SACHS J ABRIDGED JUDGMENT (CONCURRING)

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

142. This case illustrates the need for our constitutional jurisprudence to find the space in appropriate cases to move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability in those matters.

143. Is it a "judicial function" or is it "administrative action"? This was the stark classificatory choice that was presented to the Court by counsel in this matter. The premise was that if arbitration in an unfair dismissal matter by a commissioner amounted to judicial conduct, the powers of review would be limited to the relatively narrow confines established by the Labour Relations Act (the LRA). If, however, it should be regarded as administrative action, a reviewing court could exercise the relatively wide powers granted by section 33 of the Constitution and the Promotion of Administrative Justice Act (PAJA). In my view, posing the question in these terms displays undue subordination to formal classification of rights, and insufficient regard for the manner in which rights overlap and basic values animate and bind discrete rights together.

144. I accordingly associate myself with the challenge that Navsa AJ addresses to the existence of an assumed divide between the rights said to be in competition in this matter. He observes that it is misleading to define the central issue as being whether arbitration under the LRA should be identified as constituting administrative action or judicial conduct. He then states that it is a misconception to assume that the rights in

section 23 (the right to fair labour practices), section 33 (the right to just administrative action) and section 34 (the right to settle disputes in a fair hearing) of the Constitution are necessarily exclusive, and have to be dealt with in sealed compartments. Thus, even though he finds that PAJA does not in fact apply to what he would characterise as administrative action, nevertheless he holds that the broad principles of administrative justice as contained in section 33 of the Constitution should permeate the manner in which the commissioner functions. In the result, he reads the provisions of section 145 of the LRA in a broad manner, deciding that the reviewing court should apply the test of whether the commissioner's decision was one to which a reasonable commissioner, sensitive to the values of section 33, could come.

145. Ngcobo J, on the other hand, decides that the commissioner is not engaged in administrative action but in judicial conduct, which under section 34 of the Constitution necessitates a fair hearing by an impartial tribunal, provided in this case by the commissioner. The starting point of the enquiry, he states, must be the wording of section 145 of the LRA. He too would construe these words in a broad fashion. This is because the very notion of a fair labour practice requires that fairness be the touchstone throughout. In his view, the basis of the review must be whether the commissioner applied the provisions of section 145 of the LRA in a fair manner,[39] not only procedurally but substantively and in keeping with the powers and duties flowing from the section.

146. I find myself in the pleasant but awkward position of agreeing with colleagues who disagree with each other. In my view the rationale of each of their judgments is essentially the same, even though they are framed in different conceptual matrices. Employing almost identical processes when weighing the facts they unsurprisingly arrive at the same outcome. This concurrence of result comes about not through happenstance, but because in substance, though not in form, they concur on the context, interests and values involved. Both judgments are animated by the same goal, which is to determine in a constitutionally proper way the standard of conduct that can be expected of a public official arbitrating a labour dispute in an open and democratic society based on human dignity, equality and freedom. I would add that,

formal trappings aside, it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably.

147. Thus, whether one labels the commissioner's work as performing a judicial function in an administrative context, or as fulfilling an administrative function in a judicial context, the activity is intrinsically the same. The commissioner must be impartial and basically fair and reasonable in the conduct of his or her work. This is so, whatever the technical description. To my mind, any attempt at pure classifications is doomed from the start. The reality is that the function of the commissioner is a hybrid one, composed of an amalgam of three separate but intermingling constitutional rights.

148. Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other. Though in particular factual situations the interests secured by the rights might collide, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right through establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the constitutional interests involved. In this endeavour the courts will be strongly guided by the constitutional values at stake.

149. The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation.

150. The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.

151. I conclude, therefore, that the Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity. The disparate textual protections are unified by the values immanent in all of them. The relationship between the separately protected rights should thus be regarded as osmotic rather than hermetic. Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved. And hybridity should be recognised for what it is, the co-existence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what human affairs naturally and inevitably join together, we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning.

152. Concepts of hybridity and permeability of rights have not been the subject of direct theorisation in this Court. And the facts of this case do not necessitate the determination of all the possible consequences lying in the wake of their receiving due acknowledgment in appropriate cases. Yet some guidance can be sought from the manner in which this Court has emphasised the intersection and interrelatedness of different protected rights in particular matters, and highlighted the influence of overarching values.

153. Thus, when dealing with capital punishment in *Makwanyane*, the Court stressed the overlap and interaction between the rights to life and dignity on the one hand, and the right not to be subjected to cruel, inhuman or degrading punishment on the other; far from being mutually exclusive, each of these protected rights was seen as reinforcing and adding substance to the others. Similarly in the *Sodomy* case, emphasis was put on the interconnection between the rights to equality, dignity and privacy respectively. A choice between them was not required. *Grootboom* expressly referred to the indivisibility and interrelated character of protected rights, emphasising that the determination of what was reasonable in relation to the right of access to adequate housing had to take account of the right to dignity, and the gender and racial dimensions involved.

