

Notes

LABOUR DISPUTE RESOLUTION IN THE PUBLIC SERVICE: THE MYSTIFYING COMPLEXITY CONTINUES¹

Transnet Ltd & others v Chirwa (2006) 27 ILJ 2294 (SCA)

1 Introduction

In the contribution titled ‘Administrative, Labour and Constitutional Law — A Jurisdictional Labyrinth’,² the authors alluded to the fact that an unacceptable level of uncertainty has developed regarding aspects of labour dispute resolution for public service employees. In that article the hope was expressed that the Constitutional Court (CC) would, in the not too distant future, provide guidance in this problematic area of the law where administrative and labour law overlap.³ However, in the interim, the Supreme Court of Appeal (SCA) in *Transnet Ltd & others v Chirwa*⁴ has grappled with and missed a golden opportunity to resolve this complex jurisdictional debate. This contribution focuses on an analysis of the *Chirwa* decision — but first some background.

One of the central issues in the debate is the question whether disgruntled public service employees are at liberty to utilize administrative law principles, which have been codified in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), to resolve labour disputes. This question is of particular relevance since such disputes fit quite comfortably under the dispute-resolution framework established for this purpose by the Labour Relations Act 66 of 1995 (LRA).⁵

In broad terms, Labour Court (LC) judges have favoured the point of view that PAJA is not the appropriate legislative instrument to be utilized for purposes of scrutinizing employer actions in the public

¹ The term ‘mystifying complexity’ was used by Conradie JA at para 33 of the case under discussion.

² Van Eck & Jordaan ‘Administrative, Labour and Constitutional Law — A Jurisdictional Labyrinth’ (2006) 27 ILJ 1987.

³ Section 23(1) of the Constitution of the Republic of South Africa 1996 (the Constitution) guarantees everyone’s right to fair labour practices (which is given effect to by the Labour Relations Act 66 of 1995) and s 33 entrenches everyone’s right to just administrative action (which is codified in the Promotion of Administrative Justice Act 3 of 2002). Potentially, public service employees are at liberty to make use of any of these instruments to resolve disputes with their employer.

⁴ (2006) 27 ILJ 2294 (SCA).

⁵ It is to be noted that this discussion does not traverse the question whether Commission for Conciliation, Mediation & Arbitration awards may be taken on review based on grounds emanating from PAJA. It is submitted that the SCA has resolved this debate in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 2076 (SCA) where it was held that the grounds of review contained in PAJA supersede and replace the more restrictive grounds for review contained in s 145(2) of the LRA.

domain.⁶ The LC adopted the position that employer actions in this arena do not constitute ‘administrative action’ as defined in PAJA⁷ and that such disputes should be resolved under the auspices of the LRA and its dispute-resolution institutions.⁸

In contrast to this point of view, the predominant view of the HC has been that nothing precludes public service employees from approaching the general courts for purposes of the resolution of employer-employee disputes on administrative law grounds.⁹ This point of view was mainly based on two factors, namely that the former Appellate Division (AD) in *Administrator, Transvaal & others v Zenzile & others*,¹⁰ and the cases that followed,¹¹ removed all doubt that may have existed at common law as to whether administrative

⁶ *Public Servants Association on behalf of Haschke v MEC for Agriculture & others* (2004) 25 ILJ 1750 (LC); *SA Police Union & another v National Commissioner of the SA Police Service & another* (2005) 26 ILJ 2403 (LC); *Hlope & others v Minister of Safety & Security & others* (2006) 27 ILJ 1003 (LC). However, the opposite position was adopted by the LC in *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others* (2006) 27 ILJ 2127 (LC).

⁷ Section 1 of PAJA provides that ‘‘administrative action’’ means 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
- (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, but does not include —
- (aa) the executive powers or functions of the National Executive . . . ;
 - (bb) the executive powers or functions of the Provincial Executive . . . ;
 - (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, 1996 (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, 2000; or
 - (ii) any decision taken, or failure to take a decision, in terms of section 4(1)’.

