

**THE JURISDICTIONAL CONFLICT BETWEEN LABOUR AND CIVIL COURTS IN
LABOUR MATTERS: A CRITICAL DISCUSSION ON THE PREVENTION OF FORUM
SHOPPING**

by

MARCUS KGOMOTSO MATHIBA

submitted in accordance with the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR AH DEKKER

SEPTEMBER 2012

Student number: **3389 3853**

I, **MARCUS KGOMOTSO MATHIBA** declare that: **THE JURISDICTIONAL CONFLICT BETWEEN LABOUR AND CIVIL COURTS IN LABOUR MATTERS: A CRITICAL DISCUSSION ON THE PREVENTION OF FORUM SHOPPING** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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(Mr)

DATE

ACKNOWLEDGEMENTS

All praises go to the Lord, Jesus Christ, for His everlasting love and grace. Without His presence in my life, I would not have ventured this far.

I am indebted to a number of people, who played various important roles in my journey towards the completion of this piece of work:

Professor Adriette Dekker, you have always shown interest and belief in my work. Indeed, I could not have asked for a better mentor.

Freddy Mnyongani, thanks for always making time to guide me.

David Letsoalo, thank you for thoroughly working on my drafts. Your incisive editing has truly added value to my work.

I am also grateful to Frans Mahlobogwane and Johannes Magoro for their unconditional support.

Special thanks go to my parents, Aaron and Elizabeth Mathiba, for always being there for me when I needed them. My siblings, Eddie and Robert, as well as my cousin, Kabelo, have been extremely supportive.

SUMMARY OF THESIS

THE JURISDICTIONAL CONFLICT BETWEEN LABOUR AND CIVIL COURTS IN LABOUR MATTERS: A CRITICAL DISCUSSION ON THE PREVENTION OF FORUM SHOPPING

The Labour Relations Act 66 of 1995 provides an elaborate dispute resolution system which seeks to resolve disputes in a speedy and cost-effective manner. However, this system is faced with a number of challenges. The application of common law and administrative law causes tension between the Labour Court and civil courts. It creates uncertainty in the development of our labour law jurisprudence and also leads to the problem of forum shopping. These problems in effect undermine the objectives of the Act.

This dissertation analyzes problems in the LRA and other legislations leading to forum shopping. It also analyses the view of the courts on this problem and further expounds a number of possible solutions. The analysis revolves mainly around an observation of South African literature and case law.

Key terms:

- Administrative Law
- Common Law
- Concurrent Jurisdiction
- Civil Court
- Exclusive Jurisdiction
- Forum Shopping
- High Court
- Jurisdiction
- Labour Court
- Superior Courts Bill

AUTHOR'S NOTES:

The law is as at 31 January 2012.

Summary of dissertation has been limited to 150 words in order to comply with prescribed requirement.

1. Unless stated to the contrary, reference to "Sections" will mean provisions of the Labour Relations Act 66 of 1995.
2. The Labour Relations Act 66 of 1995 will be referred to as "the LRA", whereas references to the Labour Relations Act 28 of 1956 will be "the LRA, 1956".
3. The masculine includes the feminine and vice versa.
4. "Bill" refers to the Superior Courts Bill [B-2003].
5. "Labour Courts" refers to both the Labour Court and the Labour Appeal Court.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

This study focuses on the jurisdictional tension that exists between the civil and labour courts. It is crucial that this tension be resolved. A key complicating factor is the existence of forum shopping, which has a negative impact on the independence and standing of the Labour Court and all other institutions created in terms of the Labour Relations Act 66 of 1995 (The LRA). The pending Superior Courts Bill, which proposes the abolition of the Labour Court and Labour Appeal Court, creates the need for the tension to be resolved. According to the Bill, labour matters are to be decided by the High Court whilst labour appeals will be attended to by the Supreme Court of Appeal.

It is imperative that the reasons for the existence of the jurisdictional tension be determined before it can be effectively resolved. In this process, the original intent of the drafters of the LRA will have to be explored. It will further be essential that the reasons for, and the extent of, the conflict between labour and civil courts as far as jurisdiction is concerned, be thoroughly investigated. The research will finally offer recommendations on how these challenges can be addressed, and also how to prevent forum shopping.

1.2 Background

The resolution of unfair dismissal disputes under the former Labour Relations Act¹ was complex, inefficient, protracted, expensive and highly legalistic. This state of affairs was to some extent informed by the status of the Industrial Court.² The functions of the

¹ Act 28 of 1956.

² Section 1 of the former Labour Relations Act mentions as one of its aims, “the creation of structures for the prevention and settlement of disputes between...employers and employees and their respective representatives.”

Industrial Court were enumerated in Section 17 of the former LRA.³ The Industrial Court was not a court of law and its decisions were appealable in the Supreme Court. In *SA Technical Officials' Association v President of the Industrial Court & Others*⁴ the (then) Appellate Division held that the identity of the court (Industrial Court) could not be determined exclusively by the nature of the functions it performed. Accordingly, the fact that the former LRA empowered the Industrial Court to perform all the functions that a court of law may perform did not make it (the Industrial Court) a court of law.⁵

In reaching this conclusion, the court, amongst other factors, considered the composition of the Industrial Court. Accordingly, members of this court were appointed only on the basis of their knowledge of labour law.⁶ Same applied to additional members and all members of the court (including the president and deputy president), who were appointed for such periods as the Minister (of Manpower) could determine.⁷ The Industrial Court could also consult and consider any relevant information furnished by specified boards or any state department or any similar authority in terms of Section 17(20). The status of the Industrial Court was further weakened by the Minister of Manpower's authority to approve of the correction of an omission or error, or the clarification of any provision in the determination made by the Court.⁸ The Court frowned upon the idea of a court of law consulting with state departments and other

³ Section 17(11) of the Act reads as follows:

'(11) The functions of the industrial court shall be-

- (a) to perform all the functions, excluding the adjudication of alleged offences, which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered by the department of Manpower Utilization;
- (b) to decide any appeal lodged with it in terms of Section 21A;
- (bA) to consider and give a decision on any application made to it for an order under section 43;
- (c) to conduct arbitrations referred to it in terms of Section 45, 46 or 49;
- (d) to advise the Minister on any matter contemplated in Section 46(7)(c);
- (e) to determine any question referred to it in terms of Section 76 or 77;
- (f) to make determinations in terms of Section 46;
- (g) to deal with any other matter which it is required or permitted to deal with under this Act; and
- (h) generally to deal with all matters necessary or incidental to the performance of its functions under this Act.'

⁴(1985) 6 *ILJ* 186 (A).

⁵ At par 190 C-D.

⁶ Section 17(1)(b). Members of this court did not have to be Judges or advocates or persons with specialised knowledge of labour law.

⁷ Section 17(1)(b) and (c).

⁸ See Section 49(2)(a) of the Act.

bodies. That practice was held to be incompatible with the procedure in the superior courts. The uncertainty of tenure of members of the Industrial Court was also found not to be compatible with the independence enjoyed by judges in the superior courts. The court therefore concluded that the legislature, by establishing the Industrial Court in terms of the LRA, did not intend to equate it with a court of law.⁹

The Labour Appeal Court was not an apex court in labour matters either, as much as the then Appellate Division was in civil matters. Moreover, the Appellate Division had powers to hear appeals with regard to the decisions of the Labour Appeal Court, resulting in protracted, complicated and costly litigation of labour disputes.¹⁰ With the challenges and weaknesses of the former LRA and its dispute-resolution system, arose a need to establish tailor-made institutions that would function separately from the ordinary courts.¹¹ Van Eck¹² mentions the following as justification of the resolution system subsequent to the one under the 1956 LRA:

- Expeditious finalisation of labour disputes: Lengthy appeals should be avoided.
- Cost-effective processes: Employees are in a weaker financial position than employers and this financial burden can be eased by the introduction of

⁹ See the decision of Franklin J in *Vereniging van Bo-grondse Mynamptenare van Suid Afrika v President of the Industrial Court & Others* 1983 (1) SA 1143 (T). At 1151 D he held that in making a determination under Section 17(11)(f) of the then LRA, the Industrial Court does not sit as a court of law and its proceedings and orders are reviewable by the Supreme Court. He relied on the decision of the Appellate Division in *Genturico AG v Firestone SA (Pty)(Ltd)* 1972 (1) SA 589 (A) which compared the provisions of the former LRA with those of the Patents Act 37 of 1952 which established the Commissioner of Patents. Accordingly, the status of the Commissioner of Patents and the force of its decisions were clearly set out in the Patents Act. For instance, Section 82(2) states that the commissioner has to be a trained and qualified lawyer and his function is to sit as a Court to adjudicate in all disputes concerning patents arising from opposition to their being granted, and their infringement, revocation, extension, amendment, etc. The former LRA did not have such provisions. It did not have an express provision equating the Industrial Court with the Local or Provincial Division of the Supreme Court. Neither has it impliedly equated the Industrial Court with a Superior Court.

¹⁰ In *Betha v BTR Sarmcol (A division of BTR Dunlop Ltd)* 1998 ILJ 549 (SCA), it took 13 years to have a final determination of the matter. In another example, *Chevron Engineering (Pty) (Ltd) v Nkambule* (2004) 3 BLLR 214 (SCA) took 10 years to reach finality. This matter, involving the dismissal of 124 workers for participation in an unlawful strike, was commenced in March 1995 and the Supreme Court of Appeal made its final determination in June 2003.

¹¹ See Van Eck: "The Constitutionalisation of labour law: No place for a superior labour appeal court in labour matters (Part 1): Background to South African Labour Courts and the Constitution." (2005) 26 *Obiter* 549 for an exposition of countries that use a specialised court system to resolve labour disputes and those that use the ordinary courts.

¹² *Ibid.*

processes that allow employees to represent themselves or to be represented by trade union representatives or employee organisations.

- Accessibility of dispute resolution institutions: This accessibility is most facilitated by the absence of formal and technical arguments and simplification of procedures.
- The involvement of specialists in employer/employee relations to consider and determine labour disputes.
- Specialised institutions having exclusive jurisdiction to help develop a uniform and coherent labour law principles.

These aspirations of a specialised system found their manifestation in the Explanatory Memorandum to the Draft Labour Relations Bill.¹³ Of the conciliation procedures under the 1956 Act, the Memorandum stated:

The existing statutory conciliation procedures are not user friendly. Successful navigation through them requires a sophistication and expertise beyond the reach of most individuals and small business. Errors made in the initiation of conciliation procedures are often fatal to an applicant's claim for relief. The merits of the dispute often get lost in a thicket of procedural technicalities. In order for conciliation and alternative dispute resolution to function effectively it is essential that the primary thrust of procedures is to address the merits. A failure to do so leads workers and employers to resort to other methods to resolve disputes.¹⁴

And of the adjudication system, the following observation was made:

There are fundamental problems with the court system for the adjudication of labour relations. The Industrial Court is positioned outside the hierarchy of the judiciary. It lacks status. It does not provide a career path for its members or its

¹³ (1995)16 *ILJ* 278. This is a document drafted by the Legal Task Team appointed in 1994 by the Minister of Labour, in consultation with employer and trade union representatives from the National Manpower Commission (NMC).

¹⁴ *Ibid* at 326.

administrative staff. They have no security of tenure and their remuneration bears no relation to either market related or judicially related packages. The processes within the Industrial Court and appeals from this court to the LAC and the then Appellate Division all result in lengthy delays in the resolution of disputes in an area where speedy resolution of disputes is at a premium.¹⁵

The issue of overlapping and competing jurisdiction was also undesirable because it hindered the development of a coherent and developing jurisprudence in labour relations, more so because neither the Industrial Court nor the LAC had exclusive jurisdiction over labour matters. It is, however, heart-warming and at the same time disconcerting to learn that the efforts of the Legal Task Team addressed the issues, but eventually generated more problems. The Labour Relations Act 66 of 1995, with all its dispute resolution processes and institutions (as outlined in chapter one thereof) is successful but at the same time not without challenges.

1.3 The New Dispensation

The term “jurisdiction” refers to the power or competence of a court to hear and determine an issue between parties.¹⁶ Section 34 of the Constitution¹⁷ provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The Constitution further tasks the organs of state with the responsibility of ensuring, through legislative and other measures, the accessibility of the courts.¹⁸

In labour law, this has been done through the enactment of the Labour Relations Act 66 of 1995 (hereafter the LRA). The LRA has established the following dispute resolution

¹⁵ *Ibid.*

¹⁶ *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A).

¹⁷ Constitution of the Republic of South Africa, 1996.

¹⁸ Section 34.

institutions: the Commission for Conciliation, Mediation and Arbitration (the CCMA),¹⁹ Bargaining and Statutory Councils,²⁰ the Labour Court,²¹ and the Labour Appeal Court.²² This system of dispute resolution announced a move away from the dispute resolution mechanisms of the previous LRA²³ which revolved around the Industrial Court.

Du Toit²⁴, like Van Eck above, regards the following as reasons for implementing a special dispute resolution system:

- (a) The need to create a legal framework in which employers, trade unions and employees would be able to regulate conflict and resolve disputes;
- (b) the need to establish a simple, non-technical and non-judicial approach to dispute resolution;
- (c) the need to overcome the lengthy delays inherent in the Industrial Court procedure and
- (d) the need to reduce the level of strike action existed.

These reasons are in line with Section 1(d)(iv) of the LRA which aims to promote the “effective resolution of labour disputes”. The system also aims to be easily accessible and affordable.

Although there are specialised courts and institutions, the phenomenon of forum shopping has also surfaced in this field. Forum shopping refers to a tendency amongst litigants of exhausting different remedies or approaching different courts in respect of the same cause of action. For example where, the source of a dispute is administrative law or the common law (for instance in the case of a fixed-term contract), the High Court or Labour Court may have jurisdiction. This happened in the case of *Boxer Superstores*

¹⁹ Section 112.

²⁰ Section 27.

²¹ Section 151.

²² Section 167.

²³ Act 28 of 1956 above.

²⁴ Du Toit D et al *The Labour Relations Act of 1995: A Comprehensive Guide* 2nd ed (1998) Lexis Nexis Butterworths at 306. See also Explanatory Memorandum to the Draft Bill 115 at 147-151.

*and Another v Mbenya*²⁵ where a dismissed employee relied on a common law contract and therefore instituted a claim for damages in the High Court (instead of claiming for unfair dismissal in the Labour Court). It also happened in *Chirwa v Transnet Ltd & Others*²⁶ where the appellant, a public official, sought relief under the Promotion of Administrative Justice Act (PAJA)²⁷ in the High Court instead of approaching the Labour Court. There are also a number of other cases which reveal that forum shopping is mainly used by litigants to avoid these specialised institutions and procedures (of the LRA) in favour of traditional common law and public law dispute resolution mechanisms. It is the aim of this research, amongst other things, to determine the cause or causes of this deviation from the specialised dispute resolution mechanisms of the LRA.

The basic dispute resolution route stipulated by the LRA is that the matter must first be referred for conciliation either at the CCMA²⁸ or at an accredited Bargaining Council.²⁹

In terms of the LRA the following referral periods are set:

- (a) Unfair dismissal disputes have to be referred within 30 days of the date of dismissal or within 30 days of the employer having decided to dismiss the employee.³⁰

²⁵ (2007)(5) SA 450 (SCA). See also *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA) and *Old Mutual Life Assurance Co.SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA).

²⁶ (2008) 8 BLLR 97 (CC). See also *Nakin v MEC, Department of Education, Eastern Cape Province & Another* (2008) 29 ILJ 1426; *Fredericks & others v MEC for Education & Training, Eastern Cape & Others* (2002) 2 SA 693 (CC) and *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449.

²⁷ Act 3 of 2000.

²⁸ The CCMA is an autonomous statutory agency that operates independently from the state.

²⁹ A Bargaining Council is an institution which trade unions and employers' organisations are empowered to establish in terms of Section 27 of the LRA. These councils have as one of their functions the resolution of disputes. To perform the dispute resolution functions under the LRA the council must be accredited. When such accreditation is obtained, the council can resolve disputes in terms of Section 51. The Council will start accordingly by conciliating the matter and issue the certificate of outcome. If conciliation is unsuccessful and the parties so wish, the council will conduct an arbitration. If one or more of the parties to a dispute falls outside the scope of the council, or if the dispute relates to a matter that only the CCMA can resolve, such a dispute must be referred to the CCMA. Section 127 of the LRA provides for the procedure to be followed when applying for accreditation. Sections 51 and 127 provide for matters that may not be resolved by Bargaining Councils, for example disputes about collective agreements, closed shop and agency shop agreements.

³⁰ Section 191 (1)(b)(i) of the LRA.

- (b) Unfair labour practice disputes must be referred within 90 days of the act or omission that allegedly constituted the unfair labour practice.³¹
- (c) Unfair discrimination disputes have to be referred within 6 months after the act or omission that allegedly constitutes unfair discrimination.³²

Upon referral, the matter will be set down for conciliation. The commissioner must try to reach a settlement between the parties.³³ If the dispute is not resolved, the commissioner must issue a certificate of non-resolution and the nature of the dispute will determine whether it must be taken to arbitration (by the CCMA) or adjudication (by the Labour Court).³⁴ The LRA makes a clear distinction between disputes that should be referred to arbitration and those that should be adjudicated by the Labour Court. Generally, a dispute will be taken to arbitration after a failed conciliation. However, there are exceptions. For example, unfair discrimination disputes must be adjudicated by the Labour Court after failed attempts at conciliation by the CCMA. On the contrary, the interpretation or application of collective agreements is resolved by conciliation and, if unsuccessful, by arbitration (adjudication is not permissible). Arbitration will also take place when a party to the dispute requests that the matter be resolved through arbitration.³⁵ Section 141(1) of the LRA further allows parties to agree to the CCMA arbitrating disputes which would otherwise be determined by the Labour Court. The essence of arbitration is that the third party, the arbitrator, considers the versions of both parties and makes a binding decision. An arbitration award is final and binding and may be made an order of court.³⁶

³¹ Section 191(1)(b)(ii) of the LRA.

