Aantekeninge

CHIRWA V TRANSNET AND BEYOND: URGENT NEED FOR THE CONSTITUTIONAL COURT TO PROVIDE CERTAINTY

1 *Introduction*

Viewed from a labour law perspective, a number of significant issues have been given finality to by the constitutional court in the post-1994 elections era. In *NUMSA v Bader Bop (Pty) Ltd* (2003 2 BLLR 103 (CC)) it was held that trade unions with a small number of members may strike in pursuit of organisational rights. In *National Education Health and Allied Workers Union v University of Cape Town* (2003 *ILJ* 95 (CC)) the court held that the constitutional right to fair labour practices is incapable of precise definition and that it is the primary responsibility of the labour courts to give content to the right. In *SANDU v Minister of Defence* (2007 9 BLLR 785 (CC)) it was held that litigants may not rely directly on the constitution in instances where fundamental principles have already been given content to by means of other statutory regulations. And, in *Sidumo v Rustenburg Platinum Mines Ltd* (2007 12 BLLR 1097 (CC)), the court gave finality to the vexed debate about the appropriate measures to be applied in review applications of the commission for conciliation, mediation and arbitration awards.

There was enormous potential in so far as *Chirwa v Transnet Ltd* (2008 2 BLLR 97 (CC)) could also lay to rest some longstanding puzzles in the domain of labour law. The first was in relation to the exclusive jurisdiction of the labour court to resolve all labour-related disputes, while the second concerned the overlap between administrative law and labour law (Ngcukaitobi "Life after *Chirwa*: Is there scope for harmony between public sector labour law and administrative law?" 2008 *ILJ* 841; Cheadle "Deconstructing *Chirwa v Transnet*" 2009 *ILJ* 741). Regrettably, the court's decision sparked uncertainty and a heated debate about the first issue and only partly resolved the second uncertainty. However, it now seems that a third question, namely whether it was appropriate for the supreme court of appeal to develop the common-law contract of employment to include the right to be treated fairly, may have overtaken in importance the uncertainties left in the wake of the *Chirwa* decision (Van Eck "The right to a pre-dismissal hearing in terms of the common law: are the civil courts misdirected?" 2008 *Obiter* 339; Benjamin "Braamfontein versus Bloemfontein: the SCA and the constitutional court's approaches to labour law" 2009 *ILJ* 757).

The purpose of this contribution is to provide background to the *Chirwa* decision, to traverse the debate that has ensued after the decision and to reflect on how the constitutional court could possibly bring this debate to a coherent conclusion.

2 Chirwa v Transnet: *Brief facts and the questions*

Chirwa, a public service employee, was invited to attend a hearing and to respond to allegations of poor work performance during November 2002. The employee's direct supervisor issued the notice of the enquiry and she refused to participate in the proceedings on grounds that it would be unfair for the manager to act as complainant and decision-maker during the same enquiry. The supervisor continued with the enquiry and proceeded to dismiss her.

[ISSN 0257 – 7747]

Chirwa first referred the dispute to the commission for conciliation, mediation and arbitration for conciliation, but she then changed tack and decided to change her course of action from an unfair dismissal dispute under the Labour Relations Act 66 of 1995 to unfair administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000. The matter proceeded from the high court to the supreme court of appeal, where five judges handed down three judgments (*Transnet Ltd v Chirwa* 2006 *ILJ* 2294 (SCA); Ngcukaitobi and Brickhill "A difficult boundary: public sector employment and administrative law" 2007 *ILJ* 769; Van Eck "Labour dispute resolution in the public service: The mystifying complexity continues *Transnet Ltd v Chirwa* 2006 *ILJ* 2294 (SCA)" 2007 *ILJ* 793). In the final instance the eleven judges of the constitutional court handed down two majority and one minority judgment.

Two key issues had to be resolved. Firstly, do the high court and labour court have concurrent jurisdiction to consider disputes involving the dismissal of public service employees and, secondly, does the dismissal of a public servant constitute administrative action under the auspices of the Promotion of Administrative Justice Act?