⁸ The argument was accepted that the appropriate labour dispute resolution fora established for this purpose in the public service are the Public Service Coordinating Bargaining Council and the LC.

⁹ *Engelbrecht v Minister of Safety & Security & others* (2005) 26 ILJ 727 (T); *Marcus v Minister of Correctional Services & others* (2005) 26 ILJ 745 (SE); *Louw v SA Rail Commuter Corporation Ltd & another* (2005) 26 ILJ 1960 (W); *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 ILJ 1957 (SCA); *Dunn v Minister of Defence & others* (2005) 26 ILJ 2115 (T); *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* (2006) 27 ILJ 555 (E); *Nell v Minister of Justice & Constitutional Development & another* (2006) 27 ILJ 2063 (T). However, it is to be noted that a contrary view (corresponding with that of the LC) has been adopted by the HC in *Greyvenstein v Kommissaris van die SA Inkomste Diens* (2005) 26 ILJ 1395 (T); *Jones & another v Telkom SA Ltd & others* (2006) 27 ILJ 911 (T).

¹⁰ (1991) 12 ILJ 259 (A).

¹¹ *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A); *Administrator, Natal v Sibiyi* 1992 (4) SA 532 (A).

law principles applied to the contractual relationship between the public service and its employees, and whether employer actions in the public service fell under the definition of 'administrative action' in PAJA. From this the argument followed that there is nothing that precludes state employees from lodging applications with the HC for the setting aside of such administrative action.

The 'mystifying complexity'¹² of this debate is illustrated by the fact that in *Chirwa*, three opposing judgments emanated from the five judges of appeal. Although three of the five were in favour of the notion that employer action in the public service constitutes administrative action, the majority decision (with a different composition) was that public service employees are precluded from lodging review applications with the HC in respect of their labour related disputes.

2 *Chirwa: facts and questions*

Ms Chirwa, a human resources manager at one of Transnet Ltd's business units, was invited to attend a hearing and to respond to allegations of inadequate performance, incompetence and poor employee relations during November 2002. The notice of the enquiry was issued by Chirwa's direct supervisor, Mr Smith, who was also the chief executive officer of the particular business unit. Chirwa refused to participate in the proceedings on grounds that it would be unfair for Smith to act as complainant, witness and decision maker at the same time. Despite her objection, Smith continued with the enquiry and he proceeded to dismiss her.

Chirwa first referred the dispute via the dispute-resolution avenues established by the LRA. The Commission for Conciliation, Mediation & Arbitration (CCMA) issued a certificate indicating that the dispute remained unresolved after mediation. At that stage Chirwa decided to change tack and altered her cause of action from an unfair dismissal dispute (under the LRA) to unfair administrative action (under PAJA) or, in the alternative, to a breach of her constitutional right to just administrative action.

The decision to dismiss Chirwa was taken on review and was considered by Brassey AJ of the Johannesburg HC. With reference to the pre-constitutional *Zenzile* matter, the court held that the dismissal constituted administrative action and Brassey AJ set it aside. Without basing his decision on the provisions of PAJA, Brassey AJ concluded that the rules of natural justice (inherent to administrative common law) had been breached. He set aside the decision to dismiss Chirwa and awarded her the common-law remedies of reinstatement and nine months' backpay.¹³

¹² at para 33. Cameron at para 45 also gives recognition to the fact that the 'appeal raises the difficult question whether public service employees can challenge dismissal proceedings against them . . . in the ordinary courts' (emphasis added).

¹³ at para 46.

The SCA considered the appeal against Brassey AJ's decision on 28 February and 29 September 2006, almost four years after Chirwa's dismissal. The appeal was based on two main issues. The first was whether the dismissal was one that fell under the exclusive jurisdiction of the LC in terms of s 157(1) of the LRA, and the second was whether the dismissal of a public service employee constitutes 'administrative action' as defined in s 1 of PAJA.