³² Section 10 (2) of the Employment Equity Act 55 of 1998.

³³ The settlement agreement may be made an arbitration award (Section 142A of the LRA). This agreement may also be made an order of the Labour Court. Section 158(1)(c) of the LRA. This must take place by agreement of the parties on application by one of them and it happens only in relation to a matter that may be referred to arbitration or to the Labour Court.

³⁴ In addition to the arbitration procedure, the 2002 Amendments to the LRA added two new procedures, namely: the con-arb process [Section 195(5A)] and pre-dismissal arbitration (Section 188A). In terms of the con-arb procedure, the CCMA or bargaining council will commence arbitration immediately after conciliation has failed (and thereby dispensing with the referral requirement for arbitration). Pre-dismissal arbitration allows employers in dismissal disputes to request the CCMA to conduct an arbitration instead of them (employers) holding a disciplinary enquiry.

³⁵ Section 136(1) (b) of the LRA.

³⁶ Section 143 read with Section 158(1) (c) of the LRA. This will not be the case with advisory arbitration awards.

Since arbitration does not allow a right to appeal, there are restricted remedies for parties who are not satisfied with the award. The LRA provides only for review under these three sections: Section 145,³⁷ 158(1)(g) and 158(1)(h). Section 145 provides that: “any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award”. This section further provides for the time periods within which awards may be taken for review by the Labour Court.³⁸ Section 158(1)(g) gives to the Labour Court the power “despite Section 145” to “review the performance or purported performance of any function provided for in terms of this Act on any grounds that are permissible in law.” Section 158(1)(h) provides for the review of decisions taken or acts performed by the state in its capacity as an employer. The difference between these sections was considered in *Carephone (Pty) Ltd v Marcus NO & others*.³⁹

As far as adjudication of labour matters is concerned, Section 151 establishes the Labour Court as a court of law and equity. The Labour Court has the same inherent powers in relation to matters under its jurisdiction, as the provincial division of the High Court.⁴⁰ Section 157(1) of the Labour Relations Act states that subject to the Constitution and unless otherwise provided for by the LRA, 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.

This section does two things. Firstly, it defines the jurisdiction of the Labour Court i.e. “exclusive” and secondly it circumscribes this jurisdiction i.e. “Subject to the Constitution and Section 173, and except where this Act provides otherwise.” Section 157(2), on the

³⁷ Section 145 read with Section 158(1) (g) of the LRA.

³⁸ Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption. If the alleged defect involves corruption, it must be referred within six weeks of the date that the applicant discovers the corruption.

³⁹ (1998) 19 *ILJ* 1425 (LAC). Section 145 applies to the review of arbitration awards made by commissioners of the CCMA. Section 158(1)(h) applies to administrative action taken by the state as employer. Section 158(1)(g) is a residual power to review administrative action. The court further held that the word ‘despite’ in Section 158(1)(g) should be read as ‘subject to’, thus making it unnecessary for the appellants to bypass Section 145 and rely on Section 158(1)(g).

⁴⁰ See Section 151(2).

other hand, provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any violation of a fundamental right by the state in its capacity as an employer and in respect of the constitutionality of any executive conduct or act by the state in its capacity as an employer.

The exclusivity and concurrency of jurisdictions of the Labour Court (as a specialised court) and the High Court (as a civil court) have been a cause for confusion over a long period. The failure in practice to clearly distinguish between situations where the dispute may be resolved by the civil courts or labour courts is also the reason why the court in *3M SA (Pty) Ltd v SACCAWU*⁴¹ cast doubt on the significance of the term “equity” as it appears in Section 151 of the LRA. The court held, accordingly that the Labour Court (and the Labour Appeal Court) has no power to adjudicate matters on the basis of fairness except where expressly authorized to do so:

These two Courts are superior Courts of law. The only fairness that they apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the Act in respect of specific types of disputes as well as such fairness as every Court of law is required to observe in terms of the rules of natural justice.⁴²

This confusion is further exacerbated by a huge number of labour matters in which parties approached the civil courts⁴³ instead of the Labour Court for relief. The basis of these claims was mainly the common law⁴⁴ fixed-term contracts⁴⁵ and public law (PAJA).⁴⁶

⁴¹ (2001) 5 BLLR 483 (LAC).

⁴² At par 17.

⁴³“Civil court” here refers to both the Magistrates’ and High Courts. In civil matters the quantum of the claim is decisive in determining whether the Magistrates’ or the High Court should decide the dispute. The limit of the Magistrates’ court is R100 000 and it seems that it seldom occurs that the amount claimed is less than this statutory limit, which is probably the reason why reference is often made to the term “High Court” (as opposed to civil courts) when dealing with these disputes.

⁴⁴ See for example *Fedlife Assurance Ltd v Wolfaardt*; *Boxer Superstores Mthatha v Mbenya* and *Denel (Edms) Bpk v Vorster* (2004) 4 SA 481 (SCA).

⁴⁵ *Boxer Superstores Mthatha & another v Mbenya*.

⁴⁶ See *Chirwa, supra*; *Fredericks, supra* and *Nakin, supra*.

The first case in which this deviation from the traditional labour dispute resolution method took place was *Fedlife Assurance Ltd v Wolfaardt*.⁴⁷ In this matter an employee (the respondent on appeal) whose fixed-term contract was prematurely terminated approached the High Court to claim damages for breach of contract. The employer (appellant on appeal) submitted that the matter should have been referred to the Labour Court in terms of the LRA and that the High Court lacked jurisdiction. In its special plea (filed in the court *a quo*), the appellant relied on Section 157(1) which states that “subject to the Constitution and unless otherwise provided for by the LRA, 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”. It contended that the Labour Court has exclusive jurisdiction to adjudicate dismissals occasioned by operational requirements in terms of the Labour Relations Act. The employee excepted to the special plea and submitted that it did not disclose a defence. The Court *a quo* held in favour of the employee. This matter went on appeal and the same defence was still relied upon with the appellant submitting that the employee (respondent) has no remedies other than those provided for in chapter 8 of the LRA.⁴⁸ The Appeal Court therefore decided that the legislature could not, by chapter 8, be deemed to have intended to deprive the employees of common law remedies which may, by comparison, be more generous than those provided by the Labour Relations Act.⁴⁹

The Appeal Court further held that a dispute will fall under the exclusive jurisdiction of the Labour Court only if the “fairness” of the dismissal is the subject of the employee’s complaint. If the subject in dispute is “lawfulness” of the dismissal, then the High Court might as well entertain the matter. The Court noted:

Its [the Labour Court’s] exclusive jurisdiction arises only in respect of ‘matters that elsewhere in terms of this Act or in terms of any other law are to be

⁴⁷ (2001) 22 ILJ 2407 (SCA).

⁴⁸ Chapter 8 protects employees against unfair dismissal and caps damages on 12 months’ remuneration in cases of unfair dismissal and 24 months’ in cases of automatic unfair dismissal.

⁴⁹ The common law remedies may be generous in a sense that the dismissed employee will simply have to allege (and prove) the employer’s repudiation and claim damages, while under the LRA the employer has the benefit of some defence e.g. operational requirements as in this case. Moreover, the employee can be in a better financial position than he would have been had he gone the statutory route (LRA).

determined by the Labour Court.’ Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes or issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed. In my view those are the ‘matters’ that are contemplated by Section 157(1) and to which the Labour Court’s exclusive jurisdiction is confined.⁵⁰

As a result of this judgment, the High Court (and the Supreme Court of Appeal) was flooded with cases involving disputes between employer and employee.⁵¹ The most significant cases which came before the court were *Boxer Superstores & Another v Mbenya*⁵²; *Chirwa v Transnet Ltd & others*⁵³; *Makambi v MEC for Education, Eastern Cape*⁵⁴ and *Gcaba v Minister for Safety and Security & others*.⁵⁵

In *Boxer Superstores, supra* the Supreme Court of Appeal held that the High Court will exercise jurisdiction in a labour matter if the unlawfulness (as opposed to fairness) of the dismissal is at issue.

The issue of forum shopping also landed in the Constitutional Court, where the court painted a different picture in *Chirwa v Transnet and Others*.⁵⁶ The Court in this case had to decide whether the dismissal of a public sector employee could be framed as administrative action and be decided by an ordinary civil court. It was held that the primary objective of Section 157(1) is to “give effect to the declared object of the LRA to establish specialist tribunals with exclusive jurisdiction to decide matters arising from it.”⁵⁷ In particular the Court held further that Section 157(2) purports to confer constitutional jurisdiction on the Labour Court. From this decision one can conclude that

⁵⁰ At par 2.

⁵¹ See the decisions in *Boxer Superstores* and *Nakin* above.

⁵² (2007) 5 SA 450 (SCA).

⁵³ (2008) 8 BLLR 97 (CC).

⁵⁴ (2008) 5 SA 449 (SCA).

⁵⁵ (2009) 12 BLLR 1145 (CC).

⁵⁶ (2008) 8 BLLR 97 (CC).

⁵⁷ At par 113.

the existence of an administrative action in a dispute cannot prevent the Labour Courts from exercising jurisdiction.

Therefore according to this decision, parties to a labour dispute can invoke neither contract nor administrative law to avoid the resolution mechanisms contained in the LRA. The court held that by enacting Section 157(2), Parliament did not intend to extend the High Court's jurisdiction in labour matters but to afford the Labour Court the capacity to address constitutional issues that sometimes arise in labour matters. In the words of Skweyiya J, the LRA "was envisaged to be a one-stop shop for all labour related disputes".⁵⁸

1.4 Conclusion and Research Question

In this chapter, the labour dispute resolution system was outlined. A brief background of case law relating to jurisdictional conflict was outlined so as to give an overview of problems that form part of this study. Case law has shown that the problem of forum shopping cuts across various areas of labour law; for example, the conflict between common law and statute (LRA) that arose as a result of a premature termination of a fixed term contract in the *Fedlife* case. The problem which is sought to be addressed by this study is to determine why forum shopping is possible and how it can be prevented. A critical investigation will also be conducted on various forms of forum shopping, and the current position in law as interpreted by the courts.

⁵⁸ At par 47. See further *Fedlife Assurance v Wolfaardt* on how the court dealt with the employee who relied on common law contract instead of the LRA.

CHAPTER TWO

COMMON LAW AND OTHER LEGISLATION OPENING THE DOOR FOR FORUM SHOPPING

2.1 Introduction

The remedies for unfair dismissal of an employee are dealt with in Section 193 of the LRA. Reinstatement and re-employment are primary remedies for unfair dismissal. These primary remedies may not be granted under certain circumstances, however. If the employee does not wish to be reinstated (or re-employed) the remedy cannot be imposed upon that employee. The employee may not be re-instated or re-employed if the circumstances are such that the continuation of the employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate or the dismissal is only procedurally unfair.⁵⁹ If any of these exceptions exists, the Court or tribunal will order compensation instead of reinstatement.

Section 194 of the LRA regulates the amount of compensation payable for unfair dismissal and provides for the following limits:

- a) If dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration at the date of dismissal.⁶⁰
- b) For automatically unfair dismissal, compensation must not be more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration at the date of dismissal.⁶¹

⁵⁹ Section 193(2) of the Act.

⁶⁰ Section 194(1) of the Act.

⁶¹ Section 194(3) of the Act.

- c) If the dismissal is found to be unfair because the employer did not prove that the reason was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, compensation must not be less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration at the date of dismissal.⁶²

In all these instances the LRA requires that compensation be "just and equitable in all the circumstances."⁶³ In 2002 Section 194 (1) of the LRA was amended and when that happened, the LRA Amendment Act⁶⁴ accorded the same treatment to a substantively unfair dismissal and a procedurally unfair dismissal for purposes of compensation. However, the court decided in *HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes*⁶⁵ that the two forms of unfairness will still be substantially different when compensation is determined. Zondo J had the following to say:

In a case where the dismissal is unfair only because an employer did not follow a fair procedure, one is dealing with an employee who did not deserve to continue in the employ of the employer in any event because there was a fair reason to dismiss such an employee and the employer only got the procedure wrong whereas in a subsection (2) case one is dealing with an employee who should

⁶² Section 194(4) of the Act.

⁶³ The court has judicial discretion to determine what "just and equitable" compensation is. In *National Industrial Workers Union & others v Chester Wholesale Meats KZN (Pty) Ltd* (2004) 25 ILJ 1293 (LC), Gering AJ, in awarding three months' salary in compensation, considered the fact that the dismissal was only procedurally unfair, fault that existed on the part of both parties, the length of service of the employees involved, the long period of unemployment resulting from the unfair dismissal and the period of time from the date when it became clear that there was a gap in communication between the employer and the union. In *The Minister of Justice and Constitutional Development v Tshishonga* (2009) 9 BLLR 862 LAC the court took into account the embarrassment suffered by the respondent, the gross humiliation as a result of being moved to a non-existent position and the costs of securing the services of an attorney to defend the respondent in an enquiry where the respondent was eventually found not guilty.

⁶⁴ Act 12 of 2002. The former provision drew a distinction between substantively unfair dismissal and one that is unfair by virtue of the employer not having followed the correct procedure.

⁶⁵ (2002) 4 BLLR (LAC).

not have been dismissed in the first place and who should have been allowed to continue in the employer's employ.⁶⁶

From the perspective of the drafters of the LRA, forum shopping has the effect of undermining the objectives of the LRA and perhaps the whole Act itself; hence the remarks by Zondo JP in *Langeveldt v Vryburg TLC*⁶⁷:

One of the deficiencies in the dispute-resolution of the old Act which the stakeholders in the labour relations field sought to bury when they negotiated the new dispute-resolution dispensation under the Act was that the system was costly, inefficient and ineffective. Through the new system with its specialist institutions and its courts which are run by experts in the field, the stakeholders and parliament sought to ensure a certain efficient, cost-effective and expeditious system of resolving labour disputes. The fact that the High Courts also have jurisdiction in employment and labour disputes completely undermines and defeats that very important and laudable objective and thereby undermines the whole Act.⁶⁸

It is however interesting to note that this act and its objectives were primarily aimed at protecting employees, while it is employees themselves who are the cause of and continuation of forum shopping. It is also worth mentioning that there is nothing that prevents employees to waive rights and protections offered by legislation. Consequently, it seems that the ratio in *Langeveldt* will hold true only as far as the drafters of the Act are concerned. But to a dismissed employee who is subjectively involved in litigation, the following benefits will outweigh the problems caused by forum shopping (and perhaps the objectives of the Act):

- No referral period-When taking the matter for resolution by the CCMA, parties must do so within 30 days of the date of dismissal or within 30 days of the

⁶⁶ *Ibid* at par 15.

⁶⁷ (2001) 22 *ILJ* 1116 (LAC).

⁶⁸ At par 1138-1139A.

employer having decided to dismiss the employee.⁶⁹ These periods do not apply when the employee approaches the civil courts for relief. The only limitation for the employee seems to be the three years prescription under civil law.

- Compensation is not capped.⁷⁰
- Legal representation is possible.⁷¹
- Appeal is permissible.⁷²

In this chapter the focus will shift to a discussion of the two main issues before the court leaving an opportunity for forum shopping. These relate to fixed-term contracts and public-sector employment law.

⁶⁹ See Section 191(1)(b) and also Section 10 (2) of the EEA.

⁷⁰ See Section 194 of the LRA and Chapter III for a detailed discussion of compensation in the LRA. Suffice to say, in civil courts using common law remedies, employees can claim more than they can under the LRA.

⁷¹ Section 135(4) of the LRA lists parties who may represent employers and employees in Arbitration and Conciliation proceedings. Section 138(4) lists parties who may represent employers and employees at arbitration proceedings. Section 135(4) was amended by Section 8(b) of the Labour Relations Amendment Act 127 of 1998 and subsequently deleted by Section 23 of the LRA amendment Act 12 of 2002. Section 140(1) of Act 66 of 1995 provides that despite Section 138(4), parties are not entitled to be represented by legal practitioners in the arbitration proceedings unless the commissioner and all the other parties consent or the commissioner concludes that it is unreasonable to deal with the dispute without legal representation after considering certain factors such as the complexity of the dispute, public interest and the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute. Section 140 (1) has been repealed, but is now still embodied in the footnote to Rule 25 of the CCMA Rules. The constitutionality of the exclusion of legal representatives at the CCMA was considered in *Netherburn Engineering cc t/a Netherburn Ceramics v Modau NO & others* (2009) 30 ILJ 269 (LAC). The employer in this case argued that the restriction on legal representation infringed the constitutional right to equality, that the restriction was irrational and that it was in conflict with the right to fair administrative action. The full bench of the LAC rejected these arguments, finding that the restriction did not infringe the right to equality because arbitrations concerning matters, in respect of which legal representations was allowed as of right, were distinguishable, because these matters were generally more complex. The LAC held further that the denial of legal representation conflicts with the right to fair administrative action, because not even the PAJA, which regulates the constitutional right to fair administrative action, confers an absolute right to legal representation before administrative tribunals. The Constitutional Court in the matter of *Netherburn Engineering CC t/a Netherburn Ceramics v Modau NO & others* refrained from commenting on the issue of legal representation before the CCMA because it would not be in the interest of justice to determine the issue. This means that the issue of legal representation is quite problematic in proceedings before the CCMA. So, in civil proceedings, parties have the privilege and comfort of engaging legal representatives without any hassle.

⁷² No appeal is allowed against arbitration awards by the CCMA. Review by the Labour Court and rescission by the CCMA are the only remedy for a party not satisfied with the outcome. See 3.4 for a detailed discussion.

