FAIRNESS OF A DISMISSAL
FROM A CONTRACTUAL AND ADMINISTRATIVE LAW PERSPECTIVE

by

LEON VOULTSOS

Submitted in partial fulfilment of the requirements
for the degree of

MAGISTER LEGUM
(LABOUR LAW)

in the Faculty of Law
at the Nelson Mandela Metropolitan University

Supervisor: Prof JA van der Walt

January 2010
# INDEX

<table>
<thead>
<tr>
<th>SUMMARY</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER 1: INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>3</td>
</tr>
<tr>
<td>2.2 The Constitution</td>
<td>3</td>
</tr>
<tr>
<td>2.2.1 The Right to Administrative Justice</td>
<td>3</td>
</tr>
<tr>
<td>2.2.2 The Right to Fair Labour Practices</td>
<td>4</td>
</tr>
<tr>
<td>2.3 Promotion of Administrative Justice Act 3 of 2000</td>
<td>7</td>
</tr>
<tr>
<td>2.4 Labour Relations Act 66 of 1995</td>
<td>8</td>
</tr>
<tr>
<td>2.5 Basic Conditions of Employment Act 75 of 1997</td>
<td>13</td>
</tr>
<tr>
<td>CHAPTER 2: STATUTORY FRAMEWORK</td>
<td>3</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>3</td>
</tr>
<tr>
<td>2.2 The Constitution</td>
<td>3</td>
</tr>
<tr>
<td>2.2.1 The Right to Administrative Justice</td>
<td>3</td>
</tr>
<tr>
<td>2.2.2 The Right to Fair Labour Practices</td>
<td>4</td>
</tr>
<tr>
<td>2.3 Promotion of Administrative Justice Act 3 of 2000</td>
<td>7</td>
</tr>
<tr>
<td>2.4 Labour Relations Act 66 of 1995</td>
<td>8</td>
</tr>
<tr>
<td>2.5 Basic Conditions of Employment Act 75 of 1997</td>
<td>13</td>
</tr>
<tr>
<td>CHAPTER 3: THE CONTRACTUAL POSITION</td>
<td>15</td>
</tr>
<tr>
<td>3.1 Lawfulness v Fairness</td>
<td>15</td>
</tr>
<tr>
<td>3.2 Case Law</td>
<td>15</td>
</tr>
<tr>
<td>3.2.1 Fedlife Assurance Limited v Wolfaardt</td>
<td>15</td>
</tr>
<tr>
<td>3.2.2 Buthelezi v Municipal Demarcation Board</td>
<td>20</td>
</tr>
<tr>
<td>3.2.3 Denel (Pty) Ltd v DPG Vorster</td>
<td>25</td>
</tr>
<tr>
<td>3.2.4 Boxer Super Stores Mthatha v NL Mbenya</td>
<td>26</td>
</tr>
<tr>
<td>3.2.5 Old Mutual Life Assurance Company SA Ltd v TG Gumbi</td>
<td>29</td>
</tr>
<tr>
<td>3.2.6 GF Murray v The Minister of Defence</td>
<td>31</td>
</tr>
<tr>
<td>CHAPTER 4: ADMINISTRATIVE LAW</td>
<td>36</td>
</tr>
<tr>
<td>4.1 Introduction</td>
<td>36</td>
</tr>
<tr>
<td>4.2 United National Public Servants Association of South Africa v Digomo NO</td>
<td>37</td>
</tr>
<tr>
<td>4.3 PSA on behalf of Haschke v MEC for Agriculture &amp; Others</td>
<td>39</td>
</tr>
<tr>
<td>4.4 SAPU v National Commissioner of the SA Police Services</td>
<td>40</td>
</tr>
<tr>
<td>4.5 Fredericks v MEC for Education &amp; Training, Eastern Cape</td>
<td>47</td>
</tr>
<tr>
<td>4.6 POPCRU v Minister of Correctional Services</td>
<td>48</td>
</tr>
<tr>
<td>4.7 Chirwa v Transnet Ltd</td>
<td>51</td>
</tr>
<tr>
<td>4.7.1 The Facts</td>
<td>51</td>
</tr>
<tr>
<td>4.7.2 Questions before the Constitutional Court</td>
<td>52</td>
</tr>
<tr>
<td>4.7.3 Purpose-Built</td>
<td>52</td>
</tr>
<tr>
<td>4.7.4 Concurrent Jurisdiction</td>
<td>53</td>
</tr>
<tr>
<td>4.7.5 Minority Judgment</td>
<td>55</td>
</tr>
<tr>
<td>4.7.6 Factors</td>
<td>56</td>
</tr>
<tr>
<td>4.7.7 Is Chirwa Binding Precedent?</td>
<td>58</td>
</tr>
<tr>
<td>4.7.8 Fredericks case</td>
<td>58</td>
</tr>
<tr>
<td>CHAPTER 5: POST CHIRWA DEVELOPMENTS AND THE INTERPRETATION OF SECTION 157(1) AND (2) WITH REGARD TO THE CONTRACTUAL AND ADMINISTRATIVE LAW POSITION</td>
<td>63</td>
</tr>
<tr>
<td>5.1 Nakin v MEC, Department of Education, Eastern Cape Province</td>
<td>63</td>
</tr>
<tr>
<td>5.2 Nonzamo Cleaning Services Cooperative v Appie</td>
<td>77</td>
</tr>
<tr>
<td>5.3 De Villiers v Minister of Education, Western Cape</td>
<td>85</td>
</tr>
</tbody>
</table>
SUMMARY

Section 157 of the LRA provides for the nature and extent of the Labour Courts jurisdiction. This provision has been subjected to extensive interpretation by the Judiciary and the various interpretations of the courts have not been entirely consistent. Specific mention is made of the relevance and applicability of section 157(1) and (2) of the LRA regarding the overlap between administrative law and contractual law into labour law.

Reference will be made to case law specifically dealing with cases concerning the jurisdiction of the civil courts and labour courts where cases concerning employment and labour matters were brought either in terms of the PAJA or on the basis of contract law.

The question arose whether matters which appear to be quintessential labour matters but simultaneously also capable of being entertained on the basis of the PAJA or in terms of contract law are matters which, generally, in terms of section 157(1) of the LRA fall within the exclusive preserve of the Labour Court or, in terms of section 157(2) of the LRA, fall within the concurrent jurisdiction of the High Court and the Labour Court.

The discussion which follows will also include reference to the current legal position pertaining to the prohibition of public sector employees from pressing their claims relating to employment or labour matters in the civil courts on the basis of the PAJA as decided in the Chirwa v Transnet Ltd (2008) 2 BLLR 97 (CC) and; the impact thereof on employees pressing claims pertaining to employment and labour matters in the civil courts on the basis of contract law. In addition the similarity of considerations which are common to both administrative law and contract law regarding the “overlap” of each into labour law will be considered and discussed.

In the light of the discussion which follows agreement will be expressed with certain decisions of the High Court and the SCA where civil courts were held to retain jurisdiction to entertain common law contractual claims concerning labour and
employment matters as opposed to restricting all employment and labour matters to the forums established under the LRA and to claims and remedies which are provided for by the LRA.
CHAPTER 1
INTRODUCTION

This note will encompass a critical discussion of the developments with regards to case law in South African labour law regarding the requirement of fairness in dismissal law, viewed from a contractual position and an administrative law position.

From a contractual position, the perspective of a dismissed employee will be considered and from the perspective of an employer who wishes to dismiss employees fairly and is confronted with the “hurdle” of lawfulness.

In considering the above, further consideration will be given to section 157 of the Labour Relations Act\(^1\) (hereinafter referred to as “the LRA”). Section 157(1) of the LRA specifically deals with exclusive jurisdiction of the Labour Court and section 157(2) specifically deals with the concurrent jurisdiction of the Labour Court and the High Courts.

It is submitted that the interpretation and application of section 157 of the LRA is of particular and material importance to the topic at hand.

The “concurrent jurisdiction” of the High Court and the Labour Court in labour disputes that have constitutional implications and in which constitutional rights other than the right to fair labour practices are alleged to have been infringed, continues to perplex judges and litigants alike.

In Langeveldt v Vryberg Transitional Local Council\(^2\) the judge president of the Labour Appeal Court held as follows:

“I am of the opinion that serious consideration should be given by parliament, the Minister for Justice and Constitutional Development, the Minister of Labour and NEDLAC to taking a policy decision to the effect that all such jurisdiction as the High Courts may presently have in employment and labour disputes be transferred the Labour Court and all such jurisdiction as the Supreme Court of

\(^1\) 66 of 1995.
Appeal may have in employment and labour disputes be transferred to the Labour Appeal Court. The objective would be that there would only be one superior court – the Labour Court – which has jurisdiction to deal with employment and labour matters or disputes as a court of first instance and that appeals from such court would only lie to the Labour Appeal Court as a court of final appeal except in respect of constitutional issues where a further appeal would lie to the Constitutional Court."

In the *Langeveldt* case the court ordered that the judgment in that matter be served on the Minister of Justice and Constitutional Development, the Minister of Labour and NEDLAC. The Courts call went unheeded in the amendments which followed in 2002, and has remained unheeded.

---

3 *Langeveldt supra.*
2.1 INTRODUCTION

It is submitted that for the purpose of the discussion which follows it is important to consider at the outset which legislation is applicable and the relevant sections in respect thereof.

The statutory framework hereunder is not meant to be an exhaustive reference but more of a general reference of what is submitted to be the core sections of legislation applicable.

2.2 THE CONSTITUTION

2.2.1 THE RIGHT TO ADMINISTRATIVE JUSTICE

In terms of the final Constitution\textsuperscript{4} this right is called the right to just administrative action.

Section 33 reads as follows:

\begin{quote}
"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must:
\hspace{1em} (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
\hspace{1em} (b) impose a duty on the state to give effect to these rights in subsections (1) and (2); and
\hspace{1em} (c) promote efficient administration."
\end{quote}

The principal function of section 33 is to regulate conduct of the public administration and, in particular to ensure that where action is taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice.

\textsuperscript{4} The Constitution Act 108 of 1996.
The right to fair administrative action controls public power and also affirms the dignity of individuals affected by administrative decisions. Individuals are afforded an opportunity to make representations in an attempt to influence the administrative decisions.

Section 33 thus serves as an important guard against the abuse of public power and gives effect to our constitutional law which is based on the doctrine of separation of powers. Therefore through judicial review the judiciary can be the guardian of the rule of law ensuring proper checks and balances.

2.2.2 THE RIGHT TO FAIR LABOUR PRACTICES

The purpose of the LRA is to give effect to the constitutional right to fair labour practices, as enshrined in section 23(1) of the Constitution. The relevant section in the Interim Constitution was section 27; however section 23 retained the salient features of section 27. The following changes are apparent:

- The right to collective bargaining was redrafted;
- it expanded the right to strike;
- the employers right to lock-out was deleted; and
- it included union security arrangements.

The right to fair labour practices has its origins in the equity based jurisprudence of the Industrial Court. The Industrial Court made equity-based decisions. These decisions covered the labour relations field from individual labour law to collective labour law.

The right to fair labour practices is not defined by the Constitution and is left to gather meaning primarily from legislation and through the decisions of the courts. In the NEHAWU case the court held:

“Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour
practice is incapable of precise definition. The problem is compounded by the
tension between the interests of the worker and the interests of the employers
that is inherent in labour relations. Indeed what is fair depends upon the
circumstances of a particular case and essentially involves a value judgement. It
is therefore neither necessary nor desirable to define this concept."

In the *NEHAWU-case* the Court held that the right to fair labour practices applies to
both employers and employees and it cannot be said that fairness is of particular
importance to employees because of their vulnerability and unequal power relations
in the workplace.

Thus without the constitutional duty to act fairly, there is no guarantee that employers
will act fairly to employees in the workplace. Thus again it is clear that the right to fair
labour practices is an important guard against the abuse of the employers power and
guarantees that employers act fairly toward employees.

The promulgation of national legislation is contemplated by both section 23 and
section 33 of the Constitution. In this regard the Promotion of Administrative Justice
Act 3 of 2000 (PAJA) and the Labour Relations Act 66 of 1995 (LRA) has been
promulgated.

The LRA, BCEA and the EEA cannot be read in isolation from section 23 and have
been promulgated to give effect to section 23. However, an employee aggrieved by
the conduct of an employer must first seek a remedy in terms of the labour statutes,
whichever one may be applicable. If no statutory remedy is available, a court “must
apply, or if necessary develop, the common law to the extent that legislation does not
give effect to that right”. Only if no common law remedy is found does the possibility
arise of eying directly on a constitutional right, or challenging the relevant statute for
failing to give adequate protection to a constitutional right.

The rights set out in section 23 provide a primary framework within which labour
legislation must be interpreted. The essential values promoted under section 23 are
fairness at an individual level, freedom of association and the right to organize,
collective bargaining and the right to strike. While upholding individual fairness,
these values emphasize the collective aspirations of the Bill of Rights and serve as a counterweight to the more individualistic rights contained in other provisions. In addition section 39(2) of the Constitution calls for an infusion of all constitutional values into legal interpretation. It provides that “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”. Here there is no privileging one set of rights and values over another. However where two competing values dictate conflicting interpretations of the LRA, the interpreter will be entitled to tip the balance in favour of the collective values in section 23. This is why the Legislature singled out section 23 rights in the objects clause.

In addition to the above any provision which prima facie violates a provision of the Constitution, but which is reasonably capable of a more restrictive interpretation consistent with the Constitution should be construed accordingly. In interpreting a provision in compliance with the Constitution it is important to bear in mind that if a provision prima facie infringes a fundamental right, it may still be rescued by the limitations clause provided by section 36 of the Constitution. Only if it does not pass muster under the limitation clause will it become necessary to exercise an interpretation in compliance with the Constitution.

In addition to the above; another provision which, it is submitted, is of direct relevance to the topic under discussion for reasons which are more apparent hereunder is that of section 169 which reads as follows:

“High Courts
169. A High Court may decide –
(a) any constitutional matter except a matter that –
   (i) only the Constitutional Court may decide; or
   (ii) is assigned by an Act of Parliament to another Court of a status similar to a High Court; and
(b) any other matter not assigned to another court by an Act of Parliament.”

---

7 Ibid.
2.3 PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

PAJA defines administrative action as:

“any decision taken, or an failure to take a decision, by -
(a) an organ of state, when –
   (i) exercising a powerings terms of the Constitution or a provincial constitution; or
   (ii) exercising a public power or performing a public function in terms of an legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...”

In terms of section 1 “decision” is defined as: “as any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision”.

Section 1(i)(b)(a)(ii) of PAJA specifically excludes nine types of decisions from the definition of administrative action and from the application of PAJA. However, for immediate purposes, the specifically excluded categories do not include employment decisions taken by public bodies.

Section 3(1) of PAJA provides that when administrative action “materially and adversely affects the rights or legitimate expectations of any person” that administrative action must, in order to be valid, be procedurally fair. In this regard section 3(2)(b) attempts to set out minimum requirements of procedural fairness:

“(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons in terms of section 5.”

The complexity or seriousness of a particular case may result in the administrator granting the person affected by the administrative action additional rights such as legal representation.
Section 5 provides for the right to be given reasons for the administrative action which adversely affects the rights of any person. Section 5(3) provides that if an administrator fails to furnish adequate reasons for administrative action, the action must, subject to section 5(4), and in the absence of proof to the contrary, be presumed to have been taken without good reason.

Section 6 codifies the grounds for judicial review of administrative action. Section 6(1) provides that any person “may institute proceedings … for the judicial review of an administrative action”. Section 6(2) provides a list of grounds for review.

In regard to the review grounds three important constitutional safeguards are apparent, namely; the exercise of public power must be authorized by law, it must be rational and not arbitrary and administrative action must be preceded by a fair process. Where these fundamental safeguards are absent, administrative action should be set aside. Section 6(2)(f) provides that administrative action may be set aside where no decision is taken despite the existence of a duty to take a decision. A decision can also be reviewed where it is unconstitutional or otherwise unlawful in terms of section 6(2)(i).

Section 7 provides two jurisdictional prerequisites to judicial review. Section 7(1) provides that judicial review proceedings should be commenced within a period of 180 days after the administrative action has been taken while section 7(2) provides that a party wishing to challenge administrative action must first exhaust internal remedies before approaching the Court. If there are exceptional circumstances, a person may be exempted from the requirement to exhaust internal remedies.

**2.4 LABOUR RELATIONS ACT 66 OF 1995**

Section 3 of the LRA directs any person applying the Act to interpret its provisions:

“(a) to give effects to its primary objects;
(b) in compliance with the Constitution;
(c) in compliance with the public international law obligations of the Republic.”
The interpretation clause in effect sanctions a purposive or purpose-seeking approach to interpretation. The traditional approach required the words of a statute to be given their “ordinary literal and grammatical meaning” unless this would lead to “a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent” in which case certain contextual aids could be invoked. This method has been criticized for its failure to take into account the “legal-political activity” involved in the process of statutory interpretation.

The purposive approach can be seen as:

“[it] looks beyond the manifested intention. The purposive theory has its ratio in the fact that a statute is a legislative communication between the legislature and the public that is ‘inherently purposive’. The interpreter must endeavor to infer the design or purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources.”

However a purposive approach does not allow one to ignore the clear language of the statute, nor must it be confused with the liberal or extensive approach to interpretation. In Business SA v COSATU it was held that a purposive approach could mean that a provision should be interpreted restrictively rather than extensively.

The effect of the interpretation clause is to privilege the objects of the Act in the hierarchy of rules governing the interpretation of statutes. Therefore if an Act is capable of two mutually contradictory interpretations the interpretation which advances the objects of the Act should be adopted.

In the context of labour relations; in giving content to concepts such as “reasonable”, “fair” and “just and equitable” the courts should seek out the constructions which best advances the objects of these statutes. This will ensure that the statutes are interpreted in a value-coherent way and their different parts are construed in a harmonious manner.

---

8 Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 at 804B-C; also referred to as the “golden rule” of interpretation.
10 (1997) 5 BLLR 511 (LAC).
The purpose of the LRA is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the “primary objects” of the Act. These are:

- to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;

- to give effect to the obligations incurred by South Africa as a consequence of its membership of the ILO;

- to provide a framework for collective bargaining and the formulation of industrial policy by trade unions, employers and employers’ organistaions; and

- to promote orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making and the effective resolution of labour disputes.  

In terms of section 188 of the LRA, an employer is required to prove that the reason for an employee’s dismissal is “a fair reason related to the employee’s conduct, capacity or the employer’s operational requirements” and “that the dismissal was effected in accordance with a fair procedure”. Section 188(2) provides that any person considering whether or not a reason for a dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms of the LRA.

Schedule 8 of the LRA provides for the Code of Good practice: Dismissal which was passed in terms of the LRA and sets out guidelines for determining whether a fair reason for dismissal existed.

In addition the Code of Good Practice: Dismissal makes provision for the requirements for a procedurally fair dismissal in labour law. The process by which a
dismissal decision of employers can be challenged under the LRA requires, generally, the referral of a dispute within 30 days of the dismissal, to conciliation and where conciliation fails, to arbitration.\textsuperscript{12}

An arbitrator is required to determine the fairness of the decision of the employer to dismiss with reference to the standard set in the LRA.

If one considers the rights referred to under PAJA and the LRA it would appear that they are concerned with the imposition of constraints on the exercise of power. They do not stand in opposition to each other. Section 33 seeks to regulate the exercise of public power by imposing three main requirements for its exercise, namely; lawfulness, rationality and procedural fairness. Section 23 entails substantive and procedural fairness. However the concept of substantive fairness is not concerned with the lawfulness of the employer’s decision. This will be discussed in more detail below under the appropriate heading when considering the developments which have taken place by the courts.

In considering the LRA further, reference is made to section 157, which, it is submitted, appears consistently in the relevant case law and could be considered to be the core section relevant the topic under discussion.

Few legislative provisions have divided the Courts more sharply than section 157(1) and section 157(2) of the LRA. The proper interpretation of these provisions is fundamental because, together, they seek to draw the dividing line between jurisdictions of the High Court and the Labour Court in labour and employment matters and thus to circumscribe the scope of the exclusive jurisdiction of the Labour Court to those matters.

Section 157 reads as follows:

\begin{quote}
“(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
\end{quote}

\textsuperscript{12} See s 191 of LRA.
(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996 and arising from –
(a) employment and from labour relations;
(b) any dispute over the Constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
(c) the application of any law for the administration of which the Minister is responsible."

According to section 157(1), the Labour Court, and the Labour Court alone may decide only those disputes it is required by statute to decide. According to section 157(2), both the High Court and the Labour Court may adjudicate and determine disputes concerning alleged violations of constitutional rights which arise from employment and labour relations or which concern constitutionality of any administrative act by the State acting as an employer.

Section 157(1) and section 157(2) seem to be relatively straight forward regarding the issue of jurisdiction until the membrane of section 157(1) was pierced by litigation in the High Court concerning matters as varied as urgent relief of strikers, employment contracts, the provision of employment benefits to state employees and the application and scope of agency shop agreements.

This influx of labour and employment related cases into the civil courts provoked an early lament by the Labour Appeal Court in the *Langeveldt* case which called for legislative intervention to clarify the situation. This was not done.

We therefore see that provision is made for the Labour Court's exclusive jurisdiction; it is submitted the purpose of which is that the Labour Court is comprised of Judges who have knowledge, experience and expertise in labour law. There are various matters regulated by the LRA in respect of which no provision is made that they are to be determined by the Labour Court. Such matters do not appear to fall within the exclusive jurisdiction of the Labour Court.

The concurrent jurisdiction of the Labour Court and the High Court is limited to fundamental rights other than the labour rights entrenched in section 23 of the
Constitution. The effect is that while rights to which the LRA do not give effect may be subject to concurrent jurisdiction. The Labour Court has exclusive jurisdiction in respect of fundamental labour rights.

The exclusive jurisdiction of the Labour Court is subject to the Constitution. An additional provision of relevance to the topic under discussion which will be considered more fully hereunder is that of section 158(1)(h) and section 145 of the LRA, which in brief provide for the Labour Courts review powers. The question which arises is whether matters which, generally, would ordinarily be subject to statutory arbitration in terms of the LRA, but subject to review of the Labour Court, be considered matters which fall within the exclusive jurisdiction of the Labour Court?

It is submitted that the above provisions to which reference has been made is not intended to be a *numerus clausus* of provisions which may be discussed hereunder, but merely as a point of reference of the provisions which are more directly related to the topic under discussion.

In considering section 157, particular reference will be made to claims based on employment contracts which are brought in the civil courts by aggrieved employees as well as to proceedings brought by employees in the civil courts in terms of the Promotion of Administrative Justice Act\(^\text{13}\) (hereinafter referred to as “PAJA”). This will be considered in more detail hereunder.

### 2.5 BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

Section 77 of the BCEA is relevant to the topic under discussion and provides as follows:

> “Jurisdiction of the Labour Court
> (1) Subject to the Constitution and the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.
> (2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in

\(^\text{13}\) 3 of 2000.
terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or arbitration held in terms of an agreement.

(5) If proceedings concerning a matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court."

It is important to note that section 77(3) confers a general jurisdiction on the Labour Court to hear and determine disputes arising from contracts of employment. The issue which arises, as will be seen in more detail below, is that of jurisdiction and forum-shopping as an employee may approach either the High Court or the Labour Court for relief if the employer has breached the employment contract.

However, this provision along with the provisions referred to above and the manner in which the courts have interpreted them will be considered in more detail below.
CHAPTER 3
THE CONTRACTUAL POSITION

3.1 LAWFULNESS v FAIRNESS

It is important to distinguish between the lawful termination of an employment contract and the fair termination of an employment contract.

If the termination is in accordance with the contract, the termination is lawful. If it is not in accordance with the contract, this will be a breach of the contract and thus renders such termination unlawful.

The common law does not concern itself with the reason for the termination of the employment contract, as long as the contractual and statutory provisions relating to notice have been complied with, the requirements of the common law are satisfied and the termination is regarded as lawful.

The concept of fairness originates from the LRA and in terms thereof, a dismissal must be fair. The dismissal must comply with certain substantive and procedural requirements. Even though a dismissal is lawful, it does not necessarily follow that such a dismissal is fair.

Regarding the contract of employment; what will follow is a discussion, with reference to case law developments in South African labour law regarding the requirement of fairness, as referred to above.

3.2 CASE LAW

3.2.1 FEDLIFE ASSURANCE LIMITED v WOLFAARDT\(^\text{14}\)

This matter concerned the respondent employee (Mr Wolfaardt) who was appointed on a fix term contract for five years. After only two years, the appellant employer terminated the contract on the grounds that the respondent position had become

The respondent elected to accept the appellant's repudiation and claimed damages in the High Court. The appellant filed a special plea claiming that the matter should have been referred to the Labour Court under the LRA, the High Court lacking jurisdiction. The respondent accepted to the special plea on the ground that it did not disclose a defence. The court *a quo* dismissed the special plea. In the majority judgment of the court; Nugent AJA held that the LRA created an elaborate and innovated legal framework for the regulation of the relationship between employers and employees.

In referring to the unfair labour practice created by the 1956 Labour Relations Act \(^{15}\) (hereinafter referred to as “the 1956 LRA”) for which a statutory remedy for commission of such an unfair labour practice was interpreted by the courts to include the unfair dismissal of an employee. The effect of that interpretation was to recognize the right not to be unfairly dismissed and such right is now expressly provided for in section 185 of LRA.

In this matter the court confirmed that they were only concerned with the Labour Court's exclusive jurisdiction as reflected in section 157(1).

The court furthermore referred to the issues in this matter as being whether the respondent’s action against the appellant is a matter that falls within the exclusive jurisdiction of the Labour Court and is thus excluded from the jurisdiction of the High Court and whether the respondent’s claim is legally cognisable at all.

The appellant employer in the matter contended that chapter VIII of the LRA codifies the rights and remedies that are available to all employees in our law arising from the termination from their employment. The Chapter is alleged to be comprehensive and exhaustive in so far as it provides for remedies upon dismissal. Accordingly, in was contended that the common law right to enforce a fixed term contract of employment has been abolished by the LRA.
The clear purpose of the legislature when it introduced a remedy against unfair dismissal was to supplement the common law rights of an employee whose employment might lawfully be terminated at the will of the employer. It was furthermore to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

An implied right not to be unfairly dismissed was imported into the common law employment relationship by section 27(1) of the Interim Constitution\(^{16}\) even before the LRA was enacted by guaranteeing every person the right to fair labour practices.

Therefore the Constitutional dispensation never deprived employees of their common law rights to enforce the terms of a fixed term contract of employment. However, question was whether the LRA simultaneously deprived employees of their pre-existing common law right to enforce such contracts, thus confining them to the remedies for “unlawful dismissal” provided by the LRA.

In considering whether the LRA did so, the court held that it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law, not to deprive parties of existing remedies for wrongs done to them.

The continued existence of the common law right of employees to be fully compensated for damages they can prove they suffered by reason of an unlawful premature termination by the employers of their fixed term contracts of employment is not in conflict with the spirit, purport and objects of the bill of rights and it is appropriate to invoke the presumption in the present case.

In addition the court held that there is a clear indication in the LRA that the legislature had no such intention. In support of this the court referred to section 186(b) which extends the meaning of dismissal. It was significant that the legislature did not include in this extended definition the premature termination of a fixed term contract not withstanding that such termination would be manifestly unfair. The court held that the reason for this is plainly that the common law right to enforce such term

\(^{15}\) 28 of 1956.

\(^{16}\) 103 of 1993; see s 23(1) of Act 108 of 1995.
remained intact. The Legislature intention behind section 186(b) was to bestow on the employee a new remedy where there was a reasonable expectation on the part of the employee that such contract would be renewed.

The court considered that it would be “bereft of any rationality” for the legislature to deny an employee whose fixed term contract has been prematurely and unlawfully terminated of the benefit of either specific performance or damages and to confine that employee to the limited and arbitrary compensation yielded by the application of the formula in section 194 of the LRA. The Court held that the absurdity extended if one considers that the employer can show a fair reason for the dismissal and that such dismissal was in accordance with a fair procedure; the employee would not receive any compensation.

In addition, the court referred to section 195 of the LRA which makes it clear that an order or award of compensation in consequence of an unfair dismissal is “in addition to and not a substitute for any other amount to which an employee is entitled in terms of any law, collective agreement or contract of employment”.

The further question is whether this falls within the exclusive jurisdiction of the Labour Court in terms of section 157(1), the court indicated that in the light of the restrictions pertaining to relief afforded by the LRA it is impossible to infer that the legislature intended the LRA should provide the employee with the full balance of the common law damages as well. Absent such an intention, section 195 contemplates that for such a balance an employee is free to proceed in the civil courts. Section 77(3) of the Basic Conditions of Employment of Act\(^7\) conferred concurrent jurisdiction on the Labour Court. Section 157(1), accordingly, does not purport, to confer exclusive jurisdiction on the Labour Court generally in regard to matters concerning the relationship between employer and employee. Whether a particular dispute falls within the provisions of section 191 of the LRA depends on what is in dispute, and the fact that an unlawful dismissal may also be unfair is irrelevant to the enquiry. A dispute fails within the terms of the section only if the “fairness” of the dismissal is the subject of the employee’s complaint. Where it is not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, probably is, unfair
is quite coincidental for that is not what the employees complaint is about.

In addition to the majority judgment above, Froneman AJA also delivered a minority judgment. It is submitted that with reference to the cases discussed hereunder, such minority judgment will prove to be materially significant. Judge Froneman held that the issue in this case was narrow and particular and concerned the question whether the dispute resulting in the dismissal of an employee, following upon an unlawful repudiation of the employment contract by his employer, is a “dispute about the fairness of a dismissal” under section 191 of the LRA.

Judge Froneman expressed the opinion that this matter does seem to be a dispute about unfair dismissal as it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract of employment arrives.

Judge Froneman held further that the right not to be unfairly dismissed is a particular concretized form of the constitutional right to fair labour practice which the LRA gives expression to. In dealing with the question to what extent the common law has been altered; the LRA does not purport to change the pre-constitutional common law by expressly mentioning each and every aspect of it that it wishes to change. It deals with specific issues and states expressly what the law now is in regard to these issues.

Accordingly, Judge Froneman held that the common law contract of employment must give some form of expression to the fundamental right not be unfairly dismissed, once the common law contract of employment does give this expression, the difficulty is namely; to conceive how an unlawful dismissal would not also be an unfair dismissal.18 If such a dismissal is unfair any dispute about it fails square within section 191 of the LRA.

Once it is accepted that the dispute is about the fairness of a dismissal, it follows the procedure in section 191 must be followed, which in one way or another ends up with

17 1997.
18 NUMSA v Vetsak Co-operative Limited 1996 (4) SA 577 (AD) at 592 F–H.
the Labour Court or the Labour Appeal Court having the final say. Section 158(1)(a)(vi) provides for the Labour Court having competence to aware damages and thus the present case is a matter to be determined by the Labour Court by virtue of the provisions of section 157(1); exclusively.

In addition, in dealing with the concurrent jurisdiction provided in section 77(3) of the Basic Conditions of Employment Act,\(^\text{19}\) Judge Froneman held that the High Court does not need the Basic Conditions of Employment Act\(^\text{20}\) to give it jurisdiction in a matter concerning a contract of employment. It has residual competence in any event although it may be attenuated by statutory provisions such as section 157(1) of the LRA. Thus, what section 77(3) does is to give the same residual concurrent competence to the Labour Court, something that court does not enjoy without specific statutory authority.

Without stating the obvious, it is submitted that the difficulty seems to lie in the interpretation of the relevant provisions above.

### 3.2.2 BUTHELEZI v MUNICIPAL DEMARCATION BOARD\(^\text{21}\)

This was a matter decided by the Labour Appeal Court, as opposed to the *Wolfaardt* case which was decided by the Supreme Court of Appeal. The issues in both cases were similar and the Labour Appeal Court referred to and followed the decision of the Supreme Court of Appeal in the *Wolfaardt* case.

Mr Buthelezi was appointed on a fixed term contract for five years; however within the first year of his appointment, Mr Buthelezi received a notice of retrenchment, which involved an instructional restructuring process. The consultation process took place and the appellant (Mr Buthelezi) was invited to apply for a different vacant post within the respondents structure. The appellant was unsuccessful and was served with a notice of dismissal and he was required to vacate his office with immediate effect. A dispute arose about the fairness of the dismissal, the matter was referred to

\(^{19}\) Supra.  
\(^{20}\) Supra.  
\(^{21}\) (2005) 2 BLLR 115 (LAC).
the CCMA for Conciliation and the Labour Court for adjudication, and the appellant sought reinstatement and compensation.

The Labour Court held that the dismissal was substantively unfair as a result of the appellants dismissal during the currency of the fixed term contract; however the dismissal in other respects were substantively fair with regard to reasons pertaining to the respondents operational requirements.

The matter then proceeded to the Labour Appeal Court. The issue before the Labour Appeal Court was the premature termination of the appellants fixed term contract. Regarding the issue of substantive fairness the Labour Appeal Court held that the starting point would have to be to determine whether a valid fixed term contract had been concluded, which was confirmed. The question was whether the respondent was entitled to terminate the fixed term contract of employment prematurely?

From a common law perspective, a party to a fixed term contract of employment has no right to terminate such a contract in absence of repudiation or a material breach of contract by the other party. There is no right to terminate such a contract, even on notice, unless the terms provide for such notice.

The court held that the rationale for this is clear:

“When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully look into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future has been erroneously or had over looked certain things. Under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of a material breach of such a contract by the other party.”

In response to the contention that the rule that parties to a fixed term contract should be held liable to such a contract for the duration of the term of the contract in the
absence of any material breach of the terms of such contract could be unfair to an employer who wants to restructure his business before the expiry of the term of such contracts, the Labour Appeal Court held that there is no unfairness in such a rule, because the employer is free not to enter into a fixed term contract but to conclude a contract for an indefinite period if such an employer thinks that there is a risk that he might have to dispense with the employees services before the expiry of the term. If he chooses to enter into a fixed term contract, he takes the risk that he might have need to dismiss the employee mid term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes.

The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.

Accordingly, the Labour Appeal Court held that although labour legislation has amended the common law in certain respects, it has not amended the general principle that a fixed term contract may not be cancelled unilaterally during its currency in the absence of a material breach of such contract. The Labour Appeal Court referred to section 186 of the LRA and indicated that this is an illustration of an amendment of the common law in the specific areas of which they are concerned.

The Labour Appeal Court also confirmed that there is a presumption against the deprivation of common law rights. The Labour Appeal Court referred to the *Wolfaardt* case and referred, with approval, to what the majority judgment held with regard to the interpretation referred to above. Accordingly, the Labour Appeal Court concluded that the respondent *in casu* had no right in law to terminate the contract of employment for a fixed term. The Labour Appeal Court held that the premature termination of the fixed term contract *in casu* was unfair and thus constituted an unfair dismissal.

It may be worth while to note that in the *Buthelezi* case, the Labour Appeal Court did not have to deal with the issue of the jurisdiction of the Labour Court and the High Court in matters of this nature, however in terms of the minority judgment in the
Wolfaardt case, Judge Froneman indicated that the matter before the court constituted an unfair dismissal and thus the LRA would apply. In the Buthelezi case, the matter was treated as an unfair dismissal and accordingly dealt with under the LRA.

The effect of the majority judgment in the Wolfaardt case was to give employees a choice between referring disputes to the Labour Court under the LRA, alternatively launching actions for breach of contract in the civil courts.

In dealing with the issue of fairness and lawfulness, in the minority judgment of Judge Froneman, the learned judge noted that the majority judgment turned on a view of the common law contract of employment which denudes it of all requirements of fairness.

As indicated by Judge Froneman, if an unlawful dismissal is axiomatically unfair, and an unfair dismissal is axiomatically unlawful, the difference between the two cannot itself provide a basis for determining whether the dispute falls within the exclusive jurisdiction of the Labour Court. It is submitted that in light of the subsequent judgments, to be discussed herein the distinction between lawfulness and unfairness has become increasingly blurred.

In addition, regarding the majority judgments concerned in the Wolfaardt case about the reduction and removal of rights which justified retaining contractual claims arising from employment under the wing of the High Court, Judge Froneman commented as follows on this issue:

"The presumption against taking away existing rights ... presupposes a common law contract of employment free of the spirit and values underlying constitutionalised labour rights ... I would imagine how an employment law, infused with these values, would make provision both for a system that guarantees that employees maybe entitled to claim as their financial due that which they bargained for, over and above basic statutory entitlements, as well as for a right not to be unfairly dismissed. I happen to think that this is what the LRA and the Basic Conditions of Employment Act in a difference context achieves, all be it perhaps not to the fullest extend possible."

The majority judgment in the Fedlife case was confirmed by the Constitutional Court
in *Fredericks v MEC for Education and Training, Eastern Cape.*

Regarding the majority judgments view in the *Fedlife* case of section 195, Judge Froneman pointed out that section 195 had the opposite effect as section 195 simply enables the Labour Court to award such damages in appropriate cases, as referred to above.

Therefore had Mr Wolfaardt instituted action in the Labour Court, proved that his dismissal was unfair, he could have been conceivably reinstated (equivalent to an order of specific performance), or he could have been awarded compensation plus contractual damages which he could prove. If this is so, the LRA leaves fully in tact the rights of employees on fixed terms contracts and there is no reduction or taking away of any rights, in fact the LRA adds to theses rights by rendering the termination of fixed term contracts unfair where an employee reasonably expected renewal. In considering the above, it is submitted, that the “absurdities” referred to by the majority judgment are placed in question.

It is therefore clear that the LRA does not alter the rule affirmed in *Fedlife*, that employers may not terminate fixed term contracts before their expiry date unless the employee had materially breached he contract. In drawing this conclusion, the Labour Appeal Court followed the minority judgment in the *Fedlife* case as it was Judge Froneman who was unable to draw the distinction between unlawful and unfair dismissals, a distinction the majority judgment rested on. Judge Froneman suggested that the premature termination of a fixed term contract was *ipso iure* unfair.

The above therefore confirms that the premature termination of a fixed term contract is unfair, as well as unlawful. It is also worth while to note that, although Buthelezi could have approached either the High Court or the Labour Court, on approaching the Labour Court and launching his claim under the LRA, he was awarded precisely the same amount he would have been awarded in a civil court, namely; lost salary before acquiring another job.

---

22 2002 (2) BLLR 119 (CC).
Importantly the LAC never considered the employers claim that there were compelling operational requirement for dismissing Buthelezi, as a court is required to do under the LRA. The LAC merely decided the matter on principle; the dismissal was unfair because the employer prematurely terminated Buthelezi’s fixed term contract. However the following questions remain unanswered as to how an employer who concludes a lengthy fixed term contract with an employee is suppose to predict that’s its operational requirements may alter during the course of the contract? In addition, even if there is a risk involved in concluding a fixed term contract, does it follow that an employer acts unfairly if its operational requirements happen to change due to unforeseeable circumstances beyond its control? Apart from the right to dismiss for operation requirements when circumstances so require if an employer follows the procedural requirements of the LRA, how can an employer fulfill its obligation to select employees fairly if those on fixed contracts are absolutely secure? In the Buthelezi case, the matter was decided on principle, in some circumstances the premature retrenchment of an employee on a fixed term contract is unfair for that reason alone, but, it is submitted that it may be equally said that in appropriate circumstances an employer cannot to be said to have acted unfairly by terminating the services on an employee on a fixed term contract for compelling operational requirements, in accordance with a fair procedure.

In proceeding further, subsequent decisions will be considered and evaluated in the light of Wolfaardt and Buthelezi.

3.2.3 **DENEL (PTY) LTD v DPG VORSTER**

This involved an appeal which was confined to a claim for damages for breach of contract. There was no dispute that the appellant (employer) had proper substantive grounds for summarily terminating the respondent’s employment. The respondent’s complaint was confined to the process that was adopted.

The procedures that had to be followed when disciplinary action was taken against an employee, and the identities of the persons who were authorised to take such
disciplinary action, were circumscribed in the employer’s disciplinary code. The terms of the disciplinary code were expressly incorporated in the conditions of employment of each employee with the result that they assumed contractual effect.

The employer did not follow the prescribed procedure in the disciplinary code.

Through the employer’s disciplinary code as incorporated in the conditions of employment, the employer undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the employer unilaterally to substitute something else.

If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect. The procedure in the disciplinary in the matter was held to be affair one and the employee was entitled to insist that the employer abide by its contractual undertaking to apply it.

It is therefore submitted that in the light of the fundamental right to fair labour practices, there is an implied reciprocal duty of fairness, however this duty of fairness does not displace contractual terms which are fair and accordingly a party is entitle to rely on such terms. However, such a duty of fairness can very well play an important role as far as unfair terms of a contract are concerned, alternatively to supplement contractual terms.

3.2.4 **BOXER SUPER STORES MTHATHA v NL MBENYA**

This matter concerned an appeal from the High Court dismissing an objection to the High Court jurisdiction. The employer terminated the employment of an employee who applied to the High Court for an order, *inter alia*, that the disciplinary hearing

---

proceeding her dismissal be set aside and its outcome be declared unlawful and be set aside, a declaratory that her dismissal was unlawful and of no force, reinstatement and back pay. The employer raised a point of law contending that the High Court lacked jurisdiction in the matter as it fell within the exclusive competence of the Labour Court.

On appeal, the Court held that the exclusive jurisdiction of the Labour Court has been carefully circumscribed over the years.

The court held that despite section 157(1), the following is now well established:

(i) Section 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in regard to matters concerning the relationship between employer and employee, and since the LRA affords the Labour Court no general jurisdiction in employment matters, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations.

(ii) The LRA's remedies against conduct that may constitute an unfair labour practices are not exhaustive of remedies that might be available to employees in the course of the employment relationship – particular conduct may not only constituted an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employees claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice.

(iii) An employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract which gives rise to a claim of damages.

(iv) Similarly, an employee may sue in the High Court for damages for a dismissal

25 Fedlife Assurance Ltd v Wolfaardt supra.
26 Fredericks v MEC Education & Training, Eastern Cape supra.
27 United National Public Servants Association of South Africa v Digomono.
in breach of an employers own disciplinary code which forms part of the contract of employment between the parties.\textsuperscript{29}

In the light of the above it is clear that the exclusive jurisdiction of the Labour Court does not preclude the employee’s recourse to the High Court.