3 *In support of the LC approach*

Mthiyane JA (Jafta JA concurring) followed a line of thinking that is broadly in line with the well reasoned approach adopted by Murphy AJ of the LC in the *SA Police Union* case, although they did not refer to this.¹⁴ With reference to s 157(1) and (2) of the LRA, the SCA judges first accepted that the HC and LC have concurrent jurisdiction to decide any constitutional matter even though it may fall under the broad category of employment disputes. They found support for this in an earlier CC case, *Fredericks & others v MEC for Education & Training, Eastern Cape & others*,¹⁵ where it was held that 'the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations'.

This, Mthiyane JA held, is reminiscent of the situation where unfair dismissal (as regulated in chapter 8 of the LRA) and common-law remedies both apply to the situation where a contract of employment is terminated. In *Fedlife Assurance Ltd v Wolfaardt*,¹⁶ Nugent AJA held that the LRA's unfair dismissal provisions do not have an exhaustive effect, and that the Act therefore does not deprive dismissed employees of their common-law remedies upon termination of the contract of employment. Based on the fact that Chirwa complained about her supervisor's actions that had infringed her right to lawful, reasonable and procedurally fair administrative action, Mthiyane JA concluded on the first issue that the HC did have jurisdiction to decide the matter at hand.

Turning to the second question, Mthiyane JA accepted that PAJA was promulgated with the view of codifying administrative law principles that developed under the common law. He held that *Zenzile* and the cases followed by Brassey AJ were distinguishable from the present situation because they were decided before the introduction of the definition of 'administrative action' in s 1 of PAJA. In terms of PAJA, which now regulates the situation, administrative action only falls under the definition if it is the exercise of public power or the performance of a public function in terms of any legislation. The nature of the conduct rather than the nature of the functionary is

¹⁴ above n 6.

¹⁵ (2002) 23 *ILJ* 81 (CC); 2002 (2) SA 693 (CC) at para 40.

¹⁶ (2001) 22 *ILJ* 2407 (SCA); 2002 (1) SA 49 (SCA).

instructive. The judges opined that '[o]rdinarily the employment contract has no public law element to it and it is not governed by administrative law'.¹⁷ When Transnet Ltd decided to dismiss Chirwa it did so as employer and not as public functionary. The LRA gives effect to the constitutional right to fair labour practices and regulates the reasons and accompanying processes in schedule 8 and the Code of Good Practice to the LRA. To conclude, Mthiyane JA and Jafta JA held that although the HC has jurisdiction over employer-employee disputes in terms of the procedures of the LRA, the dismissal of the employee does not constitute 'administrative action' and cannot be considered under the auspices of PAJA.

4 *The holistic policy orientated approach*

Conradie JA was alone in his reasoning of the matter, but nevertheless swung the scale in favour of Mthiyane JA and Jafta JA by holding that it was misplaced to adjudicate the matter under PAJA. Conradie JA chose to follow a policy orientated approach rather than delving into the exact wording of the definition of 'administrative action' in PAJA. Unlike Mthiyane JA, he did not consider the meaning of the terms 'public power' and 'public function' but held that even if it were to be accepted that such action did constitute administrative action (which he was prepared to accept), this was not the true question. He held that the 'important question is whether the structure of the legislation entails that dismissals in the public domain be dealt with in administrative acts'¹⁸ and that the answer can only be addressed by a 'holistic approach'.¹⁹

Conradie JA remarked that PAJA was enacted seven years after the LRA, which was introduced 'with the state's desired comprehensive scheme of labour regulation'. He referred to *SA Police Union* and endorsed the following statement by Murphy AJ of the LC:

'[T]here are important underlying . . . policy concerns at play here, namely that the resolution of employment disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values as in the private sector.'²⁰

To this Conradie JA added that whereas the LRA lays down the guidelines for procedures to be followed should an employer decide to dismiss an employee, PAJA provides procedural guidelines for fair administrative decisions of public institutions of whatever description. In his view, PAJA covers much broader relationships than the LRA which regulates a more specific relationship, namely the one between employer

¹⁷ at para 15.

¹⁸ at para 27.

¹⁹ at para 26.

