1956, therefore the Industrial Court had no jurisdiction to hear a complaint of failure to appoint—*Fourie v The Director-General, North West Province* [1997] 3 BLLR 275 (IC). *Contra* the position of an applicant for promotion—*George v Liberty Life Association of Africa Ltd* [1996] 4 BLLR 494 (IC).

39 *British Guiana Credit Corporation v Da Silva* [1965] 1 WLR 248; (1965) 7 WIR 248 (PC); *Richardson v Koefod* [1969] 1 WLR 1812 (CA).

40 It is not found in either the old Australian Conciliation and Arbitration Acts 1904–1967 or the modern Fair Work Act 2009; not even in any of the States Numbered Acts, such as the Labour Relations Legislation Amendment Act 1997 (3 of 1997). It was not mentioned in the earlier Trinidad and Tobago Industrial Stabilisation Act 1965, which was repealed and replaced by the current Industrial Relations Act 23 of 1972 (chapter 88:01), as amended. Instatement as a term of industrial relations or labour law cannot be traced to the UK Industrial Relations Act 1971, the Trade Unions and Labour Relations Act 1974 or the current Employment Relations Act 1996; or even to the Namibia Labour Acts of 1992 and 2007.

41 2001 (1) SA 1 (CC); discussed extensively by Okpaluba (n 17) 111–117.

42 *Seneca College of Applied Arts & Technology v Bhadauria* (1981) 124 DLR (3d) 193 (SCC).

with job applicants under the new law of unfair labour practice[43] or in claims against discriminatory treatment under the Bill of Rights.[44] Yet reinstatement would still not be applicable to the circumstances of the applicant cabin attendant.

In *Hoffman,* an applicant for the position of cabin attendant had passed the employer's selection and screening processes but was refused employment when the employer discovered that he was HIV positive. The Constitutional Court held that the conduct of the employer was a violation of the applicant's fundamental right to equality and non-discrimination. Further, that the denial of employment in the circumstances impaired the applicant's right to dignity, constituted unfair discrimination and violated his right to equality under section 9 of the Constitution. Then the question of the appropriate remedy arose. At that point in the history of labour law, the only recognised remedy was reinstatement, which restores the parties to the *status quo*. In the cabin attendant's case, there was no *status quo* to restore since an employment relationship had not yet been entered into. Even if there were such a contract, the common-law courts would ordinarily not make an order in the form of specific performance of a contract of employment,[45] not to mention a situation as inchoate as the stage at which the parties found themselves in *Hoffman.*[46] If that were the common-law position, it would be unimaginable that the instatement of a person wrongfully denied employment could

43 Item 2(1)(*a*) read with item 2(2)(*a*), Schedule 7, Labour Relations Act 1995. An applicant for employment must demonstrate that he or she was an applicant for a specific job; that vacancy was advertised and that his or her failure to secure the job was because of the discrimination on one of the grounds listed in the Act: *National Entitled Workers Union v Mtshali & Another* (2000) 21 *ILJ* 1166 (LC). Query: Can foreign nationals who do not have work permits in terms of s 26(1) of the Aliens Control Act 1991, and who for that same reason have been denied employment, complain that they have been discriminated against? It would appear that if their right to work in this country depends, in the first instance, on their obtaining a work permit, it would follow that they could not allege discrimination based on a principle of international law which gives every country the right to regulate the entry into its territory by foreign nationals. And where such a person has secured employment but does not have a work permit, it would also seem that it would be legally impracticable for them to enjoy the status of an employee who could approach the Commission for Conciliation, Mediation & Arbitration for the determination of an employment dispute. See *Moses v Safika Holdings (Pty) Ltd* (2001) 22 *ILJ* 1261 (CCMA), where Moletsane C held that s 26(1)(*b*) of the Aliens Control Act, which made it a condition for a foreigner to obtain a work permit as a condition for working in South Africa, was not unconstitutional. See also *Mthethwa v Vorna Valley Spar* (1996) 7(11) *SALLR* 83 (CCMA).

44 Cf in *Ayangma v Eastern School Board* (2000) 187 DLR (4th) 304, where the Prince Edward Island's Supreme Court (Appeal Division) held that damages could be recovered as the appropriate relief under s 24(1) of the Canadian *Charter*, where a public authority was shown to have refused to employ an applicant on grounds of race, national origin, colour, age or qualifications.

45 See, generally, C Okpaluba, 'Specific Performance and Reinstatement in Swazi Labour Law: English or South African Approach?' (1999) 28(3) Anglo-American LR 287–323.