The Court held that the question in this case pushes the boundary further as to whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and dismissal were “unlawful”, without alleging any loss apart from salary? The court held that the answer to this question is “yes”.

The court referred to the matter of \textit{Old Mutual Life Assurance Company SA Ltd v Gumbi}\textsuperscript{30} in respect of which the court held that the common law contract of employment developed in accordance with the Constitution to include a right to a pre-dismissal hearing. This means that every employee has a common law contractual claim, not merely an unfair labour practice right to a pre-dismissal hearing. Contractual claims are cognizable in the High Court. The fact that they may be also cognizable in the Labour Court through that courts unfair labour practice jurisdiction does not detract from the High Court’s jurisdiction.

In the \textit{Gumbi} case; the employer in that case abandoned its initial jurisdictional challenge to the High Court competence to deal with the case, the court noted that High Court and Supreme Court of Appeal would have been obliged to raise the lack of jurisdiction had the matter fallen within the Labour Court’s exclusive statutory competence. Accordingly, by adjudicating the employees claim in that matter, the courts in the \textit{Gumbi} case implicitly decided the question at issue in this case.

In addition the employee was careful to formulate her claim on the basis that her dismissal was unlawful, she did not complain about its unfairness nor did she invoke the benefits the LRA confers on employees through the protection of the Labour Court’s unfair labour practice jurisdiction. It was contended that the employee was in truth invoking the unfair labour practice and the Labour Court’s remedial jurisdiction,

\begin{footnotesize}
\begin{enumerate}
\item Fedlife Assurance Ltd v Wolfaardt supra.
\item Denel (Pty) Ltd v Vorster supra.
\end{enumerate}
\end{footnotesize}
which in terms of section 191 of the LRA falls squarely within the Labour Court’s exclusive competence.

In light of the above, employee contended at the SCA should give effect to the substance, rather than the form of the employees case.

The court held that this characterization maybe correct but it leaves out of account the fact that the jurisdictional limitations often involve questions of form, and that the employee in this case, as already mentioned, formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness. The court referred to the Fedlife case in support and held that it applies.

The SCA thus upheld the jurisdiction of the High Court in this matter.

3.2.5 OLD MUTUAL LIFE ASSURANCE COMPANY SA LTD v TG GUMBI\textsuperscript{31}

This matter concerned Old Mutual, the employer, who dismissed the respondent, the employee, following a disciplinary hearing in respect of which the employee was found guilty of misconduct and dismissal was recommended as an appropriate sanction. The respondent instituted an application in the Transkei High Court challenging the dismissal on the basis that the enquiry was held in his absence and as a result he was denied a hearing before a decision to dismiss was taken. Miller J dismissed the application on the ground that employee had “willfully and wrongfully excluded himself from the disciplinary hearing” because he failed to return to it after a short adjournment. The employee appealed to a full court and the majority reversed the decision of the court of first instance and held that the employees’ absence from the disciplinary hearing was neither willful nor voluntary and that the medical certificate handed to the disciplinary tribunal by the representative of the employee could not be rejected when it authenticity and correctness had not been disputed at the hearing. In a dissenting judgment of Somyalo JP, the learned judge found that the employee’s absence from the hearing was willful and voluntary. The present appeal is with special leave of this court.

\textsuperscript{30} (2007) 8 BLLR 699 (SCA).
\textsuperscript{31} Supra.
The central issue in the appeal was whether the termination of the employees’ employment by the employer was procedurally fair.

The employer initially raised a jurisdictional challenge to the claim, however subsequently abandoned it. The sole focus of the appeal was the employees right to a pre-dismissal hearing under the common law.

The court held that the employees’ entitlement to a pre-dismissal hearing is well recognized in South African Law. Such a right having as its source, *inter alia*, the common law. The court held that it is clear that coordinate rights are now protected by common law: to the extent necessary, as developed under the Constitutional imperative to harmonize the common law into the bill of rights which itself includes the right to fair labour practices in section 23(1).

In recognizing a right to a hearing the court held that South African law is consistent with international law in respect of pre dismissal hearings as set out in article seven of the ILO Convention on termination of employment. The convention recognized that the right is not absolute in that there are certain circumstances were they may not apply.

The court held further that by extending requirements of the *audi alteram partem* rule to employment relationship, South African law promotes justice and fairness in the workplace and promotes the primary objectives of the LRA. In this context, the court held that fairness must benefit both the employer and the employee. The court held that the process of determining the actual content of fairness the Court referred with approval to *National Union of Metal Workers of South Africa v Vetsak Cooperative Ltd* the court at 589 C-D held as follows:

“Fairness comprehends that regard must be had not only to the position and interest of the worker, but also those of the employer, in order to make a balance and equitable assessment. In judging fairness, a court applies a moral or value judgment to establish facts and circumstances … and in doing so it must have

32 S 39(2) of the Constitution.
33 *ILO Convention* Article Seven 158 of 1982.
34 S 2 of the LRA.
due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lie down or attempt to lay down any universally applicable test for deciding what is fair.”

The right to a pre-dismissal hearing imposes on employers an obligation to afford employees an opportunity of being heard before their employment is terminated by means of dismissal. However, should employees fail to take the opportunity offered, in a case where he or she ought to have, the employers decision to dismiss cannot be challenged on the basis of procedural fairness.

In applying the above the principles to the present matter, the crucial question was whether the absence of the employee from the hearing, in the circumstances of the case, were justified; or whether fairness to both parties demands that his dismissal be set aside or not?

In determining this issue, the court referred to the facts of the case and held that when all the above facts are viewed objectively, it cannot be said that the employer acted procedurally unfairly in continuing with the disciplinary hearing in the employees’ absence which culminated in his dismissal. For the purposes of brevity a detailed analysis of the court’s assessment of the facts will not be undertaken in this note.

3.2.6  **GF MURRAY v THE MINISTER OF DEFENCE**\(^{35}\)

In this matter the appellant (employee) was employed with the respondent (employer) being the Navy since 1984. The employee was the officer in charge of the Simonstown Military Police Station. His superiors in Simonstown lodged appraisals that lauded his commitments, dedication, and managerial abilities, with attended performance bonuses.

The employee came into bitter conflict with member so his unit whose accusations lead to a series of investigations and courts-marshal. None of the allegations culminated in any serious adverse finding.

The navy removed the employee from his post in Simonstown and declined to reinstate him. After two years in a supernumerary position at the Naval Staff College in Muizenburg, at despite the navy offering a senior staff officer’s position in Pretoria, the employee resigned.

The High Court found that the employment relationship had not broken down irretrievably, that in weighing each individual complaint advanced, the court held that none of them rendered employees position intolerable, or caused him to resign. This appeal is with the leave of the court.

The only matter before the court is whether the plaintiff is entitled to damages for constructive dismissal.

The applicable legal framework was agreed in that there was no directly applicable statute. This was due to the LRA excluding members of the South African National Defence Force. The parties agreed that the employee could rely directly on section 23(1) of the Constitution which provided that everyone has the right to fair labour practices and section 10 of the Constitution which provided for the right to dignity which the court held is closely associated to the right to fair labour practices.

The impact of these rights in this case could be best understood through the Constitutional development of the common law contract of employment. The contract of employment always imposes mutual obligations of confidence and trust between the employer and employee, that it was developed as it must be to promote the spirit, purport and objects of the bill of rights, that the common law contract of employment must be held to impose on all employers a duty of fair dealing at all times with their employees’, even those the LRA does not cover.

The court held that this case involved the particular application of that duty where the employee terminates the contract of service formally; the employee is not dismissed but rather considered to have resigned. However, the court held that the form in which the termination of service was clad cannot deprive the employee of his cause

36 S 2 of LRA.
of action. This is the position under the LRA; the position under the common law as constitutionally developed can be no different. The reasons were that the LRA recognizes the right not to be unfairly dismissed and furthermore that a dismissal includes the termination with or without notice by an employee because the employer made continued employment intolerable for the employee.

This provision made statutorily explicit what the jurisprudence of the industrial court and the Labour Appeal Court had already achieved under the unfair labour practices dispensation. In employment law, constructive dismissal represents a victory for substance over form.

The LRA expressly codified unfair employer-instigated resignation as a dismissal. However the court confirmed that this does not apply in this case. However the court noted that the constitutional guarantee of unfair labour practices continues to cover a non-LRA employee who resigns because of intolerable conduct by an employer, and to offer protection through the constitutionally developed common law. All contracts are subject to constitutional scrutiny, which includes employment contracts outside the LRA. Whether an employer dismisses such an employee in violation of the right to fair labour practices, or unfairly precipitates a resignation, is a matter of form, not constitutional substance.

That substance, as was pointed out before the LRA, is that the law and Constitution impose a continuing obligation of fairness towards the employee on the employer when he makes decisions affect the employees’ in his work. The obligation has both a formal-procedural and substantive dimension, it is now encapsulated in the constitutional right to fair treatment in the workplace.

The court then proceed to deal with issues pertaining to onus of proof, what was required to be proved by the employee, the relevant questions in the particular case as well as an assessment of the evidence.

However, a detailed discussion of constructive dismissal falls outside the ambit of the

---

37 S 185 of LRA.
38 S 186 of LRA.
However, of more direct relevance, it is important to note that the appellant in this matter as a member of the SANDF fell outside the ambit of the LRA. Despite this being the case, the court held that the Appellant could rely on section 23(1) of the Bill of Rights\(^{39}\) and furthermore held that the common law contract of employment must be held to impose on all employers a duty of fair dealing and at all times with their employees, even those employees which the LRA does not cover.

In addition, the appellant employee proceeded by way of civil action in the High Court on the basis of constructive dismissal. Such a constructive dismissal being a breach of the appellant employee’s contract of employment and the implied duty on the employer to conduct itself fairly at all times with their employees as aforesaid. It is worthwhile to note that although the appellant employee proceeded by way of civil action, the SCA drew heavily on the LRA as well as the position prior thereto with particularly reference to what the jurisprudence of the industrial court and the Labour Appeal Court had already achieved under the unfair labour practice dispensation.

In essence, it is submitted, that even though the Appellant employee proceeded by way civil action, the concept of “fairness” was clearly applicable to the case and, accordingly, it is submitted that this blurs even further the distinction between “lawfulness” and “fairness”.

It is furthermore worth while to note, in considering the above, that approximately six years after the *Fedlife* case the SCA did precisely what Judge Froneman suggested; to develop the common law to bring it into line with the Constitution and International Law and concluded that employees have a contractual right to a pre-dismissal hearing being a procedurally fair dismissal. It is event that in the *Old Mutual Life Assurance Company SA Ltd v Gumbi* case that the distinction between dismissals that are unlawful and unfair has been obscured, this being the basis on which the majority judgment in the *Fedlife* case rested. It is accordingly submitted that this distinction, can longer serve as the basis for determining whether a matter falls within

\(^{39}\) Chapter 2 of the Constitution *supra*.
the exclusive jurisdiction of the Labour Court. Perhaps, it is submitted, what needs to be focused on more specifically is the interpretation of section 157(1) and (2) of the LRA.

However, notwithstanding the comments above regarding the concepts of “lawfulness” and “fairness”, Cameron J held that in light of the above authorities, even though an employee could have pursued a claim in terms of the LRA, this did not detract from the High Court’s jurisdiction to grant an order declaring an employee’s dismissal as unfair.

However, it is submitted, that the question remains whether the above authorities remain correct statements of the law. In considering this question, the focus of the discussion at hand will turn to the administrative law position with particular reference to the *Chirwa* case which could prove to reverse the aforesaid decisions.

In proceeding further with the topic under discussion, it is submitted that an evaluation of the Constitutional Court’s decision in the *Chirwa* case and *Frederick’s* case should be conducted and there impact on the aforesaid decisions.
CHAPTER 4
ADMINISTRATIVE LAW

4.1 INTRODUCTION

There is, in addition, to the above issues, a further complication of overlapping and conflicting legislation. This is as a result of the situation created by the LRA and PAJA which appear independently to protect the same or similar rights.

The LRA is designed to give effect to the fundamental right to fair labour practices and PAJA is designed to give effect to the constitutional right to just administrative action in section 33 of the Constitution. The two statutes overlap because, where the State acts in its capacity as the nations biggest employer, many of the decisions or actions which constitute labour practices also appear to constitute administrative action.

Before the implementation of the LRA, the Industrial Court and the former Labour Appeal Court borrowed heavily from administrative law when developing the procedural requirements for fair dismissal under the unfair labour practice jurisdiction. The former Supreme Court had to deal with all labour disputes immigrating from the public sector because the 1956 LRA excluded public servants from its ambit. This resulted in labour law and administrative law continuing to develop in tandem.

Under the current LRA and the code of good practice promulgated under the Act the right to fair labour practice has been codified and public servants now have access to labour tribunals established by the Act. By virtue of section 157(2), the Labour Court and the High Court have concurrent jurisdiction as referred to above.

These provisions invite public servants to approach the High Court with complaints about their employer and to invoke either their right to fair labour practices and their right not to be unfairly dismissed or their right to fair and reasonable administrative action, or all such rights simultaneously, in support of their claims against their

---

Supra.
employer. Even private sector employees sometimes approach the High Court under PAJA or the common law for review of disciplinary action against them.

The various divisions of the High Court have not dealt with such applications consistently in that they have assumed jurisdiction in terms of the normal principles of contract or administrative law or ruled that they lack jurisdiction because the matter should be dealt with by the Labour Court.

When a court is faced with a labour complaint brought in civil courts on the basis of PAJA, there is a lengthy list of conflicting judgments on that issue. To celebrated instances was that of Administrator, Transvaal v Zenzile\(^{41}\) and Administrator, Transvaal v Sibiya\(^{42}\) where it was held that dismissal of public sector employees were reviewable under the principles of administrative law. In addition there were subsequent cases which dealt with matters on the basis of administrative law with regard to suspensions, collective labour disputes, transfer of teachers, members of the defence force concerning promotions and disciplinary hearings of public sector employees. Unfortunately, for the purposes of brevity, these decisions are referred to generally and will not be dealt with in any detail in order to allow for more attention and consideration to be given to decisions referred to hereunder which, it is submitted, are more immediately relevant to the topic under discussion.

4.2 **UNITED NATIONAL PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA v DIGOMO N0\(^{43}\)**

This matter involved a complaint by employees of the government of the Northern Province that they had been unlawfully overlooked for appointment to certain promotional posts, the encumbrance of which had been found to have been irregularly appointed by a commission appointed for that purpose. The Pretoria High Court dismissed the matter on the basis that it was clearly a labour matter is premised on unfair labour practice and thus fell outside the courts jurisdiction. The Supreme Court of Appeal overruled the decision. The court held that employees are entitled to choose between PAJA and the LRA to press their claims against

\(^{41}\) 1991 (1) SA 21 (A).

\(^{42}\) 1992 (4) SA 532 (A).

\(^{43}\) (2005) 26 ILJ 2957 (SCA).
employers and, that if they choose to litigate under the former Act, the High Court is bound to deal with the matter.

“The remedies that the Labour Relations Act provides against conduct that constitutes an ‘unfair labour practice’ are not exhaustive of the remedies that might be available to employees in the course of the employment relationship. Particular conduct by an employer might constitute both an ‘unfair labour practice’ (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant’s claim in the present case was not that the conduct complained of constituted an ‘unfair labour practice’ giving rise to the remedies provided for by the LRA, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that its source in the Constitution and that is protected by section 33 – which is clearly cognizable in ordinary courts.”

However, a question which was left open was whether the decision not to appoint the employees to the post in question constituted administrative action that is liable to be set aside. It is submitted that by leaving this question open, the court left open a crucial issue. If decisions effecting employment and labour rights are not deemed administrative action, the effect would be tantamount to restricting actions of that nature to the Labour Court or to ordinary contractual actions in civil courts.

Even after the promulgation of PAJA the High Court and the SCA has continued to apply the principles of administrative law to employment and labour disputes.

In Dunn v Minister of Defence the court granted a naval captain relief under PAJA because the Minister had failed to follow applicable legislation and regulations when dealing with his application for promotion. However cases of this nature may be distinguishable from cases involving other public sector employees as soldiers are excluded from the LRA, however this matter still concerned labour matters where administrative law found application.

Another illustration would be that of SA Police Services v SA Police Union where the court held that proper promotion procedures in the SAPS served a “powerful and legitimate public interest”, and were subject to review.

---

44 Dunn v Minister of Defence 2005 ILJ 212 (T).
In *Simela v MEC for Education, Province of the Eastern Cape* the Labour Court set aside the proposed transfer of teachers on the basis that the decision infringed their right to fair labour practices and their right to fair and rational administrative action. Public sector dismissals have been dealt with on the same basis by both the High Court (*Bester v Sol Plaatje Minicipality*) and the Labour Court (*Lloyd v CCMA*). The same applies to suspension (*Mbayeka v MEC for Welfare, Eastern Cape*) and demotions (*Holgate v Minister of Justice*).

The above matters as well as the earlier general reference to previous decisions indicate that the High Court has been intent upon guarding its jurisdiction to entertain labour and employment disputes not specifically referred to the Labour Court.

### 4.3 PSA ON BEHALF OF HASCHKE v MEC FOR AGRICULTURE & OTHERS

This matter involved a disputed decision by a CCMA Commissioner not to condone the late referral of a dispute concerning an alleged unfair failure to promote the applicant employee. Part of the applicant's case was that the Commissioner had failed to provide reasons for the decision. The respondent's contended *in limine* that the application was premature because the applicant's could of sort reasons for the decision under PAJA, which would have avoided litigation. The Court dealt with the issue of whether PAJA applied in labour disputes.

The Judge noted that labour law and administrative law share common characteristics, administrative law falls exclusively in the category of public law whereas labour law has elements of administrative law, procedural law, private law and commercial law. In the past courts have had recourse to administrative law to advance labour rights, this was no longer necessary under the current Constitutional Court dispensation because the Constitution caters for administrative rights and labour rights as distinct categories and the legislature had given effect to each of

---

46  (2001) 9 BLLR 1085 (LC).
49  (2001) 1 All SA 567 (Tk).
these rights with specific legislation in which two sets of rights were separately codified. If labour legislation failed in any specific respect to give effect to labour rights, recourse could be had directly to the Constitutional right to fair labour practices or to the constitutional right to bargain collectively. Accordingly, there was no longer any need to apply administrative law, as enshrined in PAJA, in labour disputes.

However, the court ruled in any event that awards, rulings and decisions of the CCMA did not constitute administrative action as defined in PAJA. In addition, Pillay J went further and held that public sector employees no longer have a choice between PAJA and the LRA when seeking to enforce their labour or employment rights, all such disputes must now be dealt with under the relevant labour laws.

4.4 SAPU v NATIONAL COMMISSIONER OF THE SA POLICE SERVICES

This concerned a dispute over the unilateral change by the employer of shift hours. The applicant union, relying on PAJA, claimed that the decision was procedurally unfair because the SAPS had not consulted and that it was also irrational, arbitrary and capricious because the National Commissioner had allegedly failed to take into account the circumstances of the employees. The respondent's raised the point that the decision under attack did not constitute administrative action.

Murphy AJ indicated that there was nothing inherently public about setting hours of police officers, the matter fell more readily within the domain of contractual regulation of private employment relations, in did not bear the relationships between government and its citizenry.

“The powers and function concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining.”

Murphy AJ went further and held that the concept of administrative action is not intended to embrace acts properly regulated by private law.

52 (2006) 1 BLLR 42 (LC).
To hold otherwise would carry the risk of imposing burdens on the State not normally encountered by other actors in private sphere.

“Allowing that the distinction may be seen by some to be a fine one, even strained or artificial, it must be kept in mind that our Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of judicial acts, and subjects them to different forms if regulation, review and enforcement. Labour regulations in our system are regulated primarily through collective bargaining, minimum standards legislation and contextually sensitive dispute resolution which takes into account the policy prescriptions and values of a constitutionally sanctioned pluralist model, underpinned by organizational rights, majoritarianism and preference for negotiated solutions and outcomes.”

In the light of the above, the court held that policy required that the resolution of disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values and principles as in the private sector.

In the light of the above the question then arises as to what purpose is served by section 157(2) of the LRA which gives the Labour Court concurrent jurisdiction with the High Court in any dispute over the constitutionality of “any executive or administrative act or conduct … by the State in its capacity as employer?”

Murphy AJ held further that the state may perform administrative acts in its dealings with employees; however in terms of section 157(2) this encompasses only some of such acts and not all.

The Court noted that this reasoning suffers from two possible defects, namely:

- A logical difficulty in that on a narrow interpretation of section 157(2)(b), the Labour Court would assume jurisdiction over administrative acts relating to employment only in cases where the employer is an organ of state, in cases of private employers, review powers could only be exercised by the High Court; and

- The doctrinal difficult which entailed that the courts have from the early 1990’s
accepted that actions having a bearing on employment relationships in the public sector cannot be viewed as private, and have extended that principle to dismissals, retrenchments, suspension, transfers, promotions and appointments and provision of benefits.

Regarding the logical difficulty the court noted that the answer was to place it on a scale of competing anomalies. That the Labour Court had jurisdiction to entertain administrative acts of public but not private sector employers might seem anomalous, but far more anomalous results would follow if both the High Court and Labour Courts were to be empowered to treat all public sector employment issues under PAJA. The lesser anomaly was considered easier to live with.

Regarding the doctrinal problem, the court noted:

“It follows that the line of thought that progressive decisions of our courts, extending labour rights to public sector employees by categorizing employer conduct as administrative action, have lost their force following the codification of our administrative and labour law, and the extension of full labour rights to public sector employees by the LRA. Courts might therefore be justifiably expected to reconsider previous doctrine in the light of the new constitutional and statutory framework.”

Regarding the conclusion that a change in shift hours did not constitute administrative action, the court noted that an additional factor that, although the police officers may be adversely affected in their rights, the union could not get past the second threshold that the change in shift hours must have a direct and external legal effect, if it is to qualify as administrative action under PAJA. To have an external effect an act must “affect outsiders and should not be purely an internal matter of departmental administration and organization, the person affected must be someone other than a person in government”.

The decision in SAPU case and the Haschke case may be correct in so far as they held that the relevant conduct in each case did not constitute administrative action as contemplated by PAJA. In both cases the court went further and held that no labour and employment related conduct can ever constitute “administrative action”, subject to the exceptions mentioned, and that the employers conduct in any labour matter
cannot by definition be treated as administrative action because it falls under the umbrella of the constitutional right to fair labour practices.

This approach was followed in *Hlophe v Minister of Safety & Security*\(^ {53}\) where the court accepted that transfers of employees and demotions are not administrative action as defined in PAJA.

In considering the above decisions; namely the *SAPU* case, *Haschke* case and the *Digomo* case, it should be born in mind that the constitutional entrenchment of separate rights to fair administrative action and fair labour practices does not necessarily imply the creation of two distinct and impermeable areas of law. The object of the Constitution is to enshrine the values of a democratic state founded on, *inter alia*, the advancement of human rights and freedoms, founded on the supremacy of the Constitution and the Rule of Law.\(^ {54}\) The rights entrenched in Chapter 2 are intended to collectively to enshrine these broad values.\(^ {55}\) To say that an employment related decision has no external effect overlooks the fact that decisions of this nature are deliberate, conscious and public events which are meant to be governed by the principles of transparency and openness, by which the public sector is constitutionally bound, as acknowledged in the *SAPU* case. In addition employment related decisions may affect the efficiency of State Organs (*Public Servants Association o South Africa v Minister of Justice*,\(^ {56}\) *Stoman v Minister of Safety & Security*\(^ {57}\) and *Coetzer v Minister of Safety & Security*)\(^ {58}\) and public expenditure.

In *Digomo* case it was confirmed that the same act may infringe more than one fundamental right and give rise to separate causes of action. It makes little sense to insist that the victim approach different courts with different actions. It is presumed that this is why the Legislature gave the Labour Court concurrent jurisdiction with the High Court in cases involving any alleged or threatened violation of any fundamental right arising from any dispute over the constitutionality of any executive or

\(^{53}\) (2006) 3 BLLR 297 (LC).

\(^{54}\) S 1 The Constitution, 1996.

\(^{55}\) S 7(1) The Constitution, 1996.

\(^{56}\) 1997 (3) SA 925 (T).

\(^{57}\) 2002 (3) SA 468 (T).
administrative act or conduct by the State in its capacity as employer. It appears as though the intention was to preserve the High Court’s constitutional and residual inherent jurisdiction overall matters, including labour matters except in so far as these matters fall within the exclusive jurisdiction of the Labour Court as contemplated by section 157(1) of the LRA; entail all matters which fall within the LRA or in terms of the BCEA or EEA are to be determined by the Labour Court.

Therefore it appears as though section 157(2) extends the jurisdiction of the Labour Court beyond the issues to which it is restricted by statute to those matters which the High Court may in any event determine, except for those placed in the exclusive preserve of the Labour Court. Therefore section 157(2) does not limit the jurisdiction of the Labour Court any more than already restricted by section 157(1).

As seen in the Fedlife case above, the SCA has held that it retains jurisdiction to entertain matters involving the alleged unlawfulness of the termination of contracts of employment.\(^59\) The Labour Court has the exclusive jurisdiction to determine the fairness of a dismissal. In the context of public law the reasoning of the majority in Fedlife case indicates that an attack on the unlawfulness of a dismissal is based on the allegation that the employer was acting unlawfully in the sense in which that term is used in administrative law; in that the employer acted irrationally or unfairly as contemplated by the common law and now refined in PAJA. The overlap between the requirements for fair dismissal as defined in the LRA and the requirement of a fair administrative act as defined in PAJA cannot mean that public sector employees are confined to the actions and remedies afforded by the LRA. This was in essence what Fedlife held but in the context of contractual matters. In addition, it cannot equally be held that as a result of this overlap, all conduct falling in the sphere of employment must now be regarded as something other than an administrative act or conduct.

In considering the interpretation of section 157(2) of the LRA it does not restrict the concurrent jurisdiction of the high Court and Labour Court to executive and administrative acts. It also includes conduct by the State in its capacity as employer which is wider than the terms preceding it, namely; executive and administrative acts.

\(^{58}\) (2003) 2 BLLR 173 (LC).
\(^{59}\) Fedlife supra.
This must therefore include employment related actions, even if they do not constitute administrative action. In addition the Legislature must have been aware in drafting section 157(2) that the High Court and the Supreme Court treated dismissals and other employment related conduct as administrative acts. It can be reasonably presumed that they did not intend to change the law in this regard. Most of the powers exercised by public sector employers in respect of their employees are regulated by statute or regulation and cannot therefore be regarded as mere contractual powers. To ensure that statutory powers are exercised within the four corners of the enabling legislation has always been and remains the central function of administrative law. To insulate employment related conduct from judicial scrutiny by the civil courts because it is now considered a separate constitutional right, regulated by different statutes, would undermine the principle that organs of State are bound by legislation, as well as hamper the High Court in the exercise of its constitutional obligation to ensure that organs of State adhere to legislation which binds them. Almost all acts by the State in its capacity as employer are regulated by statute.

An additional consideration to note at this stage would be that in the Digomo case the court expressly refrained from ruling on whether the decision not to promote the relevant employees constituted administrative action; however the court held that the aggrieved employees were entitled at least to approach the court to resolve that question. If all employment matters are barred from the reach of PAJA because they do not fall within the definition of distractive action, the court’s finding that a particular conduct may simultaneously give rise to an unfair labour practice and other rights of action would have no practical consequence, the High Court would simply non-suit applicants on the basis that PAJA has no application.

An additional issue of what about disciplinary action, dismissal and other forms of unfair labour practice specifically listed in the LRA, which were previously treated as administrative acts under the pre-constitutional dispensation?

Are dismissed public officials and those subject to unfair labour practices contractual remedies or to proceeding against the State in the Labour Court or relevant
bargaining council?

This was addressed in *Jones v Telkom SA Ltd.* The case concerned two managers who were dismissed after they unsuccessfully applied for the remaining posts in a restructured management cadre. The contended that the respondent had not applied the criteria for the remaining posts properly and by so doing their constitutional right to fair procedure was infringed. They sought an interim order pending review compelling Telkom to appoint them to the positions concerned. Telkom argued *in limine* that the High Court lacked jurisdiction to entertain the dispute as it fell within the exclusive jurisdiction of the Labour Court. The applicants argued that the dispute fell within the jurisdiction of the High Court as Telkom was an organ of State.

The court held that since the employees’ case concerned unfair labour practices, unfair dismissals and dismissals for operational requirements it did not assist them to claim that the matter was a constitutional issue and further that the matter could not be determined without reference to matters falling within the scope of the LRA. The mere fact that Telkom was an organ of State did not confer jurisdiction on the High Court. The fact that the High Court had jurisdiction in constitutional matters did not confer on the court jurisdiction it otherwise lacked; it conferred jurisdiction on the Labour Court which that court would otherwise not have had. The urgent application was accordingly dismissed.

The view that employment related decision can never constitute administrative action appears to be in conflict with the court’s decision in *Fredericks v MEC for Education & Training.* However this decision will be considered and discussed in more detail below.

It is submitted at this stage that the High Court’s jurisdiction extends to reviewing acts by the State in its capacity as employer. In doing so the High Court will apply administrative law principles, now codified in PAJA. It is submitted that the exclusion of all employment matters save for the exceptions mentioned in SAPU from the reach of PAJA seems too wide.

---

60 (2006) JOL16326 (T).
This case concerned the application of a retrenchment agreement. The court ruled that the High Court had jurisdiction because the applicant based its case on the constitutional right to administrative justice and equal treatment. This claim arose from the special duties imposed on the state by the constitution.

Regarding the reach of section 157(2), the section provides that challenges based on Constitutional rights arising from the State’s conduct in its capacity as an employer is a matter which may be determined by the Labour Court, concurrently with the High Court. Section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.

It is submitted that this is confirmation that the High Court’s jurisdiction extends to reviewing acts by the State in its capacity as employer. In doing so, the High Court must necessarily apply administrative law principles, now codified in PAJA, it must follow that disputes concerning the application of collective agreements falls within the reach of judicial review.

It is submitted that the exclusion of all employment matters other than the exceptions mentioned in the SAPU case from the reach of PAJA therefore seems too wide.

In addition the fact that the CCMA and bargaining councils are given exclusive jurisdiction to entertain particular labour matters does not deprive the High Court of jurisdiction to entertain such matters if they can be described as constitutional matters. However in Hlope v The Minister of Safety & Security, the court held that given the broad remit of section 23(1) of the Constitution, virtually all employment disputes are capable of being described as constitutional matters.

The court in the Hlope case held that if the approach put forward in Fredericks case was adopted with regards to the jurisdiction of the CCMA and the Bargaining Council
as well as the High Court, this would fundamentally undermine the system of statutory dispute resolution established by the LRA.

In addition with regards to section 157(5) of the LRA this provides that the Labour Court should not have the jurisdiction to adjudicate unresolved disputes if this Act requires the dispute to be resolved through arbitration. It is submitted that reference to “concurrent jurisdiction” in section 157(2) must mean that the High Court is also necessarily deprived of jurisdiction by section 157(5) and therefore, as indicated in the Hlope case, that employees should utilize arbitration when the LRA specifies that they must do so.

4.6  **POPCRU v MINISTER OF CORRECTIONAL SERVICES**[^64]

This matter concerned the dismissal of seventy two prison warders for engaging in unlawful strike, which took the form of a collective refusal to perform overtime work on Christmas and New Year week ends of 2004/2005. The warders claimed that they had all, simultaneously; fallen ill, however in any event they were entitled to decline to work overtime. They also contended that the department had violated their constitutional right to fair labour practices and to lawful and fair administrative action, as well as their contractual rights by dismissing them without following the procedures prescribed in its own disciplinary code.

The Department contended that because a dismissal is a labour matter the case was not justifiable under PAJA but that the High Court was bound to deal with the matter as if it were the Labour Court.

This meant that the court could only grant remedies allowed in the LRA and not the normal remedies that flow from review. If this is correct, the practical implications for the warders were considerable in that they would effectively receive no relief at all. Regarding the issue of jurisdiction of the court, Judge Plasket referred to the statutory force of the High Courts inherent review jurisdiction to make order, unlimited as to amount so long as it not prohibited by law.

[^64]: (2006) 4 BLLR 385 (E).
In respect of section 157(1) and (2) Plasket J held that they do not purport to oust jurisdiction of the High Court to determine the constitutionality of the conduct of organs of state in the field of employment. They do not limit the High Court jurisdiction that section 169 of the Constitution vests in them. Instead they vest jurisdiction concurrent with that of the High Court in the Labour Court.

In addition, Plasket J also referred to section 158(1)(h) and section 158(1)(g) read together suggest that when the Labour Court reviews functions performed in terms of the LRA, section 145 applies, whereas when it reviews actions of the State it may go further and invoke any appropriate law or remedy. This means that in doing the latter, the Labour Court acquires the same jurisdiction and powers of the High Court, subject only to the limitation that those powers maybe exercised in labour matter alone.

In the light of the above, the question arises as to whether the High Court is obliged or entitled to apply the LRA when it adjudicates employment or labour matters in terms of section 157(2). The High Court is not required and or obliged to apply the LRA as the LRA provides for the exclusive jurisdiction of the Labour Court to adjudicate all matters which are to be determined by the Labour Court in terms of the LRA. Accordingly, the High Court lacks jurisdiction to apply sections 193 and 194.

In addition to the above, Plasket J commented on the definition of administrative action and held that the definition is not exhaustive and indicated that the mere fact that administrative action is defined, does not mean that administrative action not falling within the terms of the definition is not reviewable. This is because beyond PAJA there is the over arching constitutional principle of the rule of law and legality, beneath then is the common law which has not been eliminated by the Constitution and as such continues to inform that interpretation of PAJA. The common law, accordingly, can be drawn upon where it provides principles of lasting value. Plasket J referred, in confirmation, to the decision of Administrator, Transvaal v Zenzile and held that Zenzile case and other cases of the like form a part of the foundation of the

65 Supra.
constitutional dispensation and therefore remains law. Accordingly, the court considered itself bound by the judgment.

Regarding the issue of public power, the court held that public power is vested in a public functionary who is required to exercise it in public interest and not for private interest. The essential difference between public and private power is that public power flows from legislation and must be exercised within the framework of the empowering statute and subject to its limitations, express or implied. In addition, Plasket J held that the assumption that the constitutional right to fair labour practices trumps others is false and not supported by PAJA as it could have been added to the list of exclusions. The court held further that there is nothing incongruous about individuals having more legal rights rather than less, or more than one fundamental right applying to one Act, or more than one branch of law applying to the same set of facts, even if this means that public employees enjoy greater protection than private employees. This is an issue for parliament to rectify and not the courts.

It is worthwhile to note that in POPCRU there was no concern about the possible forum swapping by observing that the constitution is paramount and that jurisprudence in respect of legislation must ultimately be shaped by that same source. In labour matters the State may appear in the guise of an employer, but it remains the State, the officials of which are obliged to conduct themselves in accordance with statutes that bind them.

However, the question remains does the overlap between labour and administrative law have negative consequences?

Labour Law services an important social role, but so to does the principle of legality upon which the POPCRU judgment was founded. Ultimately law makers, the Supreme Court of Appeal and the Constitutional Court will have to choose which value is more important.
4.7  **CHIRWA v TRANSNET LTD**\(^{66}\)

4.7.1  **THE FACTS**

Ms Chirwa had been employed at Transnet for approximately 3 years and she was promoted from Human Resources Manager to Human Resources Executive Manager, and transferred to the Transnet pension fund. However the fund CEO, a Mr Smith, was unimpressed with her administrative skills. Smith instituted disciplinary action Ms Chirwa. An outside presiding officer found her guilty of misconduct, but recommended only a warning. Neither Mr Smith nor Ms Chirwa were satisfied with this outcome and Ms Chirwa filed a formal grievance against Mr Smith, Mr Smith responded by lodging fresh charges against Ms Chirwa for inadequate performance, incompetence and poor employee relations and this time he himself assumed the role of presiding officer. Ms Chirwa declined to participate in the hearing because she indicated that Mr Smith was simultaneously acting as complainant, witness, and judge. Mr Smith pressed on with the enquiry and dismissed Ms Chirwa. Ms Chirwa referred a dispute to the CCMA for conciliation. The commission issued a certificate stating that the dispute could not be resolved and noting that the Ms Chirwa could refer the dispute to arbitration. Ms Chirwa accordingly triggered the statutory process of labour dispute resolution. However, Ms Chirwa decided not to pursue that route. Instead Ms Chirwa resolved to refer the dispute to the High Court alleging that by permitting a bias manager to preside at her disciplinary hearing and by not giving her time to appoint a legal representative; her former employer had failed to comply with the requirements of schedule 8 of the LRA. This she contended rendered the decision to dismiss her reviewable under PAJA.

Ms Chirwa succeeded in the High Court. The judge concluded that her right to natural justice had been violated. But in reaching this conclusion the court relied not only on PAJA, but on the rules of natural justice enshrined in the common law as confirmed in the judgment of *Administrator, Transvaal v Zenzile*.\(^{67}\) The result of this finding that was Ms Chirwa’s dismissal was declared a nullity and Transnet was ordered to reinstate her.

---

\(^{66}\) (2008) 2 BLLR 97 (CC).

\(^{67}\) *Supra.*
The matter then proceeded to the Supreme Court of Appeal. Of the five judges on the Supreme Court of Appeal panel three upheld the appeal, but on different grounds. Two judges held that although the High Court had jurisdiction to entertain the matter, the appeal had to succeed because Ms Chirwa’s dismissal did not constitute administrative action. In a judgment which concurred with the result, Conradie JA was prepared to accept that the dismissal was an administrative act, but upheld the appeal on a different basis, being that the High Court lacked jurisdiction because the matter fell within the scope of the LRA, which confers exclusive jurisdiction in such matters on the Labour Court. The two minority judges held that the High Court had jurisdiction, that the dismissal constituted an administrative action, and that the court below was correct when it decided that Ms Chirwa’s right to natural justice had been violated. These two judges would have upheld the appeal, except that they would have remitted the matter to Transnet to heard afresh, rather than simply reinstating her as the High Court had done.

4.7.2 QUESTIONS BEFORE THE CONSTITUTIONAL COURT

The questions before the Constitutional Court were as follows:

(a) Does the High Court have jurisdiction to entertain claims by dismissed public sector employees; if so,

(b) In terms of which law; and, if so

(c) Did the dismissal constitute an administrative action?

4.7.3 PURPOSE-BUILT

Skweyiya J, with seven judges concurring decided the matter on a jurisdictional point. Following Conradie JA his reasoning started from this premise:

"It is my view that the existence of a purpose-built framework in the form of LRA and associated legislation infers that labour process’ and forums should take precedence over non purpose built process’ and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative course of
action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or unfair labour practices by the employer, it is in the first instant mechanism established by the LRA that the employee should pursue her or his claims."

It is submitted that the existence of a purpose-built framework for the resolution of labour disputes does not in itself resolve the question whether another, equally purpose-built framework for the resolution of administrative law disputes is completely displaced when the two happen to overlap. However, Judge Skweyiya indicated that this problem was answered by section 210 of the LRA, which provides that when any legislation conflicts with the provisions of that Act, the LRA prevails. Accordingly, the legislature intended the LRA to prevail over PAJA. It is worth while to note that at this stage this is no answer to the judgment in the POPCRU – case in respect of which it was held that the existence of overlapping constitutional rights, and of overlapping legislation giving effect to those rights, does not give rise to any conflict.

**4.7.4 CONCURRENT JURISDICTION**

Skweyiya J held that section 157(2) is not intended to entrench the High Courts jurisdiction over all matters not expressly reserved for the Labour Court, but rather to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights. Accordingly the starting point was section 157(1) in determining whether Ms Chirwa’s complaint was a matter falling within the exclusive jurisdiction of the Labour Court. This was the key to the dispute before the court. Her claim was based squarely on the provisions of the LRA. She could not seek to vindicate her claim under another Act. In addition, Ms Chirwa had correctly referred her dismissal to the CCMA at the outset, but had then purported to exercise an election she lacked, because all employees, including those of the State, are covered by the LRA, which treats all employees alike in the same fashion.

Thus far, it is submitted, that the judgment seems to indicate that if public sector employees have employment related disputes governed by the LRA, they must use the dispute resolution procedures provided for in the LRA, especially where, as Ms Chirwa had done, they commenced proceedings under the LRA and then switched to
the High Court and rely on the rights confirmed by that Act. It is submitted that the judgment of Skweyiya J could arguably have been confined to those facts and accordingly would not have provided a binding precedent in cases, for example, were public sector employees approach the High Court directly with claims to enforce their constitutional right to fair administrative action.

Ngcobo J indicated that the matter could have been disposed of on the narrow basis suggested by Skweyiya J, however he regarded the issues as to important. These issues were the meaning and scope of section 157(2) of the LRA and whether Ms Chirwa had two courses of action, one emanating from the LRA and the other emanating from PAJA, between which she could choose.

In terms of section 157(2), it was necessary to confer limited constitutional jurisdiction on the Labour Court, because it was realised that disputes over which it had jurisdiction may impinge on constitutional rights other than those arising from labour legislation. In addition, the Constitution itself deprives the High Court of jurisdiction to determine constitutional matters assigned by an Act of parliament to another court of status similar to that of the High Court, which status the Labour Court enjoys.68

Section 157(2) applies to the High Court only when a party relies directly on a provision of the bill of rights, subject to the caveat that, when this is done, that party must also attack the constitutional deficiency of the LRA.

In addition, Ngcobo J dealt with the question of whether dismissals of a public sector employee have separate causes of action under labour legislation and PAJA? As seen, the decisions of the High Court and Labour Court are sharply divided in this regard. The issue that ultimately divides theses schools is whether the decision of public authorities to dismiss employees involves an exercise of public power. However Ngcobo J indicated that this in not the key question. An exercise of public power constitutes an administrative action only if it constitutes an administrative action as envisaged by the Constitution. The line between administrative action and other forms of action must be drawn on a case by case basis in light of the Constitution as a whole and the overall constitutional purpose of an efficient,
equitable and ethical public administration.

