

ARE MAGISTRATES WITHOUT REMEDY IN TERMS OF LABOUR LAW?
President of SA & others v Reinecke 2014 (3) SA 205 (SCA); (2014) 35 *ILJ* 1585
(SCA).

1 INTRODUCTION

Compared to the situation that prevailed under the former Labour Relations Act¹ (LRA), the current LRA 66 of 1995 has an extensive scope of application. Members of the South African Police Service, public servants, school teachers and university lecturers have all been brought under the protective reaches of South Africa's primary labour statute. The only categories of workers that are expressly excluded are members of the South African National Defence Force and members of the State Security Agency.²

Despite their exclusion, these categories of workers are nonetheless not entirely without protection. In *Murray v Minister of Defence*³ the Supreme Court of Appeal (SCA) confirmed that soldiers can rely on their fundamental right to fair labour practices and, for example, may not be constructively dismissed. Also with the backing of the Constitution Act 108 of 1996, the reach of labour legislation has been stretched beyond the existence of an enforceable common law contract of employment. In *State Information Technology Agency (Pty) Ltd v Commission for*

¹ Act 28 of 1956.

² s 2 of the LRA 66 of 1995, as substituted by s 53 of the General Intelligence Laws Amendment Act 11 of 2013.

³ 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA) (*Murray* (SCA)). In *SA National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC); (1999) 20 *ILJ* 2265 (CC) the Constitutional Court also held that members of the Defence Force are 'akin' to workers when they fought to have their constitutional right to establish trade unions recognised. See A Van Niekerk, M A Christianson, M McGregor, N Smit and B P S van Eck *Law@work* (2012) 38.

*Conciliation Mediation & Arbitration & others*⁴ the Labour Appeal Court (LAC) concluded that the existence of an employment relationship (rather than a contract of employment) should be the determinative factor regarding the protection afforded by labour law.⁵

The trend to bring workers within the fold of labour protection has also been evident in the sphere where administrative and labour law principles overlap. In *Gcaba v Minister for Safety & Security & others*⁶ the Constitutional Court (CC) confirmed that it is preferred that labour disputes should be resolved by means of tailor-made labour law remedies rather than by relying on administrative law remedies.

In *President of SA & others v Reinecke*⁷ the question was whether a magistrate is eligible to claim damages in consideration of being subjected to constructive dismissal. The SCA dismissed the claim and held that the claimant magistrate should have relied on his administrative law remedies. Even though the issue was not raised at either the a quo or the appellate stages of the proceedings, one cannot but wonder whether magistrates are not entitled to some form of protection within the fold of labour law. The purpose of this contribution is to consider whether, against the trend of the extension, rather than the limitation, of the categories of

⁴ (2008) 29 *ILJ* 2234 (LAC). See also P A K le Roux ‘The Meaning of “Worker” and the Road Towards Diversification: Reflecting on Discovery, SITA and “Kylie”’ (2009) 30 *ILJ* 49.

⁵ The courts have confirmed that labour legislation also applies to prostitutes and illegal immigrants. See ‘Kylie’ v *Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 1600 (LAC) and *Discovery Health v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 1480 (LC). See also C Bosch ‘Can Unauthorised Workers be Regarded as Employees for Purposes of the Labour Relations Act?’ (2006) 27 *ILJ* 1342 and D Norton ‘Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers’ (2010) 31 *ILJ* 1521.

⁶ 2010 (1) SA 238 (CC); (2009) 30 *ILJ* 2623 (CC) (*Gcaba* (CC)). See also *Chirwa v Transnet* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) (*Chirwa* (CC)).

⁷ 2014 (3) SA 205 (SCA); (2014) 35 *ILJ* 1485 (SCA) (*Reinecke* (SCA)).

persons who are covered by labour legislation, it is appropriate for magistrates to be left out in the cold.

2 THIN LINE OF CASES

Reinecke (SCA) is the most recent addition to a thin line of South African cases that have considered the status of magistrates as employees. Earlier, in *Van Rooyen & others v The State*,⁸ the CC made a vague reference to this issue when the court suggested that magistrates are not entitled to engage in collective bargaining based on the independence of magistrates. Later, in *L D M du Plessis obo L Pretorius v Department of Justice*,⁹ the Commission for Conciliation Mediation and Arbitration (CCMA) latched onto the CC's obiter statement and came to a firm conclusion that magistrates are not covered by the provisions of the LRA. In the more recent *Reinecke* saga, the High Court (HC)¹⁰ awarded the aggrieved magistrate a significant amount of contractual damages because of the repudiation by the employer of an employment contract. However, as previously mentioned a full bench of the SCA unanimously overturned the decision and held that the issue should have been adjudicated within the realm of administrative law.