Regarding the first question, Skweyiya J (with seven judges concurring) held that the high court does not have concurrent jurisdiction with the labour court to entertain disputes about the unfair dismissal of public service employees. In respect of the second question, based on the answer to the first, it was not necessary to decide if the dismissal of public service employees constituted administrative action.

In a second majority decision, Ngcobo J (with six judges concurring) agreed with the first answer, namely that the labour court and high court do not have concurrent jurisdiction. The court emphasised that the dismissal of all employees, whether based on administrative action or the breach of contract, should ideally be finalised by the one-stop shop dispute-resolution mechanisms established by the Labour Relations Act. With respect to the second question, the court concluded that the dismissal of a public service employee does not constitute administrative action under section 33 of the constitution and the Promotion of Administrative Justice Act.

The minority decision of Langa CJ (with two judges concurring) was based on an earlier constitutional court decision – *Fredericks v MEC for Education & Training, Eastern Cape* (2002 2 BLLR 119 (CC)) – and held that the high court and labour court do have concurrent jurisdiction to entertain constitutional matters, but concluded that the dismissal of a public service employee does not constitute administrative action.

There can be no doubt that the constitutional court has settled one of the two issues before it, namely that the dismissal of a public servant does not constitute administrative action. However, the door has been left wide open for debate about the issue as to whether the labour court has exclusive jurisdiction in all dismissal disputes. This becomes particularly relevant if a litigant places reliance not only on the Labour Relations Act, but also on the wording of section 77(3) of the Basic Conditions of Employment Act 75 of 1997, which was not placed under the spotlight by either of the majority decisions in the *Chirwa* case.

3 *The legislative framework and exclusive jurisdiction*

Section 169(a) of the constitution states that the high court has jurisdiction to consider "any constitutional matter". This inherent jurisdiction is qualified in section 169(a)(ii), which provides that legislation may be enacted that limits the right of the high court by referring exclusive jurisdiction to any other court with "similar

status", but not lower, than that of the high court (Norton "What is (and what isn't) a 'constitutional matter' in the context of labour law?" 2009 *ILJ* 772).

It is clear that the Labour Relations Act has as one of its underlying policies the establishment of a coherent dispute resolution framework with the aim of resolving most, if not all, labour disputes. (See the preamble and s 1 of the Labour Relations Act; *Explanatory Memorandum on the Labour Relations Bill* 1995 *ILJ* 278.) The main dispute-resolution mechanisms introduced by the Labour Relations Act are the commission for conciliation, mediation and arbitration, bargaining councils and the labour courts. Almost all labour disputes must first be subjected to conciliation before disputes will be finalised by means of arbitration or adjudication. After conciliation, the resolution of disputes is split between the commission for conciliation, mediation and arbitration(and bargaining councils) and the labour court. Most notably, unfair dismissal and unfair labour practice disputes must be referred to the commission for conciliation, mediation and arbitrationand bargaining councils, and the labour court has no jurisdiction to entertain such disputes (s 157(5) of the Labour Relations Act). The Labour Relations Act established the labour court as court with equal status to the high court (s 151(2) of the Labour Relations Act). The important question here is to what extent labour legislation limits the jurisdiction of the high court as permitted in section 169(a)(ii) of the constitution.

Subject to the constitution, section 157(1) of the Labour Relations Act confers exclusive jurisdiction on the labour court in respect of all matters that elsewhere in terms of the Labour Relations Act are to be determined by the labour court. Section 157(2) provides that the high court and labour court have "concurrent" jurisdiction in any "violation of any fundamental right" entrenched in the constitution.

Skweyiya J held that section 157(2) was introduced against the background of section 157(1), which purports to give the labour court exclusive jurisdiction and was introduced merely to extend the jurisdiction of the labour court to include the consideration of constitutional violations. According to Skweyiya J it was, however, not introduced to confirm the fact that both courts have the jurisdiction to consider such disputes but rather to extend the jurisdiction of the labour court (par 54).