The Constitution recognizes that labour relations and administrative action form different areas of law, distinct rights and the Constitutional provisions dealing with public administration make it plain that employment and labour relations in that sphere are subject to fair employment practices. In addition, the LRA governs all employees and the Public Service Act\(^{69}\) provides that the power to dismiss employees shall be exercised in accordance with the provisions of the LRA.

The PAJA governs labour relations between the State and the citizenry generally, not between the State and its employees. That been the case, judgments like Zenzile case are no longer applicable because it is no longer necessary to have recourse to administrative law to protect public servants against unfair dismissal.

4.7.5 MINORITY JUDGMENT

The minority judgment of Lange CJ (Mokgoro and O'Reagan J concurring) agreed that Ms Chirwa's dismissal did not constitute administrative action, or be it for different reasons. The minority judgment did not agree with Judge Skweyiya that the matter should be dismissed on the basis that the High Court lacked jurisdiction. In addition the minority judgment disagreed with Ngcobo J that dismissals in the public sector may never constitute administrative action subject to review by the High Court.

According to Lange CJ, the High Court had jurisdiction to consider whether Ms Chirwa's dismissal constituted an administrative action, but had merely erred by finding that it did.

In addition, Lange CJ also referred to Fredericks case which, in his view, had already decided the issue of jurisdiction by the Constitutional Court.

Lange CJ noted that Ms Chirwa's case did not fall within the scope of section 157(1) for two reasons, namely: the first was that the claim had been brought under the

---

\(^{68}\) S 169(a)(ii) of the Constitution.

\(^{69}\) 103 of 1994.
PAJA, not under the LRA. The second reason was that, in terms of the LRA, Ms Chirwa's dispute would have been determined, not by the Labour Court, but by the CCMA or bargaining council. That been so, matter could not possibly have fallen within the scope of section 157(1), which ousts the High Court's jurisdiction only were it confers exclusive jurisdiction on the Labour Court. This finding, it is submitted, is in accordance with the Fredericks case. In addition, Langa CJ noted that the concerns expressed by the majority about the overlapping jurisdiction and possibly conflicting jurisprudence could not alter the plain meaning of section 157(2). If that provision leads to a result inconsistent with the legislature's intention, it was for the legislature to redraft the statute, not for a court to impose a meaning contrary to its plain words. It is submitted at this stage that in placing the responsibility at the door of the Legislature, this approach is somewhat similar to the reasoning adopted by Plasket J in the POPCRU case.

Langa CJ also held that by dismissing Ms Chirwa, Transnet did not exercise administrative action on the basis that they was no legislative provision governing the appointment and dismissal of Transnet employees. The PAJA defines as administrative action as action taken *inter alia* “in terms of any legislation”. Transnet's power to dismiss derived from Ms Chirwa's employment contract. This was not an exercise of public power, a further element of the statutory definition of administrative action. In addition, the dismissal of Ms Chirwa had very little if any impact on the public.

Langa CJ held further that although these considerations tilted the balance against Ms Chirwa, they did not necessarily apply to the dismissal of any public servant.

It is therefore clear that Ms Chirwa's final appeal failed because she had chosen the wrong court and, even if it had been the correct one, the court should have dismissed the application because the source of the complaint was not reviewable administrative action.

4.7.6 FACTORS

It is clear from the judgment that the two majority judgments have concluded, in
summary, the following:

- Where a dispute is covered by the LRA, the High Court lacks jurisdiction because that matter must be pursued under the LRA;

- public sector employees cannot rely on PAJA in employment matters because the LRA trumps PAJA;

- dismissals to not constitute administrative actions if the dismissed employees falls under the LRA;

- section 157(2) merely extends the constitutional jurisdiction on the Labour Court and does not confer concurrent jurisdiction on the High Court to deal with constitutional matters arising from employment;

- the overlap between the constitutional rights to lawful and fair administrative action and to the fair labour practices does not give rise to a choice of pressing claims under either the constitutional provisions;

- the High Court, should not as a matter of policy, entertain claims by public sector employees which can be pressed over the LRA;

- where there is a conflict between PAJA and the LRA the LRA prevails;

- pre-constitutional judgments which enshrine in the common law the rights of public servants to a fair dismissal procedure a no longer relevant;

- any employment related matters, even those not expressly covered by the LRA fall outside the scope of PAJA but may fall under the Constitution to be dealt with by the Labour Court; and

- where an employment labour dispute involves a right for which the LRA provides no remedy, employees may rely directly on the Constitution only if they
satisfy the High Court or the Labour Court that the LRA is constitutionally deficient.

4.7.7 IS CHIRWA BINDING PRECEDENT?

It is submitted that there are two arguments which are open to public sector employees who pursue civil remedies apparently closed to them by the Chirwa case. The first is that the Chirwa case may be distinguished from their own cases and the second is that the majority judgment in Chirwa are plainly wrong, either in principle, or because the court did not consider relevant issues which it should have considered or because they conflicted with the courts own earlier judgment in the Fredericks case.

It is submitted further that Ms Chirwa’s case was peculiar in a number respects. She commenced her action in the CCMA and only later switched to the High Court. In addition, the fact that the matter could have been disposed of a narrow basis means, strictly speaking, that everything set beyond that point is obiter and therefore of nothing more than persuasive authority.

In addition to the above, Ms Chirwa’s matter involved an individual dismissal and accordingly did not involve any compelling public interest. The court furthermore did not specifically consider whether the principles approved and applied in the Chirwa case necessarily applied also to employment and labour issues other than dismissals.

Furthermore, it is trite law that the Constitutional Court in these circumstances must enjoy the power of any court to declare plainly wrong an earlier decision of its own. Should the Chirwa judgment be attacked, it is submitted that the minority judgment should be used in support of this, especially with reference to its reliance on the Fredericks case.

4.7.8 FREDERICKS CASE

It is worth while to note that Skweyiya J did not overrule Fredericks case, he
distinguished that judgment on the basis that Fredericks and his colleagues had not relied on section 23(1) of the Constitution, or any provision of the LRA, whereas Ms Chirwa relied on the LRA itself.

However, Langa CJ, correctly pointed out that Fredericks case rested on a point different from those which rendered it distinguishable, and which applied directly to the facts of Chirwa. This was that even in terms of the LRA, the dispute in question did not fall within the exclusive jurisdiction of the Labour Court.

The main thrust of the Fredericks case was that the mere fact that the LRA requires a dispute to be referred to arbitration cannot oust the High Courts jurisdiction, because neither bargaining councils nor the CCMA are courts of law. That was why the Fredericks judgment concluded with the finding that the High Courts concurrent jurisdiction was not ousted by section 24 of the LRA.

Skweyiya J and Ngcobo J judgments effectively came to the conclusion that the High Court lacked jurisdiction to entertain Ms Chirwa’s claim, Ngcobo J judgment on elaboration effectively deprived the High Court of jurisdiction in all disputes covered by the LRA. This is clearly at odds with the Fredericks judgment. Even if the majority judgment in Chirwa could be construed as impliedly overruling Fredericks, the fact is that the Fredericks case was declared distinguishable by the majority in the Chirwa case.

Currently there are now two conflicting judgments of the Constitutional Court on the issue. As such, lower courts may choose to follow that which they consider correct. Another factor which seems not to have been taken into account in the Chirwa judgment all be it possibly because the provision was not drawn to the courts attention, was that of section 157(5) of the LRA which expressly deprives the Labour Court of jurisdiction to adjudicate disputes if the LRA requires the dispute to be resolved through arbitration. It cannot thus possibly be concluded that the High Court could not have had jurisdiction because the Labour Court had exclusive jurisdiction in terms of section 157(1); that would be tantamount to arguing that the Labour Court has exclusive jurisdiction even though the Act has expressly deprived it of jurisdiction.
That section 157(5) does not deprive the High Court of jurisdiction if the LRA requires dispute to be referred for arbitration may seem complex, but the omission may have been intended to reflect the point made in Fredericks, that the legislature intended the High Court to retain its inherent jurisdiction to entertain labour and employment disputes, even when the matter may also be referred for arbitration under the LRA.

The only other provision of the LRA which arguably places public sector dismissals in the ambit of section 157(1) is section 158(1)(h), which gives the Labour Court power to review. But section 158 deals with the Labour Court powers not with its jurisdiction. Accordingly, section 158 must be read with section 157. Section 158(1)(h) read with section 157(2), the former provisions simply reinforce the concurrent jurisdiction of the Labour Court and High Court by empowering the Labour Court to entertain the kind of reviews contemplated in section 157(2).

However one of the most formidable findings in the Chirwa judgment was that disputes covered by the LRA cannot, in principles, constitute administrative action and/or constitutional matters because the rights and remedies involved in labour and/or employment disputes are fully regulated by dedicated statutes.

However, Langa CJ held that the LRA expressly recognized that the Labour and High Courts have concurrent jurisdiction over [any] alleged or threatened violation of fundamental rights arising from employment and labour relations or from actions by the State in its capacity as employer.

In addition, the Chirwa judgment did not deal with the correctness or otherwise of the judgments of the Supreme Court of Appeal like the Fedlife Assurance case, Denel (Pty) Ltd case70 in respect of which the court accepted jurisdiction in case in which employees relied on claims for breach of contract arising from dismissals.

It is submitted that Ms Chirwa could conceivably had pressed her claimed as an implied term of her agreement with Transnet or, more broadly on the basis that her

70 Supra.
dismissal was unlawful as opposed to unfair. Such a claim would have been consistent with the Constitutional Courts unanimous finding that Ms Chirwa dismissal was an exercise of contract power.

However Ngcobo J referred to the *Boxer Superstores* case and, without expressly ruling on the correctness or otherwise thereof, he merely noted that the judgment illustrates the difficulty of relying on form rather than substance as it creates an avenue to bypass the whole conciliation and dispute resolution machinery created by the LRA.

In addition, another factor to be considered is that of section 77(3) of the Basic Conditions of Employment Act\textsuperscript{71} which confers on the Labour Court "concurrent jurisdiction" with the civil courts. It is submitted that this is a confirmation of the civil courts continuing jurisdiction to entertain contractual disputes arising from employment.

Consequently it would be worthwhile to note whether, had Ms Chirwa approached the High Court with a claim based on breach of contract, rather than on administrative law, she might have succeeded as Mr Vorster succeeded with a very similar complaint in the *Denel* case.

From a jurisdictional perspective, it is difficult to understand how a claim based on an alleged breach of an employment contract intrudes any less on the exclusive jurisdiction of the Labour Court than does a claim based on an alleged administrative law principle, especially when the employees’ complaint relates to alleged procedural unfairness.

The question arises is whether the courts approach to the issues raised in Chirwa applies to claims in which employees dress up disputes over unfair dismissals as contractual claims.

Could the High Court have assumed jurisdiction in terms of section 77(3) of the

\textsuperscript{71} Supra.
BCEA? If section 77(3) serves the same function as the court attributed to section 157(2) of LRA in Chirwa, ie to extend the exclusive jurisdiction of the Labour Court, rather than to confirm and ring fence the jurisdiction of the civil courts, it would seem that the High Court could not have assumed jurisdiction.
What will follow hereunder is a discussion on selected decisions of the High Court subsequent to the *Chirwa case* and an analysis of how the courts have dealt with the issue of jurisdiction in the light of the *Chirwa case* and the *Fredericks case*. This discussion will entail reference to both the administrative law principles as well as contractual law principles. Generally in the cases referred to and discussed hereunder the various courts have referred to and considered the *Chirwa case*. In this regard no detailed reference will be made in respect of the *Chirwa case* as dealt with by the cases hereunder in order to avoid unnecessary repetition. However, the various interpretations and conclusions reached by the courts will be discussed.

5.1 *NAKIN v MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE*\(^{72}\)

(i) FACTS

In 1995, the applicant, then a school principal, lost his post in circumstances for which he was not to blame and was subsequently erroneously re-appointed to a lower post. In 2002, the Department of Education acknowledged the error and undertook to reinstate the applicant to his former grade, and to correct his salary with retrospective effect. Some years later, the applicant launched an application in terms of PAJA for orders declaring the respondent’s failure to comply with its obligation constituted a breach of his right to fair administrative action, reviewing their conduct, and directing the Department to give effect to the improved salary benefits. The Department contended that the court lacked jurisdiction because the dispute fell under the LRA and also denied the claim that it had failed to comply with its obligations.\(^{73}\)

---

\(^{72}\) [2008] 5 BLLR 489 (Ck).
(ii) JURISDICTION SINCE FREDERICKS CASE

The court noted that ever since the SCA decision in the Fedlife Assurance (Ltd) case and the Constitutional Court decision in Fredericks case, it had been accepted that the High Court has concurrent jurisdiction with the Labour Court to determine employment matters which arise from common law contract of employment as well as the alleged or threatened violation of fundamental rights under the Constitution, 1996 arising from employment and labour relations, disputes over the constitutionality of any executive or administrative acts or conduct by the State in its capacity as employer and disputes about the application of labour laws. Both decisions dealt with the effect of section 157 of the LRA on the jurisdiction of the High Court and the Labour Court in relation to these matters. The court confirmed that in the Fedlife case Nugent JA found nothing express or implied in the LRA to abrogate an employee’s common law entitlement to enforce contractual rights in the High Courts. Nor did he consider that Chapter 8 of the LRA was exhaustive of the rights and remedies that accrue to an employee upon termination of a contract of employment.

In Fredericks case O’Regan J, writing for a unanimous court, found that there can be no constitutional objection to the ouster of the court’s jurisdiction under section 157(1) of the LRA because section 169 of the Constitution authorises such an ouster and further that the Labour Court is a Court of similar status to that of the High Court by virtue of section 151 of the LRA. However the Constitutional Court held that the High Court’s jurisdiction could not be ousted where jurisdiction is conferred upon a tribunal which is not a court of status similar to that of a High Court, such as the CCMA established in terms of the provisions of the LRA. Fredericks case went further and held that a review power under section 158(1)(h) of the LRA does not confer such exclusive competence on the Labour Court to decide or settle matters where the State acts in its capacity as employer.74

Froneman J held that the interpretation of section 157(1) and section 157(2) in Fredericks case was consistent with the Fedlife case formed the foundation for a

---

73 Nakin supra at 490.
74 Nakin supra at 492, 493 and 494.
number of decisions in the SCA where the exclusive jurisdiction of the Labour Court has been carefully circumscribed. The court referred to the developments which took place and referred to above in the *Gumbi* case and the *Boxer Superstores* case. In addition the court referred to *MEC, Department of Roads and Transport*, *Eastern Cape v Giyose* where it was held that that the common law contract of employment has also developed to include a pre-transfer hearing for a public employee and that the High Court had jurisdiction to deal with a dispute in relation to the transfer on that basis, as well as under PAJA. The court in the *Giyose* case relied on the *Gumbi* case and the *Boxer Superstores* case.\(^\text{75}\)

On the basis of the above, Froneman J held, that there was little doubt that the High Court had jurisdiction to hear and determine the matter before him. Froneman J held that the applicant did not refer to a unfair labour practice under the LRA and the essence of the applicant’s case was that the Department approved a recommendation to reinstate him to his previous post level and that it has failed to give effect to that decision.\(^\text{76}\)

Regarding the applicant’s allegation that the Department’s aforesaid failure constitutes administrative action; Froneman J held that under section 38 of the Constitution the allegation of the infringement of a fundamental right would be sufficient to clothe the High Court with jurisdiction to enquire whether the right to just administrative action had been infringed or not, and to grant appropriate relief depending on its finding. PAJA gives specific content to this competence in relation to the fundamental right to just administrative action.\(^\text{77}\)

(iii) **THE EFFECT OF THE CHIRWA CASE**

The question which arose in the case was whether this settled state of law, as far as, the jurisdiction of the High Court to determine alleged fundamental rights disputes in relation to the conduct of the State in its capacity as employer, and civil law disputes arising from the common law contract of employment is concerned, has been

\(^{75}\) *Nakin supra* at 495-496.

\(^{76}\) *Nakin supra* at 497.

\(^{77}\) *Nakin supra* at 497.
disturbed or overruled by the recent majority judgment of the Constitutional Court in the *Chirwa* case?

Froneman J held that it may have disturbed the state of affairs but it did not have the effect of overruling the existing state of law, albeit that the learned Judge indicated that he arrived at this conclusion with some, respectful, hesitation.

The court held that the *Chirwa* case was about dismissal, which itself might justify the conclusion that the present case which concerns the implementation of remuneration benefits falls outside the scope of the majority decision in the *Chirwa* case.\(^78\)

Froneman J referred to the majority judgments of Skweyiya J and Ngcobo J as well as the minority judgment of Langa CJ.

It is worthwhile to note that the Langa CJ dismissed the appeal but not on jurisdictional grounds as the learned Chief Justice considered this issue to have been settled by the *Fredericks* case.

Skweyiya J distinguished the *Fredericks* case on the grounds that the claimants in that case placed no reliance on the constitutional right to fair labour practices under the Constitution, nor on any fair labour practice or other provisions of the LRA. Skweyiya J also accepted that the provisions of section 157(1) of the LRA did not confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between employer and employee unless it can be shown that a particular matter falls within the exclusive jurisdiction of the Labour Court. Froneman J held:

"It is, with respect, not entirely clear to me what the binding reason in Skweyiya J’s judgement is for finding exclusive Labour Court jurisdiction in the provisions of the LRA. He refers to the advantages of the “purpose-built framework” of the LRA, compared to the different purposes of PAJA ... "\(^79\)

The court then referred to Skweyiya J’s conclusion that Ms Chirwa’s claim was a

\(^78\) *Nakin* supra at 497.

\(^79\) *Nakin* supra at 498.
dispute contemplated by section 191 of the LRA, which provides for a procedure for its resolution. As a result and as discussed above, Skweyiya J held that the High Court had no concurrent jurisdiction with the Labour Court to decide the matter. Froneman J commented as follows regarding Skweyiya J’s finding:

“...The difficulty I have with the reasoning in this passage, even on acceptance of the characterization of Ms Chirwa’s claim as one grounded in an allegation of an unfair labour practice under the LRA, is that it is in direct contradiction to the reasons for the decision in Fredericks, namely that exclusive jurisdiction ousting the High Court’s constitutional jurisdiction cannot legitimately be done by assigning jurisdiction to bodies that are not similar in status to the High Court, and that such jurisdiction is not conferred on the Labour Court by the review provisions of the LRA. The feature relied upon by Skweyiya J for distinguishing Fredericks, namely characterization of the dispute as an unfair labour practice one under the LRA, thus distinguishes Fredericks without making a difference to, or challenging its ratio decidendi. In addition there is no indication that on the facts in Chirwa that the Director of the CCMA referred the matter to the Labour Court in terms of section 191 (6) of the LRA. Accordingly, in terms of the express provisions of section 157(5) of the LRA, the Labour Court had no jurisdiction to adjudicate the matter.”

Referring to Ngcobo J’s judgment, a separate concurring judgment dealing with two additional issue, namely; the scope of the operation of section 157 (1) and (2) and the characterisation of a dismissal as administrative action, Froneman J noted that Ngcobo J considered that the issues could be disposed of on the simple basis that a party should, as a matter of judicial policy, be held to its initial election in cases of concurrent jurisdiction, but that the issues were to important to be dismissed on this narrow basis.

The court referred to Ngcobo J’s judgment as examining the scope of the provisions of section 157 and concludes by reconciling section 157(1) and (2) by having regard to the primary objects of the LRA.

Froneman J referred to issues addressed in Ngcobo J’s judgment, namely; the history of the multiplicity of laws, the Explanatory Memorandum, the principle underlying the LRA namely as one Act for all sectors, competing and overlapping jurisdictions of institutions dealing with employment issues, all-embracing dispute resolution scheme of the LRA which leaves no room for intervention by another court,

80 Ibid.
the specialized skills of the LRA institutions, the object of the LRA to give effect to the constitutional right to fair labour practices the various provisions in the LRA under which employment disputes are regulated, the historical context for the original enactment of section 157(2), the present constitutional context and the establishment of a “one-stop court for labour and employment relations” which was enhanced by the concurrent constitutional jurisdiction in certain matters to the Labour Court in terms of the provisions of section 157(2), that other provisions in the LRA also make it apparent that the object was to create one Court only for labour and employment relations and in the light of the manifest purpose of the LRA, the use of the word “concurrent” in section 157(2) is unfortunate. Ngcobo J then concluded by stating that the application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of rights as referred to above.

In addition to the above Ngcobo J goes further about the comprehensive and all encompassing nature of the provisions of the LRA, founded on the fundamental right to fair labour practices in section 23 when he expresses disagreement about a further cause of action based on the constitutional right to just administrative action in another court being available to public sector employees as all workers should be treated equally and there is no reason why public sector employees who fall within the ambit of the LRA should be given more rights than private sector employees.

(iv) **IS THE CHIRWA CASE DISTINGUISHABLE?**

The court had indicated that *Chirwa* case may be distinguished from the present case on the basis that it deals only with unfair dismissal cases and that the jurisdictional issue may still fall to be decided in accordance with *Fredericks* case. The fact that the majority specifically sought to distinguish *Fredericks* case would justify this approach. However the court accepted that it could be argued that the implication of the reasoning of the majority judgments precludes such a formalistic approach.

In the light of the findings in the *Chirwa* case, namely that the High Court’s constitutional jurisdiction is excluded and the Labour Court had exclusive jurisdiction even in the face of section 157(5) is the implication that a conciliation or arbitration
institution under the LRA may have exclusive jurisdiction, ousting the High Courts constitutional jurisdiction? The court held that if that is not the proper implication to draw from the majority judgments, is the more plausible reading then that the Labour Court’s exclusive jurisdiction in such a case to be found in the review powers granted to the Labour Court in terms of the LRA? Either way, the court held, these implications cannot be squared with the reasoning and explicit findings in the Fredericks case. In the Fredericks case the Constitutional Court accepted that it is sufficient for an applicant to raise the breach of a fundamental right to just administrative action in an employment dispute to establish the Constitutional Court’s own jurisdiction to hear the matter. The court held that it is respectfully difficult to see any space for concurrent jurisdiction of the High Court in any kind of employment matter, be it in relation to fundamental constitutional rights under the Constitution or under the common law contract of employment, under the reasoning of the majority in the Chirwa case. Froneman J held that it appeared to him that the reasoning of the majority in the Chirwa case and the far-reaching consequences of that reasoning inevitably appeared to conflict with virtually every aspect of the Constitutional Court’s own earlier decision in the Fredericks case.  

Froneman J held that the Fredericks case applied to the case before him. Froneman J held that it may be inappropriate and impermissible for a judge of the High Court to infer that a previous decision of the highest court on constitutional matters might have been overruled by a later decision of that court, especially when that fact is not acknowledged openly by the court making the later decision.

Even if it were appropriate and permissible to point out the potential consequences and implications of such a later decision, the lower courts are entitled to expect that when previously authoritative judgments of the higher appellate courts are overruled, the nature and extent of that ruling should be stated in clear and express terms.

Froneman J commented that he was sympathetic to the broad approach that employment disputes should generally be approached from an employment law perspective, in order to achieve the objective of developing “a coherent and evolving

---

81 Nakin supra at 501.
jurisprudence in labour and employment relation”. Froneman J referred to his minority judgment in the *Fedlife* case where he attempted to give voice to some of the concerns and reasoning more comprehensively dealt with in the *Chirwa* case. However the decision in the *Fredericks* case was after the *Fedlife* case, and with apparent approval of the majority in the *Fredericks* case. Froneman J held that the issues resurrected by the *Chirwa* case were laid to rest years ago, on sound jurisprudential grounds.

Froneman J held further that if the developments since then had undermined the emerging coherence of employment law jurisprudence then concerns about their effect might be justified, however Froneman J held further that he had come around to the view that even the development of that jurisprudence had taken place in different courts, the fundamental constitutional concern for fairness in employment matters has been advanced, not restricted, by its wider application in courts other than the Labour Court. Froneman J held:

“The coherence of an emerging labour and employment jurisprudence is not primarily or necessarily determined by its development in one exclusive forum, but rather by the degree to which it gives proper expression of the entitlement of everyone, in terms of section 23(1) of the Constitution, to fair labour practices. Approached from that perspective, the question needs to asked is whether the coherence of employment law has gained or lost from administrative law insights relating to employment in the public sector, or from the development of the common law contract of employment to incorporate in its fabric some aspects of the constitutional right to fair labour practices. Opinions may differ on this, but my own view is that developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law. If that is the case, does it matter as a matter of substance rather than form where the development takes place, in the civil courts or in the Labour Court?”

Froneman J then dealt with the issue relating to the reliance on administrative law and now the fundamental right to just administrative action under the Constitution by the High Courts in public employment disputes, that development has not impoverished the quest to determine what is fair in those particular employment matters. Fundamental constitutional rights do not operate in tightly fitted compartments. In many, perhaps most, they overlap and are interconnected.

---

82 *Nakin supra* at 503.
Froneman J held that the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms underlie the application of the right to just administration action, the right to fair labour practices and the possible application of these rights in the direct or indirect development of the common law contract of employment under either section 8 or section 39(2) of the Constitution, in whatever court this might happen. Fairness in public employment may conceivably have a different content to that in the private sector for reasons relating to constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service. From that perspective, the substantive coherence and development of employment law can only gain from insights derived initially from administrative law concerns.

Regarding the development of the common law contract of employment in accordance with the Constitution the court held that the beneficial insights have mostly been flowing to the civil courts from developments in the Labour Court and from the concretisation of fair labour standards in labour legislation and general employment practices, not the other way around.

Froneman J held that the development of the common law to bring it in line with the constitutional ethos may often follow legislative advances which pave the way for new thinking. To insulate the development of the common law contract of employment by compartmentalising and narrowing not only the constitutional right upon which such development might occur, but also to state that any such development may not occur in general courts of the land in addition to specialized courts, runs counter to the constitutional objective of ensuring that the Judiciary in general has a duty to play its part in effecting the constitutional transformation of our society. Froneman J held further that substantive coherence in employment law may be achieved and developed in different courts, provided these courts give a broadly similar effect to the underlying constitutional right to fair labour practices.84

The content given to that right can also be enriched by recognising and giving appropriate expression to the inter-connectedness between that right and other

84  Nakin supra at 505.
fundamental rights, such as the right to just administrative action. Institutional control of the process can be achieved by various means. One of which would be for the High Courts to give recognition to the fact that in many cases, the dispute resolution mechanisms and institutions provided for in the LRA may be more appropriate to deal with a specific matter brought before it. However this would have to take place on a case by case basis and not as a general principle. Froneman J acknowledged that easy access to the dispute resolution institutions created under the LRA must be a reality in a particular case and the actual prejudice to the opposing party in not following that route must be apparent from the facts of the case before that route must necessarily be followed.\textsuperscript{85} Froneman J held further that final institutional control would lie with the Constitutional Court. If the coherence of employment law is disturbed in way, either in the High Courts or the Labour Courts, the Constitutional Court can rectify it by giving proper direction on the substantive content of employment law in accordance with the Constitution. It has always had that competence.

Froneman J held that the applicant \textit{in casu} did not rely on any allegation of unfairness under the LRA as his cause of his application, but rather on unlawful administrative action. On the authority of the \textit{Fredericks} case Froneman J held that the High Court had jurisdiction to determine whether, on the merits, he does have a claim based on unlawful administrative action.\textsuperscript{86}

The applicant chose to characterise the failure by the respondent to pay outstanding benefits as unlawful administrative action actionable under PAJA. He chose not to formulate his claim in contract or under any provision of the LRA or the common law contract of employment. Accordingly the first issue on the merits of the claim as formulated is thus whether the respondent’s failure as alleged amounts to administrative action under PAJA.

\textbf{(v) ADMINISTRATIVE ACTION}

In determining whether the respondent’s conduct as alleged amounted to

\textsuperscript{85} \textit{Ibid.}  
\textsuperscript{86} \textit{Ibid.}
administrative action as contemplated by PAJA; the court noted that a starting point would be that a foundational value of our new constitutional order is the rule of law. The rule of law is an evolving concept in our jurisprudence and its implications still need to be explored and elucidated. At its broadest level; it means that all legal actors, public or private, are bound by the law, including all arms of Government, executive, legislative and judiciary. It also includes all private legal persons; natural and juristic. Thus conduct of all public and private officials, from the highest to the lowest are subject to judicial scrutiny.

The exercise of all power is in the end subject to judicial scrutiny and adjudication. The nature of the judicial adjudication or review remains the same no matter who is involved, but the degree or intensity may vary depending on the kind of power exercised and the interests affected by the exercise of that power.

Regarding the exercise of public power; the Constitution provides for the threefold separation of the State authority into legislative, executive and judicial authority. Importantly, on an institutional level the exercise of proper constitutional legislative, executive and judicial authority does not involve administrative action under section 33 of the Constitution or under PAJA. However that does not mean that the legislatures, executive authorities or courts always act as legislatures, in their executive capacities, or as proper courts. They may perform tasks that fall outside their respective constitutional capacities, and when they do so they might be involved in administrative action under section 33 of Constitution or PAJA. Accordingly it is only when the issue is whether or not constitutional legislatures, executive authorities or courts acted outside their respective constitutional competencies that what matters is not so much the functionary as the function becomes applicable.

Once it is determined that the function exercised by a legislature, an executive authority or a court was administrative action or not, the “function not functionary” test loses its relevance. Its purpose is to assist in determining whether the legislative, executive and judicial bodies established in terms of the Constitution acted within their exclusive constitutional competencies.87

87 Nakin supra at 507.
If they did, they are not subject to judicial review under the just administrative action principles, but only under the rule of law or principle of legality. If they did not act within their exclusive constitutional competencies, they are subject to the principles of just administrative action under section 33 of the Constitution, as expressed and regulated under the provisions of PAJA.

The court held that the case before it was not one where the respondent’s purported to exercise any constitutional legislative, executive or judicial authority.

Froneman J held that in order to qualify as administrative action the alleged conduct of the respondent in casu must meet seven requirements; the failure must be:

- A decision;
- by an organ of State;
- exercising a public power or performing a public function;
- in terms of any legislation;
- that adversely affects someone’s rights;
- which have a direct, external legal effect; and
- that does not fall under the exclusions listed in section 1 of PAJA,

Froneman J then applied the facts of the case with particular reference to the nature of the Respondent and its constitutional competencies and held that it is difficult to see how the approval of the applicant’s reinstatement could have been anything other than the exercise of a public power in terms of the provisions of the EEA to re-determine the applicant’s remuneration entitlements. But what does one make of the alleged failure, within the Department, to implement that undoubted exercise of public power? In terms of the definition section of PAJA, inaction may also meet the requirement of being a “decision” under PAJA. The inaction at stake here is that of an organ of State, it has adversely affected the Applicant’s rights, which appears to meet the requirement of “a direct external legal effect” and it does not fall within any of the PAJA exclusions.  

What remains is to ask whether this establishment of a legal relationship by virtue of

---

88 Nakin supra at 508.
enabling legislation also necessarily implies that the exercise of rights and obligations flowing from the established legal relationship retains its public nature. PAJA may be read as forcing one to make a conceptual choice in this regard, but conceptual choices can be manipulated in order to avoid voicing the real substantive reasons why one choice is made in preference to another.

What is the nature of the legal relationship established by the Department’s approval to reinstate the applicant to a post level 4 status? Froneman J held that there are three plausible possibilities:

- The applicant has couched his claim in, namely a public administrative relationship between the State and one of its subjects;

- the applicant’s common law contract of employment with the Department has amended to the extent that he has a contractual claim to payment of his past salary and other remuneration benefits; and

- The applicant has a statutory right under the provisions of the LRA that protects him from unfair labour practices, one of which consists of withholding employment benefits.

Froneman J held further that if one views these three possibilities as conceptually exclusive, both in relation to the kind of rights that may be established under each, as well as the manner of its enforcement, then a stark choice awaits one. But it seems in truth, all three possibilities rely on similar underlying constitutional rights and values, and that their enforcement in different courts should have the same broad purpose, namely to give practical effect to these constitutional rights and values.

Accordingly, Froneman J held that the legal employment relationship between the applicant, a public employee, and the Department, an organ of State, is a complex one that is not, in the learned Judge’s point of view, capable of exclusionary compartmentalisation into only one of the three possibilities mentioned above. The common law contract of employment is framed by administrative law principles and should include, as a constitutionally mandated implied legal term, the right to fair
labour practices. Fairness is required in administrative justice, in legislation and in contract too. Fairness has much to do with equality, dignity and freedom; founding values of the Constitution. To view these interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole complete picture of such a relationship. In this process one might forget to ask and assess the real substantive issue at stake in a particular case.89

Froneman J then dealt with the question of whether the applicant should be entitled to legal relief if his complaint that he has not been properly paid after being reinstated to post level 4 status is factually correct? The answer is of course the Department should pay him the money he is entitled to, but that answer reveals some of the problems that the applicant has created by bringing legal proceedings under the guise of administrative review. That kind of claim for the payment of money does not fit easily, or perhaps not at all, into review proceedings.

It is submitted that the above judgment of Froneman J is material to the topic under discussion as the learned Judge explains the difficulties regarding the issue of determining whether to follow the Chirwa case or the Fredericks case in terms of the Doctrine of Precedent in the light of a particular set of circumstances which may or may not be applicable to these decisions.

The learned Judge went further and dealt with the difficulties surrounding the interpretation of the Chirwa case, one of which being that the majority judgments never expressly overruled the Fredericks case but rather sought to distinguish it, however it is submitted that Froneman J has provided invaluable assistance in the manner in which one can approach this difficulty. In addition, the learned Judge’s remarks regarding the development of our law in different courts as being acceptable so long as such development is in line with the Constitution and gives effect to the relevant rights and values of the particular case. In addition, the learned Judge reminds us that constitutional rights cannot be seen in isolation. It is submitted that what adds to the value of this judgment is that Froneman J acknowledges sympathetically to the broad approach that employment disputes should generally be

89 Nakin supra at 509.
approached from an employment law perspective with the view to achieving a coherent and evolving jurisprudence in labour and employment relations, as he expressed in his minority judgment in the Fedlife case, however the learned Judge indicated that he has “come round to the view” that even though the development of that jurisprudence has taken place in different courts, the fundamental constitutional concern of fairness in employment matters has been advanced, not restricted, by its wider application in courts other than the Labour Court.

In the light of this judgment it is submitted that as there can be no doubt that any contemplated development should give effect to the relevant rights and values in the Constitution, to limit labour and employment matters to specific forums may result in a potential risk that labour and employment law development may take place at a slower rate and furthermore by limiting labour and employment relations disputes to specific forums there may be an added risk that while such specific forums are giving effect to the fundamental right to fair labour practices, any development in this regard may take place in isolation from other overlapping constitutional rights as was correctly pointed out by Froneman J that “fairness is required in administrative law, in labour legislation and, yes, in contract too”. In addition the learned Judge remarked,

“the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms underlie the application of the right to just administrative action, the right to fair labour practices and the possible application of these rights in the direct or indirect development of the common law contract of employment under either section 8 or section 39(2) of the Constitution, in whatever court this may happen”.

5.2 NONZAMO CLEANING SERVICES COOPERATIVE v APPIE

(i) FACTS

The appellant was a worker for a cooperative incorporated in terms of the Co-operatives Act 91 of 1981 and its affairs were governed by that Act as well as by its statute registered in terms of the Act. Its declared object was to provide cleaning services and to manage the rendering of services by its members. The appellant’s statute provided for the expulsion of a member in specified circumstances, by way of
a special resolution granted at a general meeting, the member would receive notice of the recommendation and the particulars of the notice, all of which are prescribed by the Act. The Annual General Meeting of the appellant was completely disrupted by the unruly behavior of a group of members including the respondents’. A meeting was scheduled thereafter for the purpose of passing a special resolution for the expulsion of the respondents’. The respondents’ did not attend the meeting, the meeting was accordingly postponed and after the meeting a decision was taken to dismiss the respondents’ and terminate their membership. Subsequently a special general meeting was called at which a special resolution was passed to give effect to and confirm the dismissal and expulsion of the respondents’.

There was a factual dispute as to whether the respondents’ received various notices sent to them by the appellant to advise them of the meetings and to inform them of the charges against them.

This case concerned an appeal which brings into question the jurisdiction of the High Court vis-à-vis the Labour Court in a dispute arising from employment relations.91

(ii) THE ISSUE OF THE HIGH COURTS JURISDICTION

The appellant’s raised a point in limine that the relief sought by the respondent was a claim in terms of the LRA and the High Court had no jurisdiction to hear or decide the matter. The court a quo held that the respondent’s members were defined as, inter alia, a person who was willing and able to be employed by the co-operative; consequently the fact that the respondents were employed by the co-operative was incidental to them being being members of the body. In any event the appellant dealt with the conduct of the respondents in terms of its statute rather than dealing with them as employees. The court held that the court a quo erred in the reasons for dismissing the objection.

The court referred to section 213 of the LRA which, inter alia, defined employee. The court held that the sole purpose of the respondents’ membership of the co-operative

90 [2008] 9 BLLR 901 (Ck).
91 Nonzamo supra at 904.
was to obtain employment in order to receive remuneration. Their membership was the means by which they achieved that purpose.

The co-operative had no other purpose than providing remunerative employment for its members.

It would negotiate with third parties for work to be done by its members; it would receive payment from the third party and in turn remunerate its members. The members worked for the co-operative not for the third party. The relationship between the appellant and its members was held to be essentially one of employer and employee. This relationship was governed by the Co-operatives Act and the appellant’s statute. The relationship was nevertheless contractual, which was established on a member acquiring membership of the co-operative. The respondent’s cause of action was based on an alleged breach of contract of employment. However the court held that despite the statutory foundation of the appellant, the co-operative was not an organ of State and therefore the provisions of PAJA do not find application.92

(iii) STATUTORY LAW

From a general perspective the court referred to Chapter 8 of the Constitution, confirming that courts in the Republic of South Africa derive their jurisdiction from this Chapter; section 165(1) vests judicial authority of the Republic in the courts, section 166 identifies various courts and section 19(1) of the Supreme Court Act 59 of 1959 which declares that a “provincial division shall have jurisdiction over all persons residing or being in and in relation to all causes arising ... within its area of jurisdiction and all other matters of which it may according to law take cognizance ...”. This wide jurisdiction is delineated by section 169 of the Constitution, 1996. Against this background; section 169, the Court confirmed further that the Labour Court is a creature of the LRA from which it derives its status and jurisdiction.

In this regard the Court referred to section 151(2) of the LRA which confirms that the

92 *Nonzamo supra* at 906.
Labour Court is “a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of a High Court has in relation to the matter under its jurisdiction”. It is therefore a court of equal status to that of a High Court.

The essential question which arises on the point in limine is whether the respondents’ cause of action involved a matter, constitutional or other, assigned by the LRA to the Labour Court. The answer to this question lies in the provisions of the LRA viewed in the light of the Constitution. In the context of section 169 of the Constitution, “assign” has the meaning of vesting exclusive jurisdiction in the designated court in respect of the particular matter. The court further referred to the primary object of the LRA in terms of section 1, namely, to give effect to and regulate the fundamental rights conferred by the Constitution, with specific reference to section 23 of the Constitution.

The area of operation which was held to be applicable in casu was that of section 185 which declares that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice. Regarding the dispute resolution process to be followed, the court referred to section 191(1), regarding the processes of conciliation, arbitration by the CCMA or Bargaining Council and adjudication and review by the Labour Court. The court held further that it is to be noted that in this procedural structure, the Labour Court is not a court of first instance and could be accessed directly only through certain sections highlighted by the court, however none of which related to the dispute-resolution process in terms of the LRA.

The court referred to the nature and extent of the Labour Courts jurisdiction and held that the specific provision of relevance is section 157 of the LRA. With reference to section 157 the court held that this “enigmatic” provision has given rise to considerable judicial interpretation, however the court considered it necessary to deal with only three decisions of the Highest Courts and one delivered by the Eastern Cape Division. The court referred to the Fedlife case, the Fredericks case, the Chirwa case and the Nakin case. The court referred to the issues dealt with in these

93 Nonzamo supra at 908.
cases and this will not be dealt with hereunder as these issues have been addressed and referred to above.

(iv) CASE LAW

The court in referring to the aforesaid judgments held that in the light of these judgments the question which arises is whether we are free to follow the *Nakin* case or are we bound by the *Chirwa* case to the complete derogation of the *Fredericks* case? The court held that this will depend on whether the *Chirwa* case overruled the *Fredericks* case, either expressly or by necessary implication, on the law determinative of the High Court’s jurisdiction in the present matter.

The court held that in the absence of an express indication, a judgment will overrule an earlier decision of the court if the two judgments are mutually irreconcilable. The court will be assumed to intend to overrule the earlier judgment if it delivers its judgment with knowledge of the conflict. However the judgments will not be in conflict if the one is distinguishable from the other on the relevant issue.

The court held that the first step in deciding that question is to identify the full import of the decision of the court in the *Chirwa* case. This involves having regard to the conclusion reached in both majority judgments and the reasons underlying those findings. The majority judgments of Skweyiya J and Ngcobo J were concurred by seven and six judges, respectively, Ngcobo J concurred with Skweyiya J however Skweyiya J did not signify concurrence with Ngcobo J. Skweyiya J nor Ngcobo J expressed any disagreement with the reasoning of the other and neither did the any of the concurring judges express any reservations about either of the judgments. The court accordingly held that we must therefore find consonance in the two judgments. However the minority judgment of Langa CJ is also relevant in so far as it reflects on the import of the two majority judgments. The court held that the following propositions are integral to the judgment of the court:

“(a) Any dispute determinable under section 191 read with section 185 of the LRA is, for the purposes of section 157(1), a dispute to be determined

94 *Nonzamo supra* at 914.
exclusively by the Labour Court.

(b) For that purpose, the LRA dispute-resolution councils and the CCMA constitute ‘the Labour Court’.

(c) For the purposes of section 169(b) of the Constitution, the Labour Court so constituted is ‘another court’.

(d) Any matter ‘to be determined’ under the LRA is a matter to be assigned to such ‘court’ by an Act of Parliament.