46 The most that the common-law courts have done for the intending employee in the circumstance where the contract of employment has literally been concluded but subsequently repudiated by the employer has been to award damages for breach of such contract: *British Guiana Credit Corporation* (n 39); *Richardson* (n 39).

ever have been contemplated.[47] On the other hand, if the cabin assistant had already been in an employment relationship with South African Airways, then he could have brought his action alleging unfair discrimination in terms of section 9 of the Constitution on the ground of his being HIV positive and could have claimed reinstatement as the appropriate relief.

Emboldened by the new legislative regime regulating labour founded on a Bill of Rights that entrenches a right to fair labour practices[48]—a system that abhors 'unfair labour practices' and regulates the procedure for settling disputes arising from them,[49] one founded on the principles of constitutionalism and the rule of law which is based on human dignity and the achievement of equality that prohibits unfair discrimination in any shape or form[50]—the Constitutional Court took its cue from the concept of reinstatement and came up with 'instatement' as a remedy. This remedy does not relate to an ongoing employment relationship; it applies at the engagement stage where an applicant, although duly qualified for the position advertised, is nonetheless denied employment through some unfair conduct on the part of an employer.

In delivering this novel opinion, Ngcobo J (as he then was) held that instatement—an order that the applicant cabin attendant be appointed to the position to which he was denied appointment—was the appropriate and most practicable relief, the fullest redress to make in the circumstances. Although 'carved out of the image of reinstatement' or by the analogy of that remedy,[51] instatement is much nearer to an order of specific performance of a contract of employment[52] or the public-law equivalent of an order for '*mandamus* compelling a public authority to employ the applicant in accordance with the tenets of the Constitution or any other law the respondent had breached.'[53]

The reasoning of the Court could be seen in two crucial paragraphs in the judgment of Ngcobo J. In the first instance, the Judge stated:

> An order of *instatement*, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that, where a wrong has been committed, the aggrieved person should, as a general matter and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair

47 Okpaluba (n 17) 113.

48 Section 23(1) of the Constitution, 1996.

49 See ss 186(2) and 191 of the LRA, 1995.

50 Section 9 of the Constitution, 1996.

51 Paragraph 52 n 45, citing the speech of Nicholas AJA in *NUMSA* (n 35) 462I–463A. See, generally, Okpaluba (n 37).

52 *Contra* s 158(1)(*a*)(iii) of the LRA, read with s 77A(*e*) of the Basic Conditions of Employment Act 75 of 1997; and see *Santos Professional Football Club v Igesund* 2003 (5) SA 73 (C); *Ngubeni v National Youth Development Agency* (2014) 35 *ILJ* 1356 (LC); *Dyakala v City of Tshwane Metropolitan Municipality* [2015] ZALCJHB 104 (23 March 2015).

53 Okpaluba (n 17) 115.

> discrimination, the Constitution not only seeks to prevent unfair discrimination but also to eliminate the effects thereof. In the context of employment the attainment of that objective rests not only upon the elimination of the discriminatory employment practice but also requires that the person who suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.[54]

Secondly, it was made clear that:

> *Instatement* serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.[55]

If, as has been observed, *instatement* is carved out of the image of *reinstatement*, the question that naturally arises is this: Would its availability also be subject to the conditions laid down for the award of *reinstatement*? Although the latter is a primary remedy for unfair dismissal, it is not obtainable as a matter of course, because under the Labour Relations Act 66 of 1995, the CCMA or the Labour Court must be satisfied that: (*a*) the employee wishes to be reinstated; (*b*) it is practicable to do so; (*c*) the working relationship has not broken down to such an extent that continued employment of the employee would be intolerable; and (*d*) that the dismissal was not unfair merely on the ground of defective procedure.[56] In the circumstances of a job applicant, it would appear that it is only the first two conditions that would have any relevance. An applicant who reacts to the discriminatory practice of the employer by intimating unwillingness to be instated may leave the Court no option but to consider the quantum of compensation for the fundamental rights breached, because the Court would not foist a reluctant employee on an equally reluctant employer.

The situation would, however, be different if the employer were the reluctant party, since their wish in this regard would not be the dominant consideration. It is this type of employer attitude that the law is designed to change. An argument based on a reluctant employer takes one back to the original criterion for refusing the order of reinstatement as a remedy in labour law: the stereotypical contention of foisting a willing employee on

54 2001 (1) SA 1 (CC) para 50.

