A CRITICAL ANALYSIS OF THE JURISDICTIONAL OVERLAP BETWEEN LABOUR AND CIVIL COURTS

by

MABULENYANA WHITTY MARWESHE

(Student number: 820406284)

Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM (LLM)

in

LABOUR LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

Supervisor: Ms Elmarie Fourie

JANUARY 2018

DEDICATED TO:

The labour law fraternity and my children - My mother and the entire family clan, Ba Bina Tau – Pula!

ACKNOWLEDGMENTS:

Ms Elmarie Fourie, my supervisor – for her excellent guidance, authentic leadership and meaningful input throughout of this research process. I am immensely indebted to her insightful knowledge.

Rosemary Hunter - for her morale and financial support and believing in my dream.

Advocate Tebele – your input and guidance is highly valued and appreciated “where there is a will, there is a way”.

ABSTRACT

The promulgation of the Labour Relations Act 66 of 1995 (LRA) gave birth to specialised labour dispute resolutions mechanisms such as the labour courts and the Commission for Conciliation, Arbitration and Mediation. The main reason for the establishment of specialist dispute resolution structures was prompted by the need for expeditious, efficient and affordable procedures, and easy accessible, specialist but informal institutions.

However, the introduction of specialised dispute resolution structures by the LRA did not abolish the rights emanating from common law for employees to pursue any remedies in civil courts, such as the high court and Supreme Court of Appeal pertaining to the contract of employment. These permitted civil courts such as the high court and Supreme Court of Appeal to adjudicate over disputes in respect of the contracts of employment. However, such continuous adjudication of labour disputes regarding the contract of employment by civil courts creates and perpetuates the overlap of jurisdictions between it and labour courts, and facilitates forum shopping.

This research analyses the jurisdictional overlap between labour and civil courts in respect of adjudicating labour disputes pertaining to the contract of employment as envisaged by the LRA and other legislation. It also investigates the developments in this area of the law from case precedent and other relevant materials. It further explores the common law regarding to its status in governing the contract of employment and its remedies as compared to the remedies derived from the LRA and other status. The conflict between the LRA and administrative law is revisited and explored.

The research's main investigation revolves around the developments relating to the overlapping jurisdiction between the civil and labour courts in the Republic of South African, by analysing the literature and case law and to, ultimately, offer recommendations.

TABLE OF CONTENTS

CHAPTER ONE

1. BACKROUND AND INTRODUCTION

1.1 Introduction

The research focuses on the jurisdictional overlap between the labour and civil courts pertaining to the adjudication of matters relating to the contract of employment. The jurisdictional tension between the labour and civil courts has produced numerous court judgments that reignited conflicting views within the legal fraternity for years. Traditionally, civil courts had powers to adjudicate over disputes relating to employment contracts, such power being derived from common law.

However, with the promulgation of the Labour Relations Act 66 of 1995 (LRA), the labour law fraternity would have assumed that in these circumstances most labour disputes would be referred to the dispute resolution structures established by the LRA and that common law claims would become a less attractive option for prospective litigants.[1] Despite the comprehensive coverage of labour legislation, in terms of both substance and reach, the contract of employment remains an important source of employment-related rights and obligations.[2] Indeed, there is a cogent argument that the contract of employment remains the foundation of labour law.[3] It is not uncommon for aggrieved employees to rely on common-law rights and bypass the jurisdiction of the Commission of Conciliation, Mediation and Mediation (CCMA) to deal with unfair dismissal and unfair labour practices and proceed to the high court concerning contracts of employment.[4]

The research explores the developments in this area of the labour law, with specific focus on the overlapping jurisdiction of the civil and labour courts in respect of the adjudication of employment contracts. It begins by observing the relationship between the employer and employee under the common law in comparison to the employment relationship under the labour law.

[1] Van Niekerk and Smith *Law@work* (2017) 89.
[2] *Ibid*.
[3] Vettori *The Employment Contract and the Changed World of Work* (2007) 21.
[4] *Jacot-Guilmarmod v Provincial Government, Gauteng* 1999 20 ILJ 1689 (T).

There is a need to have a legal certainty and appropriate resolution of the issue relating to the existing overlapping jurisdiction between the two judicial structures. Such certainty and resolution will inevitably contribute to the coherent development of labour law jurisprudence in this area of law and the existing legal jurisprudence in the Republic of South Africa.