In a coincidental parallel development, the English Supreme Court in *O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs)*¹¹ grappled with the issue whether judges should be deemed to be employees. The court held that the relationship between judges and the Ministry of Justice is, by its nature, substantially the same as the relationships that exist between employers and their

⁸ 2002 (5) SA 246 (CC) (*Van Rooyen* (CC)). See the discussion below.

⁹ Unreported award number GA 26670 considered by Commissioner P J van der Merwe 17 December 2002. See also the discussion below.

¹⁰ HC 4 September 2012 case no 25705/2004 unreported. See also the discussion that follows.

¹¹ [2010] UKSC 34 (*O'Brien (1)*); and *O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs)* [2013] UKSC 6 (*O'Brien (2)*).

employees. Could South Africa gain guidance from these international developments?

3 THE *REINECKE* CASES

The facts that gave rise to *Reinecke* (SCA) are as follows: In 2001 Reinecke was appointed as a relief magistrate in Randburg. At the time of his appointment, the Randburg Magistrate's Court provided relief magistrates to the North West area. During his interview Reinecke made it clear that he was only prepared to accept the position if he could do relief work in different areas close to his family home in Rustenburg. Despite this, the Chief Magistrate unilaterally deployed him primarily at the Randburg Magistrates' Court. Reinecke claimed that he was victimised and discriminated against and that his duties were unilaterally changed when he was assigned only to do administrative and bookkeeping duties.¹² Reinecke claimed that he had no other alternative but to resign because his continued employment had been made intolerable.

Reinecke initially approached the CCMA for relief, but abandoned this avenue when he was made aware of the fact that in a previous matter to which we return later, *L D M du Plessis*,¹³ the CCMA had held that a magistrate is not an employee. Fearing disappointment, he proceeded with a contractual claim in the HC.¹⁴

Pretorius J of the North Gauteng HC¹⁵ accepted that a contract of employment existed between the claimant and the Minister of Justice and that s 23(1) of the Constitution confers the right not to be treated unfairly on magistrates.¹⁶ On the facts, the court accepted that the Chief Magistrate had made Reinecke's continued

¹² *Reinecke* (SCA) n 7 above para 19.

¹³ n 9 above.

¹⁴ *Reinecke* (SCA) n 7 above para 24.

¹⁵ n 10 above.

¹⁶ *Reinecke* (HC) n 10 above para 44.

employment intolerable. This, the court held, comprised breach of contract in the form of repudiation which entitled the claimant to accept repudiation by means of a resignation. The court awarded Reinecke damages concomitant to the amount he would have received until his retirement at the age of 65. The defendants were ordered to pay Reinecke the amount of R9 460 270 together with interest at the rate of 15.5% per annum from 30 September 2004.

On appeal the SCA wrestled with the issue whether Reinecke should succeed with a claim based on common law damages as a result of breach of contract against the background of being appointed to an independent office. The SCA was at pains to point out that the issue before it was narrowly construed, namely, whether there was a contract of employment between a magistrate and the state and whether a claim for contractual damages should succeed under these circumstances. The court said, ‘I leave aside for present purposes whether he might have had remedies available under the ... LRA ... as that raises other issues’.¹⁷ The court took account of the recommendations of the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts (Part 1 of the 5th Report, (1983) para 4.4.1) which suggested that magistrates should be removed from the public service to secure their independence. This led to the enactment of the Magistrates Act¹⁸ and the establishment of the Magistrates Commission, the object of which was to ensure that the appointment, promotion, transfer and discharge of magistrates take place without favour or prejudice.¹⁹ Despite this, the court remarked that the promotion, transfer and discharge of magistrates are typical of the existence of an ‘employment relationship’.²⁰ The court was even prepared to accept the principle confirmed by the Supreme Court of England in *O’Brien (2)*²¹ that the requirement of judicial

¹⁷ *Reinecke* (SCA) n 7 above para 23.

¹⁸ Act 90 of 1993.

¹⁹ *ibid* s 4.

²⁰ *Reinecke* (SCA) n 7 above para 13.

²¹ n 11 above.

independence does not mean that part-time judges cannot be employees for purposes of directives dealing with employment matters.