This is a controversial point of view and contradicts the interpretation accorded to this section by the constitutional court in the *Fredericks* case. There the court held that the labour court and high court both have jurisdiction to entertain constitutional matters. In my view it is regrettable that the *Chirwa* case did not explicitly overrule the *Fredericks* case on the interpretation of section 157(2) if this is what it had intended to do. This leaves ample room for courts to elect which constitutional court decision it prefers to follow.

However, whichever of the two interpretations of section 157(2) one prefers to accept for the moment, it should be noted that it is not the function of the labour court to consider unfair dismissal disputes. The Labour Relations Act assigns this role to the commission for conciliation, mediation and arbitrationand bargaining councils that do not have the same status as the high court. It could therefore be argued that the exclusive jurisdiction conferred on the labour court in terms of section 157(1) therefore has no limiting influence on the functions of the high court.

In addition to this, section 77(3) of the Basic Conditions of Employment Act provides that the labour court and high court have concurrent jurisdiction to consider claims emanating from contracts of employment.

The majority of constitutional court judges in the *Chirwa* case concluded that the dismissal of a person in the shoes of the applicant does not constitute administrative action for the purposes of the Promotion of Administrative Justice Act. Why is it then so important to debate whether section 157(2) establishes concurrent ju-

risdiction in respect of public service employees or not? At first glance a dismissed public service employee can in any event not approach the high court. The answer is twofold. Although the dismissal of an employee in Chirwa's instance has been held not to fall under the Promotion of Administrative Justice Act, there may be other aspects of employer–employee conduct that could possibly still fall under the definition of administrative action. And the door is still open for public service employees to bring their unfair-dismissal disputes to the high court on the grounds that their common-law contract of employment has been developed to include procedural fairness. However, this last possibility would fall away if, as was suggested in the *Chirwa* case, the dispute-resolution forums of the Labour Relations Act establish an all-embracing one-stop dispute-resolution mechanism in respect of employment-related matters.

4 *One step back in history*

Before unpacking the cases after the *Chirwa* case*,* it is necessary to reflect on developments that occurred in the supreme court of appeal before the *Chirwa* decision. Whether one agrees with this controversial development or not, it was confirmed by the supreme court of appeal before the *Chirwa* case that the common-law contract of employment has been developed to include the right to fair treatment parallel to the provisions of the Labour Relations Act (Pretorius and Myburgh "A dual system of dismissal law: Comment on *Boxer Superstores Mthatha v Mbenya* (2007 *ILJ* 2209 (SCA))" 2007 *ILJ* 2172).

In 2001, in *Fedlife Assurance Ltd v Wolfaardt* (2001 12 BLLR 1301 (SCA)), Nugent AJA held that the Labour Relations Act does not eliminate the existing common-law remedies in terms of the contract of employment, and employees have not been deprived of their right to enforce contractual rights in the civil courts. The court also made the *obiter* suggestion that the possibility exists that the right not to be unfairly dismissed may have been "imported into the common-law employment relationship" (par 14).

During 2007, in a duo of judgments, *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007 8 BLLR 699 (SCA)) and *Boxer Superstores Mthatha v Mbenya* (2007 8 BLLR 693 (SCA)), it was held that pursuant to the enactment of the constitution and the adoption into our law of ILO conventions, the right to a pre-dismissal hearing is "well recognised" in our law (par 5-6) and that the entitlement to a pre-dismissal hearing is now incorporated into the common-law contract of employment.

In the *Boxer Superstores* case it was argued that even though disputes may be brought under the "lawfulness" of termination, in substance, these complaints are about its "fairness" which is dealt with in the Labour Relations Act. Cameron J noted that there may be some merit in this argument, but that jurisdictional determinations nevertheless often involve questions of form rather than substance.

The debate after the *Chirwa* case has been extensive, but not all cases that form part of the discourse have been discussed. The focus of the remainder of the contribution falls on a set of cases which have been categorised under competing decisions of the high court and supreme court of appeal, and contrasting decisions of the labour court.