154. In *Khosa* the question was whether withdrawal of certain welfare entitlements for permanent residents who were not South African citizens, raised a question of equality (non-discrimination), or of the right of access to social welfare, and whether the rights of the child also featured. Mokgoro J stated:

"[i]n this case we are concerned with these intersecting rights [socio-economic rights and the founding values of human dignity, equality and freedom] which reinforce one another at the point of intersection."

Ngcobo J, characterising the question as "interesting and difficult", stated:

"The exclusion of non-citizens from the scheme manifestly implicates the right not to be discriminated against. This question was not addressed in argument. It need not be considered on this occasion. The outcome would be the same under either constitutional provision. My Colleague, Mokgoro J, has approached the matter on the footing that the right of access to social security governs the question presented in this case. There is much to be said for this view. . . . The Bill of Rights is the cornerstone of our constitutional democracy and it 'affirms the democratic values of human dignity, equality and freedom'.

The founding values will inform most, if not all, of the rights in the Bill of Rights... A denial of access to a social welfare scheme may, as demonstrated by this case, therefore have an impact on more than one constitutional right. We are therefore concerned with a statute implicating multiple constitutional rights that reinforce one another at their point of intersection." (Footnote omitted.)

155. In *New Clicks* I raised the question of what I called a hybrid regulatory system. In relation to a debate as to whether the adoption of subordinate legislation amounted to an administrative or a legislative act, I said:

"One may thus envisage a continuum ranging from pure law-making acts at one end, to pure administrative (adjudicative) acts at the other. All will be subject to constitutional control that is of both a procedural and a substantive kind. There will be a difference of emphasis rather than of kind, to take account of the different constitutional and public law values implicated at each end of the spectrum. Hybrid regulatory systems involving both generality (regulatory scheme) and specificity (adjudicative act) could then be comfortably accommodated at appropriate places along the spectrum. The precise form of the hearing required in each case, and the manner in which substantive reasonableness will be determined, will accordingly depend more on the nature of the interests at stake in each particular instance than on the label or labels to be attached. In this way administrative law emerges from its constitutional chrysalis as an integrated body of law. Shed of the remnants of its one-time fragmented and particularistic form, it has been metamorphosed into a comprehensive, principled, operational and elegant new legal figure."

156. To my mind, far from promoting unprincipled eclecticism, acknowledgment where appropriate of hybridity encourages paying appropriate attention in a focused way to the context and the interests and values involved. The basic analysis remains the same, but more weight is given to context, interests and values, and less to categorical reasoning.

157. Most constitutional issues will ordinarily fall within the parameters of one or other specifically protected right. The point that I underline, however, is that there are many cases where rights will not just touch at the margins but overlap in substance. I believe that in these matters undue preoccupation with a quest to establish the primacy of one or other right could defeat the constitutional objectives to be realised. The present case, I believe, is one of those. I accordingly emphasise the importance of acknowledging hybridity in particular cases such as this one, and accept the significance of constitutional values in all matters. This does not in any way diminish the importance of classification being at the heart of all legal reasoning. As this Court held in *Prinsloo*:

"It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom."

The objective I would seek is not therefore to supplant precise text and rigorous classification with amorphous and arbitrarily-chosen values. It is to acknowledge the way values are anchored in text, and text is animated by values.

158. In my view, then, the key to the present case is to interpret and apply section 145 in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands. What is largely implicit in the judgments of my colleagues should, I believe, be the centrepiece of the analysis. I agree with what appear to be the underlying premises of the two judgments: in an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner's decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour-law setting, requiring a speedy resolution of the dispute with the outcome basically limited to dismissal or re-instatement, makes it

inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds; and to the extent that the right to just administrative action is involved, the values of fair dealing that underlie section 33 of the Constitution must be respected. I accept that inasmuch as the right to a fair labour practice is at the centre of the analysis, the outcome of the arbitration process must not fall outside the bounds of reason; to accept it doing so would hardly represent a fair outcome. Finally, acknowledging the adjudicatory element that implicates the right to a fair hearing under section 34, I would hold that a fair hearing demands that at the very least there be some reasonably sustainable fit between the evidence and the outcome.

159. To my mind, acknowledging hybridity and permeability leads to direct and unstrained engagement with the particular constitutional interests and values at stake. I weigh the facts in the same way according to the same basic criteria, and arrive at the same conclusion as they do. It follows that I concur in the order made by Navsa AJ and supported by Ngcobo J.