(e) The Labour Court, in effect, has exclusive jurisdiction in respect of any alleged or threatened violation of any entrenched right in the Chapter 2 of the Constitution arising from employment and labour relations, despite the fact that section 157(2) of the LRA states that the Labour Court has concurrent jurisdiction with the High Court in such matters. 95

The court held that on a narrow interpretation of Skweyiya J’s judgment; the learned Judge held simply that where a complainant in an employment dispute about her dismissal commenced proceedings under the LRA, she had to continue on that course and that in such circumstances the High Court lacked jurisdiction subsequently to entertain the dispute. On this construction his reasoning, in effect, turned, on election and his extensive commentary on the law would be surplus. However, the court held that reading the judgment as a whole that commentary constitutes he effective rationale for the conclusion reached by him in the matter. The court held that:

“...The Constitutional Court is the highest Court in all constitutional matters. Its comments are read – and are intended to be read – as authoritative. The extensive and purposeful discussion by Skweyiya J of the status and function of the Labour Court is not simply obiter dictum but authoritative pronouncement on the law. Nice distinctions and narrow exceptions have a lesser significance in that Court than do declarations of broad principle. Deciding a jurisdictional question of major import, such as the present, by distinguishing a conflicting earlier decision on the facts or on the characterization of the cause of action, leads to uncertainty and the piecemeal determination of the wider issue. Prospective litigants are entitled to certainty on question of jurisdiction.” 96

Skweyiya J sought to distinguish the Fredericks case on certain grounds. These grounds have been discussed above and will not be repeated here. However the court held that both Skweyiya J and Ngcobo J had regard to the substance of Ms

95 Ibid.
96 Nonzamo supra at 915.
Chirwa’s claim in considering the jurisdictional question. The basis upon which Skweyiya J would distinguish the *Fredericks* case falls outside the real rationale for his conclusions and has no bearing on his interpretation of section 157 of the LRA.

The court held that the finding in the *Chirwa* case that for the purposes of section 157(1) the Labour Court is constituted of the councils of the LRA and the CCMA is crucial to the court’s findings on the exclusive jurisdiction of that “court” under that section. Equally the finding in the *Fredericks* case that the LRA does not confer jurisdictional status similar to that of the High Court on the councils of the LRA and the CCMA is crucial to the court’s finding that the jurisdiction of the High Court is not ousted by section 157(1). On that point alone the cases are in clear and diametric conflict with each other. They also conflict in regard to the jurisdiction of the High Court on constitutional matters under section 157(2) of the LRA. Clearly each case would have been differently decided on the reasoning adopted in the other. The court held that the finding *in casu* would therefore depend on which of the two decisions apply.

Where a court overrules its own earlier decision on the law, it is customary to do so expressly and to indicate the reasons for its findings. In the absence of an express statement in either of the majority judgments in the *Chirwa* case that the *Fredericks* case is overruled, one must examine those judgments and the circumstances in which they were delivered in order to determine whether the court intended by implication to overrule the earlier decision. Skweyiya J distinguished the judgment in the *Fredericks* case, but on a basis not material to the conflict in the judgments. Ngcobo J does not refer to the *Fredericks* case. Neither Skweyiya J nor Ngcobo J refers to the judgment of the Chief Justice.

In the light of the above the Court held:

“It must be accepted that they intended to overrule *Fredericks* to the extent that their judgments conflict with that of O’Regan J. It follows that this Court is obliged to apply the law as stated in Chirwa. That was the course followed by the Full Court of the Transkei High Court in *Mbasse Local Municipality & Others v Mazisi Zingisan Nyubuse* (an unreported judgement, dated 30 May 20088, case number
(v) APPLICATION OF THE CONCLUSION TO THE RESPONDENTS’ CLAIM

The court held that the majority judgments in the Chirwa case do not extend the exclusive jurisdiction of the Labour Court to wrongful dismissal, or indeed to any wrongful act within a contract of employment. Such acts fall outside the ambit of the LRA being neither unfair dismissal nor unfair labour practice. The Fedlife case therefore remains in tact.

In applying the Chirwa case to the facts before the court, reference was made by the court to the respondents’ grounds of review. The court held as follows:

“The respondents base their cause of action on the alleged unfair procedure adopted by the appellant in their expulsion from the co-operative, thereby terminating their employment. This brings their dispute within the ambit of section 191(1) read with section 185 of the LRA, and the authority of Chirwa places it beyond the jurisdiction of the High Court. However, the grounds of review….., suggest that the respondents rely also on wrongful dismissal in breach of their contract of employment found in the provisions of the Co-operatives Act and the appellant’s statute. On the authority of Fedlife, the High Court would have jurisdiction in such a dispute. This raises the unhappy spectre that the respondents’ claim falls partly within the jurisdiction of the Labour Court and partly within that of the High Court. The respondent’s grounds of review must, however, be viewed as a whole within the structure of their application. They seek the review and setting aside of the decision of the appellant to terminate their membership of the co-operative, followed by their reinstatement. This relief falls within the dispute-resolution procedure of the LRA for unfair dismissal. Such relief is, however, inappropriate on a claim based on wrongful breach of contract. The relief sought by the applicant therefore indicates that, in substance, their cause of action is one falling wholly within section 191(1) of the LRA. Furthermore the relevant provisions of the Co-operatives Act and the appellant’s statute are designed to ensure fairness in the expulsion process. In the circumstances, it seems to me that the reference to the breach of the peremptory provisions of the Act in the respondents’ grounds of review … is not intended to found a substantive cause of action of wrongful dismissal, but serves merely to reinforce the respondents’ claim that the procedure followed by the appellant in their expulsion was unfair. It follows that on the authority of Chirwa, supra, the whole of the respondents’ cause of action falls within the purview of the Labour Court to the exclusion of the jurisdiction of the High Court”.98

In the light of the above the court held that the appeal succeeds.

---

97 Nonzamo supra at 916.
It is submitted, with respect, that Skweyiya J sought to distinguish the Fredericks case on the basis that the applicant in that case disavowed any reliance on the constitutional right to fair labour practices neither on any provision of the LRA. It is submitted that this is of relevance. However the court further held that here was a clear and diametric conflict between the Chirwa case and the Fredericks case, as referred to above. It is submitted that the court's finding that the Chirwa case by implication overruled the Fredericks case is not convincing, as much of what the court held in the Fredericks case was not addressed in as much detail as opposed to what was held in the Chirwa case.

In addition, it is submitted, that in the light of the Makanya case, which will be considered in more detail below illustrates the difficulty in accepting the judgment of the court in the Nonzamo case.

5.3 DE VILLIERS v MINISTER OF EDUCATION, WESTERN CAPE

(i) FACTS

The applicant was suspended from service pursuant to certain charges of misconduct of which he was found guilty at a disciplinary hearing, conducted in his absence. A subsequent arbitration award found that the dismissal was procedurally and substantively unfair and ordered reinstatement. The applicant was instructed to report for duty, however a trade union representative advised that the instruction was in contravention of the award. The applicant failed to take up his appointment.

Subsequently the applicant was deemed to be discharged in terms of section 14(1) of the Employment Educators Act 76 of 1998 in that he did not report for duty for a period of 14 consecutive days. The applicant applied for his reinstatement, but the second respondent in exercising discretion, declined to reinstate the applicant.

An application was brought in terms of section 6(2) of the PAJA in respect of the decision to decline to reinstate the applicant.

98 Nonzamo supra at 916-917.
99 2009 (2) SA 619 (C).
(ii)  *IN LIMINE OBJECTION*

The second respondent raised an objection that the High Court lacks jurisdiction to consider this matter as the decision not to reinstate the applicant in terms of section 14(2) was taken in his capacity as employer in terms of section 3(1)(b) of that Act. Therefore the impugned decision relates to the employment relationship and not to administrative action under the AJA, as the decision was not taken as an exercise of public power by an organ of State.

In the light of the above the dispute falls to be determined by reason of the provisions of the LRA which stands to be properly heard by the Labour Court.

(iii) **THE CHIRWA CASE**

The court referred to the facts of the *Chirwa* case and the decision of the High Court and the SCA. The court concluded that an in the light of the Constitutional Court’s decision, an employee in the public service no longer has a choice between a cause of action based on the LRA or the PAJA and therefore such an employee cannot circumvent the dispute procedures set out in the LRA.

(iv) **THE NAKIN CASE**

In the *Nakin* case, the court declined to follow the *Chirwa* case, as seen above, and relied on the earlier decision of the Constitutional Court in the *Fredericks* case. The question of jurisdiction arose and the court held that the approach adopted in the *Fredericks* case had to be applied.

Therefore on the authority of the *Fredericks* case, the High Court has jurisdiction to determine on the merits whether there is a claim based on alleged unlawful administrative action.
(v) **THE FREDERICKS CASE**

The court referred to the *Fredericks* case and what that case dealt with. The *Fredericks* case has been dealt with in detail above and in order to avoid repetition it will not be restated here. However the court in the *De Villiers* case held that in considering the *Fredericks* case; in essence, when the application of a collective agreement amounts to a contravention of the right to equality and fair administrative action and that labour rights under section 23 of the Constitution are not implicated, then any decision which applies to a collective agreement constitutes a constitutional matter which can be entertained by the High Court in terms of section 169 of the Constitution read with section 157(2) of the LRA.

(vi) **RECONCILING THE CHIRWA CASE WITH THE FREDERICKS CASE**

The court held that the majority judgment in the *Chirwa* case answers the issue which was expressly left open in the *Fredericks* case, namely; the position where section 23 can be directly implicated in the dispute. The *Chirwa* case held that the right to fair labour practices and the right to just administrative action were separate and distinct rights. The fact that in terminating the applicant’s contract of employment involves a public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined with regard to section 33 of the Constitution. The subject-matter of the power involved the termination of a contract of employment. The source of the power is the employment contract and the nature of the power is contractual. The fact that Transnet is a creature of Statute does not detract from the fact that in terminating the contract of employment it was exercising a contractual power. It does not involve the implementation of legislation which constitutes administrative action.

The relevant conduct is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating an employment contract into administrative action. In the light of the above the conduct of Transnet in terminating the employment contract does not amount to administrative action.
The court then referred with approval to Cheadle and confirmed that where rights overlap, the proper right to resort to in each case is the more specific one. Where rights share same values, as fairness does in equality, the right to fair labour practices and fair administrative action, the courts have to locate the primary constitutional breach in the more specific right as was the case in the majority judgments in the Chirwa case.

(vii) THE PRESENT APPLICATION

The court then considered the various provisions applicable in casu, namely, section 14(1) and section 18(2) of the Employment Educators Act and the question as to the status of the deemed dismissal in terms of section 14(1) and its relationship to a dismissal on grounds of misconduct as set out in section 18(2).

The legal meaning of the word “deemed” taken in its general sense means “considered” or “regarded”. A deemed dismissal in terms of section 14(1) on account of misconduct should be treated in a similar fashion to a dismissal on account of misconduct in terms of section 18(2). The provisions of the Act that govern dismissal due to misconduct ought to apply in a similar fashion. Reference in Schedule 2 of the Act specifically incorporates Schedule 8 of the LRA.

In the light of the above the court held that section 14(1) is subject to the same scrutiny as section 18(3)(i), such conduct being capable of being tested against the Code of Good Practice in Schedule 8 of the LRA. Therefore an enquiry into the refusal of an employer to reinstate the applicant in accordance with the provisions of section 14(2) manifestly necessitates an enquiry into the conduct of the parties after an award as been delivered.

(viii) THE APPROACH ADOPTED IN THE CHIRWA CASE

The question which arose was regarding the powers invoked pursuant to an investigation into a dispute. The court held that the power concerns the termination of a contract of employment, the source of the power is the contract of employment
and the nature of the power concerns the employment relationship. The mere fact that the employer is an organ of State which exercises public power does not convert the impugned conduct into administrative action.

The court held that it is a matter which falls broadly under section 23 rather than section 33 which is concerned with acts of administration performed by an organ of State. In support of the above the court referred to the majority judgment of Ngcobo J wherein the learned Judge held, *inter alia*, that the LRA brings all employees, public and private under it, except those specifically excluded.

The court held further that the majority in the *Chirwa* case required an examination of the substance of the dispute. The court held that *in casu* the dispute is based on an employment relationship and its termination.

The court then referred to the minority judgment in the *Chirwa* case and noted that the implication is that there is no constitutional reason to prefer adjudication of a claim that may simultaneously constitute both a dismissal and administrative action, under the LRA rather than the PAJA. The Legislature could resolve any potential problems of duplication by conferring sole jurisdiction to deal with any disputes concerning administrative action under the PAJA arising out of employment upon the Labour Court. So far the Legislature has not chosen this route. Langa CJ held that rights overlap between the LRA and the PAJA and hence both pieces of legislation should apply. However the court held that the approach which was adopted *in casu* was congruent with the majority judgments in the *Chirwa* case, namely; that the right to which resort should be made in the present case should be based upon the following considerations:

- Examine the substantive nature of the dispute;
- If it is an a dispute that falls under the LRA; then
- Rely upon the more specific right; *in casu* the right to fair labour practices as opposed to the more general right to fair administrative action.
The court held in conclusion that the applicant had chosen to launch his application in the incorrect forum by relying on the PAJA rather than upon the Employment Educators Act read together with the LRA. The court held further that the Labour Court has exclusive jurisdiction to determine the outcome of this application.

It is clear from the above that the court followed the *Chirwa* case and specifically addressed the issue where section 23 is directly implicated which was not dealt with in the *Fredericks* case. However it is submitted that with reference to the *Fredericks* case should a litigant plead a case properly relying on the right to equality or contract, that the civil courts in those instances would have jurisdiction to entertain such cases. However, it appears that regarding the issue of a litigant approaching the civil courts relying on a right to fair administrative action and where such a case falls under the LRA, the *Chirwa* case has held that civil courts in these instances do not have jurisdiction to entertain such cases.

5.4  *TRANSMAN (PTY) LTD v DICK*¹⁰⁰

(i)  **FACTS**

The respondent employee and his wife started the labour broking business out of which the appellant company was formed, and both held equal shares. After the couple experienced marital problems, their working relationship suffered as well. Ultimately, the employee was charged with misconduct, suspended from duty and instructed to appear before a disciplinary inquiry. The presiding officer recommended that the employer be dismissed, which recommendation as accepted by the board. The employee was duly notified that he had been “retired”.

The employee instituted a review application challenging the termination and the second respondent’s verdict which underpinned it.¹⁰¹


¹⁰¹  *Transman (Pty) Ltd supra* at 631.
PROCEEDINGS IN THE HIGH COURT

In review proceedings, the High Court held that the disciplinary proceedings constituted administrative action and that the employee was entitled to a fair pre-termination procedure and to a separate hearing before the board. The court *a quo* ruled the presiding officer’s finding of guilt was grossly unreasonable and set aside that finding, but did not interfere with the board’s decision to terminate the contract. On appeal, the company argued that the High Court lacked jurisdiction to entertain the matter, and that the disciplinary proceedings did not constitute administrative action and that, insofar as the employee might have been contractually entitled to a fair pre-dismissal procedure, there was no such term in the contract. The employer contended that both the chairperson’s verdict and the termination of employment were not susceptible to review because those decisions did not constitute administrative action and principles of administrative law do not apply to the matter. Regarding jurisdiction the employer argued that in the light of section 157 of the LRA the High Court lacked jurisdiction to hear the matter.

On appeal the SCA held that it was necessary to remark on the findings of the court *a quo* and referred to two issues:

- Before the decision of the *Gumbi* case the right to a pre-dismissal hearing was not implied at common law and this necessitated the development of the common law in terms of section 39(2) of the Constitution. As from the date of delivery of the judgment in the *Gumbi* case the right of every employee to a pre-dismissal hearing is implied at common law. Since that judgment was delivered after the cause of action had arisen in the present case reliance on the *Gumbi* case was misplaced.

- In its reasoning the court *a quo* conflated the concept of extending the application of administrative law principles to employment contracts with administrative review. It spoke of the employee being entitled to a contractual relief and yet it approached and decided the matter as if it amounted to administrative action. It reviewed and set aside the chairperson’s verdict on the basis that it was grossly unreasonable. Taking a step further than just setting
as aside the verdict, the court substituted such verdict with its own verdict of not guilty. The relief granted is not in keeping with a contractual claim and there was no legal basis for replacing the verdict with one of not guilty. For reasons that are not apparent from the judgment the court below left the termination intact after rescinding its underlying reason—the recommendation of dismissal.102

(iii) THE ISSUES

The court held that three issues were raised in this court:

• Whether the High Court had jurisdiction to adjudicate the case;

• The competence of the relief claimed in view of the nature of the impugned decisions. The issue is whether the validity of such decisions can be challenged by invoking administrative review procedure; and

• Whether on the papers the employee has made out a case for a pre-dismissal hearing based on the terms of the employment agreement.103

(iv) JURISDICTION

The court held that the proposition that administrative action disputes are justiciable in the High Court is without controversy. What has been controversial is whether a set of facts supporting a claim of an unfair dismissal could at the same time give rise to a violation of administrative justice rights. In considering this, the court held that this controversy has been settled by the Constitutional Court in the Chirwa case and the court referred to the Chirwa case in confirmation.

However the court held as follows in respect of the meaning of the Chirwa case:

“It is important to note that in Chirwa, supra the Constitutional Court deprecated the proposition that civil servants have two causes of action, but only in so far as the second cause of action is based on section 33 of the Constitution or the

102 Transman (Pty) Ltd supra at 632-634.
103 Transman (Pty) Ltd supra at 634.
Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The decision in Chirwa prohibits the use of review process in challenging the validity of a dismissal from employment. What this means is that a cause of action based on a contractual breach is still permissible. But for the purposes of determining jurisdiction the fact that incompetent relief is sought is immaterial. Such enquiry does not entail the outcome of an adjudicative process. The issue that is essential to the enquiry is whether the court has authority to adjudicate a particular dispute. The incompetence of the claim made in the present case, therefore, plays no part in the determination of the High Court’s jurisdiction. As stated earlier, the employee has instituted review proceedings over which the High Court unquestionably has jurisdiction”.104

It is at this stage submitted that if one considers the above quote, it is submitted that to an extent it is almost consistent with the judgment Nugent AJ and the issue of separation of a special plea based on jurisdiction as opposed to a particular claim in these circumstances is bad in law. Whether a claim is bad in law does not necessarily deprive a court of jurisdiction and it appears to be consistent with the Jaftha AJ’s findings above.

(v) WAS THE REVIEW APPLICATION COMPETENT?

The answer to this question lies in whether the chairperson’s verdict and the termination of employment constitute decisions which are reviewable in administrative law. On the authority of the Chirwa case such decisions cannot be reviewed either under the PAJA or section 33 of the Constitution. The court held that although the Chirwa case dealt with employment in the public sector there was no reason why the same principle should not apply to private sector employment.

In casu the employee eschewed any reliance on the LRA and the court below found that that Act did not apply to the matter.

It dealt with the case on the basis that the relief claimed was competent at common law. Proceedings from this premise the court below then invoked the common law standard of gross unreasonableness as a basis for setting aside the chairperson’s verdict.

However, the court held that the question which arises is whether it is permissible to

104 Transman (Pty) Ltd supra at 635.
do so in the light of the decision in the *Chirwa* case. Does the review procedure at common law continue exist side by side with the system entrenched in the Constitution?\textsuperscript{105} In considering this question the court referred to the Constitutional Court’s decision of *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa.*\textsuperscript{106} In that case Chaskalson P, writing for a unanimous court held as follows:

“I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”\textsuperscript{107}

The court held that even if the *Chirwa* case did not stand in the way of the relief sought by the employee *in casu*, it would be equally incompetent to grant such relief at common law. Barring public sector employment contracts, our common law has always drawn a clear line of distinction between the branches of law which govern employment matters on the one hand, and administrative action on the other. The former is governed by the labour or employment law rules and the latter by administrative law rules. However, before the decision in the *Chirwa* case there was an overlap between the two branches of law when it came to public service contracts. The application of administrative law rules was extended to employment matters for two reasons, namely; the employment and dismissal of public servants was regulated by statute and public servants were denied the procedural fairness process that applied to dismissals of employees in the private sector under the LRA of 1956.

Since the *Chirwa* case, public servants can no longer invoke administrative review to challenge the validity of dismissals. However the court held that this does not mean that parties cannot incorporate administrative law requirements into their employment agreements. In that event, the failure to comply with such requirements would be a breach of contract and ordinary contractual claims would be available to the aggrieved party. The incorporated requirements cannot convert what is essentially a

\begin{footnotes}
\footnote{105} Ibid.
\footnote{106} 2000 (3) BCLR 241.
\footnote{107} *Transman (Pty) Ltd* supra at 636.
\end{footnotes}
contractual claim into an entitlement to judicial review on any of the grounds recognized in law. The court held that the court below failed to draw this distinction.

The court held further that there can be no doubt that the object of administrative law rules such as the rules of natural justice is to afford procedural fairness to the party against whom the decision is taken. It is also true that judicial review is not the only mode through which procedural fairness can be achieved in an employment setting. The LRA imposes a duty on employers to act in a fair manner when effecting dismissals. As does the common law since its development in the *Gumbi* case. In addition, where the parties have agreed to incorporate rules of natural justice into their employment agreement, the employee can insist on compliance with such rules by means of a contractual claim. The court concluded that there is no need to permit a challenge based on judicial review in employment dismissals. It follows that the employee in this regard misconceived his cause of action.108

(vi) **HAS THE EMPLOYEE MADE OUT A CASE FOR A CONTRACTUAL PRE-DISMISSAL HEARING?**

The court held that Counsel for the employee argued that the employee was entitled to a second hearing before the board terminated his employment.

He submitted that this entitlement arose from an implied term of the employment agreement. The court held that the parties to an employment contract may set a standard of procedural fairness applicable to their employment relationship by incorporating principles of natural justice into their agreement. Such incorporation may either be express or tacit. *In casu* the incorporation is claimed to have been tacit and the test ordinarily applicable a determination of a tacit term applies. In referring to the relevant test, the court referred in support to the decision of *City of Cape Town (CMC Administration) v Bourbon – Leftleyh.*109 In that case Brand JA said:

"(A) tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or the other, remained

---

108 *Transman (Pty) Ltd* supra at 637-638.
unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependant on the facts. But as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so ...

It follows that a term cannot be inferred because it would, on the application of the well-known ‘officious bystander’ test, have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it in the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such term if it had been suggested to them at the time … If the inference is that the response by one of the parties to the bystander’s question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified."

In the light of the above the court held that in casu the duty was on the employee not only to plead a contractual claim but also to prove facts from which the contended tacit term could be inferred. This the employee did not do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment. In fact the employee did plead the terms of the employment agreement between himself and the employer.

Jaftha JA therefore held in conclusion that the requirements of the test for importing terms into a contract had not been satisfied and the court below erred in assuming that the employment contract was “subject to an implied term that he would be afforded a fair hearing before he was dismissed”. The court held that the appeal must succeed.\textsuperscript{110}

In addition to the above, Hurt AJA wrote a minority judgment in respect of which the learned Judge held that he agreed with the order of Jaftha AJ, however the learned Judge considered that justification for the order could be found on a more simple basis.

The learned Judge referred to the approach adopted by Van Olsten J in the High

\textsuperscript{110} Transman (Pty) Ltd supra at 638-639.
Court and considered the evidence in the record of the disciplinary enquiry and the evidence and submissions in the review application.

The learned Judge referred further to the findings of the High Court, namely; the chairperson’s decisions to find the applicant guilty on what may be referred to as the “main charge” as well as on various other charges of a less serious nature were either grossly unreasonable or not based fairly upon the evidence adduced by the employer, that a decision to suspend the applicant pending the resolution of the disciplinary proceedings and a decision by he Board of Directors to retire the applicant from service as an employee were irregular and unlawful because the *audi alteram partem* rule had not been followed before these decisions were taken.

Hurt AJA held that there are two features of the situation in which an employee challenges disciplinary proceedings and/or dismissal on a contractual basis as opposed to the “unfair labour practice” with which the LRA and proceedings in the Labour Tribunals are concerned. The first is that, having based his claim on contract, it is incumbent on the employee to prove the terms of the contract on which he relies and the breach which entitles him to the relief.

The second is that the relief which he seeks must be relief in terms of the common law of contract. In confirmation the learned Judge held that this has been clearly established in the judgments of the *Lamprecht* case, the *Fedlife* case and the *Denel* case.

The learned Judge held further that there is no evidence in the founding papers which establishes the applicant’s contract of employment. In this situation the question which arises is in what respects does the applicant allege that the disciplinary proceedings constituted a breach of Transman’s contractual obligations toward him? It is not enough for the applicant to contend a general implied term that he would be “afforded a fair hearing” because what constituted a fair hearing in this particular situation would plainly depend on the contractual provisions read as a whole. There is clearly an infinite number of ways in which steps can be taken to ensure that an employee is given a fair hearing in matters which may affect his interests, particularly in the cases of disciplinary action or dismissal. Where the
contract contains express provisions in this regard, these must be followed. Where such provisions must be implied, there nature and extent must be gauged by reference to the contract as a whole so that a “clear and exact formulation” can be arrived at. It follows that the applicant cannot establish his case as a breach of contract without taking the primary, elementary step of proving the contract on which he relies. Therefore the applicant’s case cannot succeed at its threshold for want of proper proof of his contract.

In addition the learned Judge held that the relief granted by the High Court was plainly not contractual. If a breach of contract was established, the applicant was entitled to an order that Transman perform its obligations under the employment contract and such damages as the applicant may have suffered by virtue of he breach, or an order declaring the contract cancelled and appropriate compensation to the applicant pursuant to such cancellation.

The learned Judge held further that he agreed with Jaftha AJ regarding the finding referred to above pertaining to the contention that the decision to retire the applicant without first affording him the right of making representations to Transman’s Board was a breach of contract.111

5.5  

MOHLAKA v MINISTER OF FINANCE112

(i) FACTS

The applicant was a partially sighted call centre attendant and resigned from his employment with the second respondent (employer) and claimed constructive dismissal. The applicant referred a dispute to the CCMA outside the time limit prescribed by the LRA and unsuccessfully sought condonation. More than 2 years later the applicant launched an application for damages under in terms of section 77 of the BCEA.

The respondents contend that the court lacked jurisdiction to entertain the matter due

111 Transman (Pty) Ltd supra at 639-641.
to the following reasons:

- The applicant could not sue for breach of contract under the BCEA;
- The applicant had not complied with the Institution for Legal Proceedings Against Certain Organs of State Act; and
- The claim had prescribed.

(ii) JURISDICTION: THE SCHEME OF LABOUR LAWS

The court in dealing with the exception raised by the respondents considered the Explanatory Memorandum to the Labour Relations Bill (1995) and the Chirwa case.

Regarding the Chirwa case the court noted that the contest was between administrative law and labour law; the LRA and PAJA and between the jurisdiction of the Labour Court and the High Court.

*In casu* the contest was between the contract of employment and labour law, between the LRA and the BCEA and between the jurisdiction of the CCMA and the Labour Court.

The court held that the crux of the reasoning in the Chirwa case was that effect should be given to the primary objects of the LRA; a “purpose-built employment framework” as referred to above. Rather a construction which gives full effect to the policy and objectives of the LRA should be preferred.

The principle that where Parliament in the exercise of its legislative powers and the fulfillment of its constitutional obligation to give effect to a constitutional right, enacts the law, courts must give full effect to that law and its purpose. Accordingly, the provisions of section 157(1) and (2) must be construed purposively in a manner that gives full effect to each without undermining the purpose of each.

The court reiterated Skweyiya J’s remarks regarding the express aims of the Labour
Relations Bill being to address the lack of an overall and integrated legislative framework for regulating labour relations by proposing a single statute that was to apply to the whole economy whilst accommodating the special features of the different sectors. Reference was also made to section 210 of the LRA which provides for the LRA prevailing over another statute in conflict with its provision (except for the Constitution). The court noted that unless the LRA and the BCEA are consistently read and seen as legislation complimentary to each other, the BCEA will conflict with the LRA if it duplicates processes and remedies already provided for in the LRA because duplication is what the Legislature sought to avoid.

Accordingly the Chirwa case set out to streamline the resolution of labour disputes under the LRA. The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public. The purpose of labour law is to bring about fairness in employment. The court noted that Skweyiya J held that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the dispute.

This approach was reinforced in SANDU v Minister of Defence and Boysen v SAPS where Cheadle AJ was referring to the synergy between the Constitution and the LRA and the BCEA. Cheadle AJ held that the LRA and the BCEA were a response to notorious problems plaguing labour law, uncertainty about rights and obligations of employees and employers, contradictions in labour policy, the expense of dispute resolution, inequality of treatment of workers arising from the application of differential laws by different institutions and disconnection between the LRA 1956 and the BCEA 1983. The aims of the LRA were to remedy these problems. These aims are embodied in the primary objects of the LRA. When adjudicating labour disputes courts must give effect to the primary objects of the BCEA and the LRA. These objects are to give effect to and regulate the fundamental constitutional right to fair labour practices. The Legislature carefully demarcated the LRA as a statute regulating collective bargaining, dismissal and unfair labour practices and the BCEA as a statute establishing, regulating and enforcing basic conditions of employment.

Initially the legislative plan was to shift the unfair dismissal chapter from the LRA to the BCEA or another statute dedicated to individual employment law so that the LRA
remained exclusively a collective bargaining statute. Although this has not occurred, the location of dismissal law in the LRA is a matter of form. Substantively the two statutes regulate discreet issues and prescribe particular processes. However the court held that if dismissal law were located in the BCEA, this would minimize if not eliminate, the scope for litigants shopping for a forum between the LRA and the BCEA.

The codification of the law of dismissal also struck a new balance to the common law contract of employment. It added the notion of fairness to the limited concept of unlawfulness and the LRA imputes the right to fair labour practices as a term in every contract of employment. An unfair dismissal is also an unlawful dismissal because it violates the LRA and constitutes a breach of the contract of employment.

The codification extended to compensation for breach of contract beyond the notice period prescribed under the common law from 12 to 24 months. It made reinstatement and re-employment primary remedies. It prescribed inexpensive dispute-resolution processes to remedy breaches of contract. Codification created certainty about basic conditions of employment.

Section 77(3) of the BCEA provides for concurrent jurisdiction to determine any matter concerning a contract of employment, irrespective whether any basic condition constitutes a term of that contract. The court held that this term cannot be interpreted so widely as to include any matter concerning the contract of employment which is already regulated in the LRA.

Accordingly the Court held that to allow concurrent jurisdiction between the Labour Court and the CCMA would resuscitate the problems identified under the old laws. The Legislature could not have intended this.
(iii) DEVELOPING THE COMMON LAW TO ACQUIRE JURISDICTION

Does the common law contract of employment have a place in this scheme?

The court held that in order to answer this question reference must be made to section 173, section 8(3) and section 39(2) of the Constitution.

- Section 173 confirms the inherent power of the High Court and inferentially the Labour Court to develop the common law;

- Section 8(3) prescribes that courts must apply or if necessary develop the common law “to the extent that legislation does not give effect to “ a right in the Bill of Rights, furthermore when developing he common law courts must take into account the interests of justice (section 173); and

- Section 39(2) which urges a court to when interpreting legislation and developing the common law to promote the spirit, purport and objects of the Bill of Rights.

The court held that the “net effect” of these provisions is to tightly constrain the courts’ powers to develop the common law within narrow limits. Courts may not embark on an independent exercise to develop the common law in every case where the common law is in issue. The court referred to an obvious instance where the common law must be developed when legislation does not regulate an issue, for example; the premature termination of fixed-term contracts.

The court held further that the LRA and the BCEA must be applied to the interpretation of the contract and the contract must be applied consistently with the right to everyone to fair labour practices and with international law. An instance where the common law can be invoked is when the mechanical application of the text of legislation has the effect of denying or diminishing rights in conflict with the Constitution. A purposive interpretation of both the Constitution and labour legislation ensures that courts give effect to the primary intention of the Legislature.
The court held that the primary intention of the LRA, BCEA and the Constitution is to correct structural inequality in employment by elevating the otherwise vulnerable position of employees under the common law. Neither the Constitution nor the Legislature takes away or diminishes rights, especially not the weak and the vulnerable. The court held that outside the constitutional and human rights setting, relying on the common law contract of employment can destroy labour rights because not all contracts favour employees. In this regard the court noted that the employees reliance on the common law was misplaced in the *Gumbi* case and the *Boxer Superstore* case.

Regarding the *Gumbi* case the court held that the cause of action fell squarely within the LRA, which codified the common law and the SCA should not have accepted jurisdiction. Instead the SCA developed the common law by referring to previous cases which applied the *audi alteram partem* rule and to the International Labour Organisation’s Convention on the Termination of Employment (insert footnote). The court held that this was unnecessary. In the LRA the Legislature codified best practice and policy and took into account international labour standards of the ILO, the UN Universal Declaration on Human Rights and the Directives of the EU.

The codification of the labour law under the LRA extended over a year. This entailed consultation with experts from the ILO, Trade Unions, Employers Organisations and other stakeholders which chiseled numerous drafts until it was acceptable to all stakeholders. Accordingly the richness of the process of legislative law-making thus far outweighs judicial law-making. Judicial law-making arises when the law does not regulate a situation, not when the Legislature exercises its prerogative to legislate, as it did in labour law.

Regarding the *Boxer Superstores* case, the SCA accepted jurisdiction because the claim was formulated in terms of contractual unlawfulness and not fairness. The court applied the decision of the *Gumbi* case and reiterated that the contract of employment includes a right to a fair dismissal hearing. The court held that the two SCA decisions resuscitate all the problems the LRA and the BCEA sought to avoid; competing jurisdictions, multiplicity of forums, high costs of protracted litigation, uncertainty about process, its costs, timing and outcome.
In referring to the *Boxer Superstores* case, Ngcobo J in the *Chirwa* case exposed the difficulties of preferring form over substance in that this would enable astute litigants to simply by-pass the whole conciliation and dispute-resolution machinery created by the LRA and rob the Labour Courts of their need to exist. Ngcobo J went further and proffered an answer as referred to above, that the courts must give effect to the primary objects of the LRA.

It is clear that for Judge Pillay the real issue is that that development is calculated to deprive the statutory labour forums of their reason to exist; if employees may enforce a general duty of fair dealing against their employers as a contractual entitlement, what prevents them from approaching the High Courts with complaints relating to any unfair dismissal or other unfair labour practices enumerated in the LRA? What becomes of the specialist forums upon which the LRA confers exclusive jurisdiction to deal with employment an labour matters?

In the light of the majority judgments of Skweyiya J and Ngcobo J, the court held that it was not bound to follow the above two SCA decisions and found further support in the *Makambi* case (to be discussed hereunder) where Nugent AJ confirmed that the lower courts may deviate from the “schizophrenic” decisions of the higher courts. Accordingly the court held that the employee’s attempt to introduce a claim for compensation based on the common law contract of employment through section 77 of the BCEA had to fail. Judge Pillay decided that she was free to disregard the SCA’s judgments and to follow the *Chirwa* case, not because the Constitutional Court was schizophrenic but because by developing the common law contract of employment to incorporate an implied term of fair dealing, the SCA had given the common law a split personality.

The above decision should be considered in the light of the discussion which follows. However, before proceeding further it is submitted that it would appear as though the court in this case relied on *Chirwa* case as binding precedent for its decision, the issue of precedent will be addressed in more detail below. However although the court’s reference and reliance on the Memorandum to the Draft Labour Relations Bill was in order, it is submitted that one has to consider when the Memorandum was
prepared. It is submitted that this is a relevant factor to consider as legislation should not be seen as giving effect to a constitutional right and accordingly unable to be altered under any circumstances. In this regard it is submitted further that at the time of drafting the Memorandum the difficulties identified were accurate, however this does not take away from the fact that there is a risk that in promulgating a piece of legislation to give effect to and regulate a constitutional right not each and every potential difficulty can be provided for which may arise, hence the need to amend legislation. It is submitted at this stage that it could not have been the intention of the Legislature to relegate the common law as something of the past and for the LRA and the BCEA to serve as a substitute and complete codification. It is submitted that such a view, with respect, if anything would potentially inhibit the growth and development of law in general and possibly result in stagnation.

5.6  **MOGO THLE v PREMIER OF THE NORTH WEST PROVINCE**\(^{113}\)

(i) **THE FACTS**

The applicant launched an application in terms of sections 158(1)(a)(i) of the LRA and section 77(3) of the BCEA. The applicant was the Deputy Director-General of Agriculture, Conservation and Development of the North West Province and was suspended from duty after the publication of a newspaper article in which it was alleged that he was involved in corruption. Initially it was agreed to by the applicant that he would take leave of absence for one month during which it was anticipated that an investigation would be concluded. However the Legislature then resolved that a further investigation be conducted by the Auditor-General, the applicant’s leave of absence was extended indefinitely pending the conclusion of the investigation. The applicant launched an urgent application, contending that he had been unlawfully suspended because he was not afforded a hearing before his suspension was extended. The applicant’s action was based on an alleged breach of contract, alleged failure by the respondents to comply with the provisions of the disciplinary code for the managers in public service and alleged violation of hid rights under PAJA.

\(^{113}\) [2009] 4 BLLR 331 (LC).
The respondents resisted the application and contended, \textit{inter alia}, that the court lacked jurisdiction to entertain the matter. The applicant’s application was accordingly based on three grounds, namely; breach of contract, breach of statute and PAJA.

Regarding the alleged breach of a statute; this was founded primarily on the Senior Management Service disciplinary code which governs senior managers in the public service. However it was not clear to the court whether the “sms code” was a statutory or other regulatory measure, or a collective agreement or both. The court was unable to discern any clear right that might stem from the code as a statute.

Regarding the application of PAJA, the court considered and referred to the \textit{Chirwa} case. The court held that the \textit{Chirwa} case casts doubt on whether public sector employees have a right to claim that the exercise of a contractual power by their employers, where that conduct is concerned with labour or employment relations, constitutes administrative action for the purposes of PAJA. The court confirmed that the two majority judgments held that a remedy under section 33 of the Constitution is not available to public sector employees who complain of unfair conduct by their employer.

However the court noted that both the majority judgments expressly leave open the question of whether PAJA affords a remedy in these circumstances. With reference to the minority judgment of Langa CJ states expressly that his conclusion that the dismissal of Ms Chirwa was not administrative action under PAJA should not be construed to mean that dismissals of public sector employees would never constitute administrative action under PAJA.

However the court held that \textit{in casu} it was not necessary to determine whether the applicant had a remedy under PAJA, as only that part of the applicant’s claim founded on contract was considered.
(ii) FAIRNESS AND THE COMMON LAW CONTRACT OF EMPLOYMENT

The court referred to the trio of decisions where the SCA emphasised the mutual relationship of trust and confidence that the common law contract of employment imposes on both employers and employees.

With reference to the Gumbi case the court held that the SCA developed the common law contract of employment in accordance with the Constitution to include a contractual right to a pre-dismissal hearing. In the Boxer Superstores case the SCA confirmed the Gumbi case and held that every employee has a common law contractual claim, not merely an unfair labour practice statutory right to a pre-dismissal hearing.

In Murray case the SCA derived a contractual right not to be constructively dismissed from what it held to be a duty on all employers of fair dealing at all times with their employees. This continuing obligation of fairness that rests on an employer when it makes decisions that affect an employee at work; was held by the court to have both a procedural and substantive dimension.

The court held that the development of the common law by the SCA is not uncontroversial. It has been criticized for opening the door to a dual jurisprudence in which common law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA. The SCA has unequivocally established a contractual right to fair dealing that binds all employers in regard to substance and procedure and which exists independently of any statutory protection against unfair dismissal and unfair labour practice. The court concluded that this Court (Labour Court) is bound by the SCA authorities referred to above and is obliged, in the absence of a higher authority, to enforce a contractual right to fair dealing between employer and employee.

(iii) DOES CHIRWA CASE DENY THE APPLICANT A CLAIM IN CONTRACT?

The respondents contended that in the absence of any reliance on the provisions of the LRA the Labour Court had no jurisdiction to entertain the applicant’s claim. In
addition the respondents contended that on a broad reading of the *Chirwa* case, the judgment had the effect of overruling the trio of judgments by the SCA. Accordingly, if the applicant had any claim it was one contemplated by the LRA and no other.

The court held that the narrow question considered in the *Chirwa* case was whether Parliament had conferred jurisdiction to determine Ms Chirwa’s claim on the Labour Court and other dispute-resolution institutions created by the LRA and whether, expressly or by necessary implication, the jurisdiction of the High Court had been ousted.

At a higher and more policy-orientated level, the *Chirwa* case might be read to require that all employment-related disputes involving allegations of unfair conduct by both public sector and private sector employers ought to be dealt with in terms of the dispute resolution institutions and mechanisms of the LRA. The court held that this suggests that the objective of the LRA was to be exhaustive of the rights arising from employment.

The court noted that although the *Chirwa* case is a clear endorsement of the virtues of mechanisms, institutions and remedies crafted by the LRA and the merits of what Skweyiya J termed a “one-stop shop” for all labour-related disputes established by that statute, the court held that it did not understand the judgment to expressly exclude the right of an employee to pursue a contractual claim, either in the Labour Court or a civil court with jurisdiction (section 77(3) of the BCEA).

The court held further that nowhere in the judgment of the *Chirwa* case is it unequivocally stated that the effect of the legislative reforms effected after 1994 and the creation of specific statutory remedies to address unfairness in employment practices, is to deprive an employee of any common law contractual rights, or of the right to enforce them in a civil court, or in this court, in terms of section 77(3) of the BCEA. If the Constitutional Court intended to make a ruling to this effect it would have done so in express terms.

In the light of the above the court concluded that the *Chirwa* case does not have the effect of confining an employee only to the remedies provided by the LRA and this
does not fly in the face of the policy reasons that underpin the concern, expressed in the majority judgments of the Constitutional Court, to protect the integrity of the system of conciliation, arbitration and adjudication within specialist structures, a system agreed to by social partners, after careful balancing of competing interests.

The BCEA enacted some two years after the LRA is just as much a product of negotiation by the social partners and the Act represents as much of a finely balanced compromise as the LRA.

When the social partners agree to the terms of section 77(3), they acknowledged that disputes concerning contracts of employment had not been eclipsed by the LRA and the Labour Court ought appropriately to be conferred with powers to determine contractual disputes, concurrently with the civil courts.