55 *Hoffman* (n 54) para 52.

56 Putting it in its proper perspective, the Full Bench of the Labour Appeal Court had said that the vexed question whether reinstatement can be ordered in favour of an employee whose dismissal is for a fair reason but unfair merely on the ground that the procedure followed in effecting it was defective. In *Mzeku & Others v Volkswagen SA (Pty) Ltd & Others* (2001) 22 *ILJ* 1575 (LAC) para 79, it was held, setting aside an award of the CCMA Commissioner [(2001) 22 *ILJ* 771 (CCMA)] as having been made in excess of power, and affirming, *per* Landman J ([2001] 5 BLLR 558 (LC)), that reinstatement was not competent in such a situation where the dismissal was substantively fair but procedurally unfair.

a reluctant employer. The practicability of instating the applicant seems to be the main consideration in the circumstances. Incidentally, the Court mentioned this element, in addition to fairness and justice, as a consideration that may render instatement inappropriate in a given case. Rather than the practicability of instating the applicant being a problem, the Court was assured that it would be practicable to engage the cabin attendant, nor was it shown that his medical condition would render him unsuitable for employment as a cabin attendant.[57]

The order of *instatement* is in the nature of *mandamus* compelling the public authority to employ the applicant in accordance with the tenets of the Constitution or any other law that the respondent had breached. It is equivalent to an order of *mandamus* issued against a government department subsequent to a declaratory judgment that its employee's premature retirement was in violation of the guaranteed right to a fair hearing, and unconstitutional, which the government department did nothing to rectify.[58] The difference is that the applicant in the present case did not have to return to court a second time[59] after obtaining a declaration, therefore saving them unnecessary legal costs and valuable time.

Before this judgment, a public service applicant whose application was rejected contrary to law would ordinarily have obtained a declaration that the ground for refusing them employment was unlawful, and that would be tantamount to an order, albeit *sub silentio*, to employ. Instatement, therefore, will be a handy remedy in the armoury of the court or tribunal established to interpret and apply the provisions of the Promotion of Administrative Justice Act 3 of 2000.

57 *Hoffman* (n 54) paras 53 and 54. Tipnis J made the order in *X v Y Corp & Another* [1999] 1 LRC 688 (Bombay HC) para 61, that the applicant's name be restored to the list of casual workers and he be given work as and when available until such a time that he would be considered for permanent employment. This order which was consequent upon the Judge's finding that the applicant was medically fit for his normal job requirements and would not pose a threat to other workers due to his being HIV positive, was in the form of an order for reinstatement. It was held that the decision to delete the applicant's name from the panel of casual labourers simply because a medical test had shown him to be HIV positive was unconstitutional and invalid.

58 See *Shitta-Bey v Federal Civil Service Commission, Nigeria* (1981) 1 SC 40.

59 *Contra Newfoundland Association of Provincial Court Judges v Newfoundland* (2000) 191 DLR (4th) 225 para 234, where the Court of Appeal of Newfoundland refused a *mandamus* but expressed the view that in the 'unlikely event' that the Government refuses to honour its declared obligation in this case, the respondent judges 'have at their disposal the remedy of an action leading to qualification of their claims and (presumably) summary judgment, at which time they could seek enforcement of the Minister of Finance's statutory duty to pay them under s 23(4) of the Proceedings Against the Crown Act', RSC 1990. It is this double-journey syndrome that an order of *mandamus* would avert *ab initio*.

Instatement since *Hoffman*

On further reflection, *instatement*, rather than compensation,[60] is what the applicant should have obtained in *Whitehead v Woolworth*[61] had she been successful at the Labour Court of Appeal in showing that she had been denied employment on the grounds of her pregnancy. In this regard, reference may be made to *Walters v Transitional Local Government Council, Port Elizabeth,*[62] the first case in which the Labour Court applied the order of *instatement* in the exercise of its unfair labour practice jurisdiction under the Labour Relations Act, 1995. Landman J had considered the case of the applicant, a white female, for the post of principal personnel officer, job evaluation. She had alleged discrimination by the local authority on grounds of political opinion, favouritism and race in the light of the fact that the job was offered to another candidate, a less experienced black male. She claimed that her constitutional right to equality under section 157(2) of the LRA read with section 9(3) of the 1996 Constitution had been breached as well as her right to a fair labour practice under item 2 of Schedule 7 of the LRA. The Court did not entertain claims based on section 157(2) and the Bill of Rights since the applicant had adequate remedies in terms of the unfair labour practice jurisdiction of the Court.[63] Again, the Court found no evidence of discrimination other than on ground of race. The installation of the selected candidate with full knowledge that action was pending in court was not a material consideration, because if there were practical problems arising from compliance with the order, the local authority would have brought them upon itself. Similarly, the employer's selection of the black male applicant instead of Ms Walters could not be justified because the employer could not show that it had an