The Constitutional Seventh Amendment Act[5] amended section 168(3) provides that the Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to that of a high court, except in respect of labour matters or competition matters to such extent as may be determined by an Act of Parliament. The effect of the amendment is to restore the intention reflected in section 162 of the LRA that the Labour Appeal Court be the final court of appeal in respect of matters arising from the labour court other than constitutional matters.[6]

However, the status of the high court in respect of adjudicating over contracts of employment emanating from labour disputes remains intact and somewhat controversial for the coherent development of the labour law.[7] The research will finally offer recommendations on how these challenges can be addressed, and also how best to resolve the overlapping jurisdiction between the civil and labour courts in adjudicating labour disputes pertaining to the contracts of employment.[8]

1.2 Research purpose and objectives

The main objective and purpose of this research is to investigate the jurisdictional overlap between the labour and civil courts when adjudicating labour disputes relating to the contracts of employment. This research investigates the overarching jurisprudential developments in this area of the law. This is done with a view to contribute to the existing legal jurisprudence and inform policy developments in this area and provide recommendations.

[5] 72 of 2012.
[6] Van Eck and Mathiba "Constitutional Seventeenth Amendment Act: Thoughts on the jurisdictional overlap, the restoration of the Labour Appeal Court and demotion of Supreme Court of Appeal" 2014 35 ILJ 863.
[7] *Ibid* 6.
[8] *Ibid.*

1.3 Relevance of this research

This research is relevant as it adds to the existing body of knowledge by providing insight into the overarching developments relating to the jurisdictional overlap between the labour and civil courts in adjudicating employment contracts. It revisits the definition of who is an employee under the LRA and the common law, the jurisdiction of the Commission for Conciliation, Mediation and Arbitration and the powers of the labour and civil courts.

1.4 Research questions

The following research question is investigated and addressed in this dissertation:-

- What are the developments regarding the jurisdictional overlap between the labour and civil courts in adjudicating labour disputes pertaining to the employment contract?

1.5 Research methodology

The research methodology employed in this dissertation is desktop research relying, for the most part, on a study of written texts such as literature, conventions, research reports, publications, legislations, case law and other relevant materials. These all relate to the topic in the context of international and national labour law.

1.6 Structure of the dissertation

Chapter One

Chapter one of the research provides an introduction and sets out the aims, relevance and purpose of this study, together with a contextual background. It provides an overview of the research question, research methodology and structure of the research.

Chapter Two

Chapter two of the research provides an overview of the nature of the employment relationship underpinned by labour law and the employment contract governed by

the common law. It further explores the development pertaining to the fixed contract under common law and labour legislation and the emergence of the principles of fairness as imported in to the employment contract by the judiciary. It revisits the debate regarding the administrative law and LRA over the adjudication of labour disputes.

Chapter Three

Chapter three of the research investigates the jurisdiction of various competent institutions to adjudicate over labour disputes. Such institution includes the Commission for Conciliation, Mediation and Arbitration, Labour and Labour Appeal and civil courts. It further investigates the overlapping jurisdiction between the labour and civil courts and the interpretation of various judgments delivered by the Supreme Court of Appeal and Constitutional Court.

Chapter Four

Chapter four of the research presents the conclusion and findings, and offer recommendations from the desktop study and research question.

CHAPTER TWO

2. THE EMPLOYMENT RELATIONSHIP REGULATED BY THE COMMON LAW AND LABOUR LEGISLATION

2.1 Introduction

Under the common law, the contract of employment serves as the cardinal pillar in determining the scope and the nature of the relationship between the parties, being the employer and employee.[9] The principles of the employment contract remain an important source of employment-related rights and obligations between the parties in regulating the relationship.[10] The essential elements of a contract of employment such as offer and acceptance are sufficient to identify an employee as distinct from an independent contractor.[11] The contract of employment governs the working relationship between the employer and the employee, and the law of contract, in so far as it regulates the formation of the contract and the broad limits of the freedom to contract, applies.[12] The principal obligations of the employee are to make his or her personal service available to the employer and to do so with due diligence and competence within the relationship of authority that employment creates, and in good faith.[13] In reciprocal, the employer's principal obligations are to pay the agreed remuneration, to provide safe working conditions, and to treat the employee with respect and dignity.[14]

The lawmakers brought some intervention in the realm of labour law by promulgating various pieces of legislation that created fundamental rights of employees, by affording minimum conditions of employment which parties to an employment relationship are automatically obliged to comply with under the Basic Conditions of Employment Act (BCEA).[15] However, such rights are primarily afforded to those who qualify as an employee under the LRA;[16] those who are specifically excluded from the definition of an employee under the LRA, such as independent contractors may seek legal recourse from the Constitution or common-law.