In summary the court held:

- the approach adopted by the majority in the SCA in the *Fedlife* case remains intact post-*Chirwa*;

- the LRA does not expressly or impliedly abrogate an employees' common law entitlement to enforce contractual rights;

- the SCA trio of judgments unequivocally acknowledge a common law contractual obligation on an employer to act fairly in its dealings with employees;

- this obligation has both a procedural and a substantive dimension;

- in determining the nature and extent of the mutual obligation of fair dealing between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed over the years;

- if any dual system of jurisprudence emerges as a consequence and if this
represents an undesirable outcome from a policy perspective, that is a matter for the Legislature to resolve; and

- finally, if an employer acts in breach of its contractual obligation of fair dealing, the affected employee may seek to enforce a contractual remedy which may, by virtue of section 7(3) be sought in the Labour Court.

(iv) **DID THE RESPONDENT ACT IN BREACH OF ITS OBLIGATION OF FAIR DEALING IN SUSPENDING THE APPLICANT?**

The court then proceeded to consider the question whether the respondent acted in breach of its obligations of fair dealing in suspending the applicant. However save and except to state that the court’s findings regarding the application of the contractual principle of fair dealing are very instructive, a detailed reference thereto falls outside the topic under discussion.

It is submitted, in agreement with the court in the *Mogothle* case that the *Chirwa* case concerns in essence administrative action and is not extended an employees entitlement to pursue a contractual remedy as elaborated upon in the above case. However, it is worthwhile noting the court’s reference to the minority judgment of Langa CJ where it noted, *inter alia*, that the learned Chief Justice indicated that dismissals of public sector employees should not be construed as never constituting administrative action under PAJA. In this regard it is submitted that an additional issue is whether the *Chirwa* case can be regarded as an absolute precedent in this regard or will it depend on the facts of a particular case whether the *Chirwa* case will be binding precedent or not.

5.7 **TSIKA v BUFFALO CITY MUNICIPALITY**

(i) **FACTS**

The plaintiff was formerly the Municipal Manager for the Defendant Municipality. The plaintiff’s services were terminated after he was found guilty in *absentia* for

---

114 2009 (2) SA 628 (E).
misconduct. The plaintiff claimed payment of the following amounts from the defendant:

- An amount which allegedly the defendant unlawfully deducted from two preservation fund policies into which part of the plaintiff’s salary was paid; and

- a further amount which was allegedly owing to the plaintiff by virtue of a clause in his contract of employment; an ex-gratia payment.

The defendant resisted both claims and filed a counterclaim.

(ii) **POINT IN LIMINE**

After the close of pleadings the defendant filed a Notice of Intention to Amend its Plea by incorporating a Special Plea. The Special Plea alleges that the plaintiff’s claim arises out of employment relations and claims that his claims are not justiciable in the High Court which accordingly lacked jurisdiction to determine the said claims. The plaintiff filed a Notice of Objection to the Special Plea alleging that it was bad in law and that it was not open to the defendant to object to jurisdiction after *litis contestatio*. This case accordingly deals solely with the jurisdictional challenge.

(iii) **BELATED RAISING OF THE POINT IN LIMINE**

The court held that the Special Plea was understandable in the light of the *Chirwa* case judgments. The *Chirwa* case had been decided shortly after the Special Plea was withdrawn. The court held further that it was accepted that a jurisdictional challenge may be raised after *litis contestatio* where a party raising it provides compelling reasons for not doing so earlier. The challenge *in casu* goes beyond mere territorial jurisdiction, the allegation *in casu* being that the Legislature deprived the High Court of jurisdiction herein. The court held that a court cannot assume jurisdiction of which the Legislature has chosen to deprive it, even with the parties consent or where the parties do not place the court’s jurisdiction at issue.
(iv) THE JURISDICTIONAL POINT

The court held that to contend that the Chirwa case never dealt with nor resolved the jurisdictional issue raised by the defendant would amount to an oversimplification. However the court held further that neither can the jurisdictional point be dismissed because of the contention that the cause of action does not flow from an existing employment relationship.

(v) THE CHIRWA CASE

The court then turned to the Chirwa case and restated the issues dealt with in the Chirwa case. In order to avoid repeating the issues raised in the Chirwa case, which have already been referred to above, these issues will not be repeated in any detail under this heading. However in summary the majority judgment of Skweyiya J was referred to and confirmed that the main question dealt with was whether the Legislature had conferred exclusive jurisdiction to decide such issues on the Labour Court and other forums established by the LRA. In addition Skweyiya J also noted that the question of jurisdiction also arose because the dismissals of public servants seemed to involve two constitutional rights; the right to fair labour practices and the right to administrative justice. As stated above Skweyiya J had regard to, inter alia, the purpose of administrative law, the purpose of labour law and section 210 of the LRA. Skweyiya J held that the concurrent jurisdiction referred to in section 157(2) was intended to extend the jurisdiction of the Labour Court to employment matters involving constitutional rights and Ms Chirwa’s dispute was one over which the Labour Court had exclusive jurisdiction and in respect of which the High Court lacked jurisdiction.

In referring to the majority judgment of Ngcobo J the court noted that the learned Judge would have dismissed the appeal on the basis that Ms Chirwa switched forums after electing to commence in the CCMA, however the learned Judge considered it desirable to consider two further important issues;
• **THE SCOPE OF SECTION 157 OF THE LRA**

In considering this issue the learned Judge held that section 157(1) and (2) could be reconciled, as stated above, if regard is had to the primary objects of the LRA. In addition Ngcobo J held that section 157(2) was not intended to confirm the High Court’s continuing jurisdiction in labour matters, but to confer limited constitutional jurisdiction on the Labour Court. However this has been discussed above and will not be repeated here except to mention that the Constitutional Court held that where employees allege non-compliance with the LRA, they must seek their remedies under the LRA. Employees may not avoid the dispute resolution procedures provided for in the LRA by alleging the violation of a constitutional right. To permit this would be to frustrate the primary objects of the LRA and to allow astute litigants to bypass the Act. This would give rise to the forum shopping illustrated in Ms Chirwa’s case. A dispute alleging non-compliance with the LRA, falls within the exclusive jurisdiction of the Labour Court.

• **WHETHER MS CHIRWA HAD TWO CAUSES OF ACTION**

The dispute concerned the fairness of the termination of employment. Even though a dismissal in the public sector may involve the exercise of a public power, the source of the power to terminate was the contract of employment. Therefore, by dismissing Ms Chirwa; the employer exercised a contractual power and accordingly the dismissal did not constitute administrative action.

The court then referred to the minority judgment which held the following:

- The High Court had jurisdiction to entertain the matter because the Constitutional Court had already decided this in the *Fredericks* case;

- Ms Chirwa’s application was framed in terms of the PAJA and read literally section 157(2) confers jurisdiction on the High Court to entertain such claims; and
however, the minority judgment agreed that the dismissal was the exercise of contractual power.

(vi) THE AFTERMATH OF THE CHIRWA CASE

The court held that much of the debate after the Chirwa case centered around the relationship between the Chirwa case and the Fredericks case. These judgments appear to reach conflicting conclusions on a particular point, namely; whether the concurrent jurisdiction of the High Court in terms of section 157(2) in respect of particular labour matters is ousted when the dispute at issue must be referred for arbitration in terms of the LRA.

• In terms of the Fredericks case the Constitutional Court held that the High Court’s jurisdiction is ousted only when in terms of section 157(1) a matter falls within the exclusive jurisdiction of the Labour Court, but not when the Act requires the dispute to be referred to arbitration.

• In terms of the Chirwa case the majority found that it is of no moment that matters must be referred for arbitration rather than adjudication by the Labour Court and that the High Court’s jurisdiction is ousted if the cause of action falls within the scope of the LRA and the party initiating the action has a remedy under the Act.

• However, the court held that the Fredericks case does not provide direct authority for the point in casu. The dispute in the Fredericks case concerned a matter which could have been referred to arbitration under the LRA, whereas the dispute in casu is not one that could have been referred to arbitration.

• In addition the court held that all the cases post-Chirwa case where a challenge to the High Court’s jurisdiction in labour and employment matters was raised, all these cases involved applications for review of actions of employers against employees under the Constitution, the PAJA, the common law or al three.
In the present case the plaintiff neither relies on the PAJA nor does he rely on the court to invoke its inherent review jurisdiction. Plaintiff’s action is a claim for payment arising from an alleged breach of contract and the defendant's alleged unlawful appropriation of money allegedly belonging to him. The defendant counterclaims for rectification and expenses incurred as a result of an alleged failure by the plaintiff to discharge contractual and statutory obligations.

In the light of the above the court held that the present case was distinguishable from all the post-Chirwa case judgments and accordingly none of the judgments provide direct authority for the present case.

(vii) **IS THE CHIRWA CASE APPLICABLE IN THIS CASE?**

The court held that the question which arises is whether the Chirwa case provides authority to actions in the High Court for the recovery of damages?

In the Chirwa case the conclusion that the High Court lacked jurisdiction rested on two main findings, namely:

- The matter fell within the exclusive jurisdiction of the Labour Court in terms of section 157(1), which the court referred to as a “quintessential” a labour matter of a type the Legislature intended to be resolved under the dispute resolution procedure created by the LRA; and

- the dismissal at issue did not constitute administrative action but was rather an exercise of contractual power.

In the Chirwa case the main point which divided the court was the meaning attributed to section 157(2). The meaning which the Constitutional Court attributed to section 157(2) has been stated above and will not be repeated here.

(viii) **IS THIS AN LRA MATTER?**

The court held that there is no express provision in the LRA which allows either the
plaintiff or the defendant *in casu* direct access to the Labour Court or which expressly empowers the Labour Court to grant the relief sought. The closest the LRA comes to conferring on employees the right to claim contractual damages, as opposed to statutory compensation is section 195. However the court held that the contractual damages provided for in section 195 can only be awarded where an employee has referred a dispute under section 191(5) of the LRA. This can only be done where an employee disputes the fairness of a dismissal or labour practice. The court held that *in casu* the fairness of a dismissal is not disputed.

The court therefore held that this is not a matter which falls on the LRA side of the line of distinction drawn in the *Chirwa* case.

(ix) **THE EFFECT OF THE CHIRWA CASE ON THE INTERPRETATION OF THE BCEA**

The court referred to section 157(1) and the exclusive jurisdiction provided for herein. In addition the court noted the resemblance between section 157(1) and (2) and section 77(1) and (3) of the BCEA. In considering this the court held that the question which arises is whether the Labour Court has exclusive jurisdiction in the present case by virtue of the phrase “any other law” which appears in section 77 of the BCEA and in addition in the light of the resemblance between section 157(1) and (2) and section 77(1) and (3), does this mean that they must be interpreted in the same way?

In the *Chirwa* case the majority of the court appear to have extended the meaning of the term “Labour Court” to embrace other dispute-resolution forums established by the LRA (CCMA and Bargaining Councils), which a unanimous court declined to do in the *Fredericks* case.

However, the court *in casu* held, and importantly so it is submitted, that this consideration cannot apply in respect of BCEA because the CCMA and Bargaining Councils have no jurisdiction in respect of matters arising under that Act. In addition the court held that the only matters specifically reserved in the BCEA for the Labour Court are those concerning contraventions of the BCEA if they are consolidated with

116
dismissal disputes referred in terms of the LRA, disputes about the interpretation or application of Part C of Chapter 10 concerning victimization and reviews of functions performed under the Act. For the rest, the BCEA provides a specific procedure for the enforcement of minimum conditions of employment. These are matters which fall within the exclusive jurisdiction of the Labour Court.

The court held further that the only reference to the Labour Court’s role in contractual disputes appears in section 77A(e); in terms of which the Labour Court would have jurisdiction to entertain the plaintiff’s claim. Does this then mean that the High Court’s jurisdiction is axiomatically excluded? The court held that this would depend on whether the BCEA must be interpreted in such a way as to find that any matter falling within the jurisdiction of the Labour Court automatically falls outside the jurisdiction of the High Court. This would depend on whether section 77 must be given the same interpretation as the majority gave in the *Chirwa* case to section 157. The court expressed doubt as to whether the interpretation in the *Chirwa* case of the relationship between section 157(1) and (2) could be transposed to section 77 without analysing the context and purpose of section 77 and isolating the differences between section 77 and section 157. Regarding the differences the court held as follows:

- Section 77A(e) limits the Labour Court’s power to determine contractual matters to be determined in terms of section 77(3), which means that the power section 77A(e) confers is concurrent with that of the civil courts.

- Another difference between the LRA and the BCEA is that the provision conferring exclusive jurisdiction on the Labour Court in the latter Act is expressly qualified by section 77(4), which permits litigants in the civil courts to establish that “a basic condition of employment constitutes a term of a contract of employments”.

- The reasons given by the Constitutional Court for construing the word “concurrent” in the manner it did in the *Chirwa* case do not seem to apply to the interpretation of that word as it is used in the BCEA. The court’s concern was that to give public sector employees a choice would place them in a preferential
position to private sector employees. The court held that no such problem arises if disputes concerning contracts of employment may be adjudicated by both the Labour Court and the High Court.

- If the Legislature wished to give the Labour Court exclusive jurisdiction in matters concerning contracts of employment, it could have used the word “exclusive” before “jurisdiction” in section 77(3) and omitted the phrase “with the civil courts”. The court held that it is doubtful whether the High Court in casu could rely on public policy issues and the need to avoid forum-shopping, like the Constitutional Court, to justify giving the word “concurrent” an unusual meaning in section 157(2) and ignoring the literal meaning of section 77(3).

- Before the Chirwa case, the Labour Appeal Court, by judgments of which the High Court is bound, itself dismissed the challenge to the jurisdiction of the Labour Court to adjudicate a dispute involving the interpretation of an employment contract.

The court held that the Constitutional Court’s interpretation of section 157(2) yields a precedent too tenuous to permit this court effectively to redraft section 77(3) by substituting the word “exclusive” for the word “concurrent” in section 77(3) and by giving no effect to the phrase “with the civil courts”. As Langa CJ pointed out, a court cannot normally rely on policy considerations alone to give a statutory provision a meaning removed from that suggested by the ordinary meaning of the words in which it is expressed. That can only be done by way of legislative amendment.

(x) OTHER BINDING AUTHORITIES

The court held further that a further consideration which militates against a finding that the Labour Court has exclusive jurisdiction to adjudicate all matters concerning contract of employment is the growing list of authorities to the contrary which have been handed down by the SCA and referred to above. The court held that in the light of the above the plaintiff’s claim in casu is based squarely on contract and the High Court accordingly has jurisdiction over both claims.
(xii) STATUTORY ARBITRATION

It was contended that the allegations of misconduct would require the court to determine whether the plaintiff committed the misconduct and this is reserved for a statutory arbitrator. The court dismissed this contention.

(xiii) SUMMARY OF THE STATE OF THE LAW AFTER THE CHIRWA CASE

The court held that the law as it now stands on the jurisdiction of the High Court in labour and employment matters is as follows:

- All matters in which the cause of action is covered by the LRA and for which the LRA provides a remedy fall within the exclusive jurisdiction of the Labour Court and hence outside the jurisdiction of the High Court.

- Employees of statutory institutions may not bring actions in the High Court under the PAJA or by way of an application for common law review in respect of matters covered by the LRA.

- Employees may not bypass the LRA dispute-resolution procedure and approach the High Court with claims based on their constitutional right to fair labour practices.

- The High Court and other civil courts retain their common law jurisdiction to entertain claims for damages arising from alleged breaches of contract of employment and the acts or omissions of either party after the termination of employment and the Labour Court has concurrent jurisdiction to determine such matters.

5.8 THE TSIKA CASE, MOGOTHLE CASE AND MOHLAKA CASE DISCUSSED

In the Chirwa case the Constitutional Court held that all employees who have remedies under the LRA must pursue their rights under that Act. But the Chirwa
case did not specify which courts may entertain contractual claims by employees against their employers. Therefore the issue which is dealt with in the *Tsika* case, the *Mokgothle* case and *Mohlaka* case is whether employees still have a choice between pursuing actions under the LRA for unfair dismissal and other unfair labour practices, on the one hand, or, on the other, claiming damages for breach of contract under the BCEA or the common law and, if so, in which court.

Before the *Chirwa* case it appeared trite that employees still had this choice and that contractual claims could be pursued in either the Labour Court or the High Court. The BCEA conferred “concurrent” jurisdiction on the Labour Court with the civil courts to hear and determine any matter concerning a contract of employment and the option had also been expressly confirmed by several judgments of the SCA. Of the three judgments dealt with under this heading; one emanated from the High Court and two emanated from the Labour Court. The facts of each of the judgments appear above and for the sake of brevity will not be repeated here. The facts of each of these cases clearly differ from each other, as well as from the facts in the *Chirwa* case. However there are two common denominators:

- In each case the employer claimed that the respective courts lacked jurisdiction; in the *Tsika* case the employer argued that the High Court lacked jurisdiction because the dispute fell within the exclusive jurisdiction of the Labour Court, in the *Mokgothle* case, the employer argued that by bringing an urgent application under section 158(1) of the LRA, the Applicant was circumventing obligatory statutory procedures for the resolution of unfair labour practices, in the *Mohlaka* case; the employer argued that the Applicant could not sue in the Labour Court for breach of contract under the BCEA for a claim which actually fell under the LRA.

- In each case the employers relied on the *Chirwa* case.

The facts of the *Chirwa* case will not be repeated here for the sake of brevity.

The question arises as to how then does the *Chirwa* case relate to the disparate claims at issue in the *Tsika* case, the *Mokgothle* case and the *Mohlaka* case?
In each case the employers raised the *Chirwa* case as they contended that:

- It deprived the respective courts of jurisdiction;

- That the employees should have followed the procedures laid down by he LRA and that both the High Court and the Labour Court therefore lacked jurisdiction to entertain the respective claims.

The *Chirwa* case could be raised in each of the three cases because in that extensive judgment the Constitutional Court dealt not only with the narrow issue whether Ms Chirwa could challenge her unfair dismissal in the High Court under the PAJA; the two judgments for the majority dealt expansively with a much wider issue of the respective jurisdictions of the civil courts and the labour courts in all labour and employment matters. It is submitted that it will be clear that in the light of the three cases under discussion as well as other post-*Chirwa* case decisions, the *Chirwa* case has raised more questions than it answered. This can be seen from how the lower courts subsequent efforts to identify exactly what the Constitutional Court was driving at and the precedent to be derived from the *Chirwa* case. However one thing is certain from the *Chirwa* case; this is that dismissed public sector employees may no longer rely on their right to fair administrative action. However the *Chirwa* case left unresolved other issues created by section 157(2) of the LRA which provides that the Labour Court has “concurrent” jurisdiction with the High Court in matters concerning, *inter alia*, alleged or threatened violations of fundamental rights arising from “employment and labour relation”.

One of these is the effect to be given to the SCA judgments in which it has been unambiguously ruled that employees retain their right to sue for breach of their employment contracts in either the Labour Court or the civil court. The *Chirwa* case is relevant to that issue because both judgments for the majority assumed that the Legislature intended creating an exclusive statutory procedure for resolving employment and labour disputes. They also found that judgments which confirmed the civil court’s jurisdiction in such matters frustrated that objective and served merely to promote conflicting jurisprudence.
The *Tsika* case, *Mogothle* case and *Mohlaka* case all concerned employment-related matters. This is why the employers in each case argued that the *Chirwa* case must be given a “wide interpretation” and read that way the eight Judges who constituted the majority were simply saying that, if the LRA offers a remedy, claims cannot be made under other statutes or the common law. This is why, in each case, the employees relied on the BCEA, which gives the Labour Court concurrent jurisdiction with the civil courts to determine “any matter concerning a contract of employment” (section 77(3)) and on the SCA judgments which have found, without reference to that Act, that employees retain their common law right to sue for breach of contract.

In the *Mohlaka* case the learned Judge devoted considerable time to the jurisdictional point. The *Mohlaka* case has been considered and referred to in detail above and the remaining considerations are in addition thereto. According to the *Mohlaka* case the crux of the reasoning in the *Chirwa* case was that effect must be given to the primary objectives of the LRA. This applies to both the LRA and the BCEA and unless these Acts are read consistently, the BCEA will conflict with the LRA and duplicate processes and remedies provided by the LRA, which the latter Act was designed to avoid. In the *Mohlaka* case, the court held that the meaning given to section 77(3) in the BCEA must be the same as that given to section 157(2) of the majority in the *Chirwa* case. If the High Court does not have concurrent jurisdiction with the Labour Court in respect of violations of fundamental rights it cannot have concurrent jurisdiction in matters concerning contracts of employment; to recognise concurrent jurisdiction in such matters would resuscitate the problems both the LRA and the BCEA were designed to resolve.

That left the Constitution and the common law. According to the former, all courts are obliged to develop the latter to promote the spirit, purport and objects of the Bill of Rights. However the common law must be developed consistently with the Constitution, the BCA and the LRA. These two Acts recognise that contracts of employment that confer greater rights on employees will trump the legislation. To that extent the *Fedlife* case was correct. However the common law of employment may also diminish employees’ rights. This was what labour legislation was designed to correct. That being the case, the development of the common law by the SCA to
recognise the right to a fair pre-dismissal procedure was according to the Mohlaka case unnecessary, because that right is protected by the LRA. The SCA’s judgments confirming the development of the common law to include a right to procedural fairness was merely an example of judicial intervention in an area the Legislature had already decided to regulate comprehensively. In the light of the approach of the majority in the Chinwa case, the Labour Court found in the Mohlaka case that it was not bound to follow the judgments in which the SCA accepted that dismissed employees were free to sue for breach of contract if they chose to do so.

If one has regard to facts of the Mohlaka case, perhaps the court certainly had reason to find that Mr Mohlaka should have sought relief under the LRA. He was claiming that he had been constructively dismissed, a form of dismissal unknown to the common law, but developed by labour tribunals under the 1956 LRA and now given statutory expression in the current LRA. He was relying on the recent recognition of this form of dismissal by the SCA in the Murray case, discussed above, where the SCA developed the common law to hold that all employers have a tacit contractual duty to treat their employees fairly. Mr Mohlaka claimed that his employer had breached that term.

Although the facts of the Tsika case and the Mogothle case were different, the two Judges spoke with one voice and what they said was diametrically opposed to the Mohlaka case. In both the Tsika case and the Mogothle case, discussed in detail above, the courts declined to give the Chinwa case a “wide reading”. Both Judges accepted that the respective claimants could not in the light of that judgment pursue their cases under the PAJA. However, Mr Tsika had not relied on that Act at all and Mr Mogothle had relied on both the PAJA and his contractual rights. In the Mogothle case, the court regarded the reliance on the contract as sufficient for the purposes of deciding the jurisdictional point; even if the claim under the PAJA was eclipsed by the Chinwa case, the court still had to decide whether it has jurisdiction to entertain the contractual claim.

It is on this point that the Mohlaka case conflicts with the Tsika case and the Mogothle case. According to the Mogothle case the SCA has unequivocally established a contractual right to fair dealing which binds all employers and confers
on all employees an entitlement to enforce that right, which in turn exists independently of statutory protection against unfair dismissal and unfair labour practice.

Both the *Mogothle* case and the *Tsika* case held that in the absence of a higher authority to the contrary, they were obliged to follow the SCA judgments, controversial as the Judges acknowledged those judgments may have become.

Neither the *Mohlaka* case nor the *Mogothle* case was concerned with whether the High Court would have had jurisdiction to entertain the respective applications. According to the *Mohlaka* case, neither court has jurisdiction where the employee could have referred a dispute for arbitration under the LRA. According to the *Mogothle* case, the Labour Court has jurisdiction to entertain a contractual claim even if the employee could have referred the dispute for arbitration. If the *Mohlaka* case is correct, neither the Labour Court nor the High Court has jurisdiction because they cannot entertain disputes referred for statutory arbitration. However, if the *Mogothle* case is correct, a further question arises: if the Labour Court has jurisdiction, does that mean that the High Court does not? That was the issue in the *Tsika* case. After summarising the majority judgments in the *Chirwa* case, the court concluded that, strictly construed, that judgment deprived the High Court of jurisdiction only in cases arising from dismissals in the public sector where the dismissed employee has a remedy under the LRA. However the Judge noted that Mr Tsika was not disputing the fairness or lawfulness of his dismissal, and that the Labour Court would not have had jurisdiction to entertain the employer’s counterclaim. The case was therefore not an LRA matter at all.

However the court did not end the enquiry there. The further question was whether the BCEA deprived the High Court of jurisdiction. On that point, the court noted that, according to section 157(1)(a), the LRA deprives the High Court of jurisdiction in those cases in which the Labour Court must determine “in terms of this Act or any other law”. Since the Labour Court did not have jurisdiction to entertain the claim or counterclaim under the LRA, the only other law that could conceivably be of application were the BCEA and the common law. However the BCEA has its own jurisdictional clause. Section 77(1) of the BCEA is phrased in much the same words
as section 157(1) of the LRA. The question was whether all disputes concerning contracts of employment fell within the exclusive jurisdiction of the Labour Court.

The court held that this would depend on whether the word “concurrent” in section 77(3) of the BCEA must be given the same construction as that placed on it in the *Chirwa* case, namely; that the word denotes not a merged jurisdiction, but that the Labour Court has jurisdiction equal to that enjoyed by the High Court in matters other than employment and labour relations. But, unlike the *Mohlaka* case, the Judge in the *Tsika* case was not prepared to accept that the *Chirwa* case provided authority sufficiently clear to warrant ignoring what the Judge regarded as the unambiguous words of section 77(3), read in their ordinary meaning.

This is the point on which the *Tsika* case and the *Mogothle* case converge, and on which both conflict with the *Mohlaka* case. Both the *Mogothle* case and the *Tsika* case reach the same conclusion on the status of the common law, as developed by the SCA. In the *Tsika* case the court held that while the majority in the *Chirwa* case obviously had “scant enthusiasm” for the latest of the SCA’s judgment on the point, the *Boxer Superstores* case that had not expressly stated that that judgment was wrong. Like section 77(3) of the BCEA, the *Boxer Superstores* case expressly states that employees may pursue claims for breach of contract in either the Labour Court or the civil courts, and that the High Court has jurisdiction over such claims, provided they are framed as such. In the *Tsika* case the court found that to accept the employer’s jurisdictional point would require it effectively to overrule at least three judgments of the SCA, which a provincial division of the High Court cannot do.

The conflict on this point between the *Tsika* case and the *Mogothle* case, on the one hand, and the *Mohlaka* case, on the other, raises a number of jurisprudential issues:

- The manner in which courts must interpret statutes and handle precedent.

- The traditional view that courts are bound by the decisions of higher courts still holds sway under the constitutional dispensation.

- So too does the view that the courts must apply statutes in their ordinary
meaning, unless doing so leads to manifest absurdity or injustice the Legislature could not have contemplated.

- In the *Chirwa* case the Constitutional Court stretched the limits of the second principle by interpreting the LRA in an ingenious way to give effect to what the court perceived to be policy considerations underlying the Act. The majority in the *Chirwa* case acknowledged that section 157 still required the Legislature’s attention when Ngcobo J described the word “concurrent” as calculated to cause unnecessary confusion.

- However, once the Constitutional Court pronounced on the issue in a judgment, the lower courts are bound by the majority’s interpretation, and now must make of it what that can.

It is therefore clear that the current debate entails three lower courts which were confronted with a decision of the Constitutional Court and at least four decisions of the SCA. The question that arises is which view, taken in the *Mohlaka* case, the *Mogothle* case or the *Tsika* case, is correct? Until the Constitutional Court itself expressly rules on the SCA judgments, the answer must be sought in the *Chirwa* case judgments themselves.

The *Mohlaka* case laid great stress on the policy considerations expressed in the majority judgments, and reasoned that those considerations applied equally to the overlap between the common law of employment and the statutory regime created by the SCA judgments. The learned Judge concluded that, if the Constitutional Court wished to promote an exclusive and specific statutory labour dispute resolution process, its wishes should be give effect whenever disputes between employers and employees, including contractual disputes, come before any forum.

However the *Mohlaka* case rests on an assumption that is best debatable. This is that, when it approved section 77(3) of the BCEA, the Legislature in fact wished to end conflicting jurisprudence and “forum shopping” in matters relating to contractual disputes between employees and employers. As the court pointed out in the *Mogothle* case, the BCEA was enacted after the LRA. As its wording suggests,
section 77(3) may well have been designed to confirm, rather than alter, the status quo; namely an unrestricted right of employees to choose to take their purely contractual disputes to the civil courts and disputes about the fairness of treatment accorded them by their employers to the labour tribunals.

In the *Mohlaka* case the court presumed that to give the word “concurrent” in section 77(3) of the BCEA a meaning different from the meaning given the same word in section 157(2) of the LRA by the majority in the *Chirwa* case would bring the BCEA into conflict with the LRA. How the court reached this conclusion is difficult to comprehend if one considers the following:

- Nothing in the LRA suggests that purely contractual disputes between employers and employees are the exclusive preserve of the Labour Court;

- whether an employee is due something under his or her contract of employment has nothing to do with whether his or her dismissal was fair or with whether the employee was a victim of an unfair labour practice, as defined, the two questions are completely different;

- the risk of competing jurisprudence emerging in the limited area of contractual interpretation is unverified and remote;

- nor is there any fear that a “multiplicity of laws” will apply, because there is only one law of contract and the *Chirwa* case does not say as much;

- to say that dismissed public servants must bring claims for unfair dismissal to the labour tribunals is one thing; it is a long step from that proposition to the conclusion that the same applies to employees who claim that their employers have breached their contracts of employment;

- the fear of competing jurisprudence becomes more remote when regard is had to the SCA’s “development” of the common law to create a duty of fair dealing in relations between employers and employees, described in the *Mohlaka* case as
unnecessary. If anything the SCA’s judgments have set in motion a convergence of the common law and the statutory law; a movement to which the drafters of the legislation designed to enhance the rights of employees would hardly have objected;

- when regard is had to the Gumbi case and the Murray case there is no discernable difference between the jurisprudence applied by the civil courts and that applied by the Labour Courts;

- these SCA cases represent a continuation of the cross-fertilization of different areas of law on which our labour law was constructed and developed; and

- in neither the Chirwa case nor the Mohlaka case does one find a snippet of fact to support the general thesis that the civil courts, when deciding labour matters, have under the current dispensation set back the rights of employees or confused the law relating to employment. In fact, ironically, when the Chirwa case finally landed back in the CCMA, Ms Chirwa received treatment markedly less generous than that accorded to her by the High Court.

In the light of the above that leaves only one consideration to justify the inference that the Legislature intended depriving the civil courts of their jurisdiction overall labour and employment matters, including disputes concerning contract of employment. This is that the statutory labour forums will become superfluous if employees resort to the civil courts to resolve disputes with their employers. There is no factual basis for this concern:

- Labour legislation clearly demarcates those cases which fall within the exclusive jurisdiction of the labour courts and the CCMA or the Bargaining Councils.

- The door to the High Court opened for public servants by the enactment of the PAJA has been closed by the Chirwa case.

- Employment cases which come before the civil courts are few and far between.
- Nothing suggests that employees will abandon their copious rights under labour legislation by relying on their more limited contractual and common law rights.

- The SCA has itself warned that employees will be ill advised to litigate in the civil courts.

- It may furthermore be a salutary idea to unburden the CCMA by encouraging senior employees to approach the civil courts.

However the real issue raised by the conflict between the Mogothle case and the Tsika case, on the one hand, and the Mohlaka case on the other, is what the Constitutional Court actually ruled in the Chirwa case. At least one High Court Judge (Froneman J in the Nakin case) and one SCA Judge (Nugent JA in the Makambi case) candidly stated that they were unable to discern the ratio in the Chirwa case, which is of course the only aspect of the judgment by which lower courts are bound. The SCA seems to have concluded that the ratio of the Chirwa case is that dismissals in the public sector do not constitute administrative action, but the exercise of contractual power. If the precedent set by the Chirwa case was that narrow, the Mohlaka case must be wrong. But if the precedent was that employees must use the LRA procedures if they have a remedy under that Act, both the Mohlaka case and the Tsika case are right.

Perhaps the simplest way of resolving the debate sparked by the Chirwa case is to ask this question: what would have been the fate of Ms Chirwa’s action had she initiated action for breach of contract, rather than for breach of her right to fair administrative action, or perhaps, as did Mr Nakin, with both claims in the alternative? The Chirwa case did not deal with this issue. In the judgment of Ngcobo J, the learned Judge merely described the SCA’s approach as “formalistic”. But the issue was dealt with in the Nakin case and the Nonzamo case. In the Nakin case the court held that the distinction between the law of contract and administrative law was immaterial to the jurisdictional issue, because the underlying consideration in all areas of law is fairness. In the Nonzamo case the court held that consideration must be given to the main thrust of the employee’s case.
However, neither approach helps untangle the Chirwa case. If the Nakin case is correct, the jurisdictional overlap between contract law and employment law gives rise to precisely the concerns expressed in the Chirwa case. The Nonzamo case simply begs the question. As a result the question posed above can only be answered hypothetically. The spirit, if not the letter of the Chirwa case certainly supports the conclusion that Ms Chirwa’s application would have failed had it been based on either contract or administrative law, or both.

The central finding in the Chirwa case appears as though Ms Chirwa’s cause of action was covered by the LRA and that fact alone deprived the civil courts of jurisdiction. If that is indeed the ratio of the Chirwa case, Ms Chirwa’s claim would have been dismissed for want of jurisdiction even if she had approached the High Court with a breach of contract claim. Ms Chirwa as well as the applicants in the Gumbi case and the Boxer Superstores case would have presumably suffered the same fate had they launched breach of contract actions in the Labour Court. In that sense, therefore, the Mohlaka case seems to have correctly held that it was entitled to ignore the Gumbi case and the Boxer Superstores case in the light of the Chirwa case. However if the ratio of the Chirwa case is indeed simply that employees may not approach civil courts with claims against their employers where the LRA provides a procedure and relief, the question whether the respective courts had jurisdiction in each case could have been answered relatively simply.

In the Tsika case neither party could have approached the Labour Court with any of their claims under either the BCEA or the LRA. That being the case, the parties must have been entitled to approach the civil court. In the Mogothle case, the real issue turned, not on whether the Labour Court had jurisdiction, but on whether that court had the power to interdict the employer from unfairly suspending an employee. However in the light of the Nxele case, the Labour Court clearly has that power.

Apart from being non-suited by the Prescription Act, Mr Mohlaka could also have been sent away because, like Ms Chirwa, he had instituted action in the CCMA before switching to the Labour Court with a new basis for his claim; a fact sufficient, on the strength of the Chirwa case, to dismiss the application. Furthermore, Mr
Mohlaka’s contractual claim was clearly a thinly disguised action for constructive dismissal, a matter reserved for arbitration by the LRA. Commander Murray would probably have been told as much had he and his employer not been excluded from the LRA.

Therefore the outcomes in the Tsika case, the Mogothle case and the Mohlaka case all seem to have been correct, in spite of the courts’ conflicting conclusions on the meaning and scope of the Chirwa case. However the judgments do little to promote certainty in a debate which only the Constitutional Court or the Legislature can resolve. After the Tsika case, the Mogothle case and the Mohlaka case were handed down, the Labour Court granted an order in an application under section 158(1)(h) directing an employer to pay salary withheld from an unfairly suspended employee.115 The same Judge who presided in the Mogothle case held that the fact that the employee could have claimed his salary under the BCEA did not deprive the court of jurisdiction to entertain the matter because the application was premised on an unlawful suspension.

That the applicant could also have approached the CCMA with an unfair labour practice claim was not considered by the court, and raises another question.

5.9 MAKHANYA v UNIVERSITY OF ZULULAND116

(i) FACTS

Professor Makhanya was dismissed from his post at the University of Zululand and he referred a dispute to the CCMA. The arbitrating commissioner dismissed his claim on the basis that he failed to prove the existence of the contract of employment he claimed was unfairly terminated.

Subsequent to the above, Professor Makhanya instituted an action against the University of Zululand in the High Court. According to the Particulars of Claim, Makhanya alleged that he had been employed by the University under a contract of

employment, that the University had purported to terminate the contract in breach of its terms and, that, notwithstanding, Makhanya continued to render his services, or at least he tendered to do so. But the University had not paid him his remuneration and other money to which the contract entitled him and he claimed orders compelling it to do so. The University claimed that the High Court lacked jurisdiction. The High Court agreed and dismissed the claim.

The High Court’s decision appeared to be consistent with the Constitutional Court’s judgment in the Chirwa case in terms of which courts have held that where employees have remedies under the LRA they must proceed under that Act. In the Makhanya case the High Court followed this reasoning.

Subsequent to the High Court’s decision, Mr Makhanya appealed the decision to the SCA.

(ii) THE JURISDICTIONAL CHALLENGE

The court held that the jurisdictional challenge raised by the University was curious because claims for the enforcement of contracts are commonplace in the High Courts. The court referred to the Fedlife case where it was argued before the SCA that claims for the enforcement of contracts of employment had been excluded from the jurisdiction of the High Court by the LRA but that argument was rejected, which argument was not sought to be revived in casu. The court held further that if there was any residual doubt as to whether the High Court has the power to consider such a claim it was put to rest by section 77(3) of the BCEA 75 of 1997, which was enacted after the LRA, and which makes it perfectly clear that the High Courts have not been divested of their ordinary jurisdiction to enforce contracts of employment.

The court held that in the light of the above, the question arises on what basis the jurisdictional objection could possibly have been taken?

The court held that the appeal was against the order of the High Court in terms of which the jurisdictional objection was upheld and in respect of which it dismissed the claim. The court referred to the Chirwa case in which the majority expressed the
view that the High Court had no jurisdiction to consider the claim in that case.

The court held that the case before it was not materially different to the *Chirwa* case and any attempt to distinguish them would be no more than makeweight. On the one hand the *Fedlife* case and the BCEA make it clear that the High Court has jurisdiction *in casu*, on the other hand if the court is bound to apply the majority view expressed in the *Chirwa* case then the opposite conclusion must be reached.

It is submitted that it is important to note what the court held regarding the doctrine of precedent. The doctrine of precedent requires courts to follow the decisions of coordinate and higher courts and was held by Cameron JA in *True Motives 84 (Pty) Ltd v Mahdi*¹¹⁷ as an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. The leaned Judge held as follows:

> “Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, is therefore vital constitutional questions.”

Cameron AJ went further to state that “at this tender stage of our legal development, the doctrine of precedent has special importance” and warned that “this court should not lay itself open to the … complaint that it is violating the rule of law by illegitimately disregarding or evading precedents”.¹¹⁸ Cameron AJ held further

> “it is well established that precedent is limited to the binding basis (or ratio decidendi) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be ‘said along the wayside’, or ‘stated as part of the journey’ (obiter dictum), and is not binding on subsequent courts.”¹¹⁹

In the light of the above the court held that the law does not exist in discrete boxes, separate from one another.

The law is a seamless web of rights and obligations that impact upon one another.

¹¹⁸ *True Motives 84 (Pty) Ltd supra* at para 102.
across fields. If the ratio of the *Chirwa* case is as stated above; then the majority must be taken to have implicitly overruled the decision in the *Fedlife* case. Regarding the express reservation in the BCEA of the ordinary power of the High Court to consider contractual claims would need in some way to be explained. The question would arise as to what further limitations it might impose on the ordinary power of the High Courts in other cases.

Apart from the jurisdictional finding the majority in the *Chirwa* case also found the claim to be bad in law. The court held that what is most striking about this is that the two findings are mutually destructive and cannot both have provided the ratio for the order that was made. Accordingly, if the High Court had no jurisdiction in the matter then that ought to have been the end of the matter; by its own decision it would have had no power to dismiss the claim on the merits. Conversely, if the ratio for the order was that the claim was bad in law, it follows that it must have had the power to make that finding. The ratio may be one or the other but it cannot be both.

(iii) HOW THE PROBLEM ARISES

The court held that the LRA creates certain rights for employees that include the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices. The court referred to these rights as “LRA rights”. However the court held further that employees have other rights in common with other people generally, arising from the general law. The right that everyone has to insist upon the performance of a contract, emanating from the common law and the right that everyone has to just administrative action, emanating from the Constitution and the PAJA. Thus there is the potential for three separate claims to arise when an employee’s contract of employment is terminated; for the infringement of an LRA rights, for the infringement of a common law right or, in the public sector, for the infringement of a constitutional law right.

Regarding enforceability of these rights; the LRA right is enforceable only in the CCMA or the Labour Court, which the court referred to interchangeably as “Labour

119 *True Motives 84 (Pty) Ltd supra* at para 101.
Forums”, the common law right is enforceable in the High Court and the Labour Court and the Constitutional right is enforceable in the High Court and Labour Court. The source of the High Courts jurisdiction being found in section 169(b) of the Constitution and the Labour Court’s jurisdiction in section 157(2) of the LRA and section 77(3) of the BCEA.

With reference to the majority judgment of Ngcobo J the court referred to the suggestion that section 157(2) somehow divested the High Courts of their ordinary power to consider claims to enforce a constitutional right arising from employment and in this context it was suggested that the use of the word “concurrent” in section 157(2) might have been unfortunate. The court held that this suggestion may be founded on a misconception which the court considered not to be correct. The court held that section 157(2) does not purport to confer jurisdiction on the High Courts. The power to consider claims for the alleged violation of constitutional rights, whether in the employment sphere or otherwise, is assigned to them by the Constitution. Accordingly section 157(2) does no more than to confer equivalent jurisdiction upon the Labour Court.

A statute that confers power on a special court might often say expressly that it is to be exercised “concurrently” so as to remove ambiguity. But in section 157, in which the conferring of exclusive and concurrent jurisdiction is dealt with in separate subsections, there is no room for ambiguity, and the word “concurrent” is superfluous. A construction of subsection (2) that divests the High Courts of their ordinary power in such matters, and assigns it to the Labour Court exclusively, would require a major rewriting of the section as a whole, and not merely the deletion of the word “concurrent”. It would mean that subsection as a whole is superfluous, and would also call for subsection (1) to be rewritten so as to assign that power exclusively to the Labour Court. The court held that the section simply does not open itself, by any form of interpretation, to being constructed in that way.