60 In *X v Y Corp* (n 57) 723–724 and 726–727, the Bombay High Court awarded compensation in addition to quashing the decision of the respondent Corporation to delete the applicant's name from the list of casual workers pursuant to the Corporation's directive that an employee found to be HIV positive would have his or her services terminated. The Court had held that this directive was arbitrary, unjust and unlawful in that it constituted an infringement of arts 14 (the Equality Clause) and 21 (the protection of personal liberty) of the Indian Constitution. The compensation was to cover the amount he would reasonably have earned from the date his name was struck off the list to the date of judgment had his name been not removed by the employer.

61 (2000) 21 *ILJ* 572 (LAC). At the Labour Court, Waglay AJ (as he then was) had awarded the applicant an amount equal to two-thirds of what she would have earned over a 12-month period had she not been discriminated against. See also *Whitehead v Woolworth (Pty) Ltd* (1999) 20 *ILJ* 2133 (LC).

62 (2000) 21 *ILJ* 2723 (LC).

63 See also *per* Conradie J in *Naptosa & Others v Minister of Education, Western Cape & Others* 2001 (2) SA 112 (C) at 122E–123J. *Contra* in *Simelela & Others v Member of the Executive Council for Education, Eastern Cape & Another* (2001) 22 *ILJ* 1688 (LC), where Francis AJ did not address the question whether the applicants' case could have been decided on the statutory provisions based on the Educators Employment Act 76 of 1998 and item 2(1) of Schedule 7 of the LRA, 1995. If they could have obtained 'appropriate relief', therefore, the Court would not have had the need to decide the case based on the applicants' constitutional rights to fair administrative justice and fair labour practice. This is due to the restraint the Constitutional Court places on courts to approach constitutional-rights claims with caution in that, where a remedy equally adequate could be obtained from another branch of the law, that other avenue should be explored, sparing a determination based on the Constitution.

affirmative action plan in accordance with the Constitution, the LRA or the Employment Equity Act, 1998. Relying on *Hoffman,* the Court ordered the applicant's *instatement* to the post of principal personnel officer, job evaluation.

Another illustration can be taken from *South African Security Forces Union v Surgeon-General of the SAMHS,*[64] where Claassen J set aside the defendants' blanket ban of the recruitment, deployment externally or promotion within the South African National Defence Force (SANDF) of any person who is HIV positive. The ground of the challenge was that it was unconstitutional in that it unreasonably and unjustifiably infringed the rights of both aspirant and current HIV positive members of the SANDF. In effect, the rights infringed included: (*a*) the right not to be unfairly discriminated against in terms of section 9(3) of the Constitution; (*b*) the right not to interfere with the right to privacy in terms of section 14 of the Constitution; (*c*) the right not to infringe the right to dignity in terms of section 10 of the Constitution; and (*d*) the right to fair labour practice in terms of section 23(1) of the Constitution. The respondents were also directed to employ immediately the third applicant, who was a very well-qualified musician and trumpeter. This individual had been through all the medical tests successfully and 'everything was in order until they found out that he was HIV positive', and on that basis he was refused entry to and membership of the SANDF.

Six years later, similar issues arose for determination by Meyer J in *Dwenga v Surgeon-General of the SAMHS.*[65] The learned Judge held that it was indisputable that by virtue of their new testing and health policy the SANDF was denying persons who were HIV positive entry into the Military Skills Development System (MSDS); alternatively, that it was preventing them from securing a contract with the Core Service System (CSS) without regard to their health and fitness and their ability to perform the duties required of them in the MSDS or of the particular position they otherwise would have secured in terms of a CSS contract. This was an assault on their dignity[66] and the discrimination was not shown to be fair, hence it violated the right to equality guaranteed by section 9 of the Constitution.

However, Meyer J preferred to decide the matter on the basis that it was vexatious and frivolous and an abuse of process[67] for the SANDF to seek to re-litigate the same issues that had already been determined in *SASFU*, and the Judge therefore debarred the SANDF from doing so.[68] Questions of equity and fairness did not require that the question of the constitutionality of the SANDF's practice of refusing to employ all persons living with

64 [2008] ZAGPHC 217 (16 May 2008).