²⁰ at para 55 of *SA Police Union & another v National Commissioner of Police Service & another* (2005) 26 ILJ 2403 (LC).

and employee. Based on the general maxim *generalia specialibus non derogant*, he continued that there is a presumption that if the legislature has regulated a specific aspect, and later introduces a more general enactment, the intention of the legislator is not to interfere with the specific enactment unless that intention is made absolutely clear.²¹

One point of interest that was highlighted by Conradie JA is the fact that both the constitutional right to fair labour practices and the right to fair administrative action are underpinned by the rules of natural justice. Could one then rely on administrative law's foundational rules of natural justice, as Brassey AJ of the HC had done, without relying on PAJA? With reference to *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others*²² Conradie JA held that this could not be done and accepted that '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law'.²³

Turning to the applicable remedy, Conradie JA held that the normal remedy for an administrative review is to set aside the decision and to remit the matter to the decision maker to consider the dispute afresh.²⁴ In the view of Conradie JA, the court *a quo* misdirected itself by awarding nine months' salary and by reinstating Chirwa. The LRA, in ss 193 and 194, sets out the appropriate remedies of reinstatement and compensation after a rehearing of all the facts as they occurred during any internal disciplinary enquiry. In review applications there is no such rehearing but merely a consideration of the different versions as contained in the affidavits.

In conclusion, Conradie JA held that Transnet Ltd's appeal should succeed and that the order of the LC should be substituted with the decision of Mthiyane JA and Jafta JA.

5 *In support of the HC approach*

Against the background of the views expressed by Cameron JA in earlier SCA judgments²⁵ it did not come as a surprise that, in his view, the door to the HC is open to reviews of employer actions in the

²¹ Conradie JA at para 28 of *Chirwa*, quoted from Steyn *Die Uitleg van Wette* (4 ed) at 90 who in turn referred to *Barker v Edgar* [1898] AC 748 at 754.

²² 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 96.

²³ *ibid.*

²⁴ at para 31.

²⁵ In *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) Cameron JA confirmed that the LAC is not the ultimate court in labour matters and that it does not have exclusive jurisdiction in all labour matters. At para 26 he held that if it were possible for the legislature to vest final appellate powers in the LAC, it would also be possible for the legislature to create final courts of appeal in other matters such as crime, welfare, environment, land, contract, company law and administrative law. This could theoretically mean that all functions of the SCA could be assigned piecemeal to other appellate courts with equal status. See the criticism voiced against this decision by Ngalwana 'The Supreme Court of Appeal is Not the Apex Court in All Non-constitutional Appeals' (2006) 27 ILJ 2000. See also Cameron JA's decision in *Rustenburg* above n 5 where he held against the LRA and in favour of PAJA in respect of the appropriate formula for reviews of arbitration awards.

public sphere. Cameron JA (Mpati DP concurring) endorsed Plasket J's HC decision in *Police & Prisons Civil Rights Union*²⁶ and found that the dismissal of an employee in the public service does constitute 'administrative action' as defined in PAJA. Finding that the pre-constitutional era *Zenzile* case is still good authority, Cameron JA held that rather than superseding it, both the Constitution and PAJA seem to confirm the doctrine laid down by the former AD. He held:

'The doctrine propounded in *Zenzile*, and the cases that followed it, was that employment with a public body attracts the protection of natural justice because the employer is a public authority whose employment related decisions involve the exercise of public power.'²⁷

Although Cameron JA agreed with the view of the court a quo that Chirwa was entitled to relief, he disagreed with Brassey AJ's approach and reasoning on two points. Firstly, he held that it is wrong to grant public service employees a common-law remedy based on the rules of natural justice after the promulgation of PAJA, and secondly, that it is incorrect to order reinstatement and nine months' salary. In his view, although it is open to aggrieved employees in the public service to approach the HC with an application for review, the matter should have been referred back to Transnet Ltd for a proper rehearing. To this Cameron JA added that —