2.2 Fixed-term Contracts

The contract of employment is the foundation of the relationship between an employee and his or her employer. This kind of contract links the employer with the employee-irrespective of the form assumed by that employment contract. The employment contract is therefore the starting point of the application of all labour law rules. In other words, if there is no employment relationship between the parties, the rules of labour law do not apply. However, the employment contract is not without difficulties. Besides the hardship of sometimes having to distinguish between employment contracts and ordinary contractual relationships, the interaction between the employment contract and statute also creates problems.⁷³

In the law relating to dismissal, this interaction between the common law of contract and statutory employment law has led to various courts (and sometimes the same court) making different pronouncements on the jurisdictional debate, thus inciting forum shopping and retarding the search for legal certainty. Case law points to the fact that the courts had to decide in particular whether disputes involving the breach and premature termination of the employment contract were to be decided under common law (by the High Courts) or statute (by the LRA resolution chambers).

Common law recognizes three forms of remedies in cases of breach of contract. These are (i) execution of the contract, (ii) cancellation of the contract and (iii) damages. The remedies of execution of the contract and of cancellation of the contract are mutually exclusive and the innocent party has a choice between the two. Although the innocent party can claim the two remedies in the alternative, enforcement of the one excludes the other.⁷⁴

The LRA allows the employer to dismiss the employee on the grounds of misconduct, incapacity and operational requirements (of the employer). Dismissal under these

⁷³ Basson *et al*: *Essential Labour Law* 5th ed (2009) Labour Law Publications at 21.

⁷⁴ Havenga *et al*: *General Principles of Commercial Law* 7th ed (2010) JUTA at 125.

grounds must comply with the requirements of substantive and procedural fairness. Substantive fairness means that there must be a proper reason or ground for dismissal, whilst procedural fairness envisages a proper hearing before dismissal.⁷⁵ What is common about all these remedies is that they are all adjudicated through the LRA institutions.

To contextualise the conflict between common law and statutory employment law (LRA), the facts in *Fedlife Assurance Ltd v Wolfaardt*⁷⁶ are worth considering. In this case the respondent, Mr Wolfaardt was employed on a fixed-term contract of five years. After only two years, the employer (appellant) terminated the contract on the ground that the respondent's position had become redundant. The respondent averred that the appellant had repudiated the contract. He further claimed that he had elected to accept the repudiation and claimed damages for breach of contract in the High Court, whereupon the appellant claimed that the High Court lacked jurisdiction and that the matter should therefore have been referred to the Labour Court under the LRA.

In its investigation, the Court had to answer two questions: (i) whether the remedies under the LRA abolished the employee's common law claim for breach of contract and (ii) whether the premature termination of the employment contract in this matter falls under the exclusive jurisdiction of the Labour Court. The second question is extensively dealt with in chapter three below. Against the contention of the appellant, the majority of the Supreme Court of Appeal, through Nugent AJA (as he then was), held that neither expressly nor by necessary implication does the LRA abrogate an employee's common law claim to enforce contractual rights.⁷⁷ The Court also pointed to clear indications in the LRA that the legislature had no intention of abolishing the common law remedies

⁷⁵ In addition to the remedy of unfair dismissal, the LRA also provides for the remedy of automatically unfair dismissal and unfair labour practice.

⁷⁶ (2001) 22 ILJ 2407 (SCA).

⁷⁷ The Court relied on *Stadsraad van Pretoria v Van Wyk* (1973) 2 SA 779 (A) in holding that the presumption against the deprivation of existing rights is applicable in this matter. Accordingly, it is presumed that the legislature did not intend to interfere with existing law and *a fortiori*, not to deprive parties of existing remedies for wrongs done to them. This will be the case only if the legislature states expressly or by necessary implication. See also *SA Breweries Ltd v Food & Allied Workers Union & Others* (1990) 1 SA 92 (A) where the court applied the presumption and further held that in the case of ambiguity an interpretation which serves the existing rights of employees will be favoured.

and “the clearest indication that it had no such intention is Section 186 (b) which extends the meaning of ‘dismissal’ to include non-renewal of the contract against the reasonable expectations of the employee.”⁷⁸

The Court held further that although the legislature dealt in particular with fixed-term contracts, it did not include the premature termination of such contracts notwithstanding that such termination would be unfair:

The reason for that is plain: the common law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed term contracts makes it clear that the legislature recognised their continued enforceability and any other construction would render the definition absurd.⁷⁹

The majority decided that this matter concerns not the unfairness, but the unlawfulness of the dismissal and therefore the High Court was correctly approached for relief. However, Froneman AJA, for the minority, relying on the decision in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd*⁸⁰ held that it was not conceivable how an unlawful dismissal could not be unfair at the same time. In the *Vetsak* case, Nienaber JA held: “There is no sure correspondence between unlawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to

⁷⁸ At par 18 D -F. Section 186(1)(b) reads: “Dismissal means that an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it”.

⁷⁹ *Ibid.* Judge Nugent refers to two forms of absurdities: Firstly, if the employee in this case is compelled to exhaust the statutory remedies, the result would be that although the employee will have received more than is due at common law, but still the latter will not recover as of right even that which is payable at common law and instead must rest content with “compensation” which may be ludicrously small in comparison with the true loss. Secondly, if it were so that a plaintiff such as this is confined to a claim for claim for “compensation” in terms of Section 194, where the employer proves that “the reason for dismissal is a fair reason related to the employee’s conduct or capacity or based on the employer’s operational requirements” and “that the dismissal was effected in accordance with a fair procedure”, the plaintiff would not be entitled to any compensation. The Court concluded that such a result could not have been intended by the legislature.

⁸⁰ (1996) 6 *BLLR* 697 (AD).

conceive of circumstances in which it would not), a lawful dismissal would not for that reason alone be fair.”⁸¹

The decision of the Court in *Fedlife* set a precedent for a series of cases that followed. Firstly, it was *United National Public Servants Association of SA v Digomo & Others*.⁸² The SCA, relying on *Fedlife*, held that the remedies that the LRA 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 might therefore not only constitute an unfair labour practice (which can be resolved by invoking the LRA), but might also give rise to other causes of action (a contractual claim for example).

Secondly, in *Denel supra*,⁸³ the right to fair labour practices and the reciprocal duty (between employer and employee) to act fairly did not survive the *Fedlife*-jurisprudence either. Nugent JA held that if a disciplinary code has been included in the contract of employment, then a deviation from such a code constitutes a breach of contract and is therefore actionable in the civil courts. Accordingly, the Constitution, by introducing into the employment contract a reciprocal duty to act fairly, does not deprive contractual terms of their effect. Such implied duties would operate to improve 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.⁸⁴

In *Old Mutual Life Assurance Co SA Ltd v Gumbi*⁸⁵ the SCA took matters even further. According to the Court, the common law contract of employment has been developed in

⁸¹ At par 592 G-H.

⁸² (2005) 26 *ILJ* 1957 (SCA).

⁸³ The issue in this matter was the constitution of a disciplinary committee in terms of the code which formed part of the employment contract. The employee was dismissed by the committee which was not constituted in accordance with the stipulations of the disciplinary code. The employee successfully contested the departure from the code (and his subsequent dismissal) as a breach of contract.

⁸⁴ At par 16 E-I.

⁸⁵ (2007) 8 *BLLR* 699 (SCA). This decision (and the one in *Boxer Superstores*) was followed by the Eastern Cape High court in *MEC, Department of Roads & Transport, Eastern Cape & Another v Giyose* (2008) 29 *ILJ* 272 (E), where the court held that the common law contract of employment has also developed to include the right to a pre-transfer hearing for a public service employee and the High Court has jurisdiction to entertain the dispute in relation to the transfer on that basis.

accordance with the Constitution to include the right to a pre-dismissal hearing. As a result, the employee now has a common law contractual claim and not merely a statutory unfair labour practice right to a pre-dismissal hearing.⁸⁶ Before this judgment and the present Constitution, an employee had to plead the incorporation of a disciplinary procedure into his contract of employment before he could rely on procedural unfairness constituting a breach of contract.⁸⁷ The parties may opt for certainty and incorporate the right to pre-dismissal hearing in their contract.⁸⁸

Lastly came *Boxer Superstores Mthatha & Another v Mbenya*⁸⁹ where the employee contended that her dismissal was substantially unfair (because she was not guilty of misconduct) and procedurally unfair (because at the disciplinary hearing, where she appeared with a shop steward representing her, she was not asked to plead guilty or not guilty) and therefore constituted a breach of contract. Cameron JA, comparing this case to those that preceded it, held that the *Boxer* case “pushes the boundary a little further”.⁹⁰ According to the court, this case raised the question whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were “unlawful”, without alleging any loss apart from the salary. Drawing from the *Gumbi*⁹¹ decision, the court answered in the affirmative. The court concluded that the fact that contractual claims may also be decided by the Labour Court, through that court’s unfair labour practice jurisdiction, does not detract it from the High Court’s jurisdiction.

The Court, although noting that the employee was careful to formulate her claim on the basis that her dismissal was “unlawful”, still accepted that, at the level of substance, the employee’s complaint was one about the fairness of her dismissal. The Court further said that this characterization left out of account the fact that jurisdictional limitations

⁸⁶ At par 4. See also *Modise & Others v Steve’s Spar, Blackheath* 2001 (2) SA 406 (LAC).

⁸⁷ See *Lamprecht & another v McNeillie* 1994 (3) SA 665 (A).

⁸⁸ *Ibid.*

⁸⁹ This decision came two weeks after the *Old Mutual* judgment was handed down.

⁹⁰ At par 6.

⁹¹ In *Old Mutual* the court held that the common law contract of employment has been developed in accordance with the constitution to include the right to a pre-dismissal hearing. This means therefore that every employee has a common law contractual claim, not merely a statutory unfair labour practice right to a pre-dismissal hearing.

often involve questions of form, and that the employee in this case formulated her claim to exclude any recourse to fairness, relying solely on contractual unlawfulness.

Different from *Fedlife*, where the employee challenged the premature termination of his fixed-term contract as constituting an unlawful breach of contract and studiously avoiding making any reference whatsoever to fairness, the employee in *Boxer Superstores* specifically pleaded that her dismissal was unlawful (precisely because it was procedurally and substantially unfair). Taking from *Old Mutual*, which is authority for the proposition that it is permissible for an employee to bring a claim for procedural unfairness in the High Court based on a breach of contract, *Boxer Superstores* would now appear to be authority for the proposition that an employee can challenge the substantive fairness of his dismissal in the High Court, provided only that he pleads that his dismissal was unlawful because there was no good cause there for.⁹²

Froneman AJA therefore concluded that the issue in *Fedlife* was rather about the unfairness of the dismissal (as opposed to unlawfulness) and must be dealt with in accordance with the procedure set out in Section 191 of the LRA, “a procedure which in one way or another ends up with the Labour Court having the final say”. The judge further classified this matter to be a constructive dismissal (rather than a repudiation of a common law contract) as defined by Section 186 (1) (e) of the LRA.⁹³ Since the LRA allows the Labour Court to award damages (in Section 195), the respondent’s demands could have been easily met in that regard.

I submit that there could not be a better way of understanding the real claim of the employee in *Fedlife* than that proposed by Froneman AJA (i.e. the employee terminated the employment contract instead of accepting a repudiation as claimed because the employer rendered continued employment intolerable (by rendering the employee’s

⁹² Pretorius P & Myburgh A: “A dual system of dismissal law: Comment on *Boxer Superstores Mthatha & Another v Mbenya* (2007) 28 ILJ 2209 (SCA)” (2007) 28 ILJ 2172. See also *Key Delta v Marriner* (1998) 6 BLLR 647 (E).

⁹³ Section 186(1)(e) reads: “Dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

position redundant). However this view does not apparently survive scrutiny. Garbers⁹⁴ states three reasons for not conforming to this view: Firstly, he states that the principal reason for the introduction of unfair dismissal rules, as currently evidenced by section 186 (a) of the LRA, has been the recognition of the reality that lawful dismissals are not necessarily fair, rather than the assumption that unlawful dismissals are always unfair. Secondly, one of the cornerstones of fairness, he argues, is that it cuts both ways-in favour of both employer and employee.⁹⁵ Thirdly, he states that experience with fairness in the context of constructive dismissal shows that unlawful conduct by an employer (i.e. breach of an employment contract) is not necessarily unfair. The point then is that although most unlawful conduct by an employer will also be unfair, this is not necessarily the case, irrespective of whether one takes a static position, or a constitutionally-infused view of the common law.

In *Fedlife* the majority judgment was informed by the role of labour law in protecting employees against the employer's common law right to terminate the contract at will.⁹⁶ It is on this account that cases like *Buthelezi v Municipal Demarcation Board*⁹⁷ were decided. In this case, an employee was retrenched a year into his five years contract. He had been invited to apply for an alternative post in the employer's restructured operation, but another employee was appointed. The Court held that the employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If the employer chooses to enter into a fixed-term contract, he takes the risk that he might have to dismiss the employee during the subsistence of the contract but is prepared to take that risk. If he has elected to take

⁹⁴ Garbers C: "The Battle of the Courts: Forum Shopping in the aftermath of Wolfaardt and Fredericks" 2002(1) *Law Democracy and Development* 97.

⁹⁵ See *Numsa v Vetsak Co-operative Ltd & Others* at 461 B and *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) at par 599 H-I (per Willis JA).

⁹⁶ At par 13.

⁹⁷ (2005) 2 *BLLR* 115 (LAC).

such a risk, then the employer cannot be heard to complain when the risk materialises.⁹⁸

The Court in *Buthlezi*, relying on *Fedlife*, further held that in the absence of a clear indication from the LRA that the legislature intended to alter the rule relating to premature termination of fixed-term contracts during their currency, it cannot be argued that the Act had such an effect.⁹⁹ It was concluded therefore that the employer cannot dismiss the fixed-term contract employee for operational reasons.

The principles laid down in these judgments are open to criticism. Firstly, the notion that the legislature did not intend to interfere with existing law when creating new statutory rights cannot be sustained any longer. While this may have been true in the pre-constitutional dispensation, it can hardly be said of statutes which are enacted for the express purpose of giving effect to fundamental rights. Pre-existing common law remedies, by implication, are deemed not to be enough to meet this objective; and this being the case, there are no clear grounds for assuming that those remedies will continue to co-exist with the statutory remedies. Rather the opposite view should be upheld.¹⁰⁰

Though dealing with a different field of law, the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*¹⁰¹ rejected the notion set down in *Fedlife* that statute did not expressly alter common law by creating new remedies. The Court, interpreting the Promotion of Administrative Justice Act (PAJA), referred to the *Pharmaceutical* case¹⁰² and held as follows:

⁹⁸ At par 11 A-B. According to the Court, this principle applies to both parties. The employee also, by entering into a fixed-term contract, takes a risk that the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term.

⁹⁹ At par 14. See also *Casely NO v Minister of Defence* 1973 (1) SA 630 (A).

¹⁰⁰ Du Toit D "A Common law Hydra Emerges from the Forum-shopping Swamp" (2010) 31 *ILJ* 21.

¹⁰¹ (2004) 4 SA 490 (CC).

¹⁰² *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* (2000) 2 SA 674 (CC).

There are not two systems of law regulating administrative action-the common law and the Constitution- but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The *grundnorm* of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine neither of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.¹⁰³

PAJA, like the LRA, was enacted to give effect to a constitutional right. Like the LRA, it contains no provision abolishing the common law remedies. To make matters worse, PAJA does not even have a provision that gives it supremacy over other laws in the event of conflict, but still the Court in *Bato Star* did not find it difficult to decide that it had trumped over common law by necessary implication.¹⁰⁴ With the existence of Section 210 of the LRA,¹⁰⁵ therefore the Court in *Fedlife* had more than enough reasons to decide in favour of statutory remedies instead of common law

2.3. Public Sector Employment Law

2.3.1 The legal position before *Chirwa*

The application of administrative law in labour matters is a highly contentious area of our contemporary labour law.¹⁰⁶ During the pre-Constitution era, the 1956 Industrial Conciliation Act was operational. The Industrial Conciliation Act was a reaction to the

¹⁰³ At par 22 H-I.

¹⁰⁴ *Ibid* at 14.

¹⁰⁵ Section 210 of the LRA reads: "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

¹⁰⁶ Ngcukaitobi: "Life After Chirwa: Is There Scope for Harmony between Public Sector Labour Law and Administrative Law?" (2008) *ILJ* 29 849 at 862.

common law contract, which did not provide for the employees' right to be heard before dismissal. Two major changes were introduced by this Act. Firstly, employees could only be dismissed for fair reasons and after a fair procedure had been followed. Secondly, the Industrial Court was given the power to order an employer to re-instate an employee where the dismissal was found to be unfair. Nonetheless, public service employees were expressly excluded from the operation of this Act.¹⁰⁷

In 1991 the SCA handed down what could be considered the origin of public servants' protection by common law and later statute. In *Administrator, Transvaal & Others v Zenzile & Others*,¹⁰⁸ the court held that the *audi alterem* rule was applicable to the dismissal of public servants. In quashing the summary dismissal of hospital employees without hearing, Hoexter JA stated

One is here concerned not with mere employment under a contract service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and the decision-maker is a public authority whose decision to dismiss involved the exercise of public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct.¹⁰⁹

¹⁰⁷ Act 28 of 1956 as amended. Section 2 of the Act read: " This Act (except section *sixty-three*) shall not apply to persons in respect of their employment in farming operations or in domestic households nor to officers of parliament in respect of their employment as such nor, subject to the provisions of Subsections (3) and (9), to persons employed by the state in respect of their employment as such nor to any employee of any local authority designated by such authority in terms of any law as chief administrative officer of the local authority, in respect of his employment as such nor to the performance of work in a charitable institution for which the persons performing it receive no remuneration nor to work performed in or in connection with any university, college, school or other educational institution maintained wholly or partly from public funds as part of the education or training of the persons performing it nor to university students in respect of their employment in any undertaking, industry, trade or occupation as part of their university training if such employment is required for the completion of their curricula."

¹⁰⁸ 1991(1) SA 21 (A).

¹⁰⁹ At par 270 F-H.