The section clearly recognizes the existence of the High Courts original jurisdiction in such matters and merely extends it to the Labour Court as well.

*In casu,* the court held that in consequence of the termination of his employment,
Makhanya at first pursued a claim for the infringement of his LRA right in the CCMA where he ultimately was unsuccessful, much the same happened to Ms Chirwa, who was employed in the public sector. It was because Ms Chirwa had pursued the enforcement of her LRA right that the majority held that the High Court had no power to consider her claim for enforcement of her constitutional right.

Accordingly the court held that but for the fact that the right asserted in each case was different, which is not material to the jurisdictional issue, the two cases are materially indistinguishable. The court held that what had confused matters in both cases is that a claim for the enforcement of an LRA right has become muddled with a separate claim for the enforcement of a right arising outside the LRA (in casu the enforcement of a contractual right and in the Chirwa case the enforcement of a constitutional right).

(iv) JURISDICTION GENERALLY

The court dealt with the concept of jurisdiction and its general meaning. It is submitted that the court’s findings in this regard is material to the topic under discussion.

The learned Judge referred to the concept of jurisdiction and held, in summary, as follows:

- Courts derive their power to adjudicate disputes from the State, and exercise that power by permitting or denying claimants the right to call into play the power of the State to enforce their claims.

- Dismissing a claim is as much an exercise of jurisdiction as granting a claim.

- In South Africa, the High Courts derive their power to adjudicate disputes from the Constitution, as supplemented by the courts’ inherent powers.

- The lawmakers may have decided to create special tribunals to determine disputes contemplated by labour legislation, and they may have conferred on
them exclusive jurisdiction to do so. However, according to the *Makhanya* case, it does not follow that because the Labour Court and the CCMA has exclusive jurisdiction in some labour and employment matters the High Courts lack jurisdiction in others.

- Dismissed employees may still pursue their common law or constitutional claims in either the civil court or the Labour Court, because the Labour Court is granted concurrent jurisdiction with the High Court in those matters by section 157(2) of the LRA.

In the latter case the claim might be brought before either court.

*In casu*, exclusive jurisdiction to enforce LRA rights has been assigned to the Labour Forums. However in respect of the enforcement of both contractual and constitutional rights the High Courts retain their original jurisdiction assigned to them by the Constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the High Courts. The court held further that naturally a claim that falls within the concurrent jurisdiction of the High Court and the special court could not be brought in both courts. A litigant would be confronted in one court with either a plea of *lis pendens* or *res judicata*.

A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court.

But where a person has two separate claims, each for the enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court or each in one of those courts.

(v) **PLEADING JURISDICTIONAL CHALLENGES**

The court held that when cases come before a court on appeal or on application the
issues are presented to the court simultaneously and this might at times obscure the various issues if they logistically arise sequentially.

Jurisdictional challenges will be raised either by an exception or by a special plea, depending on the grounds upon which the challenge arises.

In cases where an exception is raised a court that considers the challenge might not even be aware of whether or not the defendant intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first, because upon it depends the power of the court to make any further findings.

In casu the challenge is not dependant upon the existence of a jurisdictional fact, which would generally be raised by way of a special plea and, if challenged, proceed to a factual enquiry, but instead upon the nature of the claim. As the nature of the claim is apparent from the particulars of claim a jurisdictional challenge will conventionally be raised in an exception to the particulars of claim.

The disposal of a jurisdictional challenge on exception should be elementary, because it entails no more than a factual enquiry, with reference to the particulars of claim, to establish the nature of the right that is being asserted in support of the claim. Sometimes the right that is being asserted might be identified expressly. At other times it might be discoverable by inference from the facts that are alleged and the relief that is claimed. If there is any doubt a court might simply ask the litigant to commit himself or herself to what the claim is before the court embarks upon the case.

Applying the above principles of pleading the court held that it would be worthwhile considering what would have happened had Ms Chirwa brought her claim in an action, on particulars of claim that alleged the material facts and went on to allege the conduct complained of infringed her constitutional right to just administrative action and to claim appropriate relief.

An exception to the particulars of claim on the basis that the High Court lacked jurisdiction to consider the claim would have been taken and disposed of first, with
reference only to the particulars of claim. Indeed, had the matter been pleaded conventionally, the court hearing the jurisdictional exception, on the basis that the claim was bad in law was waiting in the wings. It would have been called upon to consider the jurisdictional issue with reference to the particulars of claim, on assumption that the claim was good in law. Clearly the exception could not have been sustained, because it is manifest from the Constitution that the High Court has jurisdiction to consider such a claim. But if the court had upheld the exception, then the matter would have ended there and the challenge to the validity of the claim would not even have arisen.

The court held that some surprise was expressed in the Chirwa case at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but, the court held, that surprise seemed to be misplaced. The court held that a plaintiff might formulate a claim in whatever way he or she chooses though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it in that court. In addition the court held further that if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.

(vi) COMMON FEATURES OF THE CASES

The court referred to the Fedlife case, Digomo NO case, Boxer Superstores case and Fredericks case as cases that purported to raise jurisdictional challenges of this nature. However the court held that upon proper analysis, none of those cases were about jurisdiction at all.

The court held that the above cases, the Chirwa case and the case before it had three features in common:

- The claimant was an employee;
- the claimant had an LRA right; and
the claimant asserted that he or she also had a right that arose outside the terms of the LRA. That right in each case was either the right at common law to exact performance of a contract or it was a constitutional right.

The claim in each case arose from the termination of the contract of employment. That fact had the potential to found a claim for relief for the infringement of the LRA right, but also the potential to found a claim for relief for the infringement of the other right that was asserted. Therefore the claimant in every case had a potential claim for the enforcement of:

- An LRA right (enforceable in a Labour Forum); or
- A right that fell outside the LRA (enforceable in the High Court or Labour Court).

The court held that it follows that the claimant in each case was capable of pursuing both claims in the Labour Court, either simultaneously or in succession, because they were different claims. In one claim the Labour Court would be asked to enforce an LRA right and in the other claim it would be asked to enforce a right falling outside the LRA (but within the concurrent jurisdiction of the Labour Court). Similarly the claimant would have been capable of bringing one claim in the Labour Forum (LRA right) and to bring the other claim (right outside the LRA) simultaneously, or sequentially, in the High Court. The court held that his approach should not evoke any surprise as it is a natural consequence of a claimant asserting two claims, each of which is capable of being brought in a different forum. The two claims arising from common facts might be asserted, whether separately or in the alternative, is not unusual. Whether the assertion will succeed is another matter, but that is irrelevant to the jurisdictional question.

(vii) TWO CLAIMS ARISING FROM COMMON FACTS

The court held that it is not unusual for two rights to be asserted arising from the same facts. In support of this the court referred to the case of Lillicrap, Wassenaar
and Partners v Pilkington Brothers (SA) (Pty) Ltd\(^{120}\) where the plaintiff in that case had two distinct claims arising from precisely the same facts. The case involved a company (the plaintiff) which contracted with a firm of professional engineers (the defendant) to provide professional services. The company was not satisfied with the way in which the engineers performed their services. The facts were capable of founding a claim for breach of contract, but the company chose instead to sue the engineers in delict for negligence. That was a novel claim, because a delictual right arising in those circumstances had not been recognised in law before. The defendant opposed the claim on the basis that the claim was bad in law because the right that was asserted did not exist.

The facts relied upon in support of the delictual right corresponded with the facts that would have supported a claim in contract. What the court was being asked to do was to recognise that the company had two separate claims arising from the same set of facts. The court expressed the question that was before it as follows:

“The only infringement of which the [company] complains is the infringement of [engineers] contractual duty to perform specific professional work with due diligence; and the damages which the [company] claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for the purposes of Aquilian liability.”\(^{121}\)

The court declined to recognize the delictual right that was asserted and the claim was thus dismissed as being bad in law. The court held that what is important for the present case before it was that the plaintiff was entitled to ask the court to exercise its power to consider and rule upon a claim notwithstanding that the company might equally have founded a claim on another right.

The court then considered the question whether it would have made any difference to whether the High Court had the power to consider the claim that was before it had there been a special court with exclusive jurisdiction to deal with claims for the enforcement of contracts?

\(^{120}\) 1985 (1) SA 475 (A).
The court held that the High Court would not have declined to consider the claim; a claim that asserted a right in delict, only because the company had an alternative claim arising from the same facts; a claim that asserted a right in contract, enforceable in another court. The claim that was before it was a claim in delict and it fell within the power and duty of the High Court to consider that claim, if only to dismiss it. That there was another claim enforceable in another court was irrelevant. That can be tested by asking what would have happened had the two claims been brought simultaneously; one in either court. Clearly neither could have been met by a plea of *lis pendens*, nor if one was dismissed in one court, could a plea of *res judicata* have succeeded in relation to the other.

The court held that the existence of a right might nonetheless be relevant to a claim asserting another right arising from the same facts but in an altogether different context. The fact that the plaintiff already enjoys a right (for example a contractual right) arising from those facts might be thought by the court to be sufficient to protect his or her interests, and thus persuade it that another right (a delictual right) should not be recognized. That is what occurred in the *Lillicrap* case. The court found that the company was capable of protecting itself adequately by its contract, and thus it was not necessary for the law to recognize a delictual right in addition. However the court held that had nothing to do with jurisdiction. It has to do with whether the claim is a good claim.

**(viii) EXPLANATIONS THAT HAVE BEEN ADVANCED FOR JURISDICTIONAL CHALLENGES**

The court held that with reference to the case before it and to the cases referred to above, it was difficult to see how a jurisdictional challenge could be maintained. The claim in each case clearly fell within the ordinary power of the High Court and the fact that the claimant had another claim is irrelevant to the jurisdictional issue.

The court held that explanations that have been advanced, in this and other cases, have always resolved themselves, in one way or another, into one or the other of three unacceptable proposition. Before dealing with he propositions, the court held

---

121 *Lillicrap, Wassenaar and Partners supra* at 499D-E.
that reference first had to be made to how the issue arose *in casu*. Two special pleas were filed. One special plea raised the jurisdictional challenge, the other a defence to the claim. In both cases the relevant plea was founded upon substantially the same allegations. In the special plea relating to jurisdiction it was alleged that Makhanya had pursued the claim through the CCMA, that arbitration had been held and an award had been made, that Makahnya had at first applied to the Labour Court to review the award but had abandoned the application and that by virtue of Makhanya’s election to proceed with the aforesaid claim in the CCMA and the Labour Court the High Court had no jurisdiction to consider the claim. In the other special plea it was alleged that the disposal of the claim by the arbitrator of the CCMA gave rise to a good defence of *res judicata*; the allegation being that the claim in the High Court was the same claim that had been disposed of by the arbitrator.

Unsound propositions:

- THE COURT HAS NO JURISDICTION BECAUSE THE CLAIM IS A BAD CLAIM

It was submitted that because the claim had been disposed of finally by the CCMA the High Court had no jurisdiction in the matter and accordingly the court had no power in the matter as the University had a good defence to the claim. The court held that this is not correct, however assumed its correctness for present purposes. The court held that the term “jurisdiction” describes the power of a court to consider and to either uphold or dismiss a claim and to dismiss a claim calls for the exercise of judicial power as much as it does to uphold the claim, except where dismissing a claim for lack of jurisdiction occurs.

The court held that in respect of the above submission, the question arises as to how a court would be capable of upholding a defence and thus dismissing the claim if it had no power in the matter at all? The court held that there is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (whether a claim is good or bad) cannot be dependant upon the answer to the question. To express it another way; its power to consider a claim

---

122 *Lillicrap, Wassenaar and Partners supra* at 500F-501H.
cannot be dependant upon whether the claim is a good claim or a bad claim.

The court held that even if the University had a good defence to the claim that is irrelevant to the question of whether the High Court had the power to consider the claim, if only to dismiss it. The court held that the submission that the court had no jurisdiction in the matter because there is a good defence is not capable of being sustained, merely as a matter of logic. The court held that it becomes apparent that this case is not about jurisdiction, it is about whether the University has a good defence to the claim.

The court held that if courts were precluded from considering claims that were bad in law there would be no scope for the recognition of new rights and the development of the law. The very progress of the law is dependant upon courts having power to consider claims that have not been encountered before. A court cannot shy away from exercising its power to consider a claim on account of the fact that it considers that the recognition of the claim might have undesirable consequences. Its proper course in case like that is to exercise its power to consider the claim but to decline to recognise the rights that are asserted and to dismiss the claim as being bad in law.

- **A HIGH COURT THAT HAS JURISDICTION TO CONSIDER A CLAIM FOR THE ENFORCEMENT OF A RIGHT MAY THWART THE ASSERTION OF THAT RIGHT BY DECLINING TO EXERCISE ITS JURISDICTION**

The court held that this was the basis upon which the court below upheld the objection in this case. The court held that the claim before the High Court and the claim before the CCMA are not the same claims when reference is had to the allegations in the particulars of claim compared to the factual allegations in the special plea and the allegations read in conjunction with the award of the arbitrator. The court held that the claim before it was not even capable of being pursued and ruled upon by an arbitrator of the CCMA, because it is not for the enforcement of an LRA right. The claim that was pursued before the CCMA was a claim to enforce the right of an employee not to be dismissed unfairly which is enforceable only in a Labour Forum.

The claim in this case asserts a right emanating from the common law to exact
performance of a contract. It is plain that the High Courts have the power to consider claims for the enforcement of employment contracts, as does the Labour Court. The court held that taken to its logical conclusion the approach adopted by the court below would mean that the claim would not be capable of being adjudicated upon at all by any court, not even to be dismissed on its merits once Makhanya exercised his election as to which claim to enforce because as a matter of judicial policy once Makhanya exercised his election, this would be, as a matter of judicial policy, to the exclusion of any other claims.

The court held that it is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law allows for “forum shopping” by allowing the litigant that choice.

But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.

The approach taken by the court below has the effect of denying Makhanya, as a matter of “judicial policy”, the ability to pursue the present claim at all, thereby thwarting the assertion of the right upon which the claim is founded. The court held that this cannot be correct, because “judicial policy” to that effect would be unconstitutional. The court held that it is not unknown in history for authorities to attempt to subvert the assertion of rights by the expedient of denying the holder a forum in which to assert them. A right without a forum in which to enforce it might as well not exist at all. The drafters of the Constitution were clearly alive to the stratagem of surreptitiously negating rights in that way, which it outlawed by guaranteeing to every person a forum in which to prosecute any legal claim and not only some of them.123 That guarantee is fundamental to the preservation of rights.

The court held that even if the court below meant only that the claim could not be asserted in the High Court but may be pursued in the Labour Court under its

concurrent jurisdiction, which is not what the Court below had in mind that would also be unconstitutional. The law has designated the High Courts as a forum for pursuit of the claim, and a litigant may not be denied access to a court that the law allows.

It would be no answer to say that it really will not matter because he claimant has another right that is just as good. If the claimant has two rights, and it is not in issue in casu that he does, then both must have a forum in which to be asserted. That is what the Constitution guarantees. To the extent that the objection was upheld on that basis the order cannot stand.

- **THE CLAIM THAT IS BEFORE THE COURT IS NOT WHAT IT PURPORTS TO BE, BUT IS INSTEAD A CLAIM FOR THE ENFORCEMENT OF AN LRA RIGHT**

The court held that although this proposition was not advanced in this case, it is the foundation for a defence that has been mounted, academically, in support of the *Chirwa* case. The court referred to an article written by Halton Cheadle.124 In the article, Cheadle points out that the majority in the *Chirwa* case did two things, namely; the first was to decide as a matter of constitutional interpretation to limit the scope of the right to administrative action so as to exclude labour practices. Cheadle referred to what he considered to be a policy encapsulated in the LRA that grievances that an employee in the public sector might have arising from dismissal should be the subject only of claims under the LRA.

The court held that if this was indeed the purpose of the legislation it would justify a construction of the legislation as to deny to public sector employees any rights other than those provided for in the LRA, which is the construction that the majority placed on it. That construction, with its consequence that a claim arising outside the LRA is bad in law, will give full effect to that legislative purpose. On that finding alone any further claim that might yet be made along similar lines will be doomed to failure on that ground and the claimant will be confined to pursuing his or her LRA rights only.

However the court held that it begs the question why the Legislature should have

---

denied a claimant his or her ordinary right to approach a High Court to consider such a claim, if only to have it dismissed because the claim is bad. It would be most odd if the Legislature, having resolved to deny employees rights arising outside the LRA, should also bar the courts from declaring that an employee has no such rights.

The court held that the explanation advanced by Cheadle for the jurisdictional finding arises from what he says the majority did in that regard; which was to characterized the claim that was before it as a claim for the enforcement of LRA rights and not as a claim to enforce a constitutional right.

The court held that the claim that is before a court is a matter of fact; if claim arises from the infringement of the common law contract of employment, that is the claim as a matter of fact, if to enforce a right created by the LRA or a right derived from the Constitutions then, as a fact, that is the claim. That a claim might be a bad claim is beside the point. The court held further in this regard that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by mere use of language, this is often what is sought to be done under the guise of what is called “characterizing” the claim. Where that word is used to mean “describing the distinctive character of” the claim that is before he court, as a fact, then its use is unexceptionable. But when it is used to describe an alchemical process that purports to convert the claim into a claim of another kind then the word is abused. When then occurs is not that the claim is converted but only that the claimant is denied the right to assert it.

The court held that this is what it understood Cheadle to say; that this is what the court purported to do in the Chirwa case. The court held that if the court in the Chirwa case had indeed done so then that would not have been permissible, because that would have denied Ms Chirwa the right to assert the claim she had brought. However the court held that the statement that the majority did so is factually not correct. The court held that in both majority judgments of the Chirwa case it is stated that Ms Chirwa’s claim is for the enforcement of her constitutional right. That is how the court understood the claim. The fact alone that the court found itself able to find that the conduct in question was not “administrative action” demonstrates ineluctably that the court did not consider the claim that was before it.
to be a claim for the enforcement of LRA rights. The contrary would suggest that the majority regarded the claim as being one for the enforcement of LRA rights when assessing the jurisdictional issue, but to be a constitutional claim when assessing the merits, which would be absurd.

(ix) THE DECISION IN THE CHIRWA CASE

The court held that if the ratio of the decision in the Chirwa case to dismiss the claim was that the High Court lacked jurisdiction to consider it then it applies as much in in casu and we are bound to dismiss the claim because on that issue the two cases are indistinguishable notwithstanding the differences in their facts. Both cases dealt with the termination of employment which gave rise to a potential claim to enforce LRA rights, in both cases a claim was asserted was a separate right which was said to have been infringed. Although the right asserted in casu is an established right, unlike the right asserted in the Chirwa case, however this is immaterial because jurisdiction is not dependant on whether the claim is good or bad. In both cases the right asserted was not an LRA right, but one that falls within the ordinary power of the High Court to enforce, in casu the right asserted was contractual rights and in the Chirwa case was constitutional rights, both rights falling within the ordinary power of the High Court to enforce.

The court then in dealing with what binds a lower court is only the ratio of a judgment and not what might have been said en passant, although this is instructive, which was what was held in the True Motives case. In considering what constitutes the ratio of a case the court referred to with approval and in confirmation, the decision of Fellner v Minister of Interior where the court held:

“The decision or judgement, in the sense of the Court’s Order, by itself only operates of course, between the parties themselves: it can only state law in so far as it discloses a rule.”

Taking the above into consideration, the court held that the most striking feature of the Chirwa case is that its two findings, in so far as they purport to express a rule

---

125 True Motives supra.
126 1954 (4) SA 523 (A) at 542D-E.
upon which the order was founded, are mutually destructive.

There is nothing in the Chirwa case to suggest that the court invoked anything but its powers on appeal in reaching its conclusions.

The High Court, once having found that it had no jurisdiction, as the majority found, would not have been capable, by its own decision, of making any further orders in the matter. The only course open to it would have been to dismiss the claim, on the ground that it lacked power to make any further orders. Yet the majority went on to make a finding on the cause of action, which purported to be at least one of the grounds on which the claim was dismissed. It follows that the ratio for its decision to dismiss the claim is to be found in one or other of those findings but it cannot be found in both. The difficulty is thus to discover which of them it was because we are bound by whichever one provides the ratio of the decision. In addition one needs to remember that this case is not materially indistinguishable on the jurisdictional issue, the court indicated that it would be a pity if the case was disposed of on the wrong ground. The court held that ordinarily the ratio of the decision will appear from the express language of the judgment.

The ratio for Skweyiya J’s decision to dismiss the claim was that the High Court lacked jurisdiction and the learned Judge left the matter there. However, the remainder of the majority went on to make a further finding and the reasons for doing so are reflected in the judgment of Ngcobo J and that judgment supplemented the reasons that had been given by Skweyiya J for his jurisdictional finding, and in addition set out the reasons for the conclusion on the merits. The learned Judge stated the conclusions he reached on each of the issues, but failed to state which of them constituted the reason for dismissing the claim. As indicated above, the court held that it might have been either one of them, but it could not be both. Thus we are left with no express statement by the majority of which of those was the ratio for its order dismissing the claim.

The court held that the ratio of a decision is a rule of law; the rule itself exists as a fact, and is thus capable of being discovered in one of two ways, either expressly or where this does not occur, as with all facts, it is capable of being discovered
circumstantially by inference. In support the court referred with approval to the *Fellner* case where the learned Judge in that case held as follows:

“Where, however, even when reasons [for the order] are given, it is not possible to discover a *ratio decidendi* from them, it becomes necessary to resort to the facts found to be material and to the order, as if no reasons had been given, so as to find what must have been treated by the Court as the law, if the order was to be justified.”

In the light of the above the court considered itself compelled to approach the case before it in this way and to determine, as if no reasons had been given, with reference only to the material facts and the order that was made, what must have been treated by the court as the law if the order was to be justified. The court held that it was confined to only two possibilities. The court held that all arguments in support of jurisdictional objections of the present kind, when properly analyzed, ultimately come down to one or other of the above three unsound propositions, the court held each of which to be fatally defective, because

- it offends an immutable rule of logic;
- it is in conflict with the Constitution; and
- the third was not of relevance to the case before the court as the court held that this was not the basis of the court’s finding.

In the light of the above the court held that it could not think of any other possible explanation why the High Court might not have jurisdiction in the *Chirwa* case. The case before the court was not materially distinguishable. Thus if the High Court had jurisdiction in this case it must equally have had jurisdiction in the *Chirwa* case and it is perfectly clear that the High Court has jurisdiction in this case. That was held in the *Fedlife* case and the High Courts’ ordinary powers in such cases are also expressly preserved by the BCEA. The court held that in these circumstances that could not have been the ratio of the majority, but for Skweyiya J, in the *Chirwa* case because on the material before the court its order cannot be justified on that ground.

---

127 *Fellner supra* at 542F-G.
There being only one other possibility that presents itself; the claim was dismissed because the termination of Ms Chirwa’s employment was found not to have been administrative action with the consequence that the claim was bad in law.

The court held that the Chirwa case, like all the cases that preceded it, was not about jurisdiction at all. It was about whether there was a good cause of action. The court held further:

“In my view the least said about jurisdiction in such cases the better because, once that red-herring is out of the way, the courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA.”

The court concluded as follows:

“… I am driven to conclude that the ratio for the order that was made in Chirwa (both the minority and the majority, but for Skweyiya J) was that the termination of an employment contract in the circumstances in which it occurred in that case, does not constitute ‘administrative action’, and for that reason the claim was bad in law and it was dismissed on that ground. The further views of the majority that the High Court had no jurisdiction to consider the claim was not the ratio for the order that it made and what was said by various members of the court in that regard is thus not binding upon us. In those circumstances we are free to dispose of this appeal on conventional principles”.

_In casu_ the claim is for the enforcement of the common law right of a contracting party to exact performance of the contract. Whether the claim is a good or a bad one is immaterial, nor may the court thwart the pursuit of the claim by denying access to a forum that has been provided by law. A claim of that kind clearly falls within the ordinary power of the High Court that is derived from the Constitution and the jurisdictional objection should have failed. The court held that the appeal must accordingly succeed.

In considering the above judgment; it is clear that the SCA, as reflected in the judgment, were of the view that any confusion over whether the High Court had jurisdiction to entertain claims to enforce employment contracts had long since been cleared up by the Fedlife case and if any doubt remained after the Fedlife case, it was finally dispelled by section 77(3) of the BCEA which confirms that the High
Courts have not been divested of their ordinary jurisdiction to enforce contracts of employment, section 77(3) confers equivalent jurisdiction on the Labour Court to consider such claims. It is also worthwhile to note that in the decisions referred to above, nowhere was the *Fedlife* case overruled, including the *Chirwa* case. However, the only possible reason, in the face of these clear authorities, why the High Court had ruled that it lacked jurisdiction in the *Makhanya* case could be found in the *Chirwa* case. The SCA as seen above found itself confronted with the *Fedlife-case* and section 77(3) of the BCEA on the one hand and the *Chirwa* case on the other hand. The SCA acknowledged that if the *Chirwa* case had in fact ruled that the High Court lacked jurisdiction over claims to enforce employment contracts, then the SCA was bound to follow the *Chirwa* case irrespective of the *Fedlife* case and section 77(3) of the BCEA. Accordingly, as seen above, everything depended on whether the *Chirwa* case indeed ruled that the High Courts lack jurisdiction to entertain claims for the enforcement of employment contracts. The majority found that, properly analysed, Ms Chirwa’s case was nothing more than a claim for unfair dismissal, which fell within the scope of the LRA, and should therefore be pursued under that Act. Anything the Constitutional Court might have said, or that may be inferred about what it wished to say, about the High Court’s jurisdiction in contractual matters was therefore *obiter*, and left the SCA’s judgments intact.

Since Ms Chirwa had not instituted a contractual action, the *Fedlife* case and its successors, in all of which the SCA has unambiguously ruled that the High Court has jurisdiction to entertain claims for the enforcement of contracts of employment, must still represent good law. Therefore the SCA and the High Courts are therefore bound to follow these judgments unless the SCA finds that they were plainly wrong or the Constitutional Court has overruled them.

The question arises as to whether the *Chirwa* case must be construed as narrowly as this? The ratio of a judgment is sometimes embedded in the very premise from which the court proceeds. That premise may be founded on a principle with a reach broader than the facts before the court. It may well be that the principle laid down or confirmed by the higher court spans cases in which the facts are distinguishable in the narrow sense, but the principle is nonetheless applicable to those facts. In addition it may also be, as was held in the *Nonzamo* case, that the higher court’s
judgment impliedly overrules earlier judgments which conflict with that principle. The SCA in the *Makhanya* case was prepared to accept that the *Chirwa* case was such a judgment. The SCA held that this could be the only explanation for the High Court accepting that the *Chirwa* case deprived it of jurisdiction, even though the facts themselves were clearly distinguishable from those in the *Chirwa* case. On a wide reading of the *Chirwa* case might explain why the court a quo declined to follow the Constitutional Court’s earlier judgment in the *Fredericks* case in which two of the Judges of the *Chirwa* case thought aspects of the majority judgments conflicted, and which also confirmed that the High Court’s jurisdiction in employment matters unless those matters fall within the exclusive jurisdiction of the Labour Court, as opposed to the CCMA.

It is clear that everything in the *Makhanya* case turned on the precedent to be extracted from the *Chirwa* case. Although the Constitutional Court had to decide only on whether a claim by a dismissed public servant would be pursued under the PAJA, the three contributions that comprise that judgment are learned and far-ranging discourses on the difficult subject of the overlap between the constitutional rights to fair labour practices and to lawful and fair administrative action. The main concern for the Constitutional Court majority was that, unless each of these rights is pigeonholed and treated as exclusive, the elaborate structure created by the LRA for resolving labour and employment disputes may be by-passed by public servants who prefer to press their claims in the High Courts, that this will result in public servants being treated differently from private sector employees who do not have the option of pressing administrative law claims, and that conflicting jurisprudence will frustrate the very purpose for which a “one-stop shop” for employees was created by the Legislature. This was the broad message in the *Chirwa* case.

The issues which came before the Constitutional Court and the conclusions reached, have been referred to and considered above and will not be repeated here in order to avoid repetition.

In the light of the above the question arises as to what was the ratio of the *Chirwa* case?
Nugent J already expressed a view on this issue in the Makambi case where the learned Judge in a minority concurring judgment agreed that Ms Makambi’s appeal against the High Court’s finding that it lacked jurisdiction to entertain her claim must fail, but, according to the learned Judge, the only basis on which the appeal failed was that Ms Makambi relied primarily on her constitutional right to fair labour practices coupled with her supposed right to fair administrative action. Judge Nugent wrote that the only way he could make sense of the Chirwa case was to assume that its ratio was that dismissed public servants who wish to pursue their constitutional right to fair labour practices must, as a matter of policy, do so in the forums created by the LRA. In considering what Judge Nugent held regarding the issue of jurisdiction reflected above, the learned Judge went further and held that he did not understand the Chirwa case to hold anything different. The learned Judge held that indeed the Constitutional Court could not possibly have done so, because the majority could not logically or legally have found, in one breath, that the High Court lacked jurisdiction to entertain Ms Chirwa’s claim and, in the next ruled on the merits of her claim. This was because a finding that the court lacks jurisdiction axiomatically disposed of the second issue. Conversely, if the dismissal of Ms Chirwa’s claim was based on the finding that her claim was bad in law, the Constitutional Court must have accepted that the High Court that the High Court had jurisdiction to entertain the matter.

Therefore, since the Constitutional Court ruled on the administrative law issue and held that the High Court should have dismissed the claim because Ms Chirwa’s claim was based on a right not founded in law, the Constitutional Court must have accepted that the High Court had jurisdiction to entertain the claim, if only to dismiss it. The finding that Ms Chirwa’s dismissal was not reviewable in any court because they do not constitute administrative action was a finding on substantive law, not a jurisdictional ruling. That being so, the ratio of the Chirwa case by which all lower courts are bound is simply that dismissed employees may not rely on their right to pursue claims founded on their right to lawful and fair administrative action, because dismissals do not constitute administrative action.

In the Makhanya case there was a further distinction in the facts before the SCA and in the Chirwa case, namely; the Makhanya case concerned an action for breach of
contract not an application for review. However according to Judge Nugent, this was not enough to distinguish the two cases for the purposes of deciding the jurisdiction issue. The principle applicable to both cases is that employees have rights arising from the general law in addition to and apart from those they enjoy under labour law. One is the right, emanating from the common law, to insist on performance of their contracts, another, in the case of public servants, is their right to fair and lawful administrative action. Only the latter right was expunged in the *Chirwa* case.

Another question which arises is what of employees' contractual rights? Judge Nugent held that the existence of separate rights, each justiciable in its own right, is critically important to establishing the respective jurisdictions of the labour tribunals and the civil courts. Since the termination of the contract of employment potentially raises three claims, it follows that each claim may be pursued (though not necessarily successfully) in any court with jurisdiction. Judge Nugent held that this was the basis for judgments like the *Fedlife* case and its successors, as it was for other pre-*Chirwa* judgments in which civil courts accepted jurisdiction in labour matters where dismissed employees were pursuing remedies outside labour legislation. If employees wish to pursue claims under the LRA, they must do so in either the Labour Court or the CCMA, because those forums have exclusive jurisdiction in such matters. But if they wish to pursue claims outside the LRA, they may do so in any forum with jurisdiction. It is submitted that what Judge Nugent appears to be clarifying importantly in this complicated issue of overlapping rights and jurisdiction, is that this may ultimately having nothing to do with jurisdiction at all.

It is submitted that the learned Judge may very well be correct in that it is submitted further that his interpretation of section 157 of the LRA and section 77(3) of the BCEA is sound, both sections clearly and unequivocally preserve the High Courts jurisdiction, to interpret the sections as otherwise would be tantamount to creating an interpretation of the sections which is simply just not borne out by the wording contained therein. However conversely one may contend that a purposive interpretation of section 157 of the LRA and section 77(3) is justified by policy considerations as illustrated by the Constitutional Court in the *Chirwa* case, however it is submitted, with respect, that there is an inherent risk in applying a construction of this nature to the said sections as illustrated by Judge Nugent. It is submitted that
this risk reveals itself when the line between a jurisdictional challenge and a special
defence as to whether a claim in these particular circumstances is a bad claim
becomes blurred.

As illustrated above by Judge Nugent whether a claim is a good or bad claim still
requires a court to exercise its power to permit or dismiss the claim, thus exercising
jurisdiction. It is submitted further that policy considerations may very well prevent a
claim raised within the scope of the topic under discussion from being successful,
however it is submitted that this has nothing to do with jurisdiction.

What then are the effects of the above reasoning:

• The *Chirwa* case does no more than rule that dismissed public servants may
  not vindicate their right to fair and lawful administrative action in any court,
  including the High Court because dismissal do not constitute administrative
  action.

• If they do, any court, including the Labour Court, must dismiss their actions
  because dismissals are not subject to review, but the High Court retains
  jurisdiction to dismiss such actions.

• In addition the High Court retains jurisdiction to entertain actions in which
  employees assert other rights falling outside labour legislation, including the
  right to enforce contracts of employment.

• All employees may pursue claims to enforce employment contracts in either the
  Labour Court or the High Court, not both since these courts have concurrent
  jurisdiction to entertain such claims.

• Employees may also pursue separate claims to enforce statutory rights in the
  appropriate Labour Forum; be it the Labour Court, CCMA or Bargaining
  Council, as well as claims to enforce their contractual rights in the High Court or
  Labour Court. A plea of *lis pendens* or *res judicata* cannot be raised in the
contractual claim if the employee has also pressed a statutory claim, and vice versa. Nor can a special plea or exception be raised that the Court lacks jurisdiction to entertain the contractual claim.

• If dismissed public servants launch their claims in either the High Court or the Labour Court for alleged infringements of their right to fair administrative action, that court must dismiss the claim, not because it lacks jurisdiction, but because the claim is, in reality, an LRA matter.

According to the *Makhanya* case the law currently is as follows:

• The labour forums established under the LRA have exclusive power to enforce rights conferred by the LRA, and the High Court lacks such power;

• both the High Court and the Labour Court have power to enforce common law contractual rights, which are distinct from LRA rights; and

• both the High Court and the Labour Court have power to enforce constitutional rights as far as their infringement arises from employment.

It is submitted that this interpretation is supported by Judge Nugent’s interpretation of the section 157 and section 77(3), as well as, the learned Judge’s interpretation of the *Chirwa* case. Courts will have to follow the *Makhanya* case unless it is found to conflict with the *Chirwa* case, in which case they must follow the *Chirwa* case. Whether the SCA has read the *Chirwa* case correctly remains debatable until the Constitutional Court clarifies the issue.

With reference to the interpretation of section 157(2); one of the issues raised in the *Chirwa* case was whether the phrase “concurrent jurisdiction” means that both the High Court and the Labour Court has jurisdiction in such matters, or whether it means something else.

Skweyiya J expressly ruled that section 157(2) does not confer concurrent jurisdiction on the Labour and High Courts, but confers on the Labour Court jurisdiction
equivalent to that which the High Court would have had had it retained jurisdiction in such matters.

In the *Makhanya* case, the SCA did not agree with this finding. The SCA held that section 157(2) does not purport to confer jurisdiction on the High Courts, it does no more than confer equivalent jurisdiction upon the Labour Court. In other words section 157(2) does not give the High Court jurisdiction it would otherwise lack (neither does it purport to take away jurisdiction from the High Court which it always had), it simply confirms and preserves that jurisdiction and states that the Labour Court has that same jurisdiction. Judge Nugent read the similarly phrased section 77 of the BCEA in the same way.

At this stage it is submitted that the High Court has always been clothed with the necessary jurisdiction by virtue of section 169 of the Constitution. If the intention of the Legislature was that the Labour Court assume exclusive jurisdiction regarding all employment and labour matters, the question arises as to why the Legislature would in that instance draft section 157(1) dealing with exclusive jurisdiction and section 157(2) which provides for concurrent jurisdiction, it is submitted that it would have been logical merely to provide for exclusive jurisdiction and omit entirely any reference to concurrent jurisdiction, alternatively expressly state in one way or the other that the Labour Courts jurisdiction as contemplated by the interpretation adopted by the *Chirwa* case is absolutely to the exclusion of the High Court.

Both majority judgments in the *Chirwa* case point toward one conclusion, namely; that dismissed employees must pursue the remedies afforded them by the LRA, and that the Labour Tribunals therefore have exclusive jurisdiction to entertain those claims. That must mean in turn that the High Court’s jurisdiction to entertain all employment matters is ousted by the LRA.

The SCA in the *Makhanya* case accepted that a court’s jurisdiction defines the area and subject-matter over which its authority extends. Its powers may be exercised only within the scope of that authority. While all courts may have powers to dismiss matters because they fall outside the scope of their authority, when they do so, it is normally on the ground that the matter falls outside their jurisdiction.
There is another aspect of the *Chirwa* case that seems to be in conflict with the views expressed in the *Makhanya* case. This is the logic that underpins the finding, accepted in the *Makambi* case and *Makhanya* case that dismissed public sector servants may not seek to vindicate their right to fair administrative action under the common law, the PAJA or the Constitution. That finding was premised squarely on the view that the termination of a public servant’s contract of employment does not give rise to a cause of action under administrative law. That view seems to go further than the finding that dismissals do not constitute administrative action. It seems to be based on the view that the Constitution guarantees fair administrative action and fair labour practices as separate rights, which are not enforceable as separate claims because each is regulated by different rules and their own comprehensive statutes. On this view a cause of action arising from an LRA right is not separate from a simultaneous breach of some other right, the right and remedy conferred by the LRA supplants the other.

If that was the reason Ms Chirwa’s claim was found not to be enforceable by the High Court, it seems equally applicable to claims arising from other provisions of the Constitution and also those arising from the common law. Therefore in terms of this all actions by dismissed employees that rely on rights outside the carefully regulated set of employee rights sourced in section 23(1) of the Constitution are not justiciable outside the forums designed to give effect to those rights. Skweyiya J pointed to section 210 of the LRA which makes that Act pre-eminent if it conflicts with the provisions of any other law, save the Constitution.

However the SCA remarked justifiably that if the High lacked jurisdiction to entertain Prof Makhanya’s contractual claim, then he would be entitled to an explanation why his claim was dismissed notwithstanding the provision in the BCEA which permits him to do so and judgments like the *Fedlife* case and its successors which confirmed that he could. The SCA could not find an answer and assumed that there was none. However if one considers the *Chirwa* case further, before the *Chirwa* case, the SCA’s finding that the High Court and the Labour Court have concurrent jurisdiction to enforce common law contractual rights would not have attracted much debate. It was always accepted that if the High Court had jurisdiction to entertain claims for the
enforcement of employment contracts, it would simply enforce the terms of the contract. The *Fedlife* case merely confirmed the Court’s authority to do that. In the *Fedlife* case the majority reasoned that since the LRA afforded less comprehensive relief to the employee than was afforded by the common law the Legislature could not have intended to diminish the employee’s right under the common law. However in the *Gumbi* case, the *Boxer Superstores* case and the *Murray* case, the SCA went further, each case concerned alleged breaches of contract terminable on notice, the SCA not only confirmed the court’s jurisdiction to entertain contractual claims, it developed the common law to include in all contracts of employment an implied duty of “fair” dealing by the employer. This meant that dismissed employees may vindicate their contractual rights on grounds indistinguishable from those on which they may vindicate their statutory right not to be unfairly dismissed.

This appears to obliterate any distinction between a cause of action arising from an alleged breach of contract and a cause of action sourced in section 186 of the LRA.

If one has regard to the principles espoused by the majority in the *Chirwa* case; if the ratio of the *Chirwa* case is indeed that labour forums have exclusive jurisdiction in labour matters the question then arises; what is a “labour matter”?

In the *Makhanya* case it is predicated on the view that disputes arising from contracts of employment are distinct from disputes over LRA rights. That may have been true when the *Fedlife* case was decided, but since the SCA has developed the common law to incorporate a right of fair dealing, the distinction between the causes of action in claims for the enforcement of rights emanating from the contract of employment and rights emanating from the LRA becomes very difficult to distinguish.

In legal terms the debate started because of the contradiction between the *Chirwa* case and the *Fredericks* case. Judge Nugent accepted that the *Fredericks* case and the *Chirwa* case can be reconciled because rightly or wrongly, the majority held in the *Chirwa* case that the *Fredericks* case was distinguishable. So the issue remains as to what is to be made of the SCA’s development of the common law to incorporate fairness into the contract of employment, on the one hand and, on the other, the disapproval expressed by Ngcobo J of the *Boxer Superstores* case, which he said
put the form of an employee’s complaint above its substance.

In the *Makhanya* case the SCA held that the *Chirwa* case had not expressly disapproved of the *Fedlife* case and its successors. The SCA therefore assumed that those judgments stand. But while the *Fedlife* case and its successors may not have been expressly overruled in the *Chirwa* case, it can hardly be said to have been endorsed. The *Fedlife* case is merely referred to in passing by Skweyiya J in his summary of the SCA’s judgment, and that Judge also acknowledged that the civil courts may retain jurisdiction in some employment-related matter, without explaining which.

Ngcobo J referred to the *Boxer Superstores* case only to illustrate the formalism of the SCA’s view that the dispute resolution procedures of the LRA may be avoided merely by dressing an unfair dismissal dispute as a claim for breach of contract.

In the *Mohlaka* case, Judge Pillay sought to put Ngcobo J’s reference to the *Boxer Superstores* case in context. In considering Ngcobo J’s reference to the objects of the LRA as referred to and discussed above, taking this into consideration, Judge Pillay dismissed as unnecessary the SCA’s development of the common law to incorporate a duty of fairness as referred to and discussed above and will not be repeated hereunder.

What becomes of the specialist forums upon which the LRA confers exclusive jurisdiction to deal with employment in labour matters? The answer advanced by the *Makhanya* case was nothing. According to that judgment contractual claims and LRA claims are different species, to be enforced in different forums, each clothed with specific jurisdiction to entertain each *specie* and nothing said in the *Chirwa* case changes this elementary legal fact. The key to the problem posed by the *Chirwa* case seems to be; how does one distinguish between claims that fall under the LRA and those that fall outside the Act? In the *Chirwa* case the majority found that Ms Chirwa’s claim was in fact for the enforcement of her right not to be unfairly dismissed and that it was accordingly wrongly categorised as a claim for the enforcement of her presumed right to fair administrative action. Can it not therefore be said by analogy, Prof Makhanya’s claim was for the enforcement of his right not to
be unfairly dismissed, but that it was wrongly categorised as a presumed right to hold his erstwhile employer to his contract?