'the ordinary courts should be careful not to usurp the remedial role and special aptitudes of the labour courts: public employees may properly be discouraged from having recourse to the ordinary courts in such matters by limiting the remedy granted.'²⁸

Up to this point there is not much difference between the decisions of Cameron JA and the point of view taken by Conradie JA. Although the latter did not delve into *Zenzile* and the PAJA definition of 'administrative action' to the same degree as Cameron JA, he was prepared to accept that the dismissal of a public servant could constitute administrative action. However, this is where their views part. Conradie JA held that the LRA provides public service employees with tailor-made remedies and that this precludes ordinary courts from assisting employees under PAJA, and Cameron JA concluded that the LRA merely supplements the employee's common-law rights and that it does not 'exhaust the rights and remedies accruing to an employee on termination of employment'.²⁹ Relying on *United National Public Servants Association of SA v Digomo NO & others*,³⁰ Cameron JA endorsed the point of view that —

²⁶ above n 9.

²⁷ at para 52.

²⁸ at para 47.

²⁹ at para 59.

³⁰ (2005) 26 *ILJ* 1957 (SCA) at para 4. In this case reliance was placed on *Fedlife Assurance Ltd* and *Fredericks* mentioned above.

'[p]articular conduct by an employer might constitute both an "unfair labour practice" . . . and it might also give rise to other rights of action . . . Its claim was to enforce the right of its members to fair administrative action — a right that has as its source in the Constitution and that is protected by s 33 — which is clearly cognizable in the ordinary courts'.

Based on the principle that there should be great hesitation to interfere with a constitutional guarantee such as the right to fair administrative action, and supported by the fact that PAJA's list of exclusions from the definition of 'administrative action' does not mention employer action in the public service, Cameron JA (supported by Mpati DP) concluded that judicial review survived as remedy for public service employees.

6 Concluding remarks

At the heart of this complex debate lies the question concerning the exclusive jurisdiction of the LC. It is submitted that the state had a clear legislative intent to establish a set of specialist labour courts (with the LAC at its pinnacle) that would have exclusive jurisdiction over all labour matters.³¹ However, a number of factors have prepared fertile ground for this mystifying debate that has led to the inconclusive *Chirwa* decision. These factors include the fact that the Constitution does not provide sufficient room for labour courts with exclusive jurisdiction,³² the generality and overlapping nature of certain constitutional principles and poor legislative attempts to give effect to the state's mentioned intention.³³

To take the debate back one step, we have witnessed a staged erosion of the LC's jurisdiction under the constitutional framework. Firstly, in *Fedlife Assurance Ltd* Froneman AJ (with his background as LAC judge) contested but lost the argument against four SCA judges in the quest to curtail common-law contractual remedies under the specific remedies ensconced by the LRA. After this, in *Fry's Metals (Pty) Ltd*, Cameron JA confirmed the reality to the labour law fraternity that, apart from the CC, the LAC is not the apex court in labour matters but that this position is held by the SCA. Then in *Rustenburg Platinum Mines Ltd (Rustenburg Section)* the SCA per Cameron JA confirmed that: CCMA arbitration awards constitute administrative action; s 6(2) of PAJA sets the appropriate grounds for

³¹ See the discussion in Van Eck 'The constitutionalisation of labour law: no place for a superior labour appeal court in labour matters: (Part 1) Background to the South African labour courts and the Constitution' (2005) *Obiter* 26 (3) 549 at 558.

³² Van Eck 'The constitutionalisation of labour law: no place for a superior labour appeal court in labour matters: (Part 2) Erosion of the Labour Appeal Court's jurisdiction' (2006) *Obiter* 27 (1) 20 at 25–7.

³³ It is submitted that s 157(2) of the LRA could have been drafted to state specifically that reviews of employer actions in the public service should be lodged with the LC, and the definition of 'administrative action' under PAJA could likewise have excluded employer-employee action. See s 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 for an example where such an overlap was prevented. In this section it is stated that 'it does not apply to the extent to which the Employment Equity Act applies'.

review; and that the restrictive formula for review set by the LRA has been superseded by the provisions of PAJA.