The Court further emphasised the jural nature of the powers exercised by public bodies when dismissing employees:

The exercise of a statutory power to dismiss is not deprived of its jural character simply because a corresponding right to dismiss exists at common law or that provision for it may be made in a contract. The common law or contractual right gains an added dimension and is invested with special significance by its express enactment in a statute. This consequence cannot be ignored; and it lays the foundation of the classic formulation of the *audi* rule.¹¹⁰

This decision was embraced and followed by the court in *Sibiya and Another v Administrator Natal and Another*.¹¹¹ In this matter, the applicants' employment was terminable on a month's notice, which notice was issued on the applicants before their dismissal. The issue therefore was whether the administration could lawfully dismiss the applicants without having observed the *audi alteram partem* rule by giving them a hearing and the opportunity to make representations with regard to their dismissals. The Court, referring to the decision in *Zenzile*, held that there was no distinction between these two cases, except the fact that the employees in *Zenzile* were summarily dismissed. The Court therefore concluded that the contemplated invasion of an existing right (to continued employment) was, by and large, sufficient in the field of employment to bring the rule into operation, and that right was surely threatened once a dismissal by notice was on the cards, no less than when a summary dismissal happened to be. The dismissals in this matter were also nullified.

These decisions meant that the exclusion of public service employees from the application of the Industrial Conciliation Act of 1924 did mean that these employees were not completely unprotected against arbitrary dismissals.

¹¹⁰ At par 273 B-C.

¹¹¹ 1991(2) SA 591.

Mention must also be made of the judgement that influenced the decision of the court in *Zenzile*. In *Administrator, Transvaal & Others v Traub & Others*,¹¹² the court held that when a statute empowers a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the individual has to be heard before the decision is taken unless the statute expressly or by implication indicates the contrary. These pronouncements, as made by the courts, meant that public servants were not completely without protection and the harsh effects of their exclusion from the application of the Public Service Act¹¹³ were lessened.

When the Interim Constitution was adopted in 1994, it introduced two fundamental rights in this regard: the right to fair labour practices (Section 27) and the right to just administrative action (Section 24). These rights were later imported into the final constitution.¹¹⁴ The right to fair labour practices is dealt with in Section 23 whilst Section 33 addresses the right to just administrative action. Section 33(3) calls for the enactment of national legislation to give effect to the rights in Section 33, hence the passing of the Promotion of Administrative Justice Act (PAJA).¹¹⁵ Likewise, Section 23 contemplated the enactment of legislation to give effect to the rights provided for in it, hence the promulgation of the Labour Relations Act. Other national laws, such as the Public Service Act, the Police Services Act 68 of 1995 and the Employment of Educators Act,¹¹⁶ were also adjusted to be in line with the Constitution. PAJA defines “administrative action” as:

‘any decision taken, or any failure to take a decision, by-

a) An organ of state , when-

(i) exercising a power in terms of the Constitution or a provincial constitution;

or

(ii) exercising a public power or performing a public function in terms of any legislation ; or

¹¹² 1989 (4) SA 731 (A).

¹¹³ Act 103 of 1994.

¹¹⁴ Constitution of the Republic of South Africa 108 of 1996.

¹¹⁵ Act 3 of 2000.

¹¹⁶ Act 76 of 1998.

- 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...’

Section 1 of this Act defines “decision” as: “any decision of an administrative nature made, or required to be made, as the case may be, under an empowering provision”. Certain types of decisions are expressly excluded by Section 1 from the definition of administrative action and therefore from the application of PAJA.¹¹⁷

In giving effect to these crucial constitutional rights, both the LRA and PAJA were eventually drawn into the jurisdictional debate. The debate is substantially centred on the rights of public-sector workers. A study of case law and academic opinion shows some inconsistencies in the laws that should regulate public service employment in general and their dismissal in particular. For instance, two divergent viewpoints exist in relation to this issue. Firstly, there is a view that holds that employment relationships should be regulated by labour law (Section 23 of the Constitution and all labour legislation), to the exclusion of administrative law (Section 33 of the Constitution and PAJA). The second view argues that the exercise of public power inevitably attracts administrative law as well as labour law, so that remedies are available in both

¹¹⁷ Section 1(i) (b) mentions the following decisions:

“(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in Sections 79(1) and (4), 84(2)(a),(b),(c),(d),(f),(g),(h),(i) and (k),85(2) (b),(c),(d) and (e),91(2),(3),(4) and (5), 93,97,98,99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in Sections 121(1) and (2), 125(2)(d),(e) and (f), 126, 127(2),132(2),133(3)(b),137 138,139 and 145 of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in Section 166 of the Constitution or of a Special Tribunal established under Section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996, and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act 2 of 2000; or

(ii) any decision taken, or failure to take a decision, in terms of Section 4(1).”

branches of law in cases of public-sector employment.¹¹⁸ These two divergent views are explored below. This exploration is mainly in the form of case law.

2.3.2 Pre-*Chirwa* decisions favouring the LRA

In 2004, the Labour Court in *Public Servants Association obo Haschke v MEC for Agriculture & Others*¹¹⁹ had to decide whether the refusal by a state employer to promote the applicant constituted an unfair labour practice. Nonetheless the court deemed it necessary to make a comment on the relevance of PAJA to labour disputes. The court held accordingly that although labour law and administrative law share many common characteristics, they still remain distinct.¹²⁰

The Court held that although there is no explicit statutory injunction in the labour laws to give effect to the right to just administrative action, there is an obligation to comply with it as one of the rights in the Bill of Rights. However, the Court held, if the right to just administrative action competes or is in conflict with the right to fair labour practices then the LRA and the Basic Conditions of Employment Act 75 of 1997, read with the constitutional right to fair labour practices, must prevail over the right to administrative justice.¹²¹ According to the court, this view is further reinforced by Sections 210 and 63 of the LRA and the EEA respectively. These sections state that if any conflict arises between these Acts and the provisions of any other law, save the Constitution or any Act expressly amending these Acts, the provisions of these Acts will prevail.¹²²

In *SA Police Union (SAPU) and Another v National Commissioner of the SA Police Service and Another*,¹²³ the Labour Court was faced with a challenge by the applicant unions (*SAPU* and *POPCRU*) of the decision by the National Commissioner of the SAPS to introduce an eight-hour shift system for its members throughout the country.

¹¹⁸ Hoexter C: *Administrative Law in South Africa* 1st ed (2007) JUTA at 194.

¹¹⁹ (2004) 25 ILJ 1750 (LC).

¹²⁰ See also *Traub, Zenzile and Sibiyi*.

¹²¹ At par 156 A.

¹²² *Ibid* at B

¹²³ (2005) 26 ILJ 2403 (LC).

The unions' main challenge was based on the right to just administrative action and the contention that the commissioner's decision to change the shift system constituted administrative action which was reviewable under Section 6 of PAJA.

In deciding whether the decision to change shifts was an administrative action, the Court paid particular attention to the power exercised by the commissioner. Firstly the court held that the power exercised by the Commissioner in this instance was not public power. Neither was the function performed a public function. The source of the power in regard to labour relations was Section 24(1) of the Police Services Act 68 of 1995, which empowered the Minister to make regulations relating to the conditions of service of members and labour relations. Therefore, acting in terms of these powers, the Minister bestowed the prerogative on the Commissioner to determine working hours, which prerogative he could exercise unilaterally, or bilaterally, in terms of the existing contracts of employment or collective agreements, depending on the circumstances.¹²⁴

Secondly, the Court held that although the commissioner's power was derived from a public source, the source of power, while relevant, was not necessarily decisive. Equally, if not more important, were the nature of the power, its subject-matter and whether it involved the exercise of a public duty. The Court found that there was nothing inherently public about setting the working hours of police and therefore the whole act did not constitute administrative action under PAJA. According to the Court, the matter fell more readily within the domain of the contractual regulation of private employment relations.¹²⁵ My view is that this decision, exalts the LRA because, the mere existence of an employer-employee relationship presupposes conformity with labour legislation in general and, in particular, the LRA in cases of dismissal.

In *Hlophe & Others v Minister of Safety and Security & Others*,¹²⁶ Van Niekerk AJ referred to the *SAPU* decision above and held that the decision to transfer an employee does not constitute administrative action that invites review either under PAJA or

¹²⁴ At par 52.

¹²⁵ *Ibid.*

¹²⁶ (2006) 3 *BLLR* 297 (LC).

Section 33 of the Constitution. To the extent that the courts previously extended the reach of administrative law to ensure fairness in the exercise of employment discipline in the public sector, the extension of the LRA to that sector now ensures labour rights to public sector workers.¹²⁷

2.3.3 Pre-*Chirwa* decisions favouring PAJA

The High Court in *Police & Prisons Civil Rights Union (POPCRU) & Others v Minister of Correctional Services & Others*¹²⁸ viewed protections afforded by labour law and administrative law as complementary and cumulative; and not destructive of each other. The Court in this matter had to decide whether the dismissal of a correctional officer by the Department of Correctional Services was an administrative action (and therefore reviewable under Section 6 of PAJA). It was argued on behalf of the applicants that their dismissal was contrary to internal policies and therefore unlawful. The respondent contended, however, that the decision to dismiss the applicants was not administrative action since it did not involve the exercise of power, and this was so because the decision did not affect the public as a whole (and was consequently not reviewable under PAJA).

Plasket J held that in his view, the “elusive” concept of public power is not limited to exercises of power that impact on the public at large. Again, many administrative acts do not. For instance, the exercise of the power to arrest is a good example of an administrative action that would only have an impact on the arrestee. In this instance what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own disposition.¹²⁹ The judge further held that:

¹²⁷ At par 13. The Court made reference to Murphy AJ’s sentiments in *SAPU* at par 55.

¹²⁸ (2006) 27 ILJ 555 (E).

¹²⁹ At par 53. Plasket J also refers to the dissenting judgment of Schreiner JA in *Mustapha & Another v Receiver of Revenue, Lichtenburg & others* 1958 (3) SA 343 (A) at 347 D-G, in which he held that where a minister exercised a statutory power having a contractual aspect he acted as a state official and not as a private owner, who needs to listen to no representation and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. Instead, the minister, because he received his powers from the statute,

There is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts. This also does not necessarily mean that there is a conflict between the PAJA and the Labour Relations Act which would mean that the latter trumps the former in terms of Section 210 of the Labour Relations Act.¹³⁰

The Court held that it was bound by the decision of the court in *Zenzile*, and on its basis concluded that the power to dismiss correctional officers in this case was a public power and that, all other elements of the definition of administrative action being present, the decisions under challenge are subject to review in terms of Section 6 of the PAJA.

In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others*,¹³¹ the Labour Court declined to follow those judgments in which it had been held that employment-related decisions do not constitute administrative action.¹³² The Court, answering whether transfers in the public sector constituted administrative acts, accordingly held that before the enactment of the PAJA, such transfers were always treated as administrative acts. The Legislature must have therefore been aware of this line of decisions when the PAJA was drafted. According to the Court, nothing in the statutory definition suggests the contrary.¹³³

2.3.4 *Chirwa v Transnet* and the legal position

could only act within its limitations, express or implied. According to Plasket J, this passage encapsulates the essential difference between public and private power.

¹³⁰ At par 60. Plasket J also acknowledged the fact that public employees enjoyed greater protection than private employees and that this is an anomaly. However, he still felt that it was for parliament, and not the courts, to deal with the anomaly if it so wished.

¹³¹ (2006) 27 ILJ 2127 (LC).

¹³² See *SAPU and Hlophe supra*.

¹³³ At par 63.

The judgment in *Chirwa* comprised two majorities and a minority judgment. In the first majority judgment Skweyiya J¹³⁴ noted, with reference to Section 210 of the LRA that the LRA is the pre-eminent legislation in labour matters that are dealt with by that Act.¹³⁵ Only the Constitution itself or legislation that expressly amends the LRA can take precedence over such labour matters. PAJA came into effect five years after the LRA had been promulgated and Section 210 of the LRA remained unchanged regardless. The legislature significantly left Section 210 unchanged because it intended that PAJA should not interfere with the pre-eminence of the LRA and its specialised labour disputes mechanisms.

As far as the position of state employees is concerned, the Court held that it does not matter who the employer is. The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice and it therefore binds private and public (the state and its organs) employers alike.

The Court further noted:

Ms Chirwa is not afforded an election [between the LRA and PAJA]. She cannot be in a preferential position simply because of her status as a public sector employee. There is no reason why this should be so, as Section 23 of the Constitution, which the LRA seeks to regulate and give effect to, serves as the principal guarantee for all employees. All employees (including public service employees, save for the members of the defence force, the intelligence agency and the secret service, academy of intelligence and COMSEC), are covered by unfair dismissal provisions and dispute resolution mechanisms under the Act. The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion.¹³⁶

¹³⁴ With Moseneke DCJ; Madala; Ngcobo; Nkabinde; Sachs; Van der Merwe JJ and Navsa AJ concurring.

¹³⁵ At par 50.

¹³⁶ At par 66.

Public sector employees are not at liberty to choose between the LRA and PAJA. They are bound by the LRA. In the second majority judgment, Ngcobo J held that LRA caters for all employees, whether employed in the public sector or private sector. Accordingly, the powers given to the Labour Court under Section 158(1)(h) to review the executive or administrative acts of the state as an employer is a manifestation of the intention to bring public sector employees under the ambit of “one comprehensive framework of law” regulating employees from all sectors.¹³⁷

As to whether the applicant had two causes of action (one under PAJA and the other under the LRA), Ngcobo J held that the conduct of the respondent in terminating the employment contract does not constitute administration. It has more to do with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power does not transform its termination of the applicant’s employment contract into administrative action.¹³⁸ Support for this proposition is found in the structure of the Constitution, which draws a distinction between administrative action and labour relations. Though they share some characteristics, these two areas of law are recognised by the Constitution as distinct.¹³⁹ The judge further held that historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed. Therefore, with the codification of administrative and labour law, the principles laid down in *Zenzile* and other similar cases cease to apply.¹⁴⁰ The LRA (and other labour legislation) covers all employment sectors.

¹³⁷ At par 102.

¹³⁸ At par 142. In *President of the Republic of South Africa & Others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC), the Court held that not all conduct of State functionaries entrusted with public authority will constitute administrative action under Section 33 of the Constitution. The Court made an example of the distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation. The Court stated that the former constitutes administration, while the latter does not. It further held that the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the Executive arm of Government. What matters here is the function that is performed. The question is whether the task that is performed is administrative action or not.

¹³⁹ At par 143.

¹⁴⁰ See *SAPU supra* at par 66.

In a dissenting judgment, Langa J approached the matter from the grounds of policy. According to him, both PAJA and the LRA protect important constitutional rights and a presumption should not be made that one right should be more protected than the other. Accordingly, a litigant is entitled to the full protection of both rights, even when they seem to cover the same ground. In agreement with Cameron JA in the Supreme Court of Appeal, he referred to the following passage:

We must end where we began: with the Constitution. I can find no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to prefer one legislative embodiment of a protected right over neither another; nor any preferent entrenchment of rights or of the legislation springing from them.¹⁴¹

This means that there is no reason in the Constitution to suggest that in a claim that constitutes both a dismissal and administrative action, the law under the LRA should be preferred. The legislature is capable of resolving problems of duplication by conferring sole jurisdiction to deal with any disputes relating to administrative action under PAJA arising out of employment upon the Labour Court. In the absence of it doing so, the employee will have a choice between actions under PAJA and those under the LRA.

The question whether the dismissal in question constituted administrative action was answered in the negative. Firstly, the dismissal did not take place in terms of any statutory authority, but rather in terms of the contract itself.¹⁴² Secondly, when dismissing the applicant, Transnet Ltd was not exercising a public power or performing a public function as required by PAJA. This is mainly because Transnet, in exercising its contractual rights, has no authority over its employees in general, and gains no

¹⁴¹ *Transnet Ltd & Others v Chirwa* (2007) 2 SA 198 (SCA) at Par 65.

¹⁴² *Ibid* at par 185. However, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (2006) BCLR 1255 (CC) the Constitutional Court held that decisions in public-sector employment can under certain circumstances be considered administrative action for the purposes of PAJA. The administrative nature of a particular relationship cannot be disregarded simply because the parties exercise contractual power. After consideration of a number of factors, a decision can be found to be administrative action.

advantage over the applicant in particular, by virtue of the fact that it is a public entity.¹⁴³ In contrasting this case to the judgment in *POPCRU*,¹⁴⁴ the court could also not find the “pre-eminence of the public interest” in the services rendered by the human resources department of the Transnet Pension Fund.

2.3.5 The legal position after *Chirwa*

The majority decision in *Chirwa* has caused confusion amongst the lower courts. This has led to different reactions and interpretations by these courts, further leading to some inconsistency and uncertainty. In the Eastern Cape division, the High Court in *Nakin v MEC, Department of Education, Eastern Cape Province & Another*¹⁴⁵ had to determine whether the failure by the department to implement an approved recommendation amounted to an administrative action and therefore subject to review by a civil court. The Court held that the decision in *Chirwa* distinguished its earlier decision in *Fredericks* without overruling it.

Froneman J held that the majority decision in *Chirwa* may have disturbed what he considered “a settled state of affairs” and it did not have the effect of overruling the existing state of the law.¹⁴⁶ He further stated that lower courts are entitled to expect that when previously authoritative judgments are overruled, the nature and scope of that overruling should be stated in clear and express terms.¹⁴⁷ In rejecting *Chirwa*’s preference of purpose-built framework over non-purpose-built framework,¹⁴⁸ Froneman J held that the development of a coherent jurisprudence in labour law cannot take place in one exclusive forum.¹⁴⁹ This development is rather informed by the extent to which it

¹⁴³ *Ibid* at par 187.

¹⁴⁴ Note 188 at par 54. The Court, in deciding that the dismissal of correctional officers amounted to an administrative action, took into consideration the pre-eminence of the public interest in the proper administration of prisons; and the attainment of the purposes specified in the Correctional Services Act 111 of 1998.

¹⁴⁵ (2008) 29 ILJ 1426 (E).