---

[9] Van Niekerk and Smith *Law@work* (2017) 90.
[10] *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC).
[11] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 13.
[12] *Ibid* 9.
[13] Van Niekerk and Smith *Law@work* (2017) 90.
[14] *Ibid*.
[15] 75 of 1997.
[16] Section 213 of the LRA.

2.2 The legal nature of the employment relationship under the common law

Common law is the basis on which the employment relationship was founded and is relevant to labour law.[17] The South African legal system is founded on common law, which consists of rules and principles reflected in the body of law called Roman-Dutch law and a collection of rules and principles developed by judges in previous cases.[18] The modern contract of employment was developed from the *locatio conductio operarum* and was distinguished from other forms of work.[19] This distinction was assimilated in the South African legal system in several of cases such as *Colonial Mutual Life Assurance v MacDonald*[20] and *Smit v Workmen's Compensation Commissioner*.[21]

The distinction is fundamental to labour law because of the different legal consequences which flow from the various forms of contracts.[22] For instance, under common law only employees could render their employers vicariously liable for unlawful acts committed in the course and within the scope of their employment.[23] Moreover, an employer owes employees the duty to take reasonable care of their health and safety whereas this duty is limited in respect of independent contractors.[24] Though South African courts followed the Roman law and adopted the *locatio conductio operarum* as the foundation of the employment relationship, they also inherited the problems associated with drawing the line between the contract of employment and the contract of work.[25] The basis of the distinction between an employee and an independent contractor under the common law is the contract of employment.[26] It is the foundation of the employer-employee relationship and Mischke submits that it is only by looking at the contract of employment that it can be determined if one is in an employment relationship or not.[27]

[17] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 13.
[18] Kerr *The Principles of the Law of Contract* (2016) 7.
[19] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 12.
[20] 1931 AD 412.
[21] 1979 1 SA 51 (A).
[22] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 12.
[23] Grogan *Workplace Law* (2011) 15.
[24] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 12.
[25] Brassey "The nature of employment" (1990) 11 *ILJ* 889 893.
[26] Kasuso *The Definition of an Employee under Labour Legislation: An Elusive Concept* (Thesis SA 2015) 14.
[27] Mischke and Basson *et al Essential Labour law* (2002) 38.

Grogan,[28] defines a contract of employment as—

> "a contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's services for reward, the master being able to supervise and control the servant's work."

Under common law, the contract of employment is founded on agreement, and the law of contract, in so far as it regulates the formation of the contracts and the broader limits on the freedom to contract, applies.[29] The principal obligations of the servant are to make his or her personal services available to the master and to do so with due diligence and competence within the relationship of authority that employment creates and in good faith.[30] Common law is premised on the principles of freedom to contract and work under any conditions parties are free to agree on any terms and conditions of employment, and such terms can either be express, tacit or implied.[31]

2.2.1 Who is defined as an employee under the common law?

The judiciary developed various tests under the common law to be used in ascertaining the status of the relationship between the employer and employee; such tests include the control test, organisation test, economic realities test and the dominant impression.[32] Benjamin stated that these tests were formulated by courts as they sought "a single definitive touchstone to identify the employment relationship".[33] Despite the fact that the tests have had a huge influence for years on how courts determine who is an employee under the common law, it has been accepted that there is no single factor that independently and conclusively determines the existence of an employment relationship.[34]

In *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers and others*,[35] the Court held that given the concession by the Uber drivers that there was no contractual arrangement between them and Uber SA, the commissioner ought to have upheld Uber SA's jurisdictional challenge.[36]

---

[28] Grogan *Workplace Law* (2011) 16.
[29] Van Niekerk and Smith *Law@work* (2017) 89.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] Benjamin "An accident of history: Who is an employee under South African labour law" 2004 *ILJ* 787.
[34] Van Niekerk and Smith *Law@work* (2017) 64.
[35] 2018 1 JOL 39496 (LC).
[36] *Ibid* 35.