It is against this steady stream of decisions whittling down the notion of exclusive jurisdiction for labour dispute-resolution institutions that, almost as a surprise, the majority decision in the *Chirwa* case has resulted in the curtailment of the HC's review function in respect of public service employer-employee disputes.

But this is not the end of this debate and the question may justly be posed as to where this discourse will lead us. One of the few aspects that is certain in this debate is the fact that the Constitutional Court (CC) will have the opportunity to consider, and even possibly give finality to, the disagreement. But, what are the predominant lines of thinking that could possibly be expected from the CC?

The CC could possibly choose to make short-shrift of the matter by placing the focus on a dogmatic interpretation of the definition of 'administrative action' (as contained in PAJA). By either attaching a restrictive or expansive interpretation to the definition it will determine whether the HC has jurisdiction to consider review applications lodged by disgruntled public service employees. By holding that employer decisions do not entail the exercise of public power (as viewed by Mthiyane JA and Jafta JA), it will resolve the thorny question in favour of the LC and against the HC. However, it will not resolve the remainder of the broader policy issues that culminate in an uneasy relationship between the HC and the LC. The questions raised in *Fedlife* relating to the possible restriction of common-law remedies upon termination of contracts of employment (which has not yet been considered by the CC), and the possibility of accepting the LRA's more restrictive formula for review of arbitration awards under the limitations clause of the Constitution that came up in *Rustenburg* (which has also not been considered by the CC) will not be addressed by merely interpreting the definition of 'administrative action'.

It is therefore to be hoped that in deciding the matter the CC will take the bold step to follow a more holistic policy based approach than that followed by Conradie JA in *Chirwa*. It is my thesis that this would be the ideal opportunity for the CC to examine the reasons behind the promulgation of the LRA (and PAJA) and more specifically the establishment of specialist labour fora. Some of the reasons for their establishment are the following:³⁴

- Labour disputes should ideally be finalized expeditiously and a long line of appeals should be avoided.
- Employees can ill-afford high legal costs. Employees are generally in a weaker financial position than their employers and dismissed employees often have no income at all.

³⁴ See Van Eck (2005) *Obiter* 26 (3) 549 at 552 where the background to these reasons was discussed in more detail. See also the Explanatory Memorandum to the Draft Negotiating Document in the Form of a Labour Relations Bill Government Gazette 16259 of 10 February 1995 at 147 for the reasons for the creation of the CCMA and labour courts.

- Labour dispute-resolution institutions should be accessible to employees by virtue of simplified procedures.
- Labour law has developed into a separate autonomous body of law that would require specialists in employer-employee relations to consider and determine labour disputes.³⁵
- Specialized dispute-resolution institutions, clothed with exclusive jurisdiction, are more likely to develop uniform and coherent labour law principles.³⁶

It could be argued that the outcome of the facts of *Chirwa* is an excellent example that illustrates that there is justification for specialist labour dispute-resolution institutions. The case illustrates that during this uncertain time there is ample room for forum shopping; there is a long line of appeals (extending even further to the CC) — it took Chirwa four years to get a ruling that the disciplinary hearing had to be reconvened afresh and with an order as to costs against her; such cases are an extremely expensive exercise that would take them beyond the reach of the general worker.

Should the CC follow the policy based approach underpinned by the principle that the LRA was enacted specifically to regulate employer-employee relations to the exclusion of other legislative instruments (and even possibly common-law principles), it would provide the answer to some of the unanswered issues that have been raised. Although it would be a bold step to take, it would go a long way in resolving some of the open ended questions if the CC were to hold that the LRA was promulgated for a specific purpose, namely to regulate the employer-employee relationship and that the more general principles contained in more general legislation such as PAJA should take a back seat whenever labour specific disputes need to be resolved.