5 *Decisions after the* Chirwa *case*

5.1 The high court and the supreme court of appeal

In *Nakin v MEC, Department of Education, Eastern Cape* (2008 5 BLLR 489 (Ck)) a school principal lost his position and was transferred to another school at a lower level. The Department of Education did not implement a recommendation to reinstate the principal to his former post and the applicant proceeded with a claim for payment of outstanding money based on a review application in terms of the Promotion of Administrative Justice Act. The court considered the *Fredericks* and *Chirwa* decisions to determine if it had jurisdiction to entertain the matter.

Froneman J followed the reasoning adopted in the *Fredericks* case and held that, based on the wording of section 157(2) of the Labour Relations Act, the high court and labour court have concurrent jurisdiction in constitutional matters. The judge noted that there are three ways of classifying the legal relationship of public sector employees: an administrative and public law relationship; a contractual relationship; and an employment relationship where rights are protected in terms of the Labour Relations Act. The court reasoned that the fundamental rights of human dignity and equality underlie the application of both section 33 (the right to a just administrative action) and section 23 (the right to fair labour practices) of the constitution. Froneman J stated that "[s]ubstantive coherence in employment law may thus be achieved and developed in different courts, provided that these courts give a broadly similar effect to the underlying constitutional right to fair labour practices" (par 36). Although the court held that it did have jurisdiction to entertain the matter, the court concluded that the real question raised by the case was about the payment of an amount of money and that this does not fit comfortably under review proceedings. The applicant was ordered to file a statement of claim setting out the exact amount he alleged was due.

In *Makambi v MEC, Department of Education, Eastern Cape* (2008 8 BLLR 711 (SCA)) five judges of the supreme court of appeal once again had the opportunity to consider the issue of jurisdiction after the *Chirwa* decision. A teacher was transferred from one school to another and all of a sudden she was not paid a salary anymore. The applicant brought the application based on a breach of the Promotion of Administrative Justice Act and a breach of the constitutional right to fair labour practices. The high court held that it did not have the jurisdiction to set the Department of Education's decision aside and the supreme court of appeal considered the matter on appeal. The applicant sought to distinguish the *Chirwa* and *Fredericks* cases based on the grounds that she did not first bring an application before the commission for conciliation, mediation and arbitrationand later changed course to the high court. Farlam J (with three judges concurring) held that this was not enough to distinguish the *Chirwa* and *Fredericks* cases, as the employee had also relied on the constitutional right to fair labour practices. The majority of the court dismissed the appeal and in effect confirmed that the high court does not have the jurisdiction to consider a claim based on the constitutional right to fair labour practices or on the Promotion of Administrative Justice Act.

In his minority decision, Nugent J was sharp in his criticism of the *Chirwa* decision. He held that he was at liberty to follow the *Fredericks* decision as it was in conflict with the *Chirwa* case and the latter case had not overruled the *Fredericks* case. According to him the decision in the *Chirwa* case was based on what the judges thought the best policy would be rather than on the wording of section 157(2) of the Labour Relations Act. They used words such as what "should" or "should not" be the position rather than on what "is" or "is not" permitted in terms of legislation.

In his minority decision he held that the high court has jurisdiction to entertain the matter (par 38).

In *De Villiers v Minister of Education, Western Cape* (2009 *ILJ* 1022 (C)) Davis J and Allie J did not follow the approaches adopted in the *Nakin* case and the minority in the *Makambi* matter, and followed the *Chirwa* decision. In this instance the applicant failed to report for duty for a period exceeding fourteen days and was discharged from duty in terms of section 14(1) of the Employment of Educators Act 76 of 1998. The applicant applied for reinstatement in terms of section 14(2) of the act, but, exercising his discretion, the head of department declined to reinstate the applicant. An application was brought before the Cape high court in terms of the Promotion of Administrative Justice Act to set aside the decision of the head of department not to reinstate him.