The commissioner was bound (as is this court) by judgments of the Labour Appeal Court.[37] In which Ndlovu JA ruled as follows:

> "[I]t appears to me that, by its very nature, an employment relationship presupposes a working arrangement of a contractual nature between two or more persons, in circumstances where the rights, duties and obligations inter partes are legally enforceable".[38]

The absence of any contractual arrangement between the drivers and Uber SA was fatal to the drivers' claim to be employees of Uber SA.[39] The court held further that the Labour Appeal Court in applying the realities test took a different view and held that when a court determines the existence of an employment relationship, it must have regard to three primary criteria.[40] These are an employer's right to supervision and control, whether the employee forms an integral part of the organisation with the employer, and the extent to which the employee was economically dependent on the employer.[41] In its application of this approach to the facts of the case, the Labour Appeal Court made reference to what it termed the "reality" test, one which has regard to the substance of the relationship, rather than its form.[42]

In *MEC for the Department of Health, Eastern Cape v Odendaal*[43] it was held that the contract of employment although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices remains the basis of the employment relationship.[44] The court's judgment appears to affirm the opinion of Grogan that in spite of legislative intervention in the employment relationship, the common law of employment remains relevant.[45]

It is clear that the context of ascertaining as to who is an employee under the common law is not entirely dependent on a single test or rigid criteria. The essence of common law demand that first, there should be a determination on the basis of whether the parties are in an employment relationship. The common law tests can be used to ascertain the status of the parties in question, which consequently could result in either the parties being in an employment relationship or not.

---

[37] *Ibid* 35.
[38] *Universal Church of the Kingdom of God v Myeni* 2015 9 BLLR 918 (LAC).
[39] *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & others* (n 35) 72.
[40] *Ibid 39*.
[41] *Ibid*.
[42] *Ibid*.
[43] 2009 5 BLLR 470 (LC).
[44] *Ibid 43*.
[45] Grogan *Workplace Law* Six edition (2014) 26.

2.3 The legal nature of the employment relationship under labour legislation

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".[46]

Notably, a similar definition of employee has been included in the Basic Conditions of Employment Act, the Employment Equity Act and the Skills Development Act.[47] The definition of "employee" is the focal starting point in determining who falls within the nature and the scope of the employment relationship under the LRA and guaranteed rights and protection by the statutes.[48] The statutory definition of employee under the LRA consist two parts, part (a) and part (b).

Le Roux states that the first part of the definition has three requirements, namely, a person who works for another person, the person is not an independent contractor, and receives or is entitled to receive remuneration.[49] Benjamin argues that the terminology of contract is introduced through the exclusion of independent contractors in part (a) of the definition.[50]

Part (a) also excludes persons performing work for which they do not receive, or are entitled to receive, remuneration from the definition. Part (a) of the definition also excludes members of the church such as priests due to the spiritual nature of their work.[51] Due to the spiritual nature of their work there is no contractual intention with the result that they are not employees.[52]

Part (b) of the definition provides that any "person who in any manner assists in carrying on or conducting the business of an employer". Read in isolation, this is a broad description and could conceivably be read to extend the statutory conception

[46] Section 213 of the LRA.
[47] Skills Development Act 97 of 1998.
[48] Van Niekerk and Smith *Law@work* (2017) 6.
[49] Le Roux *The Regulation of Work, Wither the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (Thesis SA 2008) 195.
[50] Benjamin "An accident of history: Who is an employee under South African labour law" 2004 *ILJ* 787.
[51] *Universal Church of the Kingdom of God v Myeni, Mxolosi Justice* 2014 3 BLLR 295 (LC).
[52] Van Eck and Diedericks "Are Magistrates without remedy in terms of labour law?" 2014 *ILJ* 111.

of employment beyond the parties to an employment relationship.[53] However, the court has limited the scope of the definition by reading part (a) of the definition conjunctively with part (b), and by applying common-law criteria to determine the existence of an employment relationship in order to determine the existence or otherwise of an employment relationship.[54] Both subparagraphs (a) and (b) of the definition of "employee" have been held to exclude independent contractors.[55] Subparagraph (a) of the definition has been held to apply to a person who works for another person in terms of a common law contract of employment.[56] In other words, it is implicit that there must be a contract between the person claiming to be an employee and the person alleged to be the employer and secondly, the contract must be one of employment.[57]

The LRA introduces a presumption in favour of persons who work for or render services to any other person, regardless of the forms of any contract between them, of the status of 'employee', provided that one or more listed factors are present.[58]

