

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Unravelling the cases after *Chirwa*

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Introduction

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Significant issues answered after the 1994 elections:

- *NUMSA v Bader Bop* - small trade unions may strike
- *NEHAWU v University of Cape Town* - ULP not defined and role of labour courts to give content
- *SANDU v Minister of Defence* - may not rely on Constitution if legislation gives effect
- *Sidumo v Rustenburg Platinum Mines* – appropriate measures for review of CCMA awards

Introduction

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Enormous potential in *Chirwa v Transnet*:

- overlap between labour and admin law
- exclusive jurisdiction of the labour courts

The first was partly solved, the second gave rise to debate

However, a third uncertainty has overtaken in importance:

“Appropriate to develop common law to include right to be treated fairly?”

Purpose of paper:

i) background *Chirwa*; ii) traverse debate; iii) suggestions

Chirwa: Facts and Questions

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Facts:

- Public servant invited to respond poor work performance
- C did not attend - supervisor complainant and decision maker
- C dismissed – first CCMA, then changed tack, unfair admin action

Questions:

- Do HC and LC have concurrent jurisdiction; and
- does dismissal of public service employee constitute admin action?

Matter proceeded from HC to SCA with 3 decisions

In final instance 11 judges of CC handed down 3 decisions

Chirwa: Facts and Questions

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Skweyiya J (and 7 judges)

- HC does not have concurrent jurisdiction and not necessary to answer question 2

Ngcobo J (and 6 judges)

- HC does not have concurrent jurisdiction and dismissal not admin action

Langa CJ (and 2 judges)

- Based on *Fredericks v MEC for Education* HC and LC do have concurrent jurisdiction and dismissal not admin action

One issue settled, but door left widely open on exclusive jurisdiction

Legislative Framework

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S 169(a) of the Constitution

- HC has jurisdiction to consider “any constitutional matter”
- S 169(a)(ii) – legislation may limit – to court with “similar status”

LRA – aim to establish CCMA, Bargaining Councils, LC

- S 157(1) - exclusive jurisdiction on LC - elsewhere in the LRA
- S 157(2) - LC and HC have concurrent jur in constitutional matters
- Skweyiya J - interpreted s 157(2) against background of s 157(1)
- LC does not hear dismissal disputes – s 157(1) could not limit LC
- S 77(3) of the BCEA – gives concurrent jurisdiction contractual matters

- Why problem? Dismissal not admin action

One Step Back in History

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Fedlife Insurance v Wolfaardt

- The LRA does not eliminate the common law remedies or the right to claim damages in the civil courts
- Nugent J - the right to a fair hearing “may have been imported into the common-law employment relationship” by the Constitution

Gumbi and Boxer Super Stores

- In terms of the constitutional right to fair labour practices and ILO conventions, the pre-dismissal hearing is “well recognised” in our contract of employment
- Argued that “fairness” is wide enough to include “unlawfulness”
- Cameron J, jurisdiction often determined by form

Contrasting HC and SCA Cases

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Nakin v MEC Dept of Education

- Principle transferred, but on lower status
- Department's recommendation to reinstate not adhered to
- Claimed outstanding money in application under PAJA

Froneman J held:

- *Fredericks* interpreted s 157(2) correctly
- Three ways of classifying relationship
 - i) admin, ii) contractual, and iii) under LRA
- Human dignity and equality underlie all 3 relations
- Coherent principles can be developed in all courts
- Money can not be claimed under review

Contrasting HC and SCA Cases

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De Villiers v Minister of Education

- Teacher did not report for duty for period exceeding 14 days
- Discharged in terms of s 14(1) of the Employment of Educators Act
- Applied in terms of s 14(2), but HOD declined to reinstate
- Review application to set decision aside

Davis J and Allie J held:

- Based on *Chirwa*, s 33 (and PAJA) and s 23 (and LRA) must be kept separately
- S 33 regulates broader admin law and s 23 the narrow labour law
- The HC must refrain from entertaining employment matters

Contrasting HC and SCA Cases

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Makambi v MEC, Department of Education

- Teacher transferred, and all of a sudden no salary
- Claim based on breach of PAJA and s 33 of the Constitution
- HC held no jurisdiction and appeal to full bench of SCA
- Argued that matter not first referred to the CCMA

Farlam and 3 others held:

- Absence of referral to CCMA not enough to distinguish *Chirwa*
- HC has no jurisdiction to entertain admin law disputes

Nugent held:

- At liberty to follow *Fredericks*
- *Chirwa* based on what judges thought the best policy should be
- Unsuccessful only because transfer doesn't constitute admin action

Contrasting HC and SCA Cases

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Nonzamo Cleaning Services Cooperative v Appie

- Full bench of EC HC held *Nakin* incorrect
- The HC is not at liberty to choose between *Chirwa* and *Fredericks*
- Judges in *Chirwa* impliedly overruled *Fredericks*

Makhanya v University of Zululand

- Unsuccessful in CCMA, lodged contractual claim in HC
- Full bench of SCA – *Chirwa* not logical
- Can not in same breath say no jurisdiction and bad claim
- If court has no jurisdiction it can not consider the merits of a claim
- HC has jurisdiction in contractual matters and remitted to HC

Contrasting LC Decisions

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Mogothle v Premier of the North West Province

- Public service employee suspended indefinitely
- Urgent application to set aside on two grounds:
 - * Right to fair admin justice; or
 - * Common law right to fair treatment

Van Niekerk J held:

- Public servant probably not entitled to claim under PAJA
- However, bound by *Gumbi* and *Boxer Superstores* and the “contractual right to fair dealing”
- Broad reading of *Chirwa* does not overrule *Gumbi* and *Boxer Superstores* with its view on one-stop shop for labour matters

Contrasting LC Decisions

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Mohlaka v Minister of Finance

- Alleged constructive dismissal, initially referred to CCMA
- Applicant out of time and a claim for common law damages instituted in LC
- Claim based on s 77(3) of the BCEA

Pillay J held:

Chirwa overruled *Gumbi* and *Boxer Superstores*

“labour processes and forums should take precedence over non purpose built processes and forums in situations involving employment-related matters”

Contrasting LC Decisions

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Mohlaka v Minister of Finance

- “[R]elying on form rather than substance [like in *Gumbi*] ... would enable an astute litigant to ... rob the labour courts of their need to exist.”
- *Gumbi* and *Boxer Superstores* incorrect to develop common law
- *Cheadle* – proper reading of s 8(3) - must develop the common law “to the extent that legislation does not give effect to that right”
- The LRA and BCEA must be read consistently with each other
- Disputes under the LRA must not be considered in terms of s 77(3) of the BCEA

Conclusion

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What are the reasons behind the dual system?

- The SCA has taken over the role of the LAC as highest labour court
- The SCA is reluctant to give up parts of its inherent jurisdiction
- Poor legislative drafting – s 157(2) and s 77(3) of the BCEA
- SCA wrong to develop common law – courts must develop “to the extent that legislation does not give effect to that right”

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The way forward?

- *UCT* case – primary role of legislature and labour fora to give content to the definition of unfair labour practice
- *SANDU* case – do not rely on Constitution if legislation gives effect
- Look into the LRA definitions of “dismissal” and “unfair labour practice”
- Common law should be developed only where legislation does not cover
- In the interim – there is an urgent need for the CC to give clarity
- Hope is expressed that the Superior Courts Bill will provide finality