65 [2014] ZAGPHC 727 (26 September 2014) para 21.

66 *Per* Ngcobo J in *Hoffman* (n 25).

67 *Dwenga* (n 65) para 23.

68 See, for example, *per* Wallis JA, *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA); [2013] ZASCA 129 (26 September 2013) para 45; *per* Milne J, *Cook v Muller* 1973 (2) SA 240 (N) 245H–246B.

HIV be re-litigated in these proceedings.[69] Apart from the declaratory and interdictory relief sought by the applicants, which was aimed at enforcing compliance with the order made by Claassen J in *SASFU*, in this matter instatement 'which requires an employer to employ an employee'[70] was considered the appropriate relief that should also be granted to the individual applicants. Such an order would, inter alia, redress the wrong the first and second applicants had suffered and place them, as far as possible, in the same position they would have been in but for the unfair discrimination against them.[71]

Reinstatement and the Trust Relationship[72]

The controversial judgment of the Constitutional Court in *Masetlha v President of the Republic of South Africa*[73] tends to be overshadowed by the legality and rationality of the presidential conduct and whether the president was under a legal obligation to have given the spy chief an opportunity to be heard before terminating the latter's contract of employment. But, on the positive side, the case is also authority for the proposition that the remedy of reinstatement cannot be ordered where the trust relationship between the employer and the employee has broken down irreparably, and on this point both the majority judgment of Moseneke DCJ and the minority judgment of Ngcobo J were to similar effect.

The Majority Judgment on Breach of Trust

It was held that, although it was clear that there had been a breakdown in trust between the president and the applicant, that alone was not a sufficient ground to justify a unilateral termination of the contract of employment.[74] At the same time, the breakdown of that relationship of trust by the president in the applicant constituted

69 *Dwenga* (n 65) para 13. See also *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA); [2012] ZASCA 28 (28 March 2012) paras 10, 23–27; *Hyprop Investments Ltd v NSC Carriers & Forwarding CC* 2014 (5) SA 406 (SCA); [2013] ZASCA 169 (24 Nobember 2013) paras 13–20.

70 *Hoffman* (n 25) paras 50–61.

71 *Dwenga* (n 65) para 22.

72 In the law of employment, trust is considered an essential feature of the sustenance of the relationship: *De Beers Consolidated Mines v CCMA* [2000] 9 BLLR 995 (LAC) para 22; *Miyambo v CCMA* [2010] 10 BLLR 1017 (LAC) para 13; *Hadebe v SALG Bargaining Council* [2014] ZALCD 26 (11 June 2014) para 11. Both the English and the Australian courts are firm on the fact that in an employment relationship a requirement of the trust and confidence is implied for that relationship to flourish. See, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 34; *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *South Australia v McDonald* (2009) 104 SASR 344; *Commonwealth Bank of Australia v Barker* [2014] HCA 32. See also M Freedland, *The Personal Employment Contract* (Oxford 2003) 155.

73 2008 (1) SA 566 (CC).

74 ibid para 88.

a rational basis for dismissing the applicant from his post as the director-general of the National Intelligence Agency (NIA).[75] On the other hand, the irretrievable breach of trust would be relevant for the purposes of determining the appropriate relief. The ordinary remedies for breach of the contract of employment are either reinstatement or full payment of benefits for the remaining period of the contract. Even if the applicant had succeeded in his claim for unlawful termination of his fixed-term contract as the director-general of the NIA, the case was not one where reinstatement would be ordered because of the special relationship of trust that should exist between the parties in question.[76] The reason for this was that it would not be proper to foist upon the president a director-general of an important intelligence agency whom he did not trust. Nor could the public interest be served by a head of an intelligence service who has said he has lost trust in and respect for his principals, the president and the minister. The difficulty of the applicant's obtaining an order of reinstatement was further compounded by his admission that he was seeking reinstatement more for personal vindication of his reputation than to be returned to his erstwhile office. This argument, rather than strengthening the applicant's case, weakened it; reinstatement has never been known as necessarily curative of reputational damage where the relationship between parties has broken down. Without necessarily acquiescing in that submission, Moseneke DCJ responded to it in the following interesting and informative passage in his judgment when he said that:

> I have understanding for this personal quest to protect and restore his reputation. It is neither frivolous nor a matter which does not engage the cardinal constitutional value of dignity. At the inner heartland of our rights culture is human dignity. This has implications for the manner in which public power is exercised. Public power, even though properly conferred, must be exercised in a manner that would not violate the human dignity of those concerned, including reputation, which is an incident of one's sense of self-worth.[77]