In the context of taking a more holistic view, the CC could also choose to depart from the notion of labour courts with exclusive

³⁵ Hepple 'Labour Courts: Some Perspectives' 1980 *Current Legal Problems* 169 at 183–4 states that 'the reason most recently advanced by Wedderburn and McCarthy for pointing us towards a Labour Court is the quest for an autonomous labour law which "promotes collective bargaining and is freed from the contract of service" The kind of "exclusive jurisdiction" which such a British Labour Court would require, has been attained in Germany, Sweden and Belgium'.

³⁶ Jordaan & Davis 'The Status and Organization of Industrial Courts: A Comparative Study' (1987) 8 *ILJ* 199 at 219 cite De Givry 'Labour Courts as Channels for the Settlement of Labour Disputes — An International Review' 1986 *British Journal of Industrial Relations* 364 at 371 who makes the point that a number of principles are significant for the proper functioning of labour courts, namely: labour courts should be established on a permanent basis; labour judges should have special experience and knowledge in labour matters; labour courts should have exclusive jurisdiction in individual contracts of employment and collective agreements; settlement should be sought by means of conciliation before judicial determinations are made; procedures should be simplified and all measures should be taken to expedite procedures; services should be free of charge; and workers should enjoy protection against discrimination which could prevent them from having recourse to the labour courts.

jurisdiction. The court with the highest status could possibly hold that specialist courts do not comfortably fit within the hierarchy of courts established by the Constitution.³⁷ This could signal a new era in the development of South African labour law. It will be an era where the principles regulating the 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.³⁸

However, whichever way the decision of the CC goes, it is submitted that it is now the appropriate time to reach finality in the debate.

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³⁷ Section 166 of the Constitution describes the hierarchy of courts within which the country's judicial authority is vested. It states that the courts are:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts;
- (d) the Magistrates' Courts;
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrate's Courts.'

³⁸ Van Eck (2006) *Obiter* 27 (1) 20 at 32.

ARE SEX WORKERS 'EMPLOYEES'?

The Commission for Conciliation, Mediation & Arbitration (CCMA) recently ruled that a sex worker was not an 'employee' for the purposes of the Labour Relations Act 66 of 1995 (LRA)¹ and that it lacked jurisdiction to consider her claim that she had been unfairly dismissed. This note sets out the basis for the commissioner's decision and offers a commentary suggesting a different approach to the issue of jurisdiction when the underlying working agreement is tainted by illegality.

The applicant worked for a massage parlour as a masseuse/sex worker until she was asked to leave because of alleged substance abuse and disruptive behaviour. The commissioner determined that the work she performed was illegal because it appeared to be contrary to the Sexual Offences Act;² the parties' agreement was not a legally enforceable contract and consequently the applicant was barred from bringing a claim under the LRA.

It was argued for the applicant that excluding sex workers from the scope of the LRA is not justified on a proper reading of the LRA and the CCMA should not curb the scope of its jurisdiction if it was not required by the relevant law. The commissioner disagreed:

'Given the status of the common law on the enforceability of illegal contracts be they employment contracts or otherwise (it is trite that the employment contract forms the basis of the employment relationship between the parties) and the fact that the applicant was employed to perform illegal work and did, should the CCMA resolve such disputes it would then place itself in a position where it would be making policy decisions for the legislature.'³

The commissioner, furthermore, considered that the CCMA could not ignore the principle of statutory interpretation that legislation does not intend to change existing law (including the common law) more than necessary; 'the LRA did not intend to change the common law relating to illegal unenforceable employment relationships'. This was because —

'[t]he fact that sex workers are not specifically excluded in terms of s 2 [of the LRA] does not mean as argued that they are included. If that were so it could be argued that any person who is paid by another to undertake an activity which is criminalized would be able to access the LRA as well as other statutes enacted for the protection of workers and thus the majority of cases referred would be in favour of the applicant. Further, the commissioner would not be able to implement the remedy of first choice being reinstatement or re-employment'.⁴

¹ 'Kylie' v Van Zyl t/a Brigettes (2007) 28 ILJ 470 (CCMA). Section 213 of the LRA defines an 'employee' as

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee".

² Act 23 of 1957.

³ at 10–11.

⁴ at 11.