¹⁴⁶ At par 13. Accordingly the issue of the High Court’s jurisdiction to hear employment matters was settled in *Fredericks* and did not have to be resurrected.

¹⁴⁷ At par 28. See also *Bloemfontein Town Council v Richter* 1938 AD 195.

¹⁴⁸ See *Chirwa* at par 41 to 43.

¹⁴⁹ At par 30.

gives proper expression to the right of everyone to fair labour practices in terms of the Constitution.¹⁵⁰ Suggesting an all-inclusive approach, he further noted:

The nature of 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 my view capable of exclusionary compartmentalization into only one of the three possibilities mentioned above (contract, administrative law and unfair labour practice). The common law contract of public 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 labour legislation, and, yes, in contract too. And fairness has much to do with equality, dignity and freedom; founding values of our Constitution. To view these interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole and complete picture of such a relationship. And in the process one might forget to ask and assess the real substantive issue at stake in a particular case.¹⁵¹

With the authority of *Fredericks*, the court concluded that the failure by the Department to implement the applicant's reinstatement meets all the four corners of administrative justice as defined in PAJA and the High Court had jurisdiction to entertain the claim.

The issue of *Chirwa* not overruling *Fredericks* also troubled the court in *Makambi v MEC, Department of Education, Eastern Cape*.¹⁵² By deciding that the dismissal of a public servant does not amount to administrative action and also that the High Court lacks jurisdiction to hear the matter, the court appeared to be on the *Chirwa* side of the conflict. Nonetheless, the court expressed its discontent (with *Chirwa* not overruling *Fredericks*) by holding that if two superior courts make different rulings, lower courts are

¹⁵⁰ *Ibid.*

¹⁵¹ At par 50.

¹⁵² (2008) 8 BLLR 711 (SCA).

therefore free to “pick and choose” between them.¹⁵³ Also, Nugent JA observed that there was no legal basis for the decision of the majority in *Chirwa*. Accordingly, the majority interpreted the LRA as seeking to encompass both employees in the public and private sector and of being vindictive of their rights- something which the legislature denies in section 157(2).¹⁵⁴ He also concluded that *Fredericks* was not overruled because it seemed to be good law and it would be so until it was overruled or replaced by statutory amendment.¹⁵⁵

The judgment in *Makhanya v University of Zululand*¹⁵⁶ afforded yet another opportunity for Nugent JA to further come down on *Chirwa*. Accordingly, the two findings in *Chirwa* are “mutually destructive”.¹⁵⁷ After deciding that the High Court lacks jurisdiction to hear the matter, the court in *Chirwa* could not have gone forth to hold that the appellant’s claim was bad in law, because to do so the court must have had jurisdiction.¹⁵⁸ He further held that the appellant in *Chirwa* (and also the appellant in this matter) had two separate claims; one under the LRA and another under administrative law. There is therefore nothing wrong with the appellant bringing both claims in one court (under the concurrent jurisdiction of the Labour and High Courts) or each in one of these courts.¹⁵⁹ Also important was the conclusion he reached that the claim for the enforcement of the right to just administrative action (as pursued by *Chirwa*) actually falls within the ordinary powers of the High Court, and the fact that the claimant has another claim (to enforce rights under the LRA) is irrelevant.¹⁶⁰

The position in *Chirwa* was again adopted by the Supreme Court of Appeal in *Kriel v Legal Aid Board*,¹⁶¹ with the court partly concurring with the *ratio* in *Makhanya*. Even

¹⁵³ At par 28 per Nugent JA.

¹⁵⁴ At par 37.

¹⁵⁵ At par 38 - 40.

¹⁵⁶ (2009) 8 *BLLR* 721 (SCA). This judgment came exactly a year after the decision in *Makambi* was handed down.

¹⁵⁷ At par 29.

¹⁵⁸ *Ibid.*

¹⁵⁹ At par 27.

¹⁶⁰ At par 47.

¹⁶¹ 2010 (2) SA 282 (GSJ).

though the court held that the dismissal of a public sector employee does not amount to administrative action, it still maintained that the findings in *Chirwa* were inconsistent.¹⁶²

In *Majake v Commission for Gender Equality and Others*¹⁶³ the court completely adopted a different approach by holding that the dismissal of a public service employee constitutes an administrative action. To amount to an administrative action, the court held that the termination of an employment contract must have occurred in terms of a statutory power and not in terms of the contract.¹⁶⁴ The court also stated that the power to appoint also affirms the concomitant power to dismiss and therefore the power to dismiss the applicant in this matter involved the exercise of public power.¹⁶⁵ Consequently, the dismissal constituted an administrative action subject to review under PAJA.¹⁶⁶

It is in *Gcaba v Minister of Safety and Security & Others* (2009) 12 BLLR 1145 (CC) that the Constitutional Court attempted to address these inconsistencies. The Court held firstly that while the claim in *Fredericks* “removed it from the purview of labour law”,¹⁶⁷ that could not be the case with *Chirwa*. *Chirwa* was a labour matter and it had to be resolved through specialised processes (and fora) under the LRA.¹⁶⁸ Secondly, it was held that the failure by the National and Provincial Commissioners of the SA Police Service to promote Mr *Gcaba* did not amount to an administrative action because it has few or no direct implications for other citizens.¹⁶⁹ Lastly (and most importantly), to the extent that this judgment may be taken to differ from *Fredericks* and *Chirwa*, it purported to be (the most recent) authority. This authority was accepted by the Supreme Court of Appeal in *Mkumatela v Nelson Mandela Metropolitan Municipality & Another*¹⁷⁰ and

¹⁶² At par 9. It means therefore that when the court decides that it has no jurisdiction, it should not continue to consider the merits.

¹⁶³ 2010 (1) SA 87.

¹⁶⁴ At par 49. See also *Masetlha v President of the Republic of South Africa and Another* (2008) (1) SA 566 at par 63 the court held that the President’s power to appoint (and dismiss) the head of an agency is not sourced from a private law relationship. It is rather an exercise of public authority.

¹⁶⁵ At par 51.

¹⁶⁶ At par 52.

¹⁶⁷ At par 30.

¹⁶⁸ At par 31.

¹⁶⁹ At par 66.

¹⁷⁰ (2010) 2 BLLR 115 (SCA).

*National Director of Public Prosecutions & another; Tshavungwa v National Director of Public Prosecutions & Others*¹⁷¹ dealing with promotion and suspension of an employee respectively.

The decision in *Gcaba* was also unequivocally followed by the Labour Court in *Mabokela v Moretele Local Municipality*.¹⁷² The Court, in resolving a suspension dispute, held that the existence of the right to fair administrative action was doubtful in the light of the dictum in *Gcaba*, in so far as the grievance raised by the employee relating to the conduct of the state as employer which has ‘few or no direct implications or consequences for other citizens’. Consequently, an administrative law remedy was not available to the applicant, despite lack of remedy in the LRA for unfair action relating to suspension on pay, in terms of the scope of an unfair labour practice in terms of s 186(2) of the LRA.¹⁷³

It seems as if the conclusions reached in *Chirwa* and *Gcaba supra* accord with an observation made by Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹⁷⁴ that “ it would not only be jurisprudentially inelegant and functionally duplicatory to permit remedies under constitutionalised administrative law, and remedies under common law, to function side by side. It would be constitutionally impermissible.”¹⁷⁵ However, Stacey¹⁷⁶ attributes some consequences to this “law ousting law” approach. Amongst others, he argues that it has the effect of denying the constitutional protections of rights to administrative justice where they are nevertheless available. Secondly, he submits that it is inconsistent with the principle that the Bill of Rights applies to all law in section 8(1) of the Constitution and consequently with the principle that law inconsistent with the Constitution is invalid (Section 2 of the Constitution). After all these engagements by the courts, one has to wait and see whether *Gcaba* and all its supporting decisions have resolved the problem of forum

¹⁷¹ (2010) 2 *BLLR* 121 (SCA).

¹⁷² (2010) 31 2646 (LC).

¹⁷³ At par 12.

¹⁷⁴ 2007 (3) SA 121 (CC).

¹⁷⁵ At par 99.

¹⁷⁶ Stacey R: “Administrative Law in Public-Sector Employment Relationships” (2008) 125 *SALJ* 307. See also Plasket J’s comments in the *POPCRU* decision above.

shopping in public-sector employment or whether legislative intervention is still imperative.

2.4 Conclusion

The jurisdictional issues around compensation of a dismissed employee are intricate and it looks like in more areas than one, the High Court will still have an upper hand in exercising jurisdiction in what is supposed to be the Labour Court's exclusive terrain. To further compound the problem, there are provisions within the LRA which run counter to the objectives of the Act itself. For instance, Section 195 states that an award or order of compensation is in addition to, not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.¹⁷⁷ With a delictual claim for damages in the High Court, an employee will surely seek to recover "an amount under any law", as permitted by Section 195. The inevitable result of this practice would be an untenable duplication of remedies in respect of the same cause of action.¹⁷⁸ An employee can therefore claim compensation for unfair dismissal and later approach the High Court to claim damages under either the law of contract or delict.

A proper understanding of Section 194 is very imperative in the realisation of the objectives of the LRA. It is in this context that the court in *Mashava v Cuzen & Woods Attorneys*¹⁷⁹ stated that the capping of compensation "must not be understood as a yardstick against which to measure compensation. Rather it is in the nature of a guillotine because it cuts off the quantum of her claim when it reaches an amount equivalent to 24 months' remuneration."¹⁸⁰

¹⁷⁷ See also Section 77(3) of the Basic Conditions of Employment Act 75 of 1997 which gives concurrent jurisdiction to the Labour Court and civil courts in determining matters concerning contracts of employment.

¹⁷⁸ See for example *SA Maritime Safety Authority v Mckenzie* (2010) ILJ 529 (SCA), where the SCA allowed a claim for damages for breach of contract notwithstanding the fact that the respondent had already claimed compensation for unfair dismissal under the LRA.

¹⁷⁹ (2000) 6 BLLR 691 (LC).

¹⁸⁰ At par 35.

It is known that the limitations placed on compensation in the LRA have practical advantages for commissioners at the CCMA because evidence is not based on future earnings, but simply on the rate of remuneration at the date of dismissal.¹⁸¹ The lack of expert witnesses also ensures that finality is reached more swiftly.¹⁸² However, it still stands to be seen, from the employee's perspective, whether Section 194 and its benefits will prevail over the financial benefits likely to be gained when the High Court is approached under the law of delict.¹⁸³ Legislative intervention is also imperative in the resolution of problems affecting striking employees discussed above. The LRA requires judges of the Labour Court to have knowledge, experience and expertise in labour law, an advantage which High Court judges do not have. Therefore, to avoid these jurisdictional problems a suggestion is made that legislation be enacted to ensure as far as possible that all labour matters, if they have to go to a superior court, go to the Labour Court.¹⁸⁴

With regard to the interaction of common law (fixed term contracts) and statutory law, Van Jaarsveld¹⁸⁵ submits that the value of other contractual remedies in contemporary employment should not be underestimated. Accordingly, one should venture in the direction where contractual remedies are not regarded as exceptions to statutory remedies, but rather as co-existing remedies in suitable circumstances.¹⁸⁶ Although Du Toit¹⁸⁷ also argues that the role of common law is not to usurp the role of the legislature, he still submits that areas such as dismissal are not areas where the development of common law is called for.

¹⁸¹ Rycroft and Perumal at 1156.

¹⁸² *Ibid.*

¹⁸³ In the *Jacot-Guillamod* case, the employee stood a chance of being awarded more than two rand in damages in the High Court. If he had instituted an action in the CCMA or the Labour Court under the LRA, his compensation may have been limited to a lesser amount in accordance with the provisions of Section 194 of the LRA. In *SA Maritime Safety Authority v Mckenzie* the employee, after reaching a settlement of one year's salary with the employer, approached the High Court to claim R5, 2 million under in damages.

¹⁸⁴ See *Langeveldt* at par 43.

¹⁸⁵ Van Jaarsveld *The Interplay of Common Law and Statutory Law in Contemporary Law in South African Law* (LLD Thesis) 2007 at 615.

¹⁸⁶ *Ibid.*

¹⁸⁷ See Du Toit D "A common law hydra emerges from the forum shopping swamp" (2010) 31 *ILJ* 21. Du Toit argues that the upholding of common law at the expense of labour statutes in *Fedlife* was uncalled for.

As far as public-sector employment law is concerned, two schools of thought are apparent. Firstly, the argument of the majority decision in *Chirwa* that by leaving Section 210 of the LRA as it is, the legislature did not want PAJA to interfere with the pre-eminence of the LRA.¹⁸⁸ Secondly, the argument by Langa J in *Chirwa* that the legislature is assumed to have been aware of the resultant conflict between the LRA and PAJA.¹⁸⁹ Had the legislature intended the LRA to trump PAJA, it would have done so in explicit terms.¹⁹⁰ Thirdly, there is a view that the LRA and PAJA should be seen as complementary and cumulative, as opposed to being destructive of each other.¹⁹¹ The latter view does not enjoy my support for it lends itself to uncertainty. If PAJA and the LRA are cumulative, in which forum will disputes over them be entertained? In the jurisdictional debate, either the first or second school of thought should prevail. I submit that the first view should be upheld because, (i) it will help curb the problem of forum-shopping and, (ii) it is more in line with the LRA's objective of providing for the Labour Court (and other institutions) as a one-stop-shop for the resolution of labour disputes.

¹⁸⁸ *Chirwa* at par 50.

¹⁸⁹ *Chirwa* at par 175.

¹⁹⁰ *Ibid.*

¹⁹¹ See *POPCRU supra* at par 60.

CHAPTER THREE

THE LABOUR RELATIONS ACT PROVISIONS OPENING THE DOOR FOR FORUM SHOPPING

3.1 Introduction

The Labour Relations Act has brought with it a new era of protection of labour rights, marking a departure from pre-constitutional labour law.¹⁹² Not only has the LRA afforded more protection to employees (individually and collectively) but has also created a set of specially crafted forums for the resolution of employment disputes.¹⁹³ With the passage of time, practices emerged whereby these institutions were bypassed in favour of non-LRA institutions, thus revealing uncertainty and questioning the objectives of the LRA and its provisions. For instance, Section 157(2) has resulted in problems when determining where the jurisdiction of the Labour Court ends and where that of the High Court begins.

The constitutional right to fair labour practices also includes the right to strike,¹⁹⁴ which is regulated by Chapter IV of the LRA. As clear and concise as the rights in chapter IV appear, instances arise during the course of the strike which bring them (statutory laws) in conflict with common law jurisprudence. This chapter discusses areas of statutory law that allow for forum shopping. In this regard particular attention will be paid to the interpretation of Section 157 of the LRA by the courts and the relation between strikes and forum shopping. The review jurisdiction of the Labour Courts and the role it plays in intensifying forum shopping will also be considered.

¹⁹² Ngcukaitobi T & Brickhill J: "A Difficult Boundary: Public Sector Employment and Administrative Law" (2007) 28 *ILJ* 767.

¹⁹³ *Ibid.*

¹⁹⁴ Section 23(2) (c).

3.2 Section 157 of the Labour Relations Act

3.2.1 Outline and interpretation

Section 157(1) of the LRA reads: “Subject to the Constitution and Section 173 and except where this Act provides otherwise, the Labour Court has exclusive¹⁹⁵ 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.” The main question provoked by various decisions of courts in the jurisdictional debate is whether Section 157(1) ousts the jurisdiction of the High Court in deciding employment and labour matters.

In *Mondi Paper (A division of Mondi Ltd) v Printing Wood and Allied Workers Union & Others*,¹⁹⁶ the court had to determine the jurisdiction of the High Court *vis-à-vis* the Labour Court in interdicting employees who engaged in improper picketing. The court held that the onus to show that the jurisdiction of the High Court has been ousted (or excluded as the wording of Section 157 dictates) is a very heavy one. Nonetheless, the Court held that Section 157(1) confers exclusive jurisdiction on the Labour Court, in respect of matters that are to be determined by the Labour Court and therefore the High Court’s jurisdiction is ousted.

The Supreme Court of Appeal in *Fedlife, supra* gave a different meaning to Section 157(1). According to the court, this section does not confer exclusive jurisdiction generally on the Labour Court to deal with matters concerning the relationship between an employer and an employee. Accordingly, the exclusive jurisdiction of the Labour Court arises only in respect of “matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.” Various provisions of the LRA

¹⁹⁵ The Oxford Concise Dictionary defines the word “exclusive” as “shutting out”, “not admitting of” or “excluding all but what is specified.” Therefore, according to this definition section 157(1) excludes all but the Labour Court in deciding “matters that elsewhere in terms of this Act are to be determined by the Labour Court.” No court has as yet followed the dictionary meaning. Neither has the word “exclusive” been at the centre of debate before, but the courts, when engaging in the interpretation of Section 157(1), sought in context to determine whether the jurisdiction of the high courts has been excluded by this subsection.

¹⁹⁶ (1997) 18 ILJ 84 (D).

identify specific disputes that may arise between employers and employees and provides for such disputes to be resolved by the Labour Court.¹⁹⁷ Those are, according to the court, the “matters” contemplated by Section 157(1) and to which the exclusive jurisdiction of the Labour Court is confined.

The interpretation in *Fedlife* was followed by the Court in *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*.¹⁹⁸ The Court in this matter had to decide whether the Labour Court had exclusive jurisdiction to determine disputes concerning alleged infringements of constitutional rights by the state acting in its capacity as employer:

As there is no general jurisdiction afforded to the Labour Court 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. The High Court’s jurisdiction will only be ousted in respect of matters that “are to be determined” by the Labour Court in terms of the Act.¹⁹⁹

The Court went further to elucidate the impact of Section 169 of the Constitution²⁰⁰ on the exclusive jurisdiction of the Labour Court. This section provides that a High Court may decide any constitutional matter except a matter that only a Constitutional Court may decide or a matter that is assigned by an Act of Parliament²⁰¹ to another court of a status similar to that of a High Court. Since this section formed the basis of the Court *a quo*’s refusal to entertain the matter, the Constitutional Court held that the CCMA is not

¹⁹⁷ For example Sections 9, 24(7), 26, 59, 63(4), 66(3), 68(1) and 69.