It is submitted that the SCA’s view that the simple legal fact as stated above is that one is concerned with different species of rights. It is submitted further that merely because there now appears to be an overlap of two different rights which arise as a result of the termination of employment which in turn give rise to an election for an employee; it does not necessarily follow that employees should now be deprived of one of these specie of rights.

In essence this would have the result, generally, of creating a non-developmental option that each time there is an overlap between two different rights arising from the same circumstances, but giving rise to two different causes of action, one of the rights may be “culled”.

The Fedlife case provides one answer. According to that judgment, claims to enforce the statutory right not to be unfairly dismissed are different from claims for alleged breach of contract because contractual matters entail the determination of the lawfulness of the defendant’s actions, while LRA matters are about fairness. This raises two further questions, namely:

- Whether the distinction between lawfulness and fairness indeed serve to distinguish claims under employment contracts from claims under the LRA; even if the answer to this question is yes.

- Whether that distinction can still be drawn now that unfairness has become a ground for a claim for enforcement of an employment contract.

However, LRA matters do not concern fairness alone. The Labour Courts and statutory arbitrators have on innumerable occasions ruled dismissals unfair because the employer has acted unlawfully, whether by breaching a statutory provision or a
In the *Makhanya* case it appears as though the commissioner in that matter based his decision on a finding that Prof Makhanya had not proved the existence of a contract of employment that is a legal finding.

The dissenting minority judgment in the *Fedlife* case draws attention to the erstwhile Appellate Division’s observation in *NUMSA v Vetsak Co-operative Ltd* that there are two sides to whether dismissals constitute unfair labour practices, one legal and the other equitable. According to that judgment:

> “there is no sure correspondence between unlawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair ..., a lawful dismissal will not for that reason alone be fair ....”

If this is correct, forums charged with the task of determining whether dismissals or any labour practice are fair are not concerned solely with the fairness of those practices, but also with whether the employer has acted lawfully. If that is so, the only difference between contractual claims and unfair labour practice claims is that the labour tribunals are empowered to proceed beyond the issue of legality and to consider whether the employer’s conduct, even if lawful, was nonetheless unfair. Before the *Boxer Superstores* case and the *Gumbi* case civil courts were confined to the former enquiry. However after those judgments, the civil courts embark on the second enquiry. Apart from the remedies the respective courts are empowered to grant, which it is submitted a very material and logical consideration for an claimant contemplating litigation in these particular circumstances, it appears as though there is no longer any difference between claims by dismissed employees to enforce their contractual rights and claims for unfair dismissal under he LRA. It seems arguable that a termination of a contract of employment, which is defined as a dismissal by the LRA falls within the jurisdiction of those forums mandated by the LRA to determine them and if that is so, Prof Makhanya’s claim, like Ms Chirwa’s claim, was merely a complaint about unfair dismissal dressed up in another form.

Be that as it may, it is respectfully submitted that even if the SCA has developed the

---

128 *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2008] 12 BLLR 1179 (LAC) and *Buthulezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC).

common law in these particulars circumstances, firstly the SCA is entitled to do so if not indeed mandated to do so, where appropriate, in terms of the Constitution and, secondly, is the development of the common law in these particular circumstances a real threat to labour legislation, is it not possible, as illustrated by authorities referred to above that various forums could actually contribute to the development of labour law. In the light of this one cannot help but to contemplate whether any decision to deprive the civil courts of their jurisdiction in these particular circumstances is an extreme solution that could potentially in the long run reveal itself to be more of a cost than a benefit to labour legislation generally.

It is clear that the *Chirwa* case did not overrule the *Boxer Superstores* case; the question arises that in the light of the Constitutional Court’s judgment how much longer will *Boxer Superstores* survive? It appears as though the *Boxer Superstores* case and the *Makhanya* case run counter to the spirit and letter of the *Chirwa* case. The *Chirwa* case put a stop to dismissed public servants invoking the PAJA to challenge their dismissals. The *Makhanya* case licenses all dismissed employees, including public servants, to invoke their contractual rights to bypass the appropriate labour forum and press claims for the enforcement of their contractual rights instead of, or in addition to, their statutory rights.

As expressed in the *Makhanya* case, the law is not divisible into discreet boxes, it can be contended that an incongruous situation would arise if an employee, like Mr Gumbi, were to press a claim for breach of contract based on his employer’s alleged failure to afford him a fair hearing and simultaneously to press a claim for a procedurally unfair dismissal in the CCMA, based on the self-same facts. In the *Gumbi* case the court disposed of the matter on appeal on the ground that the employer had not acted unfairly. On the strength of the *Makhanya* case, Mr Gumbi would conceivably have pursued that very claim in the CCMA, where he might possibly have succeeded. According to the *Makhanya* case, the employee could not be non-suited in either forum, because the claims are different. It may be that the claims may have been categorised differently and that they are differently pleaded. But to accept that they are different in substance seems to place them in discrete boxes, which according to the *Makhanya* case does not exist in law. Skweyiya J dealt with the overlap of claims under the PAJA and claims under the LRA in the
In the *Chirwa* case and the learned Judge responded by referring to the existence of a purpose-built employment framework and such framework to take precedence over non-purpose-built processes and forums.

In considering the above it is submitted that by analogy if one considers an employee whose contract of employment is terminated is circumstances constituting a dismissal, such an employee may be subjected to a disciplinary hearing, in the event that the particular employee’s dismissal is upheld, such an employee may still proceed to refer an unfair dismissal dispute to the CCMA.

In contrast, it is submitted that there should be nothing extraordinary about an employee approaching a civil court to press a claim for breach of his or her contract of employment and simultaneously or sequentially enforcing his or her statutory rights in terms of the LRA. It is submitted that the law currently provides for this election, whether exercised simultaneously or sequentially. To contend that where the two separate causes of action arising from the same set of facts yields two conflicting decisions by separate forums may sound concerning, however it is submitted that one needs to take into account that this should be dealt with on a case-by-case basis in the sense that more than likely the parties in these circumstances will remain the same in each forum and more than likely, one of the parties will bring it to the attention of the forum that there is a separate cause of action simultaneously pending or alternatively been decided by another forum. By adopting this approach one introduces an element of flexibility to allow the presiding officer in the particular forum to be aware of this simultaneous or separate cause of action arising from the same set of facts and placing this in the hands of the particular forum to be dealt with and considered according to the circumstances of a particular case. It is submitted that this approach would be more flexible and constructive as opposed to depriving claimants of rights and courts of jurisdiction.

In considering statutory arbitration under the auspices of the CCMA, it is submitted that such arbitration should not be an absolute bar to a claimant pursuing a separate cause of action in a civil court, albeit that an employee who may be unsuccessful in an unfair dismissal dispute at statutory arbitration may still have an election of reviewing such an arbitration in the Labour Court.
Albeit that an arbitration agreement is of a different nature to that of statutory arbitration, in civil litigation, generally, such agreements may be raised in the form of a special plea, however once there has been compliance with such agreements, nothing prevents a litigant from approaching a civil court thereafter, such agreements generally do not amount to absolute barriers in proceeding further with a particular case. By affording a claimant an opportunity to approach the CCMA and a civil court, simultaneously or sequentially, does not necessarily amount to placing the law in discrete boxes, but this should rather be seen for what it simply is; namely that a claimant may have to separate causes of action arising from the same set of facts and, it is submitted, with effective judicial control, there would be no need to render obsolete a claimant’s right to enforce his or her contract of employment in a civil court.

Skweyiya J held that employees have no need to rely on the PAJA because the LRA affords them the same rights they enjoy under administrative law, albeit confining them to different remedies. It may at this point be worthwhile to mention that as illustrated above, it appears as though with the development of the common law by introducing a general duty of fair dealing in contracts of employment, one may contend equally that there is no need to rely on contract law when the LRA affords the same protection to an employee. Skweyiya J could just as well been referring to the overlap between the LRA and the common law, as developed by the SCA. Although Skweyiya J said no more than that in such matters litigation under the LRA is more “appropriate” than litigation under other legislation it could be argued that the message read in the context of the majority judgment as a whole is clear; where employees rely on unfairness of their dismissals, employees must pursue their claims under the LRA, not in the ordinary courts.

In considering this, it is submitted that one needs to consider the question as to why if the message is so clear did the Constitutional Court in the Chinwa case overrule the SCA judgments and furthermore why did it sought to distinguish the Fredericks case and, also, not declare it wrong.

This needs to be considered when one looks at the word “appropriate” as it the fact
that these judgments were not overruled appears to add support, if anything, to the contention that it would be more appropriate, however not necessarily compulsory, for an employee to pursue labour and employment matters under the LRA. In addition if the learned Judge was saying that LRA rights need to be pursued to the exclusion of rights that an employee may have under the PAJA and common law of contract, why then did the learned Judge simply not just state this expressly.

In the *Chirwa* case the High Court did not base its finding on the PAJA but on the common law principle of *audi alteram partem*. The Constitutional Court explained why the development of that branch of the common law by the former Supreme Court of Appeal in cases like *Administrator, Transvaal v Zenzile*\textsuperscript{130} no longer applies to labour matters under the present Constitution. In essence the Constitutional Court held that it is no longer necessary to extend the principles of natural justice and other rules of administrative law to public servants because the Constitution and labour legislation have brought them into the same fold as all employees, and their employment rights are guaranteed by a self-contained provision in the Constitution.

It can be argued that the same seems to be true of the extension of a common law right to procedural and substantive fairness to dismissed employees. If the Constitutional Court could rule defunct cases like the *Zenzile* case in which the former Appellate Division affirmed the rights of dismissed public servants to challenge their dismissals under the common law, there seems no reason why it should not hold that cases like the *Boxer Superstores* case and the *Gumbi* case are likewise defunct, at least wrong.

According to the *Makhanya* case, had her claim not prescribed Ms Chirwa could simply have instituted an action for breach of contract relying on the same complaint that she had relied on from the outset, once the Constitutional Court had decided the matter.

Now in the light of the *Makhanya* case, Ms Chirwa could have returned to the High Court to claim contractual damages beyond the compensation she was ultimately

\textsuperscript{130} [1991] 1 All SA 240 (A).
awarded at the CCMA. It is submitted with respect that the Constitutional Court expressly stated that cases like the Zenzile case no longer apply, the question arises as to why then did it simply expressly state the same in so far as the SCA judgments referred to above are concerned.

Regarding section 77 of the BCEA; the Makhanya case that provision as confirming the High Court’s jurisdiction over matters arising from employment contracts, so too did the Labour Court in the Mogothle case and the High Court in the Tsika case. However it could be argued that when the BCEA was enacted, the Legislature did not anticipate that the common law would be developed to absorb claims intended for labour tribunals. In addition it may also have been that when drafting the BCEA the lawmakers simply lifted section 157(1) of the LRA and recast section 157(2), with changes required by the context, on the assumption that there was indeed a material difference between unfair dismissals and unlawful dismissals. Alternatively the Legislature may have thought that there were indeed cases like the Tsika case and the Fedlife case, where employees may need to press claims not comprehensively covered by the LRA, and that the civil courts should retain jurisdiction over that limited category.

That section 157(2) gives the Labour Court “concurrent” jurisdiction with the High Court did not deter the majority in the Chirwa case from reading that phrase as meaning equivalence of jurisdiction for the Labour Court, as opposed to concurrency of jurisdiction of the Labour and High Courts. If section 77 is similarly read the phrase may assume the same meaning in section 77(3). If that is so, section 77(3) could have been intended to convey that the Labour Court has the same jurisdiction as the High Court would have had in matters concerning contracts of employment, and that those matters now fall within the Labour Court’s exclusive jurisdiction in terms of section 77(1). It may also be that the Constitutional Court will ultimately find that, like the Zenzile case, the Fedlife case was relegated to history by the enactment of the BCEA.

If one considers the Makhanya case it is submitted that the interpretation of section 77 adopted by the SCA is in line with the SCA’s development of the common law, this is because clearly from section 77(3) concurrent jurisdiction is provided for and in
In order to ensure a measure of consistency and uniformity, the SCA developed common law in order to bring it into line with labour legislation. Accordingly, it can be submitted with respect that, if anything, the concurrent jurisdiction provided for in labour legislation and as exercised by the civil court has contributed to consistency of the development of labour legislation. However, in considering this, it is submitted that the interpretation adopted by the SCA in the *Makhanya* case in respect of section 77(3) was correct in that the civil courts have always been clothed with such jurisdiction, which has now, concurrently, been extended to the Labour Court. However, as stated above, it is submitted with respect that an interpretation that the reference to “concurrent” jurisdiction as it appears in section 77(3) and section 157(2) confers exclusive jurisdiction on the Labour Court over matters the High Courts previously, but no longer, have jurisdiction over is a construction that is simply not borne out by the wording of the said provisions. If the Constitutional Court’s interpretation of section 157(2) indeed represents the intention of the Legislature, this is a matter that the Legislature would have to attend to in order to give effect to that interpretation.

Another statutory provision which requires consideration is that of section 157(2) of the LRA which provides that the Labour Court “does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration”. If, as the SCA found, the Labour Court has concurrent jurisdiction with the High Court in employment matters, the exclusion of the Labour Court’s jurisdiction must apply to both courts. Accordingly, it can be argued that employees like Prof Makhanya and Ms Chirwa who were dismissed for misconduct or incapacity are required by the LRA to refer their disputes for arbitration if they wish to obtain a remedy. If the Labour Court could entertain breach of contract claims based on unfair conduct by an employer, section 157(5) would serve no purpose and the jurisdictional wall between the Labour Court and the CCMA and Bargaining Councils would collapse.

However it is submitted that if one considers the section it is correct firstly that the Labour Court has concurrent jurisdiction with the High Court in terms of section 157(2), however it is submitted further that section 157(5) is intended to apply only to the Labour Court in the context of and within the four corners of the LRA itself. It is
submitted that it is not intended firstly to apply to the High Court, which as previously submitted, has always been clothed with the necessary power to determine contractual claims, and if it was intended to apply to the High Court and thus exclude such matters as provided for in the LRA from the High Court’s jurisdiction, the question arises as to why the Legislature did not include the High Court in section 157(5) along with the reference to the Labour Court. In addition, it is submitted that a matter that may require arbitration in terms of the LRA may constitute a separate cause of action if one has regard to a common law contractual claim. The LRA does not require a common law contractual claim to be referred to arbitration albeit that it may arise from the same set of facts from which an unfair dismissal dispute arose. In addition without an express exclusion by the Legislature barring the High Courts from entertaining a contractual claim that could have been referred to arbitration in terms of the LRA, it is submitted that one cannot adopt his construction. It is submitted further that without such an express exclusion referred to, the High Court by virtue of its inherent jurisdiction would be clothed with the necessary authority to consider such a claim.

It could be argued further that the it would be absurd to have duplicated claims for the enforcement of contracts and for the enforcement of LRA rights adjudicated by the Labour Court and how the Labour Court would handle a breach of contract action after having determined an unfair dismissal claim, or vice versa, especially where as in the Buthelezi case the employee’s unfair dismissal claim was squarely based on breach of contract, or if, as is now possible after the Boxer Superstores case, both claims are based on alleged procedural unfairness. It is submitted that one needs to bear in mind that ultimately there are two separate causes of action as pointed out by Judge Nugent in the Makhanya case. It is submitted, as a starting point and generally, that it is not impossible for one court to hear two separate causes of action arising from the same set of facts.

Another statutory provision that requires consideration is that of section 195 of the LRA which provides that compensation for unfair dismissal is apart from amounts due to employees under their contracts. It could be argued that this provision seems to be designed to enable the Labour Court to deal with both unfair dismissal and contractual breaches in the same action. Should this indeed be the case there would
be no need for concern regarding the manner in which the Labour Court would deal with a contractual claim and unfair dismissal claim simultaneously brought before it and arising from the same set of facts.

However this would also be in line with the view supported by the majority in the *Chirwa* case that all dismissals should as a matter of policy be adjudicated or arbitrated, as the case may be, under that Act. However, for reasons referred to above it is submitted that the High Court should not be deprived of its jurisdiction in respect of common law contractual claims.

In the light of the above it is submitted that from a strict legal perspective the *Makhanya* case is correct as how could the Constitutional Court in the *Chirwa* case have ruled in one breath that the High Court lacked jurisdiction and in the next ruled that the claim was bad in law. In the *Makhanya* case the court found that the ratio of the *Chirwa* case was the Constitutional Court’s finding that the application failed because the claim was bad in law. This meant that the remaining aspects of the judgment were obiter, albeit very instructive and valuable obiter. However it could be argued that the reverse applies; that the ratio of the *Chirwa* case was that he matter fell within the exclusive jurisdiction of the labour tribunals and the analysis of the other issues may all be obiter. However it is submitted with respect that the relevant legislation dealing with the issue of jurisdiction in these particular circumstances, namely section 157 of the LRA and section 77 of the BCEA, do not sustain an interpretation of the *Chirwa* case which provides for the ratio to be that the High Court lacked jurisdiction because the matter fell within the exclusive jurisdiction of the Labour Court. It is submitted further and with respect, that it may have been a more logical approach to deal with the issue of jurisdiction by way of *obiter* without the court making a ruling thereon in order to support the *ratio* being that the claim was bad in law, as it is submitted that although these are two separate issues, they are to an extent related.

In the light of the above currently the position is as follows:

- The Constitutional Court has held that public servants must vindicate their rights as employees under the LRA;
• the SCA has ruled that all employees, including public servants, may vindicate their rights as employees under the LRA as well as pursue separate actions for breach of contract in the High Court or Labour Court;

• the Labour Court has held that after the Chirwa case all employees are confined to the remedies afforded by the LRA and that the Labour Court must follow the Chirwa case and ignore the SCA judgments;

• the High Court has held that it is bound to follow the SCA judgments that hold that the civil courts have jurisdiction to entertain claims for enforcement of employment contracts;

• the Labour Court has also held that, based on the authority of the SCA judgments, it may entertain actions based on alleged breaches of employment contracts, even though the employee concerned had a specific remedy under the LRA;

• the SCA has in turn ruled that it has jurisdiction to entertain review actions by dismissed public servants, if only to dismiss them; and

• the SCA held that notwithstanding the judgment of the Boxer Superstores case and the Gumbi case that dismissed employees must plead the terms of a contract if they allege that their dismissals violated their right to a pre-dismissal fair procedure.

However, to date, the Makanya case constitutes the authoritative interpretation of the Chirwa case.

5.10 THE RELEVANCE OF CONTRACT IN EMPLOYMENT

At this stage, it is submitted that it would be worthwhile to consider the role of contract law in the employment relationship. It is submitted that in considering the
topic under discussion one, as can be seen above, has to take into account many factors that may, or debatably may not, be relevant. So far the Judicary has contributed various interpretations to the issues under discussion with reference to the relevant statutory provisions and the related issue pertaining to whether the civil courts should be deprived of jurisdiction to entertain claims based on contract or on the PAJA where such claims fall in any event under the LRA. As seen above, the issue seems to be somewhat settled regarding public servants approaching the High Court with claims based on the PAJA that involve labour and employment matters.

However in considering the role of contract law, as seen above, the SCA has developed the common law, however there appears to be some reservations as to whether this development was indeed necessary and whether, if understood correctly, whether the SCA should have even entertained the relevant cases where the said development took place in the first place.

In considering this, it is submitted that the role of contract law plays a crucial role in labour law. Any consideration to abolishing the common law contract of employment completely from the scope of labour law would, if anything, inhibit the development and the flexibility of labour law generally. Under this heading consideration will be given to additional factors which, it is submitted, are of material relevance when considering the role of contract law in labour law. What follows is by no means intended to be a detailed discussion of the factors raised as certain of the factors fall outside the scope of the topic under discussion. However, the purpose is merely to draw attention to factors that are submitted to be relevant to the role of contract law in labour law.

The law of contract of employment ought to cover the territory of work relationships more broadly with fewer and less formidable internal and external boundaries.\(^{131}\) The reality is that the world of work is changing; it is becoming more volatile due to globalization, demographic trends and the introduction of new technologies.\(^{132}\) Globalisation, flexibilisation and deregulation have been keywords in the area of

labour law and industrial relations, these three terms have become central concepts for those advocating new employment strategies specifically aimed at a more flexible and liberal market defined by minimal governmental interference.  

Certain trends have been caused by socio-economic developments in international standards which in turn influenced the role of the employment contract at all national levels. These trends include deregulation and flexibilisation of labour markets that are direct results of globalisation. Globalisation is currently used as an argument to deregulate employment both nationally and internationally. This process is particularly evident in the resistance of employers to the regulation of labour relations at any level.

The effects of changes on the world of employment have been acknowledged by the Judiciary. It is submitted of particular importance is the extent to which Judges are prepared to exercise their powers of regulation of the employment relationship, which may be of particular importance at a time of high unemployment in a deregulatory environment. However, this simultaneously gives rise to a risk of the danger of haphazard intervention by the courts and lawyers which has been stressed as follows:

“[E]xcessive judicial zeal to rewrite the common law … gives rise to dangers for society … autocratic and proactive courts which rush in where even the legislature has not seen fit to tread, are hardly consistent with the democratic ethos to which the South African nation aspires … the common law was not shaped….by intellectually retarded lawyers wholly insensitive to the needs of society.”

The industrial relations system in South Africa struggles with the relationship between contractual and statutory regulation in employment. However one may argue that the protection offered to employees by legislation together with the costs of the unemployed are a financial burden to society as a whole. However, at the same time, to subject employment entirely to market forces without any government


133 See generally Betten (ed) 1; Baskin “South Africa’s quest for jobs and equity in a global context” 1998 19 ILJ (SA) 986.  

134 Martin v Murray 1995 ILJ 589 (C) 602D-F.
interference may cause effects less desirable.

The primary legal basis for an employment relationship is a contract of employment despite the fact that the rules regulating the employment relationship are derived from mainly three sources, namely; the common law, labour legislation and collective bargaining. In the decision of Bliss v SF Thames RHA in dealing with the mutual contractual duty of trust between employer and employee, the Court held as follows with reference to the general role of contract law as a whole:

“[I]n an atmosphere in which the prospects of legislation appear less likely it is possible that the consensus favouring judicial restraint will break down and there will be greater judicial activism”.

However although the foundation of an employment relationship has not been denied, during the drafting of the South African Labour Relations Bill, there was concern expressed that the latter meant the demise of the contract of employment.

However as seen above, over the last few years possibly a resurfacing of the role and application of contractual principles in individual employment relationships in South Africa has been evident. This development has paved the way for further uncertainties.

Some decisions acknowledge and even mirror the supremacy of contractual principles:

- **Sappi Novo board (Pty) Ltd v Bolleurs** where good faith is viewed as an implied contractual term of an employment contract;

- **Santos Professional Football Club (Pty) Ltd v Igesund**, where the employer was able to claim specific performance after his employee acted in breach of his contractual duties;

---

135 1987 ICR 700 (CA) 714.
136 Bliss *supra* at 714.
138 1998 *ILJ* (SA) 784 (LAC).
139 2002 *ILJ* (SA) 2001 (C).
Fedlife Assurance Ltd v Wolfaardt,\(^{140}\) where the court held that the respondent has not been deprived of a common law remedy for contractual damages based on breach of a fixed-term contract simply because other remedies under the principles of unfair dismissal in terms of the LRA were available;

Chevron Engineering (Pty) Ltd v Nkambule,\(^ {141}\) where a claim based on the breach of an employment contract was held possible by the High Court regardless of an unfair dismissal in terms of section 188 of the LRA;

Denel v Vorster,\(^ {142}\) where the court held that an employee may rely on a claim for breach of contract as opposed to framing his claim on the basis of statutory unfair dismissal; and

Carter v Value Truck Rental (Pty) Ltd,\(^ {143}\) regarding breach of an employment contract and repudiation.

In addition and it is submitted worthwhile mentioning is and older decision of the Stag Packings case whereby the court acknowledged the remedy of specific performance in contracts of employment.

Other decisions, which have been discussed above and will be referred to in name only hereunder, seem to imply a sense of cohesion between contractual principles and legislation. These decisions are the Gumbi case, the Boxer Superstores case and the Murray case.

However the decision by the Constitutional Court in the Chirwa case appears to have created further uncertainty. The Chirwa case has been discussed and referred to above and will not be dealt with in any detail hereunder, save that the decision of the majority of the court seems to imply that where statutory provisions allow for recourse in labour matters, these statutory avenues should be followed, as opposed to leaving

\(^{140}\) 2002 1 SA 49 (SCA).

\(^{141}\) 2003 7 BLLR 631 (SCA).

\(^{142}\) 2005 4 BLLR 313 (SCA).
it up to the employee to frame a claim on the basis of contract. As referred to and discussed above, the Chinwa case appears to conflict with the Constitutional Court’s earlier decision in the Fredericks case.

What is clear from the above is that there appears to be a renewed interest in the contractual features of the employment relationship despite the availability of various forms of protective and regulatory legislation. Globally speaking, an era of diversity has been entered into which in turn implies that the development of collective economic frameworks instead of strict regulation should be considered.

However it may be argued that “flexibility” in employment implies the appointment and dismissal of employees are determined by the conditions created by the economic markets instead of the fixed regulation usually offered by legislation. Conversely, a process of flexibilisation of working life may be advocated for the purpose of liberating people from the stifling bonds of rigid labour regimes imposed by, inter alia, political activists, over-zealous legislators and non-resilient production methods of the factory type work.144

Flexibility may further be equivalent to the number of options available to the “buyers” and “sellers” of labour when dealing with one another on both the individual and collective level.

The broad definition of flexibility implies that it encompasses deregulation, decentralisation and privatisation because all these terms increase the potential for arriving at solutions tailored to the need to increase flexibility. However, most employers are aware of the advantages of the values of social protection and understand that complete dictation of labour conditions by the economic market is not desirable.

The Judiciary has acknowledged the need for flexibility in employment relationships.

143  2005 ILJ (SA) 711 (SE).
In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*¹⁴⁵ Froneman J held as follows:

“Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment … What the employee exacts in return is not only a wage, but a continuing obligation of fairness on the part of the employer.”¹⁴⁶

In the neo-classical economic model, protective labour legislation is viewed with suspicion because it is perceived as creating rigidities in the labour market, causing the role players in the market to develop new forms of flexible contracts beyond the purview of legislation.

Flexibilisation generally implies a certain level of deregulation. However deregulation is causing certain aspects of industrial relation policies, previously governed by statutory rules, to enter the domain of firm practices either negotiated or unilaterally imposed. A particular danger that is evident in countries where deregulation of the labour market has been prevalent is the trend of placing older workers and younger workers in direct job-competition, thereby shortening the working life of both parties.

The question arises as to what then is the current and future role of the common law of contract in South Africa?

It has been contended that the ongoing value of the common law in South Africa is reflected by its inclusion in the Constitution, thus implying that the common law is a living and developing body of law and not a closed entity of the past.¹⁴⁷

In the *Martin* case the High Court made reference to the characteristics of the common law in employment and held as follows:

“Truisms about the innate dynamic capacity of the common law to accommodate changing societal mores and policy in an evolutionary manner provide no justification for the propounding of an aggressively intrusive philosophy of judicial

¹⁴⁵ 1997 *ILJ* (SA) 361 (LAC).
¹⁴⁶ *WL Osche Webb & Pretorius (Pty) Ltd supra* at 365I-366A.
interventionism in the common law relating to employment.\textsuperscript{148}

Marais J added that although the common law may in some instances be rather rigid it may also be flexible when it is required to be:

“The common law does not swing about like a weathervane in whatever direction any gust of wind might blow. It is not designed to be … inherently incapable of being responsive to volatile social and economic circumstances.”\textsuperscript{149}

There are three other considerations that need to be considered:

• An employment relationship is sometimes viewed as a status relationship rather than a contractual relationship. The reason for this is that the status of an employee determines his obligations and remuneration;\textsuperscript{150}

• the law in common-law jurisdictions is regarded by some as having greater integrity simply because statutes operate in particular cases where the operation of the common law is questioned;\textsuperscript{151} and

• it was stated in the\textit{ Martin} case that the common law can not be expected to change with a changing society when the latter is characterised by:

“the ebb and flow of demand and supply in the field of the waxing and waning of respective bargaining strengths….impact with transient extraneous circumstances such as political instability, increased emigration and immigration … have on the respective positions of employer and employee….are all factors …. the common law cannot reasonably be expected to respond as they occur …. would require so frequently and kaleidoscopic a shifting of obligations that there would be … no stability in the common law”\textsuperscript{152}

The Court further observed that the common law should not be regarded as “an ossified code of immutable principles which can only be changed by legislation”, and added that “there is virtue in stability and predictability in the

\textsuperscript{148} \textit{Martin supra} at 600H-I.
\textsuperscript{149} \textit{Martin supra} at 600J.
\textsuperscript{150} Oliver Common values and the public private divide (1999) 128.
\textsuperscript{151} Beatson “The role of statute in the development of common-law doctrine” (2001) \textit{LQR} 247-271.
\textsuperscript{152} \textit{Martin supra} at 601C-E.
law … it is a virtue which should not be undervalued”.153

Therefore in this context the value of the common law of contract has been recognised by its ability to import stability and certainty into the law even when the latter is confronted with change. Employment relationships are seemingly in general regulated too extensively both during existence and upon termination. Although much of these regulative measures are imposed by legislation, the common law and principles of equity have also contributed to this phenomenon.154

Freedland has argued that employment legislation is continuing to interact with the law of contract in two ways:

• Legislation has invoked the body of the common law; and

• legislation is having a major substantive impact on the principles of common law.155 The basic principle remains that legislation usually prevails instead of the principles of the common law.

However a central question in this context is how far the application of statutory rules may possibly be defeated by the contrary contractual intent of the parties.156

In considering the attributes of legislation as a regulator of employment the Martin case held as follows:

“...The legislature is the only institution which can respond quickly and effectively to frequently fluctuating circumstances of a social-economic nature….the courts have no such inherent power … no such power exists in the common law.”157

In addition the role and interaction between the common law and legislation has been recognised by section 39(2) of the Constitution which provides:

---

153 Martin supra at 601J-602A.
154 Oliver Common values supra 24.
157 Martin supra at 601E-H.
“When interpreting any legislation, and when developing the common law ... every court ... must promote the spirit, purport and objects of the Bill of Rights.”

In addition the Constitutional Court in *K v Minister of Safety and Security*\(^{158}\) O’Regan J held that by developing the common law as provided for by the Constitution, it must be kept in mind that the common law develops progressively through the rules of precedent. O’Regan J stressed that a common-law rule may sometimes be changed totally, or a new rule introduced. Both these processes constitute development of the common law.\(^{159}\)

It is submitted that another decision which is material to this issue is that of *Logbro Properties CC v Bedderson NO*\(^{160}\) where Cameron JA held in a matter pertaining to tenders and administrative justice in terms of section 33 of the Constitution that, when performing an administrative act, the local province still had to act lawfully, procedurally and fairly in exercising its contractual rights. Although this case pertained to the interaction between the Constitution and the contractual principles in respect of administrative law, it is an illustration of how the Court has recognition to contractual principles in a statutory setting. Cameron JA’s decision meant that the principles of administrative justice framed the parties’ contractual relationship.\(^{161}\)

In the light of the above, it is submitted that court decisions in recent years where the Judiciary has referred to and applied contractual principles to the employment relationship, illustrates a re-interest in the role of contractual principles in employment, or follows a side-by-side approach through consideration of available legislative provisions and applicable contractual principles alike. Although protective legislation often provides inderogable rights, it usually assumes the prior existence of a valid contract of employment, voluntarily entered into. Whether contracts and statutes are opposites or whether they should rather be viewed as interdependent layers of regulations is an important consideration.

It is worthwhile to note that Sir Otto Kahn-Freund described the contract of employment years ago as the “cornerstone of the edifice of labour law”.

---

\(^{158}\) 2005 8 BLLR 749 (CC) at 756E-F.

\(^{159}\) *K supra* at 756F-G.

\(^{160}\) 2003 2 SA 460 (SCA) para 7.
Traditionally the role of contract of employment involved regulation of the employment relationship in four areas:

- It was the source of an employer’s powers of supervision and control based on an employee’s implied duty of obedience;

- it was a source of rights and obligations;

- it was a source of remedies; and

- it operated as a framework for statutory regulation of employment.\(^{162}\)

Another characteristic of the employment contract is perceived as its “human norm”. This characteristic is viewed as the foundation of any contract because it implies that a contractual party is both altruistic in the sense that he wants to aid others with their projects while at the same time wishing to assist himself.\(^{163}\)

It can also be contended that the contract of employment has a dual function in society, namely, it underpins the managerial power of the employer and simultaneously serves for the social protection of employees.

Another important consideration is that the source of many of the rights and obligations in the employment relationship lie outside what the parties themselves agree, giving employment law both a complex and peculiar nature.

One of the problems of the contract of employment is in its core a relationship characterised by the inequality of the contractual parties which is normally not a feature in other contracts. Sir Otto Kahn-Freund has described the employment relationship as follows:

---


“In its inception it is an act of submission, in its operation it is a condition of subordination, no matter how much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the contract of employment.”164

Another problem relating to contractual principles that feature in an employment contract is that an employment contract creates a form of status which is separate from the express agreement between the parties.165

It is submitted that not all general principles of contract are irrelevant to the employment relationship, however care must be taken to ascertain whether general contractual principles are sufficiently flexible to be applied to the employment relationship without producing artificial reasoning and unsatisfactory results.166

Another issue that needs to be considered is the concept of “freedom of contract” which has a dual meaning. It has a positive aspect encompassing the creative power of the participants in the contractual process to act as private legislators to legislate rights and duties binding upon themselves. It embraces a negative aspect pertaining to the lack of freedom of obligation unless the latter is consented to and embodied in a valid contract.167

Freedom of contract or contractual autonomy has been described as the freedom of a person with contractual capacity to determine with whom and on what terms he is prepared to contract with the purpose to create legally enforceable relationships in terms of which performance must take place.168 A more contemporary view is to regard contractual autonomy as “part of freedom, short of its obscene excesses, contractual autonomy informs also the constitutional value of dignity”.169

In the Martin case Marais J held as follows regarding the value of the freedom of

---

164 Kahn-Freund as referred to by Deakin and Morris Labour law supra at 129.
165 Deakin and Morris Labour law supra at 130.
166 Deakin and Morris Labour law supra at 131.
167 Cohen “Pre-contractual duties: Two freedoms and the contract to negotiate” in Beatson and Friedman Good Faith at 25.
169 Wynn’s Car Hire Products (Pty) Ltd v First National Industrial Bank Ltd 1991 2 SA 754 (A) at para 94.
contract of the parties in an employment contract:

“Courts have not responded enthusiastically to the suggestion that they should monitor, by reference to standards of ‘equity’ and ‘fairness’, and even rewrite, contracts seriously concluded between consenting adults of sound mind.”¹⁷⁰

Regardless of this sentiment modern contract law is currently characterised by an increased control over the contractual regime. This control is reflected by general supervision over the process of contract formation and by intervention in the contents of the contracts.¹⁷¹

A number of tools are used for controlling contractual terms and their application, namely:

• The introduction of the principle of statutory undue influence;¹⁷²

• the doctrine of public policy;¹⁷³

• the application of the doctrine of good faith;

• the tendency to dilute formal contractual requirements and to attach a greater weight to substantive fairness;¹⁷⁴

• the rise of non-contractual fields of obligations;¹⁷⁵

• the considerable fragmentation of contract law;¹⁷⁶

• the possible adaptation of contract to a change of circumstances;

• the development of contractual remedies especially in the case of legal control

¹⁷⁰ Martin supra at 590I-J.
¹⁷¹ Beatson and Friedmann Good Faith supra at 13.
¹⁷² Beatson and Friedmann Good Faith supra at 14.
¹⁷³ Beatson and Friedmann Good Faith supra at 13.
¹⁷⁴ Beatson and Friedmann Good Faith supra at 15.
¹⁷⁵ Beatson and Friedmann Good Faith supra at 15.
¹⁷⁶ Beatson and Friedmann Good Faith supra at 16.
over agreed remedies which are extended through legislation; and

- greater availability of specific performance.\textsuperscript{177}

Another issue which needs to be considered is the statement that the statutory control over contract emphasizes that the conclusion of a contract should apparently no longer be viewed as a private act because it can be controlled and dictated by either the Legislature or economic pressure.

Then there is also the critique leveled at private-law regulation of contracts based on its inherent weaknesses, which encompass the weaknesses evident in the sanctions offered by private law for breach of its regulations, the difficulty of proving a violation of a regulatory standard, the lack of an appropriate level of enforcement as is usually evident by a cost and benefit analysis, and the comparative absence of explicit policy justifications simply because policy objectives are vague. However these difficulties may be overcome by public regulation through the setting of standards, monitoring and enforcement.\textsuperscript{178}

Watt has suggested that it makes more sense to select a tailor-made design intended to reflect the specific features of the employment relationship whilst acknowledging its constant features, including inequality of bargaining power, the profitable purpose of association, the need for the parties to rely on each other and the changing nature of the relationship.\textsuperscript{179}

It is submitted that the above general comments regarding the contract of employment are material factors to consider regarding the role and impact of contract law in labour law. In considering the notion that where employees want to litigate in respect of a cause of action such as unfair dismissal or an unfair labour practice that falls under the LRA, such employees are to utilise the dispute resolution mechanisms prescribed by the LRA to the exclusion of any possible remedy that may be available to such an employee in contract law is, firstly, to drastic a notion to implement and

\textsuperscript{177} Beatson and Friedmann \textit{Good Faith supra} at 16.

\textsuperscript{178} Collins \textit{Contracts} 82, 88, 90 and 93.

\textsuperscript{179} Watt in Collins, Davis and Rideout \textit{Legal Regulation} 345-346.
secondly creates the risk that the common law contract of employment will become undermined and marginalised.

It is submitted that a view which dictates that contract no longer provides the foundation of employment law in the light of legislation goes too far for the following reasons:

- There are still many situations for which legislation does not provide and it is then up to contract to fill these gaps;
- when it comes to adjudicating statutory rights, courts and tribunals often look to the guidance of contractual theories in reaching a decision;
- the law of industrial action and possible immunity from economic torts is often influenced by whether or not a breach of contract has occurred; and
- a perceived weakness of the statutory floor of employment rights has caused workers to look towards contractual remedies as a more effective form of job protection.

It is submitted that the employment contract remains the foundation of the legal relationship between an employer and employee and in the light of the above it is submitted that any possible recourse employees may have regarding employment and labour matters with reference to contract law should be preserved and not substituted with statutory remedies and furthermore that civil courts should continue to have jurisdiction to adjudicate claims based on contract law, along with the concurrent jurisdiction of the Labour Court to do so.
It is submitted further that perhaps the solution lies in the *Langeveldt* case, where the Labour Appeal Court called for legislative intervention. One cannot resist but to entertain the idea of whether such intervention would have potentially prevented a good portion of the litigation referred to above, alternatively at least curtailed a number of issues with which the courts were called upon to adjudicate.

The SCA in the *Fedlife* case confirmed, and correctly so it is submitted, that section 157(1) does not purport to confer exclusive jurisdiction on the Labour Court generally in regard to matters concerning the relationship between employer and employee. This was in turn confirmed with approval in the *Buthulezi* case.

However in the *Fedlife* case there was a minority judgment by Froneman AJA (as he was at the time), the minority judgment has already been dealt with above. However, what is of relevance in regard to the minority judgment is the comparison between the minority judgment of Froneman AJA and the judgment of Froneman J in the *Nakin* case where the learned Judge held that he had “come round to the view” that despite the development of jurisprudence having taken place in different courts; the fundamental constitutional concern for fairness in employment matters has been advanced, not restricted, by its wider application in courts other than the Labour Court. Fundamental constitutional rights do not operate in tightly fitted compartments. In many, perhaps most, they overlap and are interconnected.

The effect of the *Fedlife* case was to give employees a choice between referring disputes to the Labour Court under the LRA, alternatively launching actions for breach of contract in the civil courts. It is significant to mention that in subsequent decisions of the SCA and the Constitutional Court regarding the topic under discussion, the *Fedlife* case has not, to date, been overturned and remains in tact, albeit taking into consideration the facts of that particular case.

The *Murray* case is arguably distinguishable from the other SCA cases referred to
above in that the appellant, as a member of the SANDF, was excluded from relying on the LRA. However of significance is the SCA’s approach in general in the case appears to be consistent with the approach generally adopted by the other SCA decisions referred to.

It is submitted that in developing the common law it is significant to note that the SCA drew heavily on the LRA, the jurisprudence of the Industrial Court and the Labour Appeal Court prior to the enactment of the LRA 1995 and the unfair labour practice dispensation. It is submitted that in doing so, it is submitted that the approach adopted by the SCA referred to is another factor which substantially reduces, if not eliminates, the risk of any dual conflicting jurisprudence emerging.

It is submitted that in attempting to draw some conclusion in respect of the topic under discussion it should be considered that one is concerned with contract law, administrative law and labour law and the overlap between contract and administrative law into labour law. In addition, it is submitted, that there are certain concerns which apply in common to both contract law and administrative law, for example, the concern of a dual conflicting jurisprudence emerging, uncertainty, etc.

It is submitted that amongst the initial case law referred to above it is important to note that the SAPU case the court held that the State may perform administrative acts in its dealings with employees; however in terms of section 157(2) this encompasses only some of such acts and not all. It is submitted that this is an important and significant finding by the court and is relevant for the purpose of attempting to arrive at a conclusion regarding the applicability of administrative law in labour and employment matters as well as the overlap between administrative law and labour law.