That human dignity was implicated in the termination exercise is one thing, but an order for reinstatement viewed as what is required to repair that damage in the particular instance is another matter. Reinstatement, a purely employment-related remedy, has underlying principles governing it that determine when it can be ordered by a court. The existence of mutual trust is one vital factor a court bears in mind when deciding that issue. The fact is that if a finding of wrongful conduct has been made, whether it is constitutional or contractual, reinstatement is not the only way to vindicate such breach: more often than not, compensation plays an important role. And if a monetary award is considered to be adequate in response to reputational injuries suffered through defamation, wrongful arrest, detention or malicious prosecution, why could it not fulfil

75 ibid para 86.
76 ibid para 98.
77 ibid para 98.

the same purpose in unlawful termination of employment cases, as in the peculiar circumstances of *Masetlha*?

Another reason why the applicant in *Masetlha* could not succeed in his claim of the remedy of reinstatement is that, having not found that the conduct of the president had breached any constitutional provision, the remedy the Court could order would, technically speaking, be of purely academic relevance. The jurisdiction of the Court to make any order that was just and equitable in terms of section 172 of the Constitution—including even an order that the financial tender offered to the applicant to place him in the same financial position that he would have been in but for the early termination of his services—is dependent upon its declaring that any law or conduct was inconsistent with the Constitution and therefore invalid.[78] That was not the judgment of the majority in this case.

Ngcobo J's Minority Judgment on Breach of Trust

The conclusion of the majority is understandable in the sense that it did not find the dismissal to be unfair and, therefore, did not order reinstatement. But what about the judgment of the minority? It will be recalled that the *Masetlha* case elicited a very strong dissenting judgment from Ngcobo J, whose conclusion was in stark contrast to that of the majority. Ngcobo J had held that the president had no power to alter the applicant's term of office unilaterally by terminating his employment contract prior to its expiry date. The learned Judge came to that conclusion upon finding that the president had breached the duty to act fairly by not consulting the applicant before taking the decision to relieve him of his duties. In his opinion, the president had acted beyond his powers conferred by section 209(2) of the Constitution and section 3(3)(*a*) of the Intelligence Services Act 65 of 2002, read with sections 3B(1)(*a*), 12(2) and 12(4)(*c*) of the Public Service Act, 1994 and, therefore, he had acted in breach of the doctrine of legality. The president's conduct was therefore inconsistent with the Constitution and fell to be declared as such under section 172(1)(*a*) of the Constitution.

Having thus held, the question was whether the learned Judge was persuaded that the order to reinstate the applicant as the most effective remedy would flow from his holding that the president had acted unconstitutionally. Ngcobo J reiterated what he had said in *Hoffman* to the effect that the requirement of a just and equitable order under section 172(1)(*b*) means that it must be fair and just in the circumstances of each case.[79] Accordingly:

> Fairness in this case requires a consideration of a triad consisting of the interests of the applicant, the interests of the President as the head of the national executive and the public interest. All these interests converge in the requirement of trust which is fundamental to relationship between

78 ibid paras 97–99.

79 *Hoffman* (n 25) paras 42–43 and 45.

> the head of the NIA and the President who is the commander-in-chief of the defence force. What is required is a careful balancing of these various interests.[80]

In normal circumstances, reinstatement would have been the most effective remedy for the applicant, but considering the nature of the relationship between the parties, whether they could still work with each other, the remaining balance of the contract period, the desirability of reinstating the applicant to his former position, and the need to place the applicant in the same position that he would have been in but for the violation of the Constitution, this remedy would not have been appropriate. In the balancing exercise with a view to determining an order that would be just and equitable in this case, the Judge found that in the execution of the sensitive but constitutional responsibilities of the parties complete trust was necessary, absolute trust being fundamental to the relationship between the president, as the head of the national executive, and the head of the NIA.[81] Once the trust in the relationship had broken down irreparably, it would be too much to expect of human nature to require that the applicant and the president should work together again. In the circumstances, therefore, reinstatement would serve neither the interests of the applicant nor those of the president. Nor would it serve the interests of the public, who had an interest in the mutual trust between the president and the applicant.[82]

Where Conduct is Invalidated due to Procedural Defect

The concurring minority judgment of Ngcobo J in *Bel Porto* presents an even more interesting scenario. While Ngcobo J joined the other minority dissenters—Madala, Mokgoro and Sachs JJ—in disagreeing with the majority judgment that there was no merit in the contention that the appellants' constitutional rights to administrative justice had been infringed, the reasons for his disagreement differed from those of the trio, and so was his approach to the issue of appropriate relief.