¹⁹⁸ (2002) 2 *BLLR* 119 (CC).

¹⁹⁹ At par 40. See also *United National Public Servants Association of SA v Digomo NO & others* (2005)12 *BLLR* 1169 (SCA). At par 4 the Court held: “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”.

²⁰⁰ Constitution of the Republic of South Africa, 1996.

²⁰¹ The Labour Relations Act is one such Act. Section 157(2) of this Act confers on the Labour and High Courts concurrent jurisdiction to determine disputes over the constitutionality of any conduct or act committed by the state in its capacity as employer.

a court of a status similar to that of the High Court as suggested by the reasoning of the Court *a quo*.²⁰²

The decisions in both *Fedlife* and *Fredericks supra* were followed by the court in *Boxer Superstores supra* with the Court here warning that the ordinary courts should be careful not to usurp the Labour Court's remedial powers, and their special skills and expertise. In a landmark decision of *Chirwa, supra*, the Constitutional Court implied that the jurisdiction of the High Court was ousted in labour matters by Section 157(1). According to the Court, Section 157(1) [and 157(2)] must be interpreted purposively to give effect to the objects of the LRA. The Court, per Skweyiya J, noted:

The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes.²⁰³

The Court further highlighted the importance of Section 210 of the LRA in interpreting the jurisdictional provision. Section 210 provides:

If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law, save the Constitution or any other Act expressly amending this Act, the provisions of this Act will prevail.

This section elevates the LRA to a higher position than other legislation in labour matters. Only the Constitution itself or legislation expressly amending the LRA can take

²⁰² The High Court held that it lacked jurisdiction to entertain the matter because the dispute concerned the application of a collective agreement and because the Labour Relations Act requires such disputes to be arbitrated by the CCMA.

²⁰³ At par 47.

precedence in addressing such labour matters. From this section and the interpretation adopted by the Court in *Chirwa, supra* one can conclude that the forums created by the LRA enjoy exclusive jurisdiction (and therefore oust the High Court's jurisdiction) in labour matters, irrespective of the existence of other rights in the matter.²⁰⁴ The decision of the court in *Chirwa supra* therefore opposed that of *Fredericks* (and all its followers).

In *Gcaba v Minister for Safety and Security & Others*²⁰⁵ the applicant, after referring the matter to a bargaining council, approached the High Court to review the decision of his employer not to appoint (or promote) him to the position of station commissioner. Following the interpretation in *Chirwa*, the high court held that it lacked jurisdiction to entertain the application because it related to an employment dispute, thus falling under the exclusive jurisdiction of the labour court in terms of Section 157(1).

In *casu*, the Constitutional Court had to distinguish between the interpretations adopted in *Fredericks* and *Chirwa* to decide whether indeed the High Court is divested of jurisdiction by Section 157(1). Contrary to the applicant's contention,²⁰⁶ the court was more inclined to the purposive interpretation as in *Chirwa*. At paragraph 69, the court echoed the sentiments in *Chirwa* to find that the Labour Court and other structures have been created as a special mechanism to settle labour disputes such as alleged unfair dismissals grounded in the LRA and not, for example, applications for administrative review as demanded by the applicant in this matter. The court further held:

Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145. Section 157(1) should, therefore, be given an expansive content to protect the

²⁰⁴ In *Chirwa, supra*, the applicant claimed that her administrative law rights under the Promotion of Administrative Justice Act 3 of 2000 were violated by the dismissal and that being so, the matter had to be reviewed by the High Court under PAJA.

²⁰⁵ See (2009) 12 *BLLR* 1145 (CC).

²⁰⁶ The applicant argued accordingly that the High Court erred in holding that it was bound by *Chirwa* and in holding that it did not have jurisdiction to adjudicate the matter as *Chirwa* had overruled *Fredericks*. According to the applicant, the Court should have followed *Fredericks*.

status of the Labour Court [and Section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well].²⁰⁷

To the extent that it differs from *Fredericks* or *Chirwa*, *Gcaba* holds that it is the authority²⁰⁸ on this and other jurisdictional issues. Most of these issues are pertinent to this chapter.

3.2.2 Problems in Section 157(1)

3.2.2.1 The determining factor

Section 157(1) provides that 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”. The problem with this section lies in deciding on which matters are “to be determined by the Labour Court”. According to *Chirwa*²⁰⁹ and *Gcaba supra*,²¹⁰ a court is required to assess its jurisdiction in the light of the pleadings and not substantive merits. This reasoning creates a loophole because it has an effect of allowing litigants to carefully plead their cases in a manner that puts those cases outside the [exclusive] jurisdiction of the Labour Court.

The debate of form and substance in jurisdiction was earlier entertained by the Labour Appeal Court in *Wardlaw v Supreme Mouldings (Pty) Ltd.*²¹¹ The Court in this matter identified two schools of thought²¹² namely; The Formalistic school of thought and the Substantive school of thought.

²⁰⁷ At par 70.

²⁰⁸ See the decision in *Sibeko v Premier for the Province of the Northern Cape & Another* (2010) 2 BLLR 207 (NCK). The Court acknowledged that the complexities in jurisdictional debate were clarified in *Gcaba*.

²⁰⁹ At par 39 and 75.

²¹⁰ At par 77. See also *Sibeko* at par 22 and 75.

²¹¹ (2007) 28 ILJ 1042 (LAC).

²¹² Section 191(5)(a) and (b) is central to these schools of thought and reads as follows:

(5) If a council or a commissioner certifies that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral and the dispute remains unresolved-

(a) The council or the commission must arbitrate the dispute at the request of the employee if-

The formalistic school of thought entails that the employee would allege what the reason for the dismissal is and the reason that he would allege would be a reason that falls under Section 191(5) (a) once such an allegation is made, the Labour Court would have jurisdiction to adjudicate the dispute up to the end even if during adjudication the court became convinced that the reason alleged by the employee is not the real reason for dismissal.

According to the court, this school of thought carries the following advantages:

- It promotes certainty, because to know whether a dispute should be referred to arbitration or adjudication, all that needs to be done is to determine what the employee alleges is the reason for the dismissal; that can be established quickly and without the court's having to embark upon any kind of protracted enquiry into the true reason for the dismissal which may require that oral evidence be heard.²¹³
- It promotes the expeditious resolution of disputes which is one of the primary objects of the Act. This is so because, once the court assumes jurisdiction with regard to a dismissal dispute, it retains that jurisdiction right up to the end.²¹⁴

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- (i) The employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
 - (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
 - (iii) the employee does not know the reason for dismissal; or
 - (iv) the dispute concerns an unfair labour practice; or
 - (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged
 - that the reason for dismissal is –
 - (i) automatically unfair
 - (ii) based on the employer's operational requirements;
 - (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
 - (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

²¹³ At par 11.6.

²¹⁴ At par 11.7.

- It can also be said to be cost effective because, once there is a trial in a particular forum, it proceeds to finality and only the costs of that trial arise whereas, where the matter must be referred to another forum after some evidence has been led in the one forum, that results in higher costs or even a duplication of costs.²¹⁵
- Lastly, it is said to be convenient to witnesses because they are called to one forum where they give their evidence once and for all and will not later be called to give the same evidence in another forum if the court declines to proceed to finality with the dispute.

However, the court noted the following points of criticism²¹⁶ against this school of thought:

- By having as its foundation a mere allegation (as to the reason for the dismissal), which prevails even when it is not true, it elevates form over substance and that goes against our case law which holds the opposite view.
- This school of thought allows the Labour Court to usurp the jurisdiction of the CCMA and bargaining councils when it entertains the merits of dismissal disputes where it is clear that the true reason for the dismissal is misconduct or incapacity simply because the employee may earlier on have made an untrue allegation as to the true reason for the dismissal. The argument here would be that whatever happens with regard to the issue of jurisdiction, a clear distinction should be made between the roles of the CCMA and bargaining councils, on the one hand, and the role of the Labour Court on the other.
- With regard to the view that this approach may be said to promote the expeditious resolution of disputes, the court warned that the significance thereof should not be exaggerated. This assertion would be made on the basis that, once the Labour Court has adjudicated the merits of a dismissal dispute that

²¹⁵ At par 11.8.

²¹⁶ At par 12.

ought to have gone to arbitration if the employee had alleged the true reason for dismissal, the appellate process which is available to the losing party in the Labour Court may, if he appeals, delay the ultimate finalization of the dispute to the CCMA for arbitration, that may well have delayed the dispute, such award would be final in terms of the Act and there would be no appeal process to the losing party but only a review process.

- Finally this school of thought may be said to encourage employees to by-pass the CCMA and bargaining councils when they prefer their disputes to be heard by the Labour Court.

The rationale behind the substantive school of thought is that the Labour Court should only provisionally accept the employee's allegation as to the reason for dismissal until it makes a finding as to the true reason of dismissal. If the reason it finds is the same reason as the one that was alleged by the employee, no problem arises and the court proceeds to adjudicate the dispute on the merits. If, however, the reason for dismissal that the court finds is not the one alleged by the employee but a reason that falls under Section 191(5) (a) of the LRA, the court should refuse to adjudicate the dispute and let it be referred to arbitration by the CCMA or a bargaining council with jurisdiction, as the case may be.

In favour of this school of thought it was noted that it gives effect to the different processes to which different disputes are subject in terms of the Act and does not blur the distinction between disputes that should go to different processes and fora. This school of thought was also praised because it prevents employees from bringing to the Labour Court dismissal disputes that do not deserve or are not required to be referred to the Labour Court. This school has however been criticised for being very costly, for unduly delaying the finalization of some disputes and creating duplication of processes.²¹⁷ In *Wardlaw*, unlike in *Chirwa* and *Gcaba*, the court preferred the substantive over the formalistic school of thought, and held that it enjoys recognition of

²¹⁷ At par 14.

the LRA. Accordingly, Section 157(5)²¹⁸, read with Section 158(2), clearly envisages a situation where the Labour Court takes as correct the employee's allegation of what the reason for dismissal is and proceeds with the hearing until it is 'apparent' to it that the reason for dismissal is a different one and it is one falling under Section 191(5) (a). In such a case Section 158(2)²¹⁹ is triggered. Once it is clear that to the court that the dispute is one that ought to have been taken to arbitration, the court deals with the matter in terms of either Section 158 (2)(a) and (b).²²⁰

The powers given to the Labour Court by *Wardlaw* were also extended to commissioners to follow the substantive school of thought when determining jurisdiction.²²¹ The Labour Court also confirmed the principles laid down by *Wardlaw in Chizunza v MTN (Pty) Ltd*,²²² where it (the Labour Court) had to determine the true nature of the dispute in spite of the characterization by the referring party or by the CCMA commissioner.²²³

3.2.2.2 The delaying effect

The High Court may, for example, decide to rely on the pleadings in order to adjudicate a matter which falls under the exclusive jurisdiction of the Labour Court (or any of the LRA institutions). Should the High Court lack jurisdiction to hear the matter, a referral will be made to the proper forum. The referral of the matter to a competent court may be a convenient way of ensuring that legal disputes are resolved. However, this referral would unnecessarily add costs and

²¹⁸ Section 157(5) provides:

'(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.'

²¹⁹ Section 158(2) of the Act provides:

'(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

- (a) stay the proceedings and refer the dispute to arbitration; or
- (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make'

²²⁰ At par 21.

²²¹ See *Chuma and Giflo Engineering (BOP) (Pty) Ltd* (2009) 30 *ILJ* 2572 (BCA).

²²² (2008) 29 *ILJ* 2919 (LC).

²²³ At par 13.

cause delay in the finalisation of the matter at hand. Litigants should, therefore, be limited to taking their labour matters to the proper LRA structures so that the delay and cost of referral can be avoided. Unnecessary delays should be avoided as they will defeat the purpose of the LRA.²²⁴ This will also assist in reducing unnecessary costs that may be incurred during the process of referral.

3.2.3 Concurrent jurisdiction

Section 157(2) of the LRA reads: “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 arising from :-

- a) Employment and from labour relations;
- b) Any dispute over the constitutionality of any 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.”

This Section has resulted in complex jurisdictional disputes in so far as determining where the jurisdiction of the Labour Court ends and where that of the High Court begins. In interpreting this section too there were tensions between the judgments of the courts in *Fredericks* and in *Chirwa*. In *Fredericks* the Court adopted a literal approach:

There is no express provision of the [Labour Relations] Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as an employer, other than Section 157(2). That section provides that challenges based on constitutional

²²⁴ The Explanatory Memorandum to the draft Bill 115 at 147-151 mentions as one of the objects for creating the new system, the need to overcome the lengthy delays inherent in the Industrial Court procedure. Section 1(d)(iv) of the LRA mentions the promotion of effective resolution of labour disputes as one of its objects.

rights arising from the state's conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with the High Court. Whatever else its import, Section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.²²⁵

In *Chirwa, supra* the applicant, a dismissed public sector employee, sought to bypass the LRA procedures (arbitration in particular) and take the dispute to the High Court. The applicant relied on Section 157(2) in contending that the High Court has concurrent jurisdiction with the Labour Court in respect of her claim, thus prompting the Court to consider the scope of this section. The Constitutional Court held that Section 157(2) must be given a purposive interpretation: That is, the courts must be guided by the primary objectives of the LRA when deciding whether the High Court has concurrent jurisdiction with the Labour Court to decide a particular dispute. The objects of the LRA are twofold:

- (a) To establish a comprehensive framework of law governing the labour and employment relations between employees and employers in all sectors, and
- (b) To establish the Labour Court and the Labour Appeal Court as superior courts with exclusive jurisdiction to determine all matters arising from the LRA.

In line with these objects, Section 157(2) should therefore be understood as not giving the High Courts jurisdiction to deal with employment matters, but rather as conferring limited constitutional jurisdiction to the Labour Court in respect of matters involving alleged violations of the rights in the Bill of Rights. The main purpose of section 157(2) was to confer constitutional jurisdiction on the Labour Court. The Labour Court therefore has exclusive jurisdiction in respect of any fundamental right entrenched in chapter 2 of the Constitution arising from employment and labour relations.

²²⁵ At par 41.

In *Gcaba, supra* the Court adopted the same approach as in *Chirwa*. The Court held accordingly that the purpose of Section 157(2) is to extend the jurisdiction of the Labour Court to embrace disputes arising from employment involving violations of fundamental rights. However, the court further warned that Section 157(2), so interpreted, must not be taken to mean that the High Court is divested of jurisdiction where a cause of action and remedy lies within its jurisdiction.²²⁶ Therefore, to the extent that *Gcaba* is different from *Chirwa* or *Fredericks*, it is law.

3.3 Strikes and Forum Shopping

Section 64 of the LRA gives to every employee the right to strike, and to employers the recourse to lock-out. The Act further states that participation in a protected strike or lock-out does not amount to a defect or breach of contract²²⁷ and also exempts employees and employers from civil legal proceedings for taking part in these forms of industrial action.²²⁸ However, the Act also states clearly that the abovementioned provisions do not apply if the act concerned constitutes an offence.²²⁹ This issue inevitably leads to the following question: which courts have jurisdiction when offences (civil and criminal) are committed during the course of strikes and lock-outs?

The first attempt at answering this question was made by the High Court in *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood & Allied Workers Union & Others*.²³⁰ The Court was asked by the employer to grant an interdict against employees who, during the course of picketing, committed acts of sabotage and intimidating non-striking employees. In its argument, the employer contended that the incidents complained of in the matter were purely delictual issues and therefore fell within the jurisdiction of the

²²⁶ At par 74. The Court held that the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court or the Equality Court, Section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as such.

²²⁷ Section 67(2).

²²⁸ Section 67(6).

²²⁹ Section 67(8).

²³⁰ (1997) 18 ILJ 84 (D).

High Court. The High Court did not agree with this argument. Nicholson J held that the High Court has no jurisdiction because:

The actions of the offending employees fall within the purview of the powers of the Labour Court. The incidents relating to the intimidation of non-striking employees at home are still examples of improper demonstrating in support of a strike. They are, moreover, necessary and incidental to a resolution of that dispute. In any event the notion that the Supreme Court should have jurisdiction for that limited purpose and that the other incidents which constitute improper picketing pure and simple should be referred to the Labour Court offends against the court's duty to avoid proliferation and multiplicity of court proceedings with their attendant costs.²³¹

The Judge further rejected the employer's argument that the dispute was a consequence of ordinary delictual conduct and it bore no relation to the objects and remedies in the LRA. He made the following observation:

The Act does not, of course, give the Labour Court jurisdiction to every dispute involving workers near a factory. The Supreme Court might willingly give its attention to a wronged wife, who is assaulted by her husband outside the factory gates, when asking for maintenance. That would be a delictual action which did not concern the Labour Court. In casu the whole background, the presence of a trade union, the recognition agreement, the wage bargaining dispute, which was incidentally referred to the CCMA, the notice of intention to strike and dispute about compliance with s 64 of the Act all clearly stamp the jurisdictional milieu as belonging to the machinery of the Act and the jurisdiction of the Labour Court.²³²

This reasoning formed the basis of a number of subsequent decisions. In *Sappi Fine Papers (Pty)(Ltd) (Adamas Mill) v Paper Printing Wood & Allied Workers Union &*

²³¹ At par 90 D-E.

²³² *Ibid* at F-H.