However, despite the existence of an employment relationship, the court held that it is unnecessary to make a final decision regarding the existence of a contract of employment as such a decision on its own would not resolve the dispute in favour of the claimant.²² Relying on a 2003 decision of the SCA,²³ the court held that it is often difficult to divorce contractual principles from statutory powers and that sometimes the law of contract and in other instances public law would provide the appropriate remedy. In this instance the court held that:

‘[T]he appropriate remedy for any grievance Mr Reinecke had, or any other magistrate might have had, relating to their appointment as a magistrate would ordinarily have been a public law remedy such as mandamus, or an interdict or proceedings by way of judicial review, and not a contractual remedy.’²⁴

The court reasoned that if Reinecke had a choice between public law and contract law remedies it would place him in a significantly better position than a conventional private sector employee. The court said that for such an employee the acceptance of a repudiation of the contract of employment constitutes an unfair dismissal in terms of the LRA and the claimant’s entitlement to relief would be limited to at most the payment of two years’ remuneration.²⁵ Reinecke’s counsel sought to justify a claim based on *Fedlife Assurance Ltd v Wolfaardt*²⁶ where the SCA held that remedies for unfair dismissal in terms of the LRA do not exclude

²² *Reinecke* (SCA) n 7 above para 16.

²³ *Logbro Properties CC v Bedderston NO & others* 2003 (2) SA 460 (SCA).

²⁴ *Reinecke* (SCA) n 7 above para 17. The court held that he could, for example, have objected to the conduct of the Chief Magistrate and if the objection had been ignored he could have challenged the recommendation by the Magistrates Commission and the decision of the Minister by way of judicial review under s 9 of the Magistrates’ Courts Act 23 of 1944.

²⁵ *Reinecke* (SCA) n 7 above para 24. Constructive dismissal is not categorised as an automatically unfair dismissal in terms of s 187 of the LRA. Hence, the court erred in referring to two years of compensation rather than one year of compensation in terms of s 194 of the LRA.

²⁶ (2001) 22 ILJ 2407 (SCA).

contractual remedies.²⁷ The court was not willing to entertain this argument as this particular claim was cast as a claim until retirement. In the words of the court it would ‘raise difficult questions of causation, remoteness and the proper method for computing damages’.²⁸ The court dismissed Reinecke’s contractual claim and, in our view incorrectly, dismantled the possibility of magistrates’ potential remedies in terms of either the LRA or the law of contract.

4 AN EARLIER VIEW OF THE CCMA

In the unreported case of *L D M du Plessis*²⁹ the applicant magistrate referred an alleged unfair labour practice dispute to the CCMA. The Department of Justice’s representatives raised the point in limine that the CCMA did not have jurisdiction to entertain the matter as the applicant was not an employee and therefore did not fall within the protective reaches of the LRA.

The centre of the argument related to the independence of magistrates as envisaged by the Constitution and the Magistrates Act. The Department of Justice argued that the Constitution provides that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.³⁰ Emphasis was also placed on provisions of the Magistrates Act and it was submitted that the Magistrates Commission (the Commission) is responsible for ensuring that everything affecting magistrates must

²⁷ *Reinecke* (SCA) n 7 above para 25. See also the debate about contractual, as opposed to LRA, remedies in J Grogan ‘Which Court When – and Why? Jurisdiction over Employment Disputes’ (2001) 17 (6) *Employment Law*; B P S van Eck ‘The Right to a Pre-dismissal Hearing in terms of the Common Law: Are the Courts Misdirected?’ (2008) *Obiter* 339–351; T Cohen ‘Implying Fairness into the Employment Contract’ (2009) 30 *ILJ* 2271; D du Toit ‘A Common-law Hydra Emerges from the Forum-Swapping Swamp’ (2010) 31 *ILJ* 21.

²⁸ *ibid.*

²⁹ n 9 above.

³⁰ s 165(2) of the Constitution.

be done without fear, favour or prejudice and that there were no contracts with the public service.³¹

It was further submitted that although the Minister's power to appoint magistrates is qualified, there is no obligation on the Minister to act on the advice of the Commission – the final say still lies with the Minister.³² The respondent furthermore relied on *Van Rooyen (CC)*,³³ to which we return below, and argued that the court provided authority for the notion that magistrates are not employees as contemplated by the LRA.

The applicant contended that the CCMA indeed had jurisdiction and that *Van Rooyen (CC)* had mainly dealt with the independence of magistrates and not with the question whether they are employees. In a rather vague argument the applicant contended that the Constitution makes provision for rights of workers and therefore *Van Rooyen (CC)* could not be regarded as authority for the view that a magistrate is not an employee.