It is submitted that the court’s finding regarding the “second threshold”; in respect of the requirement that the conduct in issue should have a direct and external legal effect for the purpose of determining whether the relevant conduct in issue constituted administrative action. This particular requirement is submitted to be debatable and somewhat of a “grey area” in that it could be possible to argue that in every case where there are labour and employment issues, it cannot be reasonably
contended that the requirement of a “direct and external legal effect” is not met. In considering this it is furthermore worthwhile to note Froneman J’s remarks in the Nakin-case regarding this particular requirement as well as the remarks of Van der Westhuizen J in the Gcaba v Minister of Safety & Security. Froneman J appears to have held that the phrase “direct and external legal effect” appeared to be somewhat vague and Van der Westhuizen J appears to have acknowledged that in certain instances an appointment to a public sector post may very well have a direct and external legal effect, for example; where the appointment or dismissal of the National Commissioner of the SAPS is at stake; this decision is taken by the President as head of the national executive and is of huge public import.

It is submitted that certain conduct in respect of labour and employment matters may very well constitute administrative action and by virtue of section 169 of the Constitution and by virtue of section 157(2) of the LRA there should be no reason why civil courts should not be able to entertain certain labour and employment matters based on the PAJA. To say that policy considerations require that these labour and employment matters based on the PAJA cannot be brought before civil courts because they appear to be ‘quintessential’ labor matters which fall within the exclusive preserve of the Labour Court may shed doubt on whether civil courts have jurisdiction to entertain such matters, however in the face of the clear meaning of the applicable provisions it is submitted that this was not the intention of the Legislature. Until such time as the Legislature intervenes with an appropriate amendment, it is submitted that the civil courts jurisdiction to entertain appropriate cases concerning labour and employment matters based on the PAJA should continue and be preserved.

Another issue which may be worthwhile to consider is that of the “flip-side of the coin” to policy considerations, namely; whether policy considerations do not require that the concurrent jurisdiction of the Labour Court with the civil courts continue in the interests of a coherent jurisprudence in order to ensure that other areas of law, such as contract law, where there appears to be an overlap with labour law, are developed consistently with labour legislation. In addition the question may be extended as to

why this cannot apply to administrative law where there appears to be an overlap.

It is submitted that as legislation stands currently, it does not appear to be possible to create a “hard-and-fast rule” regarding the jurisdictional issue under discussion without interpreting the relevant existing legislation in a manner that is not sustained by the clear wording of such legislation.

In the *Digomo* case, referred to above, the Court confirmed that the same act may infringe more than one fundamental right and give rise to separate causes of action. This is why the Legislature provided the Labour Court with concurrent jurisdiction with the High Court in section 157(2). It appears as though the intention was to preserve the High Court’s constitutional and residual inherent jurisdiction over all matters, including labour matters except in so far as those matters fall within the exclusive jurisdiction of the Labour Court as provided for in section 157(1) of the LRA or matters to be determined by the Labour Court in terms of the BCEA or EEA. It appears as though section 157(2) extends the jurisdiction of the Labour Court beyond the issues to which it is restricted by statute to consider, to those matters which fall within the jurisdiction of the High Court.

Therefore section 157(2) does not limit the jurisdiction of the High Court any more than already restricted by section 157(1).

It is submitted that it is important to note that there appear to be certain similarities in what the court held in the *Digomo* case and in the *Makhanya* case, the latter case dealt with contract law. It is submitted that what is of relevance is that although one is concerned with two areas of the law, it appears as though there are certain common denominators involved regarding the interpretation of section 157(2) and the issue of jurisdiction. It is submitted that if one considers these common denominators, the question arises as to how one approach to the interpretation of section 157(2) in a case which concerns contract law yields a different result to a case which concerns administrative law, yet both such cases concern similar general principles and further both concern section 157(2). It is submitted that in considering that the *Chirwa* case, in short, ruled that public service employees may no longer have recourse to administrative law involving cases concerning their employer and
simultaneously not overruling any of the SCA decisions where the common law contract of employment was developed, appears in itself to be inconsistent. The Chirwa case was in essence confirmed by the Gcaba case and this is the current legal position. However, it is submitted, with respect, that it would appear as though the attempt by the Constitutional Court to achieve certainty regarding the issue of jurisdiction instead resulted in uncertainty.

As referred to above, the issues in the Fredericks case concerned, inter alia, the scope of the High Court’s jurisdiction to determine certain complaints arising out of employment relationships. It is submitted that the following issues are important to note:

- The court held that whatever the CCMA’s jurisdiction; the CCMA is not a court of similar status to that of the High Court.

- In addition, the court held that a power of review is not a power to determine a dispute; it is a power to correct irregularities in a previous process.

- In addition, the applicants in casu disavowed any reliance on section 23 of the Constitution. It is submitted that this is a material factor to take into consideration in comparing the Fredericks case to the Chirwa case and distinguishing the two cases from each other. It is submitted that in the light of the Chirwa case not overruling the Fredericks case, where a litigant formulates his or her claim in such a manner as to disavow any reliance on section 23(1) of the Constitution or the LRA, the Fredericks case should, generally, theoretically serve as a precedent to substantiate and confirm a civil court’s jurisdiction where such a claim also appears to be an employment and labour matter.

- Section 158(1)(h) cannot be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient when read with section 157(1) to exclude the jurisdiction of the High Court.

The question arises that if the Legislature wanted to confer a general jurisdiction on the Labour Court in respect of all employment matters, would the Legislature simply
not just have expressly stated and confirmed that such exclusive general jurisdiction
is to the exclusion of the High Court.

Whatever else the import, section 157(2) cannot be interpreted as ousting the
jurisdiction of the High Court since it expressly provides for concurrent jurisdiction.

If one considers the Frederick’s case and the cumulative effect thereof, it is submitted
that the manner in which the Constitutional Court approached and dealt with the
issue of jurisdiction is jurisprudentially sound and as precedent, promotes certainty.

In addition it is submitted that the fact that a civil court may have jurisdiction to
entertain what may appear to be an employment and labour matter based on
contract or the PAJA has no bearing on whether such a claim would be successful.
Furthermore, in any employment and labour matter brought before a civil court on the
basis of contract law or the PAJA a civil court could utilise as a source in deciding the
matter, relevant labour legislation and precedent, which in turn contributes to
eliminating the risk of any conflicting jurisprudence emerging and increases the
development of different areas of the law consistently. The question arises as to
whether policy considerations do not require such consistent jurisprudential
development.

The Gcaba case attempted to clarify this and held that even if a particular claim is
formulated in such a manner as to exclude any reliance on section 23(1) or the LRA
but the pleadings in the particular case, read properly, reveal that such a claim is in
essence an LRA matter, then any civil court hearing such a case lacks jurisdiction to
entertain such a claim. It is submitted, with respect, that such an approach, if
anything, promotes uncertainty and will indirectly coerce prospective litigants to
utilize the dispute resolution mechanisms provided by the LRA and indirectly
dissuade such prospective litigants from relying on rights which they have indeed
been afforded.

Regarding Mr. Gcaba’s pleadings, it appears as though the court judged that Mr
Gcaba relied in part on an infringement to his right to fair labour practices. In that
sense the Gcaba case confirms the Nonzamo case, in which the court found that,
although the appellants in that matter had claimed their contracts had been breached when they were dismissed, their main complaint was that their employer had followed an unfair pre-dismissal procedure, a claim the court said fell within the exclusive jurisdiction of the Labour Court and hence outside the jurisdiction of the High Court. The *Nonzamo* case did not refer to those cases in which, about a year earlier, the SCA had ruled that employees are contractually entitled to a pre-dismissal procedure, these cases have been referred to and discussed above. If the court had found that the Nonzamo workers were entitled in terms of their contracts to a fair hearing before being dismissed, it might not have observed that, had it ruled otherwise, the case would have raised the “unhappy spectre” that the claim might fall partly within the High Court and partly within the jurisdiction of the Labour Court.

In the *POPCRU* case; the court held that section 158(1)(h) and section 158(1)(g) means that the Labour Court acquires the same jurisdiction and powers of the High Court, subject only to the limitation that those powers may be exercised in labour matter alone. The court also confirmed the importance and place of the common law. In addition, Plasket J held that the assumption that the constitutional right to fair labour practices trumps others is false and not supported by PAJA as it could have been added to the list of exclusions. The court held further that there is nothing incongruous about individuals having more legal rights rather than less, or more than one fundamental right applying to one Act, or more than one branch of law applying to the same set of facts, even if this means that public employees enjoy greater protection than private employees. This is an issue for parliament to rectify and not the courts. In labour matters the State may appear in the guise of an employer, but it remains the State, the officials of which are obliged to conduct themselves in accordance with statutes that bind them.

In the *Chirwa* case; although the Constitutional Court had to decide only on whether a claim by a dismissed public servant would be pursued under the PAJA. The main concern for the Constitutional Court majority was that, unless each of these rights is pigeonholed and treated as exclusive, the elaborate structure created by the LRA for resolving labour and employment disputes may be by-passed by public servants who prefer to press their claims in the High Courts, that this will result in public servants being treated differently from private sector employees who do not have the option of
pressing administrative law claims, and that conflicting jurisprudence will frustrate the very purpose for which a “one-stop shop” for employees was created by the Legislature. This was the broad message in the *Chirwa* case.

If one considers the *Chirwa* case and the cases which have arisen subsequent to that, it is submitted that there are still two arguments open to public sector employees who pursue civil remedies apparently closed by the *Chirwa* case, namely; that the *Chirwa* case is distinguishable from their own case and, alternatively, the majority judgments are plainly wrong in principle or because the court did not consider the relevant issues which it should have considered or because they conflicted with the court’s earlier decision in the *Fredericks* case as pointed out above.

Another issue is that section 157(5) of the LRA which expressly deprives the Labour Court of jurisdiction to adjudicate disputes if the LRA requires the dispute to be resolved through arbitration. Accordingly it cannot be concluded that the High Court should not have had jurisdiction because the Labour Court had exclusive jurisdiction in terms of section 157(1) that would be tantamount to arguing that the Labour Court has exclusive jurisdiction even though the LRA has expressly deprived it of jurisdiction. That section 157(5) does not deprive the High Court of jurisdiction if the LRA requires the dispute to be referred for arbitration may seem complex, but the omission may have been intended to reflect the point made in the *Fredericks* case; that the Legislature intended the High Court to retain its inherent jurisdiction to entertain labour and employment disputes, even when the matter may also be referred for arbitration under the LRA.

In addition to the SCA decisions, referred to above and pertaining to the development of the common law, there is section 77(3) of the BCEA which simply, it is submitted, confirms the civil courts continuing jurisdiction to entertain contractual disputes arising from employment. Accordingly it is difficult to understand how a claim based on an alleged breach of contract intrudes any less on the exclusive jurisdiction of the Labour Court than does a claim based on an alleged administrative law principle, especially when an employee’s complaint relates to alleged procedural unfairness.

In proceeding further, it is submitted that the decision of the High Court in the *Nakin*
case is of significance to the topic under discussion as the court’s reasoning and the manner in which the court analysed and approached the issues before it are sound. The court held that it is respectfully difficult to see any space for concurrent jurisdiction of the High Court in any kind of employment matter, be it in relation to fundamental constitutional rights under the Constitution or under the common law contract of employment, under the reasoning of the majority in the Chirwa case. Froneman J held that the Fredericks case applied to the case before him.

Froneman J held further that substantive coherence in employment law may be achieved and developed in different courts, provided these courts give a broadly similar effect to the underlying constitutional right to fair labour practices.\footnote{Nakin supra at 505.}

Conversely, in the Nonzamo case was an illustration of the court been faced with the Fredericks case and the Chirwa case and having considered that it had to make a choice in which of the Constitutional Court cases to follow.

The court held that the Fredericks case and the Chirwa case are in clear and diametric conflict with each other, as did the court in the Nakin case, although the outcome was different. The court held that the majority judgments in the Chirwa case do not extend the exclusive jurisdiction of the Labour Court to wrongful dismissal, or indeed to any wrongful act within a contract of employment. Such acts fall outside the ambit of the LRA being neither unfair dismissal nor unfair labour practice. The Fedlife case therefore remains intact.

The court in considering the Chirwa case and the Fredericks case decided that the latter case had been overruled by the Chirwa case. It is submitted that it is clear from the Chirwa case and the majority judgments therein that the Fredericks case was not overruled, instead the majority judgments sought to distinguish the Fredericks case on the basis already referred to above. In addition, it is submitted that if the two cases were in diametric conflict as held by the court in the Nonzamo case, it is submitted that it would be reasonable to assume that both majority judgments in the Chirwa case would have considered this and expressly overruled the Fredericks
In the *De Villiers* case the court held that the majority judgment in the *Chirwa* case answers the issue which was expressly left open in the *Fredericks* case, namely; the position where section 23 can be directly implicated in the dispute.

However, as referred to above the *Nakin* case and the *POPCRU* case have held that constitutional rights do not exist in isolation, merely because it may appear more desirable that labour and employment matters be confined exclusively to the jurisdiction of the Labour Court, ousting the High Court’s jurisdiction in so far as claims based on the PAJA are concerned or alternatively labour and employment matters which concern the violation or threatened violation of a right entrenched in the Bill of Rights, does not necessarily make it so.

The court held further that the majority in the *Chirwa* case required an examination of the substance of the dispute. It is submitted that a court having regard to the substance of a particular dispute before it, is understandable and correct, however, it is submitted further that an examination of the substance of a dispute cannot take place to the exclusion of the manner in which a dispute has been formulated, especially where a particular claim is formulated on the basis of existing rights which are not only entrenched in the Bill of Rights but also clothe a particular court with the necessary jurisdiction to entertain a particular case. Like substance, it is submitted that form too has its proper place and fulfils a necessary and important role.

However in considering the substance of the dispute; the court held that the right to which resort should be made in the present case should be based upon the following considerations:

- Examine the substantive nature of the dispute;
- If it is an a dispute that falls under the LRA; then
- Rely upon the more specific right; *in casu* the right to fair labour practices as opposed to the more general right to fair administrative action.

It is submitted, with respect, that instead of placing litigants in a position where they
have to ensure that they proceed on the more specific right, where two rights may be applicable, for example flowing from the PAJA and the LRA, and accordingly depriving them of an election which they have, it would be more appropriate to allow prospective litigants in these circumstances an election to choose which right to pursue. It is submitted that this approach is more in line with judgments such as the POPCRU case, the Nakin case, etc. and furthermore that this approach may indeed contribute to the development of a consistent and coherent jurisprudence.

It is submitted that civil courts should have jurisdiction to entertain claims based on the PAJA which concern employment and labour matters as it is submitted that there may be conduct in respect of an employment or labour matter which does constitute administrative action as contemplated by the PAJA and to state that all conduct which concerns labour and employment matters can never constitute administrative action as contemplated is too wide a statement.

In summary; it is submitted that the Transman case dealt with the following important issues:

- Parties to an employment contract are free to incorporate in the contract of employment the application of administrative law principles and in the event that there is non-compliance with these principles, this will amount to a breach a contract;

- That where a party to an employment relationship relies on the contract of employment, the relevant party must establish the contract of employment as well as any implied term which may be relied on. The court set out valuable guidelines for the manner in which such a party would need to formulate such a claim.

- That procedural fairness in an employment setting can be achieved not only through judicial review but through the LRA, the common law as developed by the SCA and by incorporating such requirements into an employment contract.

The issue which is dealt with in the Tsika case, the Mokgothle case and Mohlaka
case is whether employees still have a choice between pursuing actions under the LRA for unfair dismissal and other unfair labour practices, on the one hand, or, on the other, claiming damages for breach of contract under the BCEA or the common law and, if so, in which court.

The *Chirwa* case left unresolved other issues created by section 157(2) of the LRA which provides that the Labour Court has “concurrent” jurisdiction with the High Court, one of these is the effect to be given to the SCA judgments which ruled unambiguously that employees retain their right to sue for breach of their employment contracts in either the Labour Court or the civil courts. The employees relied on the BCEA, which gives the Labour Court concurrent jurisdiction with the civil courts to determine “any matter concerning a contract of employment” (section 77(3)) and on the SCA judgments which have found that employees retain their common law right to sue for breach of contract.

The conflict between the *Tsika* case and the *Mogothle* case, on the one hand, and the *Mohlaka* case, on the other, raises a number of jurisprudential issues:

- The manner in which courts must interpret statutes and handle precedent.

- The traditional view that courts are bound by the decisions of higher courts still holds sway under the constitutional dispensation.

- So too does the view that the courts must apply statutes in their ordinary meaning, unless doing so leads to manifest absurdity or injustice the Legislature could not have contemplated.

- In the *Chirwa* case the Constitutional Court stretched the limits of the second principle by interpreting the LRA in an ingenious way to give effect to what the court perceived to be policy considerations underlying the Act. The majority in the *Chirwa* case acknowledged that section 157 still required the Legislature’s attention when Ngcobo J described the word “concurrent” as calculated to cause unnecessary confusion.
However, once the Constitutional Court pronounced on the issue in a judgment, the lower courts are bound by the majority’s interpretation, and now must make of it what they can.

In the *Mohlaka* case the court presumed that to give the word “concurrent” in section 77(3) of the BCEA a meaning different from the meaning given the same word in section 157(2) of the LRA by the majority in the *Chirwa* case would bring the BCEA into conflict with the LRA. How the court reached this conclusion is difficult to comprehend if one considers the following:

- Nothing in the LRA suggests that purely contractual disputes between employers and employees are the exclusive preserve of the Labour Court;

- whether an employee is due something under his or her contract of employment has nothing to do with whether his or her dismissal was fair or with whether the employee was a victim of an unfair labour practice, as defined, the two questions are completely different;

- the risk of competing jurisprudence emerging in the limited area of contractual interpretation is unverified and remote;

- nor is there any fear that a “multiplicity of laws” will apply, because there is only one law of contract and the *Chirwa* case does not say as much;

- to say that dismissed public servants must bring claims for unfair dismissal to the labour tribunals is one thing; it is a long step from that proposition to the conclusion that the same applies to employees who claim that their employers have breached their contracts of employment;

- the fear of competing jurisprudence becomes more remote when regard is had to the SCA’s “development” of the common law to create a duty of fair dealing in relations between employers and employees, described in the *Mohlaka* case as unnecessary. If anything the SCA’s judgments have set in motion a convergence of the common law and the statutory law; a movement to which
the drafters of the legislation designed to enhance the rights of employees would hardly have objected;

- when regard is had to the *Gumbi* case and the *Murray* case there is no discernable difference between the jurisprudence applied by the civil courts and that applied by the Labour Courts;

- these SCA cases represent a continuation of the cross-fertilization of different areas of law on which our labour law was constructed and developed; and

- in neither the *Chirwa* case nor the *Mohlaka* case does one find a snippet of fact to support the general thesis that the civil courts, when deciding labour matters, have under the current dispensation set back the rights of employees or confused the law relating to employment. In fact, ironically, when the *Chirwa* case finally landed back in the CCMA, Ms Chirwa received treatment markedly less generous than that accorded to her by the High Court.

There is only one consideration to justify the inference that the Legislature intended depriving the civil courts of their jurisdiction overall in labour and employment matters, including disputes concerning contract of employment. This is that the statutory labour forums will become superfluous if employees resort to the civil courts to resolve disputes with their employers. There is no factual basis for this concern:

- Labour legislation clearly demarcates those cases which fall within the exclusive jurisdiction of the Labour Courts and the CCMA or the Bargaining Councils.

- The door to the High Court opened for public servants by the enactment of the PAJA has been closed by the *Chirwa* case.

- Employment cases which come before the civil courts are few and far between.

- Nothing suggests that employees will abandon their copious rights under labour legislation by relying on their more limited contractual and common law rights.

- The SCA has itself warned that employees will be ill advised to litigate in the
It may furthermore be a salutary idea to unburden the CCMA by encouraging senior employees to approach the civil courts.

As discussed above; the question arose as to what did the Constitutional Court actually ruled in the Chirwa case? It is submitted that, although the Mohlaka case, the Mogothle case and the Tsika case do not necessarily promote certainty, although each of the cases may involve in one way or another employment or labour matters, they are all fact-specific and as a result each case needs to be considered in accordance with its particular circumstances.

In the Makhanya case the court held that regarding the interpretation of section 157(2); the section clearly recognizes the existence of the High Courts original jurisdiction in such matters and merely extends it to the Labour Court as well. The court confirmed the principle as seen above that a plaintiff is entitled to ask a court to exercise its power to consider and rule upon a claim notwithstanding that the plaintiff might equally have founded a claim on another right.

The court held that the ratio of the Chirwa case by which all lower courts are bound is simply that dismissed employees may not rely on their right to pursue claims founded on their right to lawful and fair administrative action, because dismissals do not constitute administrative action.

The principle applicable to both the Chirwa case and the Makhanya case is that employees have rights arising from the general law in addition to and apart from those they enjoy under labour law. One is the right, emanating from the common law, to insist on performance of their contracts, another, in the case of public servants, is their right to fair and lawful administrative action. Only the latter right was expunged in the Chirwa case.

It is submitted that the learned Judge may very well be correct in that it is submitted further that his interpretation of section 157 of the LRA and section 77(3) of the BCEA is sound, both sections clearly and unequivocally preserve the High Courts
jurisdiction, to interpret the sections as otherwise would be tantamount to creating an interpretation of the sections which is simply just not borne out by the wording contained therein. It is submitted further that this approach appears to be similar to the minority judgment of Langa CJ (as he then was) in the *Chirwa* case regarding the interpretation of section 157(2). However conversely one may contend that a purposive interpretation of section 157 of the LRA and section 77(3) is justified by policy considerations as illustrated by the Constitutional Court in the *Chirwa* case, however it is submitted, with respect, that there is an inherent risk in applying a construction of this nature to the said sections as illustrated by Judge Nugent. It is submitted that this risk reveals itself when the line between a jurisdictional challenge and a special defence as to whether a claim in these particular circumstances is a bad claim becomes blurred.

What then are the effects of the above reasoning:

- The *Chirwa* case does no more than rule that dismissed public servants may not vindicate their right to fair and lawful administrative action in any court, including the High Court because a dismissal does not constitute administrative action.

- If they do, any court, including the Labour Court, must dismiss their actions because dismissals are not subject to review, but the High Court retains jurisdiction to dismiss such actions.

- In addition the High Court retains jurisdiction to entertain actions in which employees assert other rights falling outside labour legislation, including the right to enforce contracts of employment.

- All employees may pursue claims to enforce employment contracts in either the Labour Court or the High Court, not both since these courts have concurrent jurisdiction to entertain such claims.

- Employees may also pursue separate claims to enforce statutory rights in the
appropriate Labour Forum; be it the Labour Court, CCMA or Bargaining Council, as well as claims to enforce their contractual rights in the High Court or Labour Court. A plea of *lis pendens or res judicata* cannot be raised in the contractual claim if the employee has also pressed a statutory claim, and *vice versa*. Nor can a special plea or exception be raised that the court lacks jurisdiction to entertain the contractual claim.

- If dismissed public servants launch their claims in either the High Court or the Labour Court for alleged infringements of their right to fair administrative action, that court must dismiss the claim, not because it lacks jurisdiction, but because the claim is, in reality, an LRA matter.

According to the *Makhanya* case the law currently is as follows:

- The Labour Forums established under the LRA have exclusive power to enforce rights conferred by the LRA, and the High Court lacks such power;

- both the High Court and the Labour Court have power to enforce common law contractual rights, which are distinct from LRA rights; and

- both the High Court and the Labour Court have power to enforce constitutional rights as far as their infringement arises from employment.

However, it is submitted that, as seen above, that instead of considering the two separate rights; the right to just and fair administrative action and the right to fair labour practices as separate rights which give rise to separate claims and the LRA rights as supplanting the administrative law rights in labour and employment matters, it would be more appropriate to view these two rights not in isolation but as complimentary as ultimately they are both informed and based on the same constitutional values and principles. In addition, such an approach would give rise to an election between the two rights as opposed to one right trumping the other. The latter approach, it is submitted, is not sustainable as the courts, for example the *Gcaba* case, have recognized that there may be instances where a labour practice may indeed amount to administrative action, albeit that this is only one factor to take
into consideration. In addition, as referred to above, in the *Nakin* case, the court held that if anything the fact that a claim based on the PAJA is entertained by a civil court does not necessarily give rise to conflicting jurisprudence but rather contributes to the consistent development of jurisprudence in the relevant areas of the law.

It was always accepted that if the High Court had jurisdiction to entertain claims for the enforcement of employment contracts, it would simply enforce the terms of the contract. The *Fedlife* case merely confirmed the court’s authority to do that. However in the *Gumbi* case, the *Boxer Superstores* case and the *Murray* case; the SCA went further, each case concerned alleged breaches of contract terminable on notice, the SCA not only confirmed the court’s jurisdiction to entertain contractual claims, it developed the common law to include in all contracts of employment an implied duty of “fair” dealing by the employer. This meant that dismissed employees may vindicate their contractual rights on grounds indistinguishable from those on which they may vindicate their statutory right not to be unfairly dismissed.

This appears to obliterate any distinction between a cause of action arising from an alleged breach of contract and a cause of action sourced in section 186 of the LRA. So the issue remains as to what is to be made of the SCA’s development of the common law to incorporate fairness into the contract of employment, on the one hand and, on the other, the disapproval expressed by Ngcobo J of the *Boxer Superstores* case, which he said put the form of an employee’s complaint above its substance. But while the *Fedlife* case and its successors may not have been expressly overruled in the *Chirwa* case, it can hardly be said to have been endorsed.

What becomes of the specialist forums upon which the LRA confers exclusive jurisdiction to deal with employment and labour matters? The answer advanced by the *Makhanya* case was nothing. According to that judgment contractual claims and LRA claims are different species, to be enforced in different forums, each clothed with specific jurisdiction to entertain each *specie* and nothing said in the *Chirwa* case changes this elementary legal fact.

The key to the problem posed by the *Chirwa* case seems to be; how does one distinguish between claims that fall under the LRA and those that fall outside the Act?
In the *Chirwa* case the majority found that Ms Chirwa’s claim was in fact for the enforcement of her right not to be unfairly dismissed and that it was accordingly wrongly categorized as a claim for the enforcement of her presumed right to fair administrative action. Can it not therefore be said by analogy, Prof Makhanya’s claim was for the enforcement of his right not to be unfairly dismissed, but that it was wrongly categorized as a presumed right to hold his erstwhile employer to his contract?

The *Fedlife* case provides one answer. According to that judgment, claims to enforce the statutory right not to be unfairly dismissed are different from claims for alleged breach of contract because contractual matters entail the determination of the lawfulness of the defendant’s actions, while LRA matters are about fairness. This raises two further questions, namely:

- Whether the distinction between lawfulness and fairness indeed serve to distinguish claims under employment contracts from claims under the LRA; even if the answer to this question is yes.
- Whether that distinction can still be drawn now that unfairness has become a ground for a claim for enforcement of an employment contract.

However, as referred to above, LRA matters do not concern fairness alone. The dissenting minority judgment in the *Fedlife* case draws attention to the erstwhile Appellate Division’s observation in *NUMSA v Vetsak Co-operative Ltd*\(^{182}\) that there are two sides to whether dismissals constitute unfair labour practices, one legal and the other equitable.

If this is correct, forums charged with the task of determining whether dismissals or any labour practice are fair are not concerned solely with the fairness of those practices, but also with whether the employer has acted lawfully. If that is so, the only difference between contractual claims and unfair labour practice claims is that the labour tribunals are empowered to proceed beyond the issue of legality and to consider whether the employer’s conduct, even if lawful, was nonetheless unfair.
Before the *Boxer Superstores* case and the *Gumbi* case civil courts were confined to the former enquiry. However after those judgments, the civil courts embark on the second enquiry. Apart from the remedies the respective courts are empowered to grant, which it is submitted a very material and logical consideration for an claimant contemplating litigation in these particular circumstances, it appears as though there is no longer any difference between claims by dismissed employees to enforce their contractual rights and claims for unfair dismissal under the LRA.

It seems arguable that a termination of a contract of employment, which is defined as a dismissal by the LRA falls within the jurisdiction of those forums mandated by the LRA to determine them and if that is so, Prof Makhanya’s claim, like Ms Chirwa’s claim, was merely a complaint about unfair dismissal dressed up in another form.

Be that as it may, it is submitted that even if the SCA has developed the common law in these particulars circumstances, firstly the SCA is entitled to do so if not indeed mandated to do so, where appropriate, in terms of the Constitution and, secondly, is the development of the common law in these particular circumstances a real threat to labour legislation, is it not possible, as illustrated by authorities referred to above that various forums could actually contribute to the development of labour law. In the light of this one cannot help but to contemplate whether any decision to deprive the civil courts of their jurisdiction in these particular circumstances is an extreme solution that could potentially in the long run reveal itself to be more of a cost than a benefit to labour legislation generally.

It appears as though the *Boxer Superstores* case and the *Makhanya* case run counter to the spirit and letter of the *Chirwa* case. The *Chirwa* case put a stop to dismissed public servants invoking the PAJA to challenge their dismissals. The *Makhanya* case licenses all dismissed employees, including public servants, to invoke their contractual rights to bypass the appropriate labour forum and press claims for the enforcement of their contractual rights instead of, or in addition to, their statutory rights.

---

By affording a claimant an opportunity to approach the CCMA and a civil court, simultaneously or sequentially, does not necessarily amount to placing the law in discrete boxes, but this should rather be considered for what it simply is; namely that a claimant may have two separate causes of action arising from the same set of facts and, it is submitted, with effective judicial control, there would be no need to render obsolete a claimant’s right to enforce his or her contract of employment in a civil court.

It is submitted that in considering the ratio of the Chirwa case and the overlap between the LRA and the common law, as developed by the SCA, it could be contended that in such matters litigation under the LRA is more “appropriate” than litigation under the common law. However to go further, it could be argued that it would be more appropriate, however not necessarily compulsory, for an employee to pursue labour and employment matters under the LRA. However in support of this contention one needs to consider further that the Constitutional Court in the Chirwa case did not overrule the SCA judgments and furthermore why did it sought to distinguish the Fredericks case and not declare it wrong.

Regarding section 77 of the BCEA; the Makhanya case interpreted that provision as confirming the High Court’s jurisdiction over matters arising from employment contracts, so too did the Labour Court in the Mogothle case and the High Court in the Tsika case.

If one considers the Makhanya case it is submitted that the interpretation of section 77 adopted by the SCA is in line with the SCA’s development of the common law, this is because clearly from section 77(3) concurrent jurisdiction is provided for and in order to ensure a measure of consistency and uniformity the SCA developed the common law in order to bring it into line with labour legislation.

If the Constitutional Court’s interpretation of section 157(2) in the Chirwa case indeed represents the intention of the Legislature, this is a matter that the Legislature would have to attend to in order to give effect to that interpretation.
In the light of the above the position is as follows:

- The Constitutional Court has held that public servants must vindicate their rights as employees under the LRA;

- the SCA has ruled that all employees, including public servants, may vindicate their rights as employees under the LRA as well as pursue separate actions for breach of contract in the High Court or Labour Court;

- the Labour Court has held that after the *Chirwa* case all employees are confined to the remedies afforded by the LRA and that the Labour Court must follow the *Chirwa* case and ignore the SCA judgments;

- the High Court has held that it is bound to follow the SCA judgments that hold that the civil courts have jurisdiction to entertain claims for enforcement of employment contracts;

- the Labour Court has also held that, based on the authority of the SCA judgments, it may entertain actions based on alleged breaches of employment contracts, even though the employee concerned had a specific remedy under the LRA;

- the SCA has in turn ruled that it has jurisdiction to entertain review actions by dismissed public servants, if only to dismiss them; and

- the SCA held that notwithstanding the judgment of the *Boxer Superstores* case and the *Gumbi* case that dismissed employees must plead the terms of a contract if they allege that their dismissals violated their right to a pre-dismissal fair procedure.

In attempting to reach some conclusion it is submitted that it seems only fitting to conclude with the Constitutional Court's most recent judgment to date which attempts to provide some clarity on the topic under discussion, namely *Gcaba* case which may or may not be subject to further judicial scrutiny.
However, it is respectfully submitted that to the extent that the *Gcaba* case has attempted to resolve the jurisprudential and jurisdictional controversy provoked by the *Chirwa* case, it has not succeeded. The Constitutional Court in the *Gcaba* case appears to acknowledge that the judgment in the *Chirwa* case might have been clearer, and that the relationship between the *Chirwa* case and the *Fredericks* case is problematic. This is presumably why Van der Westhuizen J added that that judgment was the “most recent authority”. The question arises as to where the *Gcaba* case has taken the law?

The ratio of the *Gcaba* case appears to be the following:

- That the reference to the “Labour Court” in section 157(1) includes all other labour tribunals established under the LRA, and that where a complaint, properly construed, is one that must be referred for statutory arbitration under that Act, the High Court is also deprived of jurisdiction, contrary to the *Fredericks* case.

- That where a dismissal or refusal to promote entails the exercise of contractual power, the employee cannot complain of a breach of administrative law rights, and that, however such a claim is pleaded, it will fail in whichever court it is pursued.

- However, the *Gcaba* case despite affirming that employees should “preferably” seek to vindicate their employment rights in the specialized forums established under the LRA, the judgment confirms that the High Court and other civil courts retain jurisdiction where the claim does not fall within the scope of the LRA, as referred to in detail above. The court seems to have accepted that the employee could have multiple actions in different forums. However the very acknowledgement that conduct by employers in their capacity as employers may give rise to separate causes of action begs the general question raised in the *Chirwa* case, and to which the *Nakin* case, the *POPCRU* case and *Makanya* case ventured an answer. This was that the existence of different forums, procedures and remedies is no hindrance to an employee’s right to pursue any
cause of action in any forum, provided only that the employees can prove the cause of action they choose.

- On the authority of the Gcaba case one may conclude that dismissed employees and those who complain about promotions will not sustain claims under their right to administrative justice. However, in those cases, the application will fail not because the High Court lacks jurisdiction, but simply because the claimant had not proved the cause of action on which they relied.

The ratio of the Gcaba case above appears to be the current legal position to date. In addition the Gcaba case is silent on the SCA's insistence that the civil courts retain jurisdiction in employment matters where employees rely on their contractual rights. A notable omission in the Gcaba case is any reference to the comments of Ngcobo J on the Boxer Superstores case and the Gumbi case.

The Gcaba case seems to have shifted the line slightly back towards the Fredericks case. In the Fredericks case the court observed that deciding which matter falls within the exclusive jurisdiction of the Labour Court by virtue of section 157(1) of the LRA requires an examination of the LRA to see which matters fall to be determined by the Labour Court. Now that the “Labour Court” must be read to include the CCMA and Bargaining Councils, this seems to mean that a civil court confronted with an employment claim must ask, first whether, the matter could be referred under the LRA, and, second, whether the LRA provides a remedy.

In addition, it seems as though the Chirwa case and the Gcaba case appear to have been decided on a similar basis to the test adopted in the De Villiers case.

If this is indeed the proper test, the specific right to fair labour practices will trump the more general contractual right to hold the employer to the contract where the employee relies on the contractual right to be dismissed for a fair reason and in accordance with a fair procedure.

It is submitted further that if one considers the decisions considered above what is clear is that there appears to be a renewed interest in the contractual features of the
employment relationship despite the availability of various forms of protective and regulatory legislation.

It is submitted that, as referred to above, a view which dictates that contract no longer provides the foundation of employment law in the light of legislation goes too far. If the contract of employment is acknowledged to be the foundation of employment law, it is submitted that this is an additional reason why civil courts should retain jurisdiction to entertain common law contractual claims concerning labour and employment matters as opposed to restricting all employment and labour matters to the forums established under the LRA and to claims and remedies which are provided for by the LRA.

It is therefore submitted that any possible recourse employees may have regarding employment and labour matters with reference to contract law should be preserved and not substituted with statutory remedies and furthermore that civil courts should continue to have jurisdiction to adjudicate claims based on contract law, along with the concurrent jurisdiction of the Labour Court to do so.

It is submitted in concluding that it appears to be that contractual claims concerning employment and labour matters are generally considered to fall within the jurisdiction of the High Court and, if that being the case, it is submitted further that there should be no reason why a claim concerning a labour and employment matter based on the PAJA, properly formulated, should not be considered to be justiciable by the High Court.

The main conclusion that can be drawn with confidence from the judgment in the Gcaba case is that when employees take disputes with their employers to the High Court, the Court must rule that it lacks jurisdiction if, properly construed, the dispute is one that may be referred in terms of section 191 of the LRA. In the Chirwa case and the Gcaba case, the Constitutional Court has found that the respective complaints were essentially that the employers had breached the complainants’ rights not to be unfairly dismissed and not to be subjected to an unfair labour practices, and that the coupling of these claims to their claimants’ right to lawful and fair administrative action did not alter their essential nature.
BIBLIOGRAPHY

BOOKS


Cohen, N “Pre-contractual duties: Two freedoms and the contract to negotiate” in Beatson and Friedman Good Faith (1997) Oxford University Press


Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, GS; Bosch, C and Rossoow, J Labour Relations Law: A Comprehensive Guide (2006) 5th ed Butterworths: Durban


Oliver, D Common values and the public private divide (1999) Cambridge University Press

JOURNALS

Baskin, J “South Africa’s quest for jobs and equity in a global context” (1998) 19 ILJ (SA) 986


LIST OF CASES

The Administrator, Transvaal v Sibiya (1992) 4 (SA) 532 (A)
The Administrator, Transvaal v Zenzile (1991) 1 SA 21 (A)

Bester v Sol Plaaitje Municipality (2004) 9 BLLR 965 (NC)
Bliss v SF Thames RHA 1987 ICR 700 (CA)
Booysen v SAPS 1992 (4) SA 69 (A)
Boxer Super Stores Mthatha v N L Mbenya (2007) 8 BLLR 693 (SCA)
Business SA v COSATU (1997) 5 BLLR 511 (LAC)
Buthelezi v Municipal Demarcation Board (2005) 2 BLLR 115 (LAC)

Carter v Value Truck Rental (Pty) Ltd 2005 ILJ (SA) 711 (SE)
Chevron Engineering (Pty) Ltd v Nkambule 2003 7 BLLR 631 (SCA)
Chirwa v Transnet Limited (2008) 2 BLLR 97 (CC)
City of Cape Town (CMC Administration) v Bourbon-Leftleyh & another NNO (2006)
1 ALL SA 561 (SCA)
Coetzer v Minister of Safety & Security (2003) 2 BLLR 173 (LC)

Denel (Pty) Limited v D P G Vorster (2005) 4 BLLR 313 (SCA)
De Villiers v Minister of Education, Western Cape & another (2009) (2) SA 619 (C)
Dunn v Minister of Defence (2005) 26 ILJ 212 (T)

Fedlife Assurance Limited v Wolfaadrt (2001) 12 BLLR 1301 (SCA)
Fellner v Minister of Interior (1954) (4) SA 523 (A)
Fredericks & others v MEC for Education and Training, Eastern Cape & others (2002)
2 BLLR 119 (CC)

GF Murray v The Minister of Defence (2008) 6 BLLR 513 (SCA)

Hlope v The Minister of Safety & Security (2006) 3 BLLR 297 (LC)
Holgate v Minister of Justice (1995) 16 ILJ 1426 (E)
Imatu v Northern Pretoria Metropolitan Substructure (1999) 20 ILJ 1018 (T)

Jones v Telkom SA Limited (2006) JOL16326 (T)

Langeveldt v Vryberg Transitional Local Council & others (2001) 5 BLLR 501 (LAC)
Lillicrap, Wassenaarr & Partners v Pilkington Brothers (SA) (Pty) Ltd (1985) (1) SA 475 (A)
Lloyd v CCMA (2001) 9 BLLR 1072 (LC)

Makhanya v University of Zululand (2009) 8 BLLR 721 (SCA)
Martin v Murray 1995 ILJ 589 (C)
Mbayeka v MEC for Welfare, Eastern Cape (2001) 1 ALL SA 567 (Tk)
MEC, Department of Roads & Transport, Eastern Cape & another v Giyose (2008) 5 BLLR 472 (E)
Mogothle v Premier of the North West Province & another (2009) 4 BLLR 331 (LC)
Mohlaka v Minister of Finance & others (2009) 4 BLLR 348 (LC)

Nakin v MEC, Department of Education, Eastern Cape (2008) 5 BLLR 489 (Ck)
NEHAWU v University of Cape Town 2003 BCLR 154 (CC)  
Nonzamo Cleaning Services Cooperative v Appie & others (2008) 9 BLLR 901 (Ck)  
NUMSA v Vetsak Co-operative Limited (1996) 4 SA 577 (AD)  
Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services (2008) 12 BLLR 1179 (LAC)  


Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others (2000) (3) BCLR 241  
POPCRU v Minister of Correctional Services (2006) 4 BLLR 385 (E)  
PSA on behalf of Haschke v MEC for Agriculture & others (2004) 8 BLLR 822 (LC)  
Public Servants Association of South African v Minister of Justice (1997) (3) SA 925 (T)  

SA Police Services v SA Police Union (2004) 25 ILJ 203 (T)  
Santos Profession Football Club (Pty) Ltd v Igesund 2002 ILJ (SA) 2001 (C)  
Sappi Novo Board (Pty) Ltd v Bolleurs 1998 ILJ (SA) 784 (LAC)  
SAPU & another v National Commissioner of the S A Police Services & another (2006) 1 BLLR 42 (LC)  
Simela v MEC for Education, Province of the Eastern Cape (2001) 9 BLLR 1085 (LC)  
Stoman v Minister of Safety & Security (2002) (3) SA 468 (T)  

Transman (Pty) Ltd v Dick & another (2009) 7 BLLR 629 (SCA)  
True Motives 84 (Pty) Ltd v Mahdi (2009) ZASCA 4  
Tsika v Buffalo City Municipality (2009) (2) SA 628 (E)  

United National Public Servants Association of South Africa v Digomo N.O & others (2005) 26 ILJ 1957 (SCA)  
WL Ochse Web & Pretorius (Pty) Ltd v Vermeulen 1997 ILJ (SA) 361 (LAC)  
Wynns Car Hire Products (Pty) Ltd v First National Industrial Bank Ltd 1991 2 SA 754 (A)
LIST OF STATUTES

Basic Conditions of Employment Act 75 of 1997
Co-operatives Act 91 of 1981
Employment Educators Act 76 of 1998
Interim Constitution Act 103 of 1993
International Labour Organisation Convention on the Termination of Employment 158 of 1982
Labour Relations Act 28 of 1956
Labour Relations Act 66 of 1995
Promotion of Administrative Justice Act 3 of 2000
Public Service Act 103 of 1994