2.3.1 Fixed-term contract of employment

Like any other contract, a fixed-term contract of employment is founded on the contract itself and the terms and conditions of the contract remain an important source of employment-related rights and obligation between the parties.[59] The essential elements of a contract of employment such as offer and acceptance are prerequisites to identify an employee as distinct from an independent contractor.[60] A party to a contract who fails to comply with the obligations derived from the contract is guilty of a breach.[61] Common law distinguishes between serious and less serious breaches of a contract.[62] The distinction between the material and less serious forms of breach is significant in relation to the remedies to which the aggrieved party to the contract is entitled.[63] Common law permits the party to terminate the contract of employment summarily (without notice) if a material breach had transpired.[64]

[53] Van Niekerk and Smith *Law@work* (2017) 64.
[54] *Borcherds v CV Pearce & Shewards t/a Lubrite Distributiors* 1991 12 ILJ 383 (IC).
[55] *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & others* (n 35) 67.
[56] *Ibid*.
[57] *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & others* (n 35) 67.
[58] Section 200 A of the LRA.
[59] *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC).
[60] Van Niekerk and Smith *Law@work* (2017) 100.
[61] *Ibid* 100.
[62] *Ibid*.
[63] *Ibid*.
[64] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A).

Subsequent to the breach of the contract of employment, an aggrieved party may elect to claim for specific performance of the contract or cancel it.[65] A claim for damages is also allowed as a remedy under common law only when actual loss is suffered by the aggrieved party.[66]

The common-law remedies are inadequate in the context of employment relationships for a number of reasons.[67] First, for many years the courts doubted whether specific performance could be enforced in personal relationships such as employment.[68] Secondly, it could be extremely difficult and time-consuming to prove actual damages suffered as a result of the unlawful termination of, in particular, indefinite contracts of employment.[69] Finally, common law did not recognise due process prior to the termination of a contract of employment as an enforceable right that could attract the remedies associated with breach of contract.[70]

With the advent of the Constitution of the Republic of South Africa, 1996, certain fundamental rights were entrenched including the right to fair labour practices.[71] Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. It was as a result of section 23 of the Constitution that the LRA was promulgated. The LRA codifies provisions concerning unfair dismissal and establishes statutory remedies for unfair labour practices and unfair dismissal.[72]

In contrast to the common law, the LRA recognises at least three potential fair reasons for dismissal, which is incapacity, misconduct and for operational reasons.[73] An employee claiming unfair dismissal must establish the existence of dismissal under the LRA. If the facts of a dismissal are disputed, the employee bears the onus to prove the existence of the dismissal.[74] Prior to the Labour Relations Amendment Act 6 of 2014 (LRAA), the wording of "dismissal" limited its application to the termination of contracts of employment and, thus extended protection against unfair dismissal to only those persons who were employed in terms of a common-law contract of employment.[75]

[65] Van Niekerk and Smith *Law@work* (2017) 100.
[66] *Meyers v Abramson* 1952 3 SA 121 (C).
[67] *Schierhout v Minister of Justice* 1926 AD 99.
[68] *Ibid.*
[69] Van Niekerk and Smith *Law@work* (2017) 110.
[70] *Ibid.*
[71] Section 23 of the Constitution of the Republic of South Africa, 1996.
[72] Van Niekerk and Smith *Law@work* (2017) 110.
[73] Section 188 of the LRA.
[74] Section 192(1) of the LRA.
[75] Section 186(1) of the LRA.

The effect of this limitation was that not all persons who qualified as "employees" for the purposes of the definition in section 213 of the LRA could claim to have been dismissed as contemplated in section 186(1)(a).[76] However, the section has been amended to incorporate the termination of "employee" by employer (as opposed to a contract of employment), neither summarily nor by giving notice of intention to terminate.[77]

The LRA recognises the remedies for unfair dismissal of an employee, reinstatement and re-employment are the primary remedies for unfair dismissal.[78] These primary remedies may not be granted under certain circumstances; however, if the employee does not wish to be reinstated (or re-employed) the remedy cannot be imposed upon that employee.[79] The employee may not be re-instated or re-employed if the circumstances are such that the continuation of the employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate, or the dismissal is only procedurally unfair.[80]

In a crucial development case of *Fedlife Assurance Ltd v Wolfaardt*,[81] the employee was employed in terms of a five year fixed-term contract. The employer terminated the fixed employment contract before the expiry of its period, and the employee approached the High Court on the ground that the employer breached the contract of employment as opposed to referring the dispute to the CCMA for conciliation.[82] The employer raised a point that the High Court lacked jurisdiction to entertain the dispute on the basis that the LRA provide for dispute resolution structures where the dispute could have been referred for conciliation.[83] The court rejected the employer's contention that it lacked jurisdiction.[84] The court held that while the labour court may have exclusive jurisdiction in respect of unfair dismissals the LRA "does not expressly abrogate an employee's common law entitlement to enforce contractual rights".[85] The court further accepted the possibility that the Constitution might have imported into the common law contract of employment the right not to be unfairly dismissed.[86]