The CCMA ruled in favour of the Department of Justice based on the fact that the Constitution draws a distinction between the administration of the judiciary and the administration of the public service. Different sets of legislation govern magistrates and public servants respectively. The Magistrates Act and regulations provide for a specific forum and procedures whereby the grievances of magistrates are to be addressed and no reference is made to the fact that magistrates' disputes

³¹ ss 2, 4(a)-(b) and 10 of the Magistrates Act.

³² The reason for this is that the Minister must make an appointment 'after consultation' with the Commission and not 'in consultation' with the Commission. The difference between the two concepts has been confirmed in *McDonald & others v Minister of Minerals & Energy & others* 2007 (5) SA 642 (C) at para 18D where the court stated that '[w]here the law requires a functionary to consult "in consultation with" another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act "after consultation with" another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary'.

³³ n 8 above.

can be resolved in terms of the LRA. This, it was held, indicated a clear intention of policy makers to exclude judicial officers from the ambit of the LRA and the jurisdiction of the CCMA.

5 POSITION ADOPTED BY THE CONSTITUTIONAL COURT

Van Rooyen's (CC)³⁴ facts were as follows. Criminal proceedings were instituted in the Magistrate's Court against Van Rooyen and two other accused. The defendants questioned the validity of the proceedings in the Transvaal Provincial Division (TPD) based on the constitutionality of certain provisions of the Magistrates' Courts Act,³⁵ the Magistrates Act and regulations made in terms thereof.

The TPD concluded that certain provisions of the legislation in question were indeed unconstitutional as they infringed the independence of the Magistrates' Courts. The CC overturned the TPD's decision almost in its entirety, holding that the Magistrates' Courts had sufficient independence to comply with the doctrine of separation of powers. In reaching its decision the court dealt with the relevant legislation in great detail and with regard to the issue relating to the determination of the salaries of magistrates, the court said:

'Judicial officers ought not to be put in a position of having to ... engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them.'³⁶

Stated differently, the court remarked that by virtue of the magistrates' judicial independence they should ideally not be engaged in collective bargaining.

³⁴ *ibid.*

³⁵ Act 32 of 1944.

³⁶ See *Van Rooyen* n 8 above para 139.

Furthermore, this is the only indirect reference in the entire case where the court remarked on the employee status of a magistrate. The central issue concerned the independence of the magistracy. We comment on the appropriateness of the reasoning in these cases below.

6 DEVELOPMENTS FROM ABROAD

The question whether part-time judges should be deemed to be employees became prominent in England and Wales in the recent past. During 2010, in *O'Brien*,³⁷ the Supreme Court of the United Kingdom considered whether a retired part-time judge with 27 years' of service should become entitled to judicial pension benefits.³⁸ *O'Brien* based his case on the existence of a contract of employment and the European Union's Part-Time Work Directive and its associated Framework Agreement.³⁹ At the domestic level, the appeal raised a question pertaining to the status of judges as employees and, at European Union (EU) level, the question was whether part-time judges are entitled to the same pension rights as their full-time counterparts.

O'Brien argued that he worked for remuneration subject to terms and conditions 'akin' to a contract of employment falling within the definition of 'worker' in terms of domestic regulations. He reasoned in the alternative that there was an 'employment relationship' in existence, as referred to in EU norms.⁴⁰ The position of the Ministry of Justice was that *O'Brien* was not working under any

³⁷ *O'Brien (1)* n 11 above. The matter started as proceedings in the Employment Tribunal where *O'Brien* was unsuccessful. From there he appealed to the Employment Appeal Tribunal and ultimately the Supreme Court.

³⁸ The term 'judges' used in England and Wales include chairmen and members of tribunals and others exercising judicial functions for remuneration, but not lay magistrates.

³⁹ Council Directive 97/81/EC. Clause 2 of the Framework Agreement refers to 'employment contract or employment relationship as defined ... by each Member State'.