In his dissent within a dissent, Ngcobo J had held that the fact that the Western Cape Education Department (WECD) was obliged under the labour laws to consult the unions did not justify its failure to consult the appellants. Nor did the absence of a statutory provision requiring such consultation justify the failure to consult. The obligation to consult with the appellants arose from the constitutional right to fair administrative action that affects or threatens the rights or interests of individuals. Procedural fairness is an important principle of South Africa's constitutional democracy.[83] Further, Ngcobo J held that, just as in the case of the WECD, the appellants were obliged under the

80 *Masetlha* (n 28) para 212; *Hoffman* (n 25) para 45.
81 *Masetlha* (n 28) paras 215–216.
82 ibid paras 217–219.
83 *Bel Porto School Governing Council* (n 29) para 241. See also *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39.

labour laws to consult their employees, in particular, on the retrenchment that was imminent. To be able to conduct meaningful consultation, the parties required not only the information relating to the plan that would implement the personnel provisional measure (PPM), but also sufficient time to consult. Yet it is clear that before the meeting of 22 and 23 August 2000, the appellants had no idea what the plan would entail: only on 22 and 23 August were the salient features of the plan conveyed to them, the plan itself being conveyed to them only when the WECD filed its response to the supplementary affidavits. In addition, it is apparent from the proposed implementation dates that the appellants would not have had sufficient time to consult with their employees about the plan.[84]

In conclusion, it was held that in the circumstances of this case, the WECD's decision to consider and determine the plan to implement the PPM without affording the appellants the opportunity to be heard was a breach of the appellants' constitutional right to procedurally fair administrative action.

Ngcobo J then set out to consider the relief to which the appellants were entitled. The learned Judge held, first, that the starting point is to have regard to the power to grant 'appropriate relief' within the context of section 38 of the Constitution. This must be construed purposively and in the light of the corresponding power in section 172(1)(*b*) to make 'any order that is just and equitable'.[85] Second, that those factors against which the Court had to balance the interests so affected must be considered, and those factors had been laid bare in *Hoffman*[86] by Ngcobo J. But more critically in the present case was what the Court had to consider where it had found that a constitutional right had been violated, especially in the light of there being either insufficient information for it to determine the appropriate relief or where the parties had not had the opportunity to address the Court on that particular relief.

At this point, Ngcobo J wondered whether the Court should adopt a passive approach by refusing to intervene because of a lack of information or that argument had not been presented to that effect. Answering that question in the negative, the Judge held that a passive approach to the matter might defeat the constitutional rights of the litigants and render those rights meaningless and futile, whereas the proper approach in such a case was to intervene. It is even more necessary when one considers that the determination of the appropriate relief is a judicial function and, in constitutional adjudication, a court must play an active as opposed to a passive role in determining the appropriate relief. Essentially, a court has a duty to ensure that all the facts and circumstances necessary for determining the appropriate relief have been placed before it.[87] With regard to the foregoing, Ngcobo J expressed the view that

84 *Bel Porto School Governing Council* (n 29) para 242.
85 ibid para 247. See also Ngcobo J's judgment in *Hoffman* (n 25) para 42.
86 *Hoffman* (n 25) para 45, discussed above.
87 *Bel Porto School Governing Council* (n 29) para 249.

> [a] person who suffers the infringement of a right entrenched in the Bill of Rights is entitled to an appropriate relief under s 38 of our Constitution.[88] Therefore the duty of the court where an infringement of a constitutional right has been found is to give the successful party an appropriate relief. This duty derives from the obligation of the court to protect and enforce constitutional rights and the need to redress the wrong occasioned by the violation of the constitutional rights. The granting of the appropriate relief is the gist of a civil trial – it is an important component of constitutional litigation. It redresses the wrong done and thus gives meaning and substance to constitutional rights. A concomitant of this duty is the duty to inform itself as to what the appropriate relief is having regard to the nature of the violation. This duty may, depending upon the circumstances of the particular case, require the court to direct that it be provided with information that is necessary to enable it to determine the appropriate relief. Thus the fact that the successful litigant has not claimed a particular relief or that the parties did not address argument on a particular relief, should be no bar to the determination of the appropriate relief. Similarly, a lack of information on the record should be no bar either. Courts, including this Court, have available to them procedures to ensure that such information or argument is placed before them.[89]