*Others*²³³ the applicant (the employer) sought an order in the form of a *rule nisi* in the High Court, to evict employees who, in the course of a protected strike, embarked on disruptive and intimidatory ‘*toyi-toyi*’ processions. A challenge was brought to the jurisdiction of the High Court by the respondents on the basis, firstly that the Labour Court has exclusive jurisdiction to grant relief sought by the applicant and secondly, that the High Court has no jurisdiction to grant any relief to any alleged unlawful conduct committed during the course of a picket or to grant any relief which in any way relates to the powers of the CCMA with regard to the determination of picketing rules.²³⁴

The applicant, after accepting that the Labour Court had jurisdiction, disputed that the Labour Court had exclusive jurisdiction to grant the relief it sought, regardless of the provisions of Section 157(1) of the Act. The applicant argued in essence that in terms of the outline and the provisions of the Act there are, on the one hand, “protected strikes” and, on the other, strikes which do not comply with the provisions of the Act. Strikes which do not comply with the Act are therefore not covered by the Act and are not within the reach of the Labour Court. With reference to the provisions of subsections (2), (6) and (8) of s 67 of the Act, it was further argued on behalf of the applicant that it was apparent from these provisions that, even in the case of a protected strike, unlawful activity constituting an offence remains a delict or breach of contract and is subject to civil legal proceedings.²³⁵

Again, it was contended for the applicant that Sections 67, 68 and 69 made it clear that unlawful activity is not promoted, that picketing must be understood to constitute a peaceful demonstration and that the exclusive jurisdiction of the Labour Court, in so far as the granting of interdicts or restraining orders is concerned, is restricted to such orders in respect of persons partaking in a strike or in conduct in contemplation or in furtherance of a strike; that a strike in that context relates to and is limited to a refusal to work or the retardation or obstruction of work, in the sense of non-criminal activity, and

²³³ (1998)19 *ILJ* 246 (SE).

²³⁴ At par 248 I-J.

²³⁵ At par 256 A-C.

that unlawful activity in the protected strike remains subject to the jurisdiction of the High Court.²³⁶

In the light of these submissions, the court held that the purpose of Section 68 of the act is to bring strikes complained of in this matter within the ambit of the Act.²³⁷ In agreement with the judgment of Nicholson J in the *Mondi* case Nepgen J held that:

When one has regard to the general scheme of the Act it appears [to me] to be inconceivable that the legislature intended that the Labour Court should have exclusive jurisdiction in respect of only those matters referred to in Section 68(1) of the Act, particularly when it is borne in mind that Section 68 deals with strikes which do not comply with the provisions of chapter IV of the Act. If Section 68 had not been enacted, such strikes, which are not strikes held in terms of the Act, would fall outside the provisions of the Act and therefore only the High Court would have jurisdiction to make orders in relation thereto. Section 68 of the Act ensures that the Labour Court does not only have exclusive jurisdiction, which provided for in Section 157(1) of the Act, in respect of protected strikes, but that it also has exclusive jurisdiction, to the extent provided for in Section 68, in respect of other strikes.²³⁸

Nonetheless the court refrained from expressing an opinion on the jurisdiction of the Labour Court to entertain the issue of intimidation of non-striking employees at their homes.²³⁹ The decisions in the *Mondi* and *Sappi* cases were followed by the court in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & Other Workers & others*²⁴⁰ where the applicant employer insisted on the restrictive interpretation of the word 'furtherance' in Sections 68 of the Act, in order to bring the

²³⁶ *Ibid* at E-G.

²³⁷ At par 257 F-G.

²³⁸ At par 258 C- E.

²³⁹ At par 259 D.

²⁴⁰ (1998) 19 *ILJ* 43 (C).

conduct of the employees²⁴¹ in this case within the jurisdiction of the High Court. It was argued accordingly that since Section 67 purports to give effect to the right to strike, the protections conferred in the section should not be interpreted widely to encapsulate conduct that goes beyond what is reasonable for the achievement of this purpose. It was further argued that Section 68 should also be restrictively interpreted to exclude conduct which has occurred during the course of a strike but which was not in furtherance thereof.²⁴² The Court held that the restrictive interpretation of the word 'furtherance' in Section 68 was not warranted. King DJP explained that in Section 68 the legislature has established the Labour Court (and the Labour Court only) with a framework for the control and prevention of illegal strikes and conduct concomitant therewith.²⁴³ He further stated that the fact that a strike as defined means not only a refusal to work but also a retardation or obstruction thereof, it therefore followed that 'furtherance' should be understood to mean "any conduct which is engaged in during the course of a strike, is pursuant thereto and serves to advance it."²⁴⁴ Again, to interpret 'furtherance' restrictively would contradict the clear intention of the legislature and further create a duality of jurisdictions—"a veritable mish-mash."²⁴⁵ The Labour Court thus had exclusive jurisdiction to interdict the conduct of the striking employees in this matter.

Another test for determining the jurisdiction of the appropriate court to decide on the conduct of the parties during a strike action was laid down in *Fourways Mall (Pty) Ltd & Another v SA Commercial Catering & Allied Workers Union*.²⁴⁶ This test was mainly provoked by the fact that an unlawful conduct was not directed at the employer per se but at a third party. The applicant companies in this case were registered owners and landlords of two shopping centres at which Edgars Ltd was a tenant. The respondents were unions whose Ltd members were in the employ of Edgars Ltd. In consequence of

²⁴¹ The respondent employees were interdicted from entering the premises of the applicant (employer) after they blockaded and prevented access to the applicant's premises by employees, clients and prospective employees and clients of the applicant. They also assaulted the said employees and clients and interfered with the applicant's assets in transit.

²⁴² At par 47 D-E.

²⁴³ At par 48 B-C.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid* at H.

²⁴⁶ (1999) 20 ILJ 1008 (W).

a wage dispute between Edgars Ltd and its employees, the employees interfered with, intimidated, verbally and physically abused the applicant's customers and also blocked the shopping entrances. When the applicant approached the High Court for an interdict, the respondents questioned the High Court's jurisdiction to entertain the matter.

Addressing this jurisdictional issue, Classen J commented as follows:

It is common cause in the present instance that labour relations exist between the members of the two respondents and Edgars Ltd. However, no such labour relation exists between the respondents and/or its members on the one side and the applicants on the other. It is also common cause that the individuals whose conduct is complained of are in fact all members of the two respondents. The applicants in this case are common law owners of the shopping centres. They have no relationship whatsoever with the members of the two respondents, either in contract or by statute. The nature of the dispute between them arises out of the law of delict as well as the law of contract.²⁴⁷

After considering the purpose of the LRA in Section 1, the court observed that the protection of an owner's common law property rights does not feature anywhere in the Act, neither is the owner's right included in this exposition. The purpose of the Act is based on the relationship between the employer and employee and with such a relationship being absent, the High Court has jurisdiction to decide the dispute.²⁴⁸

In *Minister of Correctional Services & Another v Ngubo & Others*,²⁴⁹ there was no strike but the respondent employees engaged in unlawful acts. They, amongst other things, assaulted, molested and intimidated a Provincial Commissioner, with the intention of removing her from her office. The employer and the commissioner approached the then Natal Provincial Division for an order restraining and interdicting the respondents from

²⁴⁷ At par 1012 G-I.

²⁴⁸ At par 1013 I.

²⁴⁹ (2000) 21 *ILJ* 313 (N).

their unlawful conducts, to which the respondents objected by submitting that this was a labour matter which fell squarely within the jurisdiction of the Labour Court.

The Court held in principle that for the Labour Court to exercise exclusive jurisdiction there has to exist a direct relationship between the matter or the dispute before it and a particular relevant aspect and objective of the Act.²⁵⁰ According to the court, the respondents' conduct was aimed at removing the incumbent commissioner from her position as opposed to resolving a dispute in respect of any matters of mutual interest between employer and employee.²⁵¹ The actions of the respondents were not in pursuance of a strike action and the fact that they resulted in obstruction or retardation of work was incidental and not connected in any way with the object of the Act.

The direct relationship as a test for determining jurisdiction was questioned by the court in *Langeveldt supra*. Zondo JP submitted that if Levinsohn J's conclusion that there was no direct relationship between the conduct of the parties and the objectives of the Act was correct, then there would rather be inconsistencies between the conduct of the parties and the objectives of the LRA.²⁵² Firstly, the actions of the employees undermined labour peace and secondly, it ran contrary to the Act's objective of

²⁵⁰ At par 318 A.

²⁵¹ *Ibid* at J. This distinction was also made by the Court in *Jacot -Guillarmod supra*, where Le Roux J refused reliance on *Mondi* because it was about strike action whereas *Jacot-Guillarmod* was about an enforcement of a common law contract.

²⁵² Section 1 of the LRA reads: 1. The purpose of this act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the objectives of this Act which are-

- (a) to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employer's organisations can-
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
- (d) to promote-
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.

promoting effective resolution of labour disputes.²⁵³ Another question that arises is whether the Labour Court would have jurisdiction if, in the *Ngubo* case, the applicant for the interdict was the official concerned and not the employer. It does not seem, in my opinion, like the matter would end up with the High Court only for the lack of an employer-employee relationship. With regard to the *Fourways* case, the following jurisdictional problems arise:

- Section 67(2) states that a person commits neither a delict nor a breach of contract by engaging in a protected strike (or lock-out) or any conduct in contemplation of a protected strike (or lock-out). Again, by virtue of Section 67(6) civil legal proceedings would not be pursued against the employees in this case. The Labour Court would therefore be well-placed to deal with the conduct of the employees in this matter- at least in so far as they did not constitute criminal offences²⁵⁴, but for acts such as intimidation, physical and verbal abuse and damage to property, the High Court's jurisdiction is unquestionable.
- Section 69 deals with picketing and subsection 4 states that upon request by the union or the employer, the CCMA must attempt to secure an agreement between the parties to the dispute on rules that should apply in relation to the strike or lock-out. Any material breach of Section 69 must be taken to the CCMA in terms of Section 69(8) which must attempt to resolve the dispute by conciliation.²⁵⁵ If a dispute remains unresolved, then the parties may refer it to the Labour Court for adjudication. Therefore, the civil litigation in *Fourways* could have been avoided by applying Section 69 as cited above.

However, because of the absence of the relationship either between the parties as the applicants and strikes or between the dispute and any object of the LRA, it seems as if parties who find themselves in the position of the applicants in both the *Ngubo* and

²⁵³ At par 29-30.

²⁵⁴ Section 67 (8) reads: The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence. A mere act of picketing or seeking support from members of the public does not attract criminal or civil liability.

²⁵⁵ Section 69 (10).

Fourways cases will not be availed of remedies, for acts that constitute criminal offences and wrongs under civil law. This will lead to an untenable situation where two courts have jurisdiction to adjudicate an action which occurred at the same time, same place and by the same people. The same problem will occur when the matters are taken on appeal. For instance, the SCA and the LAC will hear different appeals in what is essentially the same dispute. The worst that could happen is to have these courts give different decisions, which are eventually taken to the Constitutional Court. The objectives of developing a coherent system of law and promotion of effective resolution of labour disputes would be hindered by these practices.

3.4 Review Jurisdiction of the Labour Court

No appeal lies against an arbitration award issued by the CCMA. The LRA provides for review as the only remedy to a litigant who is dissatisfied with the award. There is an established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong. Then it sets that decision aside and lays down what it believes to be the correct judgment.

By contrast, the court or tribunal in judicial review cannot set aside a decision merely because it believes that the decision was wrong on the merits.²⁵⁶ A reviewing court or tribunal is only concerned with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. In *Coetzee v Lebea No & Another*²⁵⁷ Cheadle AJ dealt with this distinction in the following manner:

²⁵⁶ In *Carephone (Pty) Ltd v Marcus NO & Others, supra*, the Court held that the reviewing court might sometimes find itself dealing with the merits of the case, something that might of course have the effect of blurring the line between appeal and review. The court held that this effect can be avoided as long as the judge who enters the merits is aware that he or she does so not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* (2004)7 BCLR 687 (CC) where the Court held that in judging a decision for reasonableness (during review proceedings), it is impossible to separate merits from scrutiny. However, the Court still emphasised the significance of the distinction between appeals and reviews.

²⁵⁷ (1999) 20 ILJ 129 (LC).

It seems to me that the seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings-'the failure to apply one's mind'. That test is different from the one that applies to an appeal-namely, whether another court could come to a different conclusion. Accordingly once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion.²⁵⁸

The review powers of the Labour Court are dealt with in Sections 145, 158(1)(g), 158(h) and 157(3).²⁵⁹ Section 145 affords to any party to a dispute who alleges a defect in any arbitration proceedings, a right to apply to the Labour Court for an order setting aside the arbitration award. This section further outlines the time periods within which this application can be made.²⁶⁰ In contrast to this section, Section 158(1) (g) states: "The LC may, despite Section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law". In practice Section 158(1)(g) had an adverse effect on Section 145 for the following reasons:

- a) Unlike Section 145 which specifies the time limit within which an application should be lodged, Section 158(1)(g) specifies no time limit; and
- b) Whereas Section 145 limits the application for review to a few procedural grounds, the application under Section 158(1)(g) can be based on "any ground permissible in law".

Moreover, the wording of Section 158(1)(g) rendered Section 145 less useful and this is suggested by the following differences between these two sections:

²⁵⁸ At par 10.

²⁵⁹ Section 158(1)(h) gives the Labour Court the powers to review a decision or act by the State in its capacity as employer and Section 157(3) deals with review of arbitration awards in disputes that may be referred to arbitration in terms of the LRA but which have been arbitrated under the Arbitration Act 42 of 1965.

²⁶⁰ This application can be made (i) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or (ii) If the alleged defect involves corruption, within six weeks of the date when such corruption was discovered.

- Section 145 specifies a six week’s time limit within which an application should be brought, whereas Section 158(1)(g) specifies no time limit.
- Section 145 defines specific procedural grounds upon which the review may be brought, while Section 158(1)(g) broadly mentions “any grounds that are permissible in law”.

The nature and extent of this review was addressed by the LAC in *Carephone Pty Ltd v Marcus NO & Others*.²⁶¹ Froneman DJP made the following interpretation:

It must be admitted that the choice of the word ‘despite’ in Section 158(1)(g) is an unhappy one. It allows for an interpretation of Section 158(1)(g) as granting a general review power to the Labour Court over any function, act or omission under the LRA, instead of its providing merely for the court’s residual powers of review for administrative functions not specifically defined in Sections 145 and 158(1)(h). If the latter interpretation is accepted, the provisions of Sections 145, 158(1)(g) and 128(1)(h) apply to distinct and different forms of administrative action and do not overlap. If, however, the former interpretation is accepted, the fields of application of Sections 145 and 158(1) do overlap with the result that the provisions of Section 145 become superfluous.²⁶²

The Court further explained that Section 158(1)(g) does not apply to the review of arbitration awards made by commissioners of the CCMA. This section is a residual power to review administrative action. As a result, the word “despite” in Section 158(1)(g) should read as “subject to”. It is a lesser evil than ignoring the whole of Section 145, including its sensible provisions relating to time-limits.²⁶³ In reaching this conclusion, the Court had to determine the following:

²⁶¹ (1998) 19 *ILJ* 1425 (LAC).

²⁶² *Ibid* at par 26.

²⁶³ *Ibid* at par 28.

- Whether Section 33²⁶⁴ of the Constitution was applicable to arbitration awards made by commissioners of the CCMA and
- Whether the limited grounds in Section 145 were in conflict with Section 33.

As far as the applicability of Section 33 to arbitration awards is concerned, the Court held that the issuing of an arbitration award by the CCMA constituted an administrative action as contemplated in Section 33 read with item 23(2) of Schedule 6 to the Constitution,²⁶⁵ and as such the award has to meet the requirement of rationality. The court held further that the CCMA is a public institution created by statute and exercises public powers and functions. Consequently, the CCMA is an organ of State in terms of the Constitution and therefore bound directly by the Bill of Rights and the basic values and principles governing public administration, including Section 33 read with Item 23(2) of Schedule 6 in the Constitution which deals with just administrative action.

As to the question of Section 145 of the LRA, conflicting with Section 33 of the Constitution, it was held that there was nothing in the LRA that permits a commissioner in arbitration proceedings to exceed the bounds of ‘constitutional constraints’ in the Constitution, and that the words of the LRA must be read in a way consistent with the Constitution and not in a manner that would render Section 145 less useful. The grounds of review in Section 145 were consequently not in conflict with Section 33 of the Constitution.²⁶⁶

²⁶⁴ Section 33 of the Constitution deals with the right to just administrative action and provides that:
“(1) Everyone has the right to just 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.”

²⁶⁵ Item 23(2) of Schedule 6 provides that:
“until the legislation envisaged in Sections 32(2) and 33(3) of the new Constitution is enacted:
(a) Sections 33(1) and (2) must be regarded to read as follows:
Every person has the right to-
a)lawful administrative action where any of their rights or interests is affected or threatened;
b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.”

²⁶⁶ At par 37-38, the Court formulated an additional test for the standard to be employed when determining whether or not there is a ground for reviewing a decision of a CCMA commissioner, namely

Hoexter²⁶⁷ mentions the following as the limitations of review as a post-remedial mechanism of administrative action: Firstly she describes review as marginal and peripheral for three reasons:

- It leaves out of account many administrative matters that are not amenable to resolution by a court of law;
- there is no certainty that administrators learn from the case-law or that they generally modify their behaviour in response to what the reviewing judges say about it- or worse, that they may modify their behaviour in entirely undesirable ways, by adopting defensive practices designed to minimize the risk of challenge rather than improve the quality of their decisions; and
- the outcome of judicial review is often unhelpful to applicants.

Secondly, Hoexter describes review as backward-looking because, instead of building up a positive, prospective picture of what good administration should be, it focuses on past maladministration. She consequently argues for an integrated administrative system-free of judicial interference.²⁶⁸

In support of the above (albeit in a different way), Bezuidenhout²⁶⁹ argues that the compulsory nature of the provisions of the LRA insofar as the resolution of the majority of disputes is concerned, should be tampered with by allowing an aggrieved party maximum protection which, according to her, can be assured by either allowing a right of appeal or widening the grounds of review provided for in Section 145. I submit that the argument with regard to allowing for appeals is not viable because it will multiply dispute resolution processes and run counter to the LRA's objective of expedience. This move may also not be cost-effective. However, widening the grounds of review may

the "justifiability" or "rationality" test. According to this test a question has to be asked whether there is "a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at." According to the Court, only judicial officers will be able to give more specific content to the broad concept of justifiability in the context of the review provisions of the LRA.