⁴⁰ *O'Brien (1)* n 11 above para 21.

form of a contract. They contended that he was holding office — as the independence of the judiciary demands.⁴¹

The court relied on authority that supports the views that tenure of office and a lesser degree of control over the employee does not exclude employment.⁴² The court also accepted that ‘employment may extend beyond the traditional concept of a contract of service between a “master and servant”’.⁴³ Building on this, the English Supreme Court accepted the following principle: The mere fact that a judge holds an office, which is marked by a high degree of judicial independence, does not preclude such a person from being engaged in employment. The key issue is whether the person is serving under conditions that are characteristic of employment. If this is the case the person can be regarded as an employee.⁴⁴

Based on the reality that the EU Directive on Part-time Work formed an intrinsic part of the matter before the court, the matter was referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. Having received guidance from the CJEU, the English Supreme Court reached finality on the issue when in 2013 the same court⁴⁵ held that there was no merit in denying a pension to part-timers while granting pension to full-timers. Based on the fact that there was no justification for a distinction between these categories of workers, the principle of remunerating part-timers pro-rata temporis applied to this case.⁴⁶

7 COMMENTS ON THE CASES

In chronological order, in 2002 *Van Rooyen* (CC) did not categorically deal with the questions whether magistrates are employees and whether or not the LRA in its

⁴¹ *O’Brien* (1) n 11 above para 22.

⁴² *O’Brien* (1) n 11 above para 24. The court relied heavily on *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28.

⁴³ See previous footnote.

⁴⁴ *O’Brien* (1) paras 24, 26, 27.

⁴⁵ *O’Brien* (2) n 11 above.

⁴⁶ *O’Brien* (2) paras 71, 75.

entirety applies to magistrates. Nonetheless, the court was misguided insofar as it was swayed by the judicial independence of magistrates when commenting on the employee status of magistrates. If the issue had been properly raised in *Van Rooyen* (CC), the court should have looked for the existence of indicia associated with contracts of employment and employment relationships.

Also in 2002, the CCMA in *L D M du Plessis* was misguided when it relied on *Van Rooyen* (CC) as a precedent regarding the status of magistrates as employees and the associated question whether they should be entitled to remedies in terms of the LRA. Magistrates, or any other judicial officers for that matter, are not explicitly excluded from the scope of the application of the LRA. Furthermore, the CCMA may have been blinded by the notion of judicial independence which characterises the holding of office of a magistrate and therefore did not enquire into the possibility of the co-existence of judicial independence and an employment relationship as was later suggested by the English courts in *O'Brien* and in *Reinecke* (SCA).

The CCMA did not attempt to determine whether a contract of employment existed in terms of the dominant impression test as it may have done during the early 2000s.⁴⁷ The CCMA also did not consider the possibility of the existence of an employment relationship, as it had subsequently been done in *State Information Technology Agency (Pty) Ltd*,⁴⁸ where it was emphasised that the enquiry into the application of labour legislation had shifted away from the existence of a binding contract of employment.

Turning to *Reinecke*, the HC almost eight years later in 2010 was correct in recognising that s 23 of the Constitution extends protection to magistrates and in

⁴⁷ See *Smit v Workmen's Compensation Commissioner* 1997 (1) SA 51 (A).

⁴⁸ n 4 above. The court held that the focus mainly falls on the questions whether there is control over the person rendering the services; the person rendering services forms part of the organisation of the provider of work; and the extent to which the person is economically dependent on the person or institution who remunerates the worker.

holding that Reinecke was engaged in a contract of employment. However, the court was mistaken in adopting a similar approach to the one of *L D M du Plessis*, insofar as it remarked that the LRA is not applicable to judicial officers. It was also disappointing that the court did not draw the link between this case and *Murray* where a soldier was successful with a constructive dismissal dispute in the HC.

In 2014 *Reinecke* (SCA) stifled magistrates' hopes of basing claims on contractual principles. It seems that the extent of the damages awarded by the HC, and the difficulties relating to the calculation of damages up to the date of retirement, played a contributory role in the court's decision to reject the claim. This reminds one of the similar difficulties experienced by the former Industrial Court and the consequent capping of compensation awards in terms of the current LRA.⁴⁹

However, despite this, the court may have opened the door for magistrates to reconsider referring matters to the dispute resolution institutions established in terms the LRA. The court accepted the principle as established in the English Supreme Court to the effect that judicial independence does not stand in the way of the coming into existence of a contract of employment. Furthermore, taking account of the appointment, promotion and termination of their services, it accepted that magistrates are at least engaged in what can be described as an employment relationship. This, it is argued, could open the door to arguments based on international norms and the South African Code of Good Practice: Who is an Employee⁵⁰ to convince the courts that magistrates are after all entitled to protection under the LRA

However, in what can be described as a low point of the *Reinecke* (SCA) decision, the court directed that the aggrieved magistrate should have relied on administrative law remedies to resolve his dispute. The court seemed oblivious to

⁴⁹ See *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 (LAC); *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC); and P A K le Roux & A Van Niekerk *The South African Law of Unfair Dismissal* (1994) 336-8.