[76] Van Niekerk and Smith *Law@work* (2017) 257.
[77] Labour Relations Amendment Act 6 of 2014.
[78] Section 193 of the LRA.
[79] Mathiba *The Conflict between Labour and Civil Courts in Labour Matters: A Critical Discussion on the Prevention of Forum Shopping* (Thesis SA 2012) 14.
[80] *Ibid*.
[81] 2000 12 BLLR 1301 (SCA).
[82] *Ibid par* 26.
[83] *Ibid par* 30.
[84] *Ibid par* 32.
[85] *Ibid par* 34.
[86] *Fedlife Assurance Ltd v Wolfaardt* (n 81) 27.

Following in the footsteps of *Fedlife*'s precedent, *Mogothle v Premier of the Northwest Province & another*[87] captures this development succinctly. The court emphasised the mutual relationship of trust and confidence that the common-law contract of employment imposes on both employers and employees. Common-law contracts of employment should be developed in the light of the Constitution, specifically to include a contractual right to a pre-dismissal hearing.[88] As was confirmed in *Old Mutual Life Assurance Co SA Ltd v Gumbi*,[89] "[i]t is clear, however, that coordinate rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2) to harmonise the common law into the Bill of Rights, which itself includes the right to fair labour practices section 23(1)".[90]

The *Gumbi* judgment was confirmed in *Boxer Superstores Mthatha & another v Mbenya,*[91] where the court decided that it has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include a right to a pre-dismissal hearing (*Old Mutual Life Assurance Co SA Ltd v Gumbi*). This means that every employee now has a common-law contractual claim and not merely a statutory unfair labour practice right to a pre-dismissal hearing.[92] In *Murray v Minister of Defence*,[93] the Supreme Court of Appeal derived a contractual right not to be constructively dismissed from what it held to be a duty on all employers of fair dealing at all times with their employees.[94] This obligation is a continuing obligation of fairness that rests on an employer when it makes decisions that affect an employee at work, and it was held by the court to have both a procedural and a substantive dimension.[95]

However, the development of the common law by the Supreme Court of Appeal has not been left uncriticised. It has been criticised, amongst other grounds, for opening the door to a dual jurisprudence in which common-law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA.[96]

---

[87] 2009 30 ILJ 605 (LC).
[88] *Ibid.*
[89] 2007 28 ILJ 1499 (SCA).
[90] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (n 89) 5.
[91] 2007 28 ILJ 2209 (SCA).
[92] *Boxer Superstores Mthatha & another v Mbenya* (n 91) 6.
[93] 2008 29 ILJ 1369 (SCA).
[94] *Murray v Minister of Defence* (n 93) 19.
[95] *Ibid* 19.
[96] Cheadle "Labour Law and the Constitution", a paper given to the annual SASLAW Conference in October 2007 and published in Current Labour Law 2008, the comments by Le Roux at 3 of the same

A clear inference should be derived that the Supreme Court of Appeal has unequivocally established a contractual right to fair dealing that binds all employers, a right that may be enforced by all employees both in relation to substance and procedure.[97] A contractual right to fair dealings strikes a balance for both the common law and labour legislation in a quest for fair labour practices.[98]

Du Toit[99] argues that the notion that the legislature did not intend to interfere with existing law when creating new statutory rights cannot be sustained any longer.[100] While this may have been true in the pre-constitutional dispensation, it can hardly be said of statutes which are enacted for the express purpose of giving effect to fundamental rights.[101] Pre-existing common-law remedies, by implication, are deemed not to be enough to meet this objective; and this being the case, there are no clear grounds for assuming that those remedies will continue to co-exist with the statutory remedies. Rather, the opposite view should be upheld.[102]

However, in *Makhanya v University of the Zululand*[103] the court held that it is not unusual for two rights to be asserted from the same facts.[104] A claimant could, for example, on the same facts, pursue the so-called LRA rights in the CCMA and labour court and common-law rights in the High Court.[105] However, in the United Kingdom, the House of Lords rejected arguments in favour of granting common-law damages in circumstances in which labour legislation provides for payment of compensation for unfair dismissal.[106