²⁶⁷ Hoexter C : "The Future of Judicial Review in South African Administrative Law." (2000) 117 SALJ 484.

²⁶⁸ *Ibid.*

²⁶⁹ Bezuidenhout S A: *The powers of the Labour Court to review arbitration awards of the Commission for Conciliation, Mediation and Arbitration: A Comparative Study.* (LLM Dissertation) 2004.

benefit parties to a labour dispute because it will give them further recourse and it will help prevent the civil courts from hearing labour matters, thus adding to the jurisdictional tension.

3.5 Conclusion

In this chapter the interaction between jurisdictional provisions of the LRA were discussed. To some courts, Section 157 (1) of the LRA ousts the jurisdiction of the High Courts to decide labour matters²⁷⁰ while to some, it only confers general jurisdiction to the Labour Courts in “matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court.”²⁷¹ The need for law reform in addressing the problem of forum shopping cannot be overemphasised; hence, the different suggestions put forth by case law and academic opinion. For instance, there is a view that suggests that Section 157(2) should be interpreted purposively to give effect to the primary objectives of the LRA,²⁷² and those that call for the legislature to revisit Section 157(2).²⁷³ In line with the latter view, I submit that coherence and certainty can best be achieved by the deletion of Section 157(2) from the LRA.

The jurisdictional issues surrounding strike actions and the review of compulsory arbitrations by the Labour Court are also problematic but as will be apparent in the next chapter, the adoption of the Superior Courts Bill might be helpful in addressing those issues.

²⁷⁰ See *Mondi Paper*, *supra* for example.

²⁷¹ See *Fedlife*, *supra* for example.

²⁷² See Ngcobo J's decision in *Chirwa*.

²⁷³ See Skweyiya J's decision in *Chirwa* at par 71.

CHAPTER FOUR

RECOMMENDATIONS FOR RESOLUTION OF FORUM SHOPPING

4.1 Research question answered

The LRA has its successes and shortcomings. At the CCMA level, the objectives of the LRA with regard to cheap and easily accessible processes, as well as simplicity have been achieved. In 1998, three years after its establishment, the CCMA received an average of 323 cases every working day.²⁷⁴ In 2006 that number grew to 500 per day and the resolution rate was over 10%.²⁷⁵ In the 2010 financial year this case load increased by 17%.²⁷⁶ This shows how easily accessible the commission has been over the years. The absence of pleadings and complicated referral procedures also ensured simplicity in the CCMA proceedings.

However, the CCMA processes have had their fair share of failures. The shortage of financial and human resources failed to match the exponential case growth that the commission experienced over the years and this in effect led to delays in the settlement of disputes. The objective of being expeditious has been eventually hampered by these shortcomings. I therefore propose that in order to resolve these problems, private dispute resolution mechanisms be resorted to, with the CCMA serving as a fallback measure where necessary.

The lack of a right to appeal as discussed in Chapter Three is ideal and in line with the objectives of the LRA, but has led to some problems in arbitration processes. The responsibility for resolving collective industrial disputes lies, generally speaking, with the parties involved in the dispute itself, reflecting the principles of autonomy and voluntarism, which are important features of genuine collective bargaining and freedom

²⁷⁴ 1998 CCMA Review.

²⁷⁵ www.ccma.org.za .This website was last visited on 5 January 2012.

²⁷⁶ *Ibid.*

of association.²⁷⁷ The parties to the dispute usually enjoy a great deal of latitude in settling their own disputes and in deciding upon the strategies for doing so, either through direct negotiation, conciliation, mediation or arbitration, or even through the use of industrial action.²⁷⁸ If, however, the resolution process is imposed upon the parties, some form of post-remedial relief (in the form of an appeal) is to be expected.

Brand²⁷⁹ further submits that the parties in a compulsory setting such as the arbitration under the LRA need to be able to challenge the decision of the imposed arbitrator. He further argues that this is not only demanded by the dictates of fairness and legitimacy, but it will also enhance the quality and consistency of arbitration as a dispute resolution process.²⁸⁰ This argument sounds ideal but, like other schools of thought that support the idea of appeals in arbitration processes, I submit that it is misplaced. The essence of arbitration is that disputes should be disposed of speedily (without unnecessary costs) and allowing for appeals in arbitration processes will amount to no more than a proliferation of dispute resolution processes and negate the LRA's objective of establishing simple, expedient and cost-effective mechanisms of settling labour disputes.

At the level of courts, the LRA did not make as much success as the drafters would have contemplated. A multitude of cases discussed in the previous chapters has shown a contradiction of intentions by the legislature and eventually casting doubt upon the Labour Courts as 'a one-stop-shop for all labour-related disputes.'²⁸¹ Through the application of administrative law and common law of contract, the Labour Court found itself battling for its "exclusive jurisdiction"²⁸² with the High Court, thanks to the existence of concurrent jurisdiction. The failure of the courts to bring clarity also intensified the jurisdictional conflict. For instance, the lack of boldness by the court in *Gcaba* to decide whether *Chirwa* overruled *Fredericks* left open the possibility (and

²⁷⁷ Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives 2007.

²⁷⁸ *Ibid.*

²⁷⁹ Brand: "CCMA: Achievements and Challenges- Lessons from the First Three Years" (2000) 21 *ILJ* 77.

²⁸⁰ *Ibid.*

²⁸¹ See *Chirwa* above.

²⁸² Section 157(1) of the LRA.

indeed a good opportunity) for employees to frame their disputes as administrative matters and approach the High Court for relief. The views of the courts that call for the scrapping of Section 157 (2) of the LRA and Section 77(3) of the Basic Conditions of Employment Act²⁸³ are noteworthy. The rationale behind this notion is that the High Court can be divested of its jurisdiction in labour matters, thus allowing it to focus on other legal issues.²⁸⁴ This proposed solution would also have been helpful (albeit to some extent) if the Superior Courts Bill of 2003 (discussed below) became a success, because the High Court will then not compete with Labour Courts for jurisdiction.

For the LAC, the centre did not hold either. In *NEHAWU v University of Cape Town*,²⁸⁵ the Constitutional Court held that it has jurisdiction to hear appeals from the LAC. The court held that the provisions of the LRA which equate the LAC with the SCA and clothe it with final appellate powers can have no application in constitutional matters. Those provisions can only find application in those provisions that fall within the exclusive jurisdiction of the LC and LAC. Ngcobo J observed that the starting point is the Constitution.²⁸⁶ The Constitution recognizes only two courts of appeal namely, the Constitutional Court and the Supreme Court Appeal- and to each specific jurisdiction has been assigned. The Constitutional Court is the highest court of appeal in all constitutional matters while the SCA exercises the highest powers in all but constitutional matters. Ngcobo J concluded therefore that an appeal does lie to the SCA. Nonetheless litigants are not prevented by anything from directly approaching the Constitutional Court if issues of principle are raised.

Rubbing salt in the LAC's wounds was the decision of the SCA in *NUMSA & Others v Fry's Metals (Pty) Ltd*.²⁸⁷ The Court, in deciding whether the SCA has jurisdiction to

²⁸³ This Section Reads: 77(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."

²⁸⁴ See *Langeveldt* at par 68.

²⁸⁵ (2003) 24 *ILJ* 95 (CC). See also the decision of the SCA in *Chevron Engineering (Pty) Ltd v Nkambule & others* (2004) 3 *BLLR* 214 (SCA). The Court, per Farlam JA held that litigants are entitled to appeal against the decision of the old Industrial Court at the Supreme Court of Appeal.

²⁸⁶ At par 21.

²⁸⁷ (2005) 5 *BLLR* 430 (SCA).

entertain appeals from the LAC, measured the jurisdictional provisions in the LRA against the Constitution. Firstly, section 166(4) provides that the Labour Appeal Court enjoys appellate jurisdiction against orders and final judgments of the Labour Court in matters over which the Labour Court has exclusive jurisdiction. Section 167(1) establishes the LAC as a court of law and equity,²⁸⁸ whereas Section 173(1) provides for the jurisdiction of the LAC:

“Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction-

- (a) to hear and determine all appeals against the final judgments and orders of the Labour Court; and
- (b) to decide any question of law reserved...”

The SCA described these provisions as a legislative endeavor to clothe the LAC with final appellate powers. However, the court noted that these powers are still subject to the Constitution²⁸⁹ and it is only in accordance with the Constitution that they must be interpreted.²⁹⁰ The Court observed that Section 167(3) for instance, read in light of the Constitution merely describes an equivalence of “authority, inherent powers and standing” between the SCA and LAC with regards to matters within their respective jurisdictions, without depriving the SCA of its role and function as “the highest Court of appeal except in constitutional matters”.²⁹¹ The Court therefore concluded that an appeal lies from the LAC to the SCA in all matters, constitutional and non-constitutional. It was further emphasized that if the LRA creates a final court of appeal in labour-related

²⁸⁸ Sub-sections (2) and (3) read:

“(2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.

(3) The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction.”

²⁸⁹ Section 168(3) of the Constitution reads:

“The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only-

- (a) appeals;
- (b) issues connected with appeals; and
- (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”

²⁹⁰ At par 9. The provisions expressly state themselves to be “subject to the Constitution”.

²⁹¹ At par 25.

matters to the exclusion of the SCA's appellate powers, then it would mean that the legislature could also create final courts of appeal also in other areas of law-crime, welfare, environment, family law and administrative matters, thereby assigning piecemeal the jurisdiction of the SCA to one or more appellate tribunals of similar authority.²⁹²

4.2 The Prevention of Forum Shopping

4.2.1 Lessons from Legislation

The jurisdictional conflict between the Labour Courts and ordinary courts as discussed above point towards the failure of the Labour Courts' structure and in effect renders change inevitable. The legislature, through two versions of the Superior Courts Bill, has taken an initiative to bring this change by proposing the re-organization of the Labour Courts. Section 2 of the 2003 Bill reads: (1) "The objects of this Act are-

- (a) to bring the structure of the Constitutional Court, the Supreme Court of Appeal and the High Courts of South Africa into line with the provisions of Chapter 8 of the Constitution;
- (b) to make provision for the adjudication of labour matters by the High Court and the Supreme Court of Appeal ; and
- (c) to consolidate and rationalise the laws pertaining to those courts."

In effect the Bill sought to abolish the Labour Court and the Labour Appeal Court. Jurisdiction in labour matters would be bestowed on the High Court whilst labour appeals would be handled by the Supreme Court of Appeal. However, the Bill still retained the specialist nature of and special interest involved in labour adjudication by establishing a panel of selected judges to hear labour matters. The selection of these would be done by a committee comprising-

²⁹² At par 26.

- the President and Deputy Presidents of the Supreme Court of Appeal;
- three representatives of NEDLAC, representing business, labour and the State;
- the Judge President; and
- an advocate and an attorney.

Provision was also made for the appointment to the Supreme Court of Appeal of a second Deputy President, who would be primarily responsible for managing labour appeals in the Supreme Court of Appeal. Also, all the present rules relating to the Labour Court and Labour Appeal Court would remain in force and applicable until repealed.

The intended demise of the Labour Courts would somehow represent a sorry state of affairs in labour law circles and a failure of a seemingly well designed experiment by the lawmakers in the democratic dispensation. However, there was also a positive side to the Superior Courts Bill of 2003. Since there would be only one court of appeal (the SCA), the new court structure could avoid the problem that exists at present whereby the LAC and SCA find themselves developing inconsistent jurisprudence on the same issues. At the High Court level, the fact that litigants would have the right to institute labour actions in all the divisions of the High Court means that access to justice could have been enhanced. Another advantage of that intended structure is that trade union officials and employer associations would have been allowed to retain their right to represent their respective bodies in the High Court on labour matters. It is also believed that the arrangement under the 2003 Bill could possibly make more efficient use of the labour law resources on the bench, because it was likely to involve many of the present High Court and Supreme Court of Appeal judges who have the necessary expertise but whose roles would have been limited to acting occasionally on the LAC.²⁹³ Again it is also believed that the structure could make appointment attractive for practitioners who did not wish to be nomadic members of a national court.²⁹⁴

²⁹³ Benjamin P: "A Termination for Operational Requirements? Some Thoughts on the end of the Labour Court" (2003) 24 *ILJ* 1869.

²⁹⁴ *Ibid.*

However, the new scheme would still not have been without problems. For instance, it is not certain what would have happened to divisions of the High Court where there are no judges with necessary expertise to deal with labour matters. That could possibly have lead to a situation where a single judge in a particular division could institute a fiefdom with regard to all matters in that particular division, paying no attention to the importance of creating precedent, thus aggravating unwarranted and costly appeals.²⁹⁵

There is also a view that the proposed re-organization of the Labour Courts under the 2003 Bill was in contrast to the aims sought to be achieved by the creation of a specialist court by the LRA.²⁹⁶ It also seemed to appear to move in a direction opposite to that taken by other disciplines, where the move is towards, rather than away from specialised courts.²⁹⁷ It is also proper to bear in mind that the Labour Court, unlike the High Courts, enjoys national jurisdiction and one cannot help but imagine the uncertainty and confusion that can arise in collective bargaining matters where, for instance, a strike interdict is obtained in the South Gauteng High Court. It is uncertain whether the national union members in other provinces would still be free to strike or whether the employer would have to apply for interdicts in the High Courts of other provinces.²⁹⁸ This absence of national jurisdiction would still lead to the very problem that the Bill sought to curb- forum shopping. The employers and trade unions would still have the opportunity to shop around and move towards the Court that is likely to decide in their favour.

One of the potential failures of the 2003 Bill was its silence on the issue of the backlogs facing the Labour Court. It was predicted that even if labour courts were to be integrated into the High Court system as was proposed, the problem of delays, backlogs and

²⁹⁵ *Ibid.*

²⁹⁶ Steenkamp A: "Whither the Labour Courts? The Superior Courts Bill and the Future of the Labour Courts" (2007) 27 *ILJ* 18.

²⁹⁷ *Ibid.* The author refers to the examples of the specialised Competition Court, Income Tax Court and Land Claims Court, which interestingly the Bill does not propose to abolish but to retain as special divisions of the High Court. For instance, the Land Claims Special Division, which is seated in Johannesburg and the Competition Appeals Special Division in Cape Town.

²⁹⁸ *Ibid.*

packed court rolls would still not have diminished.²⁹⁹ The High Court is still faced with the same problem and as a result, it has always been recommended that one of the ways to curb this problem is to strengthen the office of the registrar of the labour courts- whether or not they are incorporated into the High Court.³⁰⁰

The Superior Courts Bill appeared to be a well-planned document and from it a more developed regime of labour could hopefully emerge. However, the Bill, with all its good intentions, was brought to halt when the Superior Courts Bill 7 of 2011 was introduced. The

Memorandum on the objects of the 2011 Bill expressly states that:

3.3 Following the elections in 2009, the Superior Courts Bill was allowed to lapse, paving the way for the introduction of the new, revised Constitution Seventeenth Amendment Bill, and a new Superior Courts Bill 2011, in Parliament. Both Bills result from further consultation with, particularly, the judiciary. Draft versions of both Bills have also been published in Gazette No. 33216 of 21 May 2010 for public comment.

Schedule 2 to the Bill further provides as follows:

1. Amendment of section 151 by substitution for subsection (2) of the following subsection:

“(2) The 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]** Division of the **[Supreme Court]** High Court of South Africa has in relation to matters under its jurisdiction.”

The position under the 2011 Bill points towards the retention of the Labour Court system and endorses its authority *vis-a-vis* the High Court System. Although there is still some merit in the position represented by the 2011 Bill of retaining the Labour Courts under

²⁹⁹ Waglay: “The Proposed Re-organization of the Labour Court and the Labour Appeal Court” (2003) 24 *ILJ* 1223.

³⁰⁰ *Ibid.*

the circumstances, I still agree with Van Eck³⁰¹ that the jurisprudence under the 2003 Bill would still represent an “era where the principles regulating common law contract of employment, the notions of fairness as developed by the Industrial and Labour Courts, and administrative law and constitutional law principles, will all be stirred into one melting pot.”

4.2.2 Lessons from case law

In conclusion one can postulate that the judgments in *Chirwa* and *Gcaba* have, to some extent, addressed the tension that existed between labour law and administrative law. Regardless of *Chirwa*'s failure to overrule *Fredericks*, one can conclude with certainty that public sector employees do not enjoy rights different from employees in other sectors. These employees, like all other employees, are subject to the provisions of the LRA unless expressly excluded by the law. With regard to Section 157 of the LRA, various views have been advanced by the courts. In particular subsection 2 has been at the centre of interpretative battle between our courts. While some courts were calling for the purposive interpretation of Section 157(2), some suggested a contextual meaning to be given and for some, the literal meaning of the words should be decisive. I submit though that the deletion of Section 157(2) from the LRA is the best possible solution we can have to end this conflict.

Coupled with the re-organisation of the Labour Courts under the Superior Courts Bill of 2003, this repeal of Section 157(2) could also curb jurisdictional problems that emanate from strike action. These proposed solutions might also eliminate problems relating to compensation, because the employees' choice of forum will be limited. The High Court will be able to swiftly move labour matters brought to them (with hope of higher compensation) to the labour division.

It is only the conflict between common law and labour law that is still lingering in the courts. The judgements of our courts still created uncertainties in this regard. The fact

³⁰¹ Van Eck: “The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters (Part 2): Erosion of the Labour Court's Jurisdiction” (2006) 27 *Obiter* 20.

that an employment contract, like any other contract, can still be enforced in the High Court inhibits the development of a coherent system of labour law. The appointment of judges with knowledge, experience and expertise in labour law will improve the uneasy relationship that still exists between labour law and common law.³⁰² Despite resource and backlog problems discussed above, the incorporation of the Labour Courts into the High Court's system under the Superior Courts Bill would mean that the development of this coherent labour jurisprudence could be achievable.

³⁰² See Waglay at 1230.

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