⁵⁰ GN 1774 GG 29445 of 1 December 2006.

the muddy waters pertaining to the overlapping claims that employees may have in terms of fundamental administrative law, labour law and contractual principles.⁵¹ In *Gcaba* (CC)⁵² the CC in no uncertain terms directed that employment-related issues, such as the failure to appoint or to promote employees, do not constitute administrative action and that should such cases be lodged in the HC, they would be ‘destined to fail’.⁵³ The court removed any doubt regarding this aspect when it held:⁵⁴

‘Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. ... Section 23 [of the Constitution] regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens ... Section 33 does not regulate the relationship between the state as employer and its workers.’⁵⁵

It is also disappointing that the court did not take judicial notice of *Murray* (SCA) where a soldier succeeded with a claim for constructive dismissal in the SCA based on the fundamental right to fair labour practices.⁵⁶ It would have been appropriate for the SCA to first answer the question whether in fact magistrates are involved in a contract of employment and then to consider whether it was not in fact the appropriate to rely on a contractual claim. However, advising that administrative remedies should have been followed seems to be incorrect. Also in *Gcaba* (CC) it was held that it is not the purpose of the LRA to ‘destroy’ remedies. It was held that ‘where a remedy lies in the HC, [the

⁵¹ T Ngcukaitobi & J Brickhill ‘A Difficult Boundary: Public Sector Employment and Administrative Law’ (2007) 28 *ILJ* 769; B P S van Eck ‘Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues *Transnet Ltd & others v Chirwa* (2006) 27 *ILJ* 2294 (SCA)’ (2007) 28 *ILJ* 793; J Grogan ‘Re-interpreting Chirwa: New Twist in the Jurisdictional Debate’ (2009) 25(5) *Employment Law* 4.

⁵² *Gcaba* (CC) n 6 above.

⁵³ para 68.

⁵⁴ *Gcaba* (CC) n 6 above.

⁵⁵ para 64.

⁵⁶ See n 3 above.

LRA] cannot be read to mean that it no longer lies there'.⁵⁷ It is submitted that labour legislation was introduced to supplement the law of contract and that contractual remedies remain relevant except in instances where issues such as unfair dismissal have already been carefully regulated by the LRA.

8 CONCLUSION

Twenty years ago, South Africa entered an era of constitutional democracy. In 1999 the CC adopted the liberal approach that soldiers are 'akin' to employees and confirmed that members of the Defence Force are entitled to register and belong to trade unions.⁵⁸ In 2008 the SCA confirmed that, despite the fact that uniform-bearing militaries are excluded from the ambit of the LRA, they are nevertheless entitled to protection in terms of the fundamental right to fair labour practices not to be subjected to constructive dismissal.⁵⁹ To us, it goes against the grain of these developments under the Constitution to limit – rather than to expand – the categories of persons who should be entitled to protection in terms of s 23 of the Constitution.

From a strategic perspective, Reinecke may have been ill advised to focus his proceedings on a contractual claim in the HC which culminated in a significant award of common-law damages. It would have been better for him either to base a claim for constructive dismissal on his constitutional right to fair labour practices as had been done in *Murray* (SCA), or to argue against the accuracy of the view of the CCMA in *L D M du Plessis* which still seems to influence the current thinking about whether magistrates are indeed entitled to remedies in terms of the LRA.

⁵⁷ para 73.

⁵⁸ See n 3 above.

⁵⁹ *ibid.*

Against this background we argue that the door remains open for magistrates to convince the courts that they are indeed involved in employment relationships and that they are therefore entitled to have their employment-related disputes considered by the LRA's dispute resolution institutions. South African case law has not yet brought clarity to the issue whether a magistrate is an employee of the state and whether she or he can rely on the protection of labour legislation. As indicated by the English Supreme Court in *O'Brien (2)*, the finding that part-time judges (and for that matter part-time magistrates) are employees of the state, would not necessarily infringe their judicial independence.⁶⁰ Bringing magistrates into the fold of the LRA would also be a development in the right direction regarding their potential remedies. This will place limits on their potential claims for compensation for unfair dismissal that will resolve difficulties relating to the calculation of damages until the date of their retirement.

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⁶⁰ In para 7 of *Reinecke* (SCA) n 7 above it was noted that in jurisdictions such as Germany and France members of the judiciary are employees of the state but nonetheless remain independent.