Davis J and Allie J referred to sections 169 of the constitution and 157(2) of the Labour Relations Act, but did not rely on an interpretation of these sections to resolve whether it had jurisdiction. It referred to the broad policy approach adopted in the *Chirwa* case, where it was held that section 33 of the constitution and the Promotion of Administrative Justice Act on the one hand and section 23 of the constitution and the Labour Relations Act on the other need to be kept separate. Whereas section 33 and the Promotion of Administrative Justice Act seek to regulate the broader notion of administrative justice, section 23 and the Labour Relations Act are concerned with the much narrower employment relationship. In line with the *Chirwa* case, if a matter falls within the narrow employment relationship, the high court must refrain from entertaining the matter under section 33 and the Promotion of Administrative Justice Act.

In *Nonzamo Cleaning Services Cooperative v Appie* (2008 9 BLLR 901 (Ck)) a full bench of the Eastern Cape high court analysed the *Fredericks* and *Chirwa* cases and concluded that they were irreconcilable. The courts once again disagreed with the *Nakin* case and the minority in the *Makambi* case that the lower courts have the choice to follow one or the other of the constitutional court's decisions. The court held that the judges in the *Chirwa* case must have been aware of the finding in the *Fredericks* case and that they impliedly overruled the decision in the *Fredericks* case. It was bound to follow the *Chirwa* case in as far as the high court does not have jurisdiction to consider disputes where public service employees elect to rely on the provisions of the Promotion of Administrative Justice Act and the constitutional right to just administrative action.

In *Makhanya v University of Zululand* (2009 8 BLLR 721 (SCA)) a full bench of the supreme court of appeal once again reflected on the debate and this time around openly disagreed with the *Chirwa* case. An employee referred an unfair dismissal case to the commission for conciliation, mediation and arbitrationand lost the case. The applicant then launched an action in the high court based on breach of contract. The high court held that it lacked jurisdiction and an appeal was lodged with the supreme court of appeal. Nugent J held that it was not logical for the constitutional court to have ruled that the high court does not have jurisdiction in labour-related matters. The supreme court of appeal stated that the constitutional court could not at the same time decide that the high court lacks jurisdiction and also hold that the claim is "bad in law" (par 50). The one excludes the other. If a court does not have jurisdiction on a particular matter it cannot make a finding on the merits of the claim. The court concluded that the *ratio* of the *Chirwa* case lies in the fact that the dismissal of a public servant does not constitute administrative action. By contrast, the employee in this instance relied on a claim for breach of contract which is enforceable outside the Labour Relations Act. According to the court the matter was

not *res judicata* because the course of action in the commission for conciliation, mediation and arbitrationwas different. In the commission for conciliation, mediation and arbitrationit concerned unfair dismissal and not breach of contract. The appeal was upheld and the case was remitted to the high court for a decision on the remaining matters.

5.2 The labour court

The labour court is also split on the question of whether it has exclusive jurisdiction in labour matters. In *Mogothle v Premier of the North West Province* (2009 4 BLLR 331 (LC)) a public service employee was subjected to a suspension by being placed on indefinite leave. He lodged an application for an urgent review in the labour court based on two grounds: the first was a breach of his right to just administrative action; and the second was a breach of his common-law right to be treated fairly in terms of his contract of employment.

With reference to the *Chirwa* case, Van Niekerk J held that a public servant will in all probability not be entitled to rely on the provisions of the Promotion of Administrative Justice Act to set an unfair suspension of a public servant aside. However, as a court with lower status it is bound by the supreme court of appeal decisions in the *Gumbi* and *Boxer Superstores* cases where it had unequivocally been confirmed that a contractual right to fair dealing exists independently of labour legislation that regulates unfair dismissal and unfair labour practices. The court rejected the argument that on a wide reading of the *Chirwa* case, which endorsed the mechanisms and remedies created by the Labour Relations Act, the supreme court of appeal cases had been overruled. The court held that the employee could still rely on an employee's right to a hearing based on the development of the contract of employment by virtue of section 77(3) of the Basic Conditions of Employment Act that provides that "the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment".