Given the circumstances of this case, would it have been in the interests of justice for the Court to intervene and to receive further evidence on the issue of appropriate relief? The learned Justice of the Constitutional Court came up with the considerations which he held are relevant to determining the answer to the question at hand. They include that: (*a*) the appellant's constitutional rights to administrative justice have been violated; (*b*) the violation occurred during the course of litigation and was referred to in the papers; (*c*) the evidence is required on a narrow issue, namely, appropriate relief, and (*d*) refusal to receive further evidence may well compel the appellants to re-litigate the issues already litigated and this may cause further delay in the implementation of the PPM. Accordingly, these factors must be viewed against the duty of the Court to grant appropriate relief where it has found a violation of constitutional rights and the need to redress the wrong occasioned by the infringement of the appellants' constitutional rights.[90] It was therefore in the interests of justice that further information be sought and that the parties be given the opportunity to present evidence before court on the determination of appropriate relief. Accordingly, Ngcobo J would: (*a*) set aside the order of the High Court dismissing the application; (*b*) declare that the failure by the WCED to consult with the appellants on the determination of the plan to implement the PPM had infringed the appellants' constitutional rights to administrative justice in terms of section 33, and (*c*) direct the parties to file further affidavits and arguments dealing with appropriate relief in the light of the finding that the appellants' constitutional rights to administrative justice had been violated.[91]

88 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 95.

89 *Bel Porto School Governing Council* (n 29) para 250.

90 ibid para 255.

91 ibid para 260. In his concurring dissenting judgment at para 218, Madala J agreed with Mokgoro and Sachs JJ that the Court should uphold the appeal, issue a declaration to the effect that the rights of the general assistants and the appellant schools as a whole had been infringed in terms of s 33(1)(*b*) and

Conclusion

The appropriate relief or a just and equitable order are necessary adjuncts of judicial authority for every applicant, because review must of necessity ask for either or both in the ventilation of their fundamental right or in the resolution of the constitutional dispute in question. The fact that they often arise towards the end of adjudication does not in any way diminish their relevance in the scheme of adjudication. They arise at the tail end of adjudication, as it would be pointless, if not fruitless, to canvass the issue of remedy before proving the unconstitutionality of the conduct challenged in the proceedings. Rather, it is the finding of unconstitutionality, of illegality or irrationality, that triggers the question of granting the winning plaintiff or applicant appropriate relief or making a just and equitable order. They are both important because it has always been an aphorism of the common law, as affirmed in the judgments of Ngcobo J, that a wrong begets a remedy and that it would amount to a travesty of justice for a person who has suffered a wrong to be left without a remedy—or granted an inappropriate, unjust or unfair remedy, for that matter.

There can be no doubting the fact that, generally, a common-law court would, in the case of the cabin attendant, have awarded the plaintiff compensation for a breach of contract, bearing in mind that there was no specific performance of a contract of employment. For if, at common law, there can be no order of reinstatement or an order to the effect that the employer and the employee must continue a contract of personal service, then how would such a court make an order that parties who concluded a contract of employment must get on with the contract even if one of them is unwilling to do so? The innovation of ordering instatement in *Hoffman* was made possible because the Court had abundant weapons in its constitutional armoury to take its own initiative or to be creative; it has the power to grant appropriate relief and also make a just and equitable order. It is enabled to develop the common law where it is defective, outdated or inadequate in order to respond to or give effect to the right in question. It is correct in terms of the labour-law jurisprudence that where a relationship of trust that is an essential element in an employer–employee relationship has broken down in that the circumstances surrounding the dismissal have become such that a continued employment relationship would be intolerable, it would be reprehensible to attempt to foist on the parties a relationship that no longer existed.

Although the Justices in *Bel Porto* were split down the line, it is also important to bear in mind the emphasis Ngcobo J placed on the entitlement of a successful claimant of a breach of a right in the Bill of Rights to appropriate relief under section 38 of the

(*d*), to the extent of depriving the general assistants of the right to have their length of service taken into account when the PPM was implemented, and order the WCED to take account of the length of service of the general assistants at the appellant schools when implementing the PPM. This was the Judge's understanding of what amounts to appropriate relief, which may encompass wider relief than that sought.

Constitution. Therefore, the fact that a successful litigant did not claim a particular relief or that the parties did not address argument on a particular relief, or that there was a lack of information on the record, should not be a bar to determining the appropriate relief.

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