In *Mohlaka v Minister of Finance* (2009 4 BLLR 348 (LC)) the public service employee was allegedly constructively dismissed and claimed common-law damages in the labour court in terms of section 77(3) of the Basic Conditions of Employment Act. Pillay J held that the employee could not claim common-law damages in respect of constructive dismissal as the Labour Relations Act already regulates unfair dismissal law and its remedies. In essence, the judge held that it was wrong to develop the common-law contract of employment to provide a remedy based on a breach of the right to procedural fairness.

In the *Mohlaka* case, Pillay J said she was not bound to follow the *Gumbi* and *Boxer Superstores* cases on the grounds that she interpreted the *Chirwa* case to overrule the supreme court of appeal's decisions. The court quoted from the *Chirwa* decision where it was held that effect must be given to the primary objectives of the Labour Relations Act. The constitutional court held that:

> "the existence of a purpose-built employment framework in the form of the LRA … infers that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue" (the *Chirwa* case par 41).

Regarding the overlap between the terms "unlawful termination" and "unfair termination" of contracts of employment, the constitutional court held:

> "in *Boxer Superstores* the Supreme Court of Appeal expressed a different view. … It noted that the employee in that case 'formulated her claim carefully to exclude any recourse to fairness, relying

> solely on contractual unlawfulness'. This illustrates the difficulty of relying on form rather than substance … This would enable an astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the LRA and rob the Labour Courts of their need to exist" (the *Chirwa* case par 95).

From the above observation, it is clear that the constitutional court is averse to the idea of determining jurisdiction on the formulation of wording and that the determining factor should be the substance rather than the form of the dispute.

Pillay J held that the *Gumbi* and *Boxer Superstores* cases were wrong to develop the common law to include procedural fairness. She accepted the line of reasoning spearheaded by Cheadle (Cheadle "Labour law and the constitution" paper delivered at the SASLAW conference, October 2007, Cape Town, 3-6), where he argued that on a proper reading of the constitution there is no constitutional imperative to develop the common law in each and every instance when a litigant relies on a provision of the bill of rights. The constitution is clear in section 8(3) where it provides that the courts, when giving effect to a right in the bill, must develop the common law "to the extent that legislation does not give effect to that right". Added to this, section 39(2) of the constitution provides that "*when* developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" (emphasis added). The word "when" is a clear indication that there is no obligation to develop the common law in every instance.

Pillay J also held that the Labour Relations Act and the Basic Conditions of Employment Act must be read consistently with each other, that section 77(3) of the Basic Conditions of Employment Act must be interpreted in the same manner as the constitutional court had interpreted section 157(2) of the Labour Relations Act and that disputes that fall under unfair dismissal must be determined in terms of the Labour Relations Act.

6 *Analysis and the way forward*

The question can be asked what lies behind this remaining dual system of unfair dismissal. The first is the fact that the supreme court of appeal is fulfilling the role of the highest labour court and not the labour appeal court, as was envisaged in the Labour Relations Act. (See *NUMSA v Fry's Metals* (Pty) Ltd 2005 5 BLLR 430 (SCA); Van Eck "The constitutionalisation of labour law: no place for a superior labour appeal court in labour matters (part 1)" 2005 *Obiter* 549.) This is due to the structure envisaged in section 186(3) of the constitution that establishes the supreme court of appeal as the highest court in all but constitutional matters. As a result the labour appeal court was stripped of its status as highest court in labour matters as envisaged by the Labour Relations Act.

The second reason is poor legislative drafting in respect of section 157(2) of the Labour Relations Act and section 77(3) of the Basic Conditions of Employment Act. Section 169 of the constitution permits the legislature to assign certain matters away from the high court to other courts with similar status. The labour court was established as a court with similar status, but the legislature did not take the next step in assigning to the labour courts exclusive jurisdiction in respect to statutory and common-law rights.

Although I support the outcome of the *Mohlaka* case, I am not convinced that it was based on sound arguments. The *Chirwa* case dealt with the overlap of administrative law and those labour rights for which provision is made in the Labour Relations Act. In the *Chirwa* case it was held that the dismissal of public service

employees does not constitute administrative action and that in respect of situations where administrative law and labour law overlap, the labour court has exclusive jurisdiction. The overlap between the Labour Relations Act and the common-law contract of employment was not up for consideration in the *Chirwa* case, nor for that matter was any other constitutional court matter, and in my view the remarks made about the *Gumbi* and *Boxer Superstores* cases were *obiter*. For the sake of clarity, it is imperative that a dispute about the last-mentioned overlap must first be referred to the constitutional court to enable it to provide finality in this matter. It is submitted that the problem lies with the development which occurred in the supreme court of appeal, and this situation must be overturned.

In the *Wolfaardt* case, the supreme court of appeal was correct in so far as contractual claims have not been eliminated in their entirety. However, unfair dismissal and unfair labour practice disputes have been codified in the Labour Relations Act. It was wrong to suggest, as was done in the *Gumbi* and *Boxer Superstores* cases, that the right to a hearing may have been incorporated into the contract of employment by virtue of the constitutional right to fair labour practices.

In *NEHAWU v University of Cape Town* the constitutional court held that it is the primary responsibility first of all of the legislature, and thereafter of the specialist labour tribunals, to give effect to the constitutional right to fair labour practices and to develop the constitutional right to fair labour practices where the legislature has not done so already. This development first occurred in the civil courts and not in the labour courts. The argument that it was not necessary to develop the contract of employment to include procedural fairness due to the fact that the Labour Relations Act already gives effect to the constitutional right to fair labour practices has never been properly canvassed in the constitutional court.

In the *SA National Defence Union* case the constitutional court adopted the clear approach that where legislation has been promulgated to give effect to a right contained in the constitution "a litigant may not bypass that legislation and rely directly on the constitution without challenging that the legislation is falling short of the constitutional standard" (par 51-52). The court continued that it is imperative to recognise the important task conferred by the constitution on the legislature to promote the bill of rights and not to allow reliance directly on the constitution.

It is patently clear that all aspects of the contract of employment have not been codified by the Basic Conditions of Employment Act and the Labour Relations Act and it is undoubtedly permissible for litigants to still claim for unpaid bonuses and unpaid leave, and to institute claims regarding unilateral changes to contracts of employment that are not covered by the definitions of unfair labour practices or unfair dismissals. In these circumstances, reliance can be placed on section 77(3) of the Basic Conditions of Employment Act, which provides the labour court and high court with concurrent jurisdiction to consider contractual matters.

There can be no doubt that the Labour Relations Act and the Basic Conditions of Employment Act had been poorly drafted in so far as the provisions dealing with jurisdiction do not give effect to the purpose of the Labour Relations Act, which seeks to establish a single system of dispute-resolution forums for labour disputes. There is an urgent need for the constitutional court to provide direction in the interim by explicitly closing down the avenues created by the *Wolfaardt*, *Gumbi* and *Boxer Superstores* cases and the hope is expressed that the Superior Courts Bill (currently under discussion) will contain provisions that will put an end to this uncertainty.

In conclusion, it is suggested that litigants should refrain from utilising contractual remedies when seeking to remedy what is in effect unfair dismissal and/

or unfair labour practice disputes. Applicants should look into the definitions of unfair dismissal (s 186(1) of the Labour Relations Act) and unfair labour practice (s 186(2) of the Labour Relations Act) and utilise the tailor-made institutions and remedies for alleged infringements. Only in those instances where employee rights that relate to fair treatment are not covered under unfair dismissal and the definition of unfair labour practice should the courts look into developing the common law where it is lacking in giving effect to the constitutional right to fair labour practices.

BPS VAN ECK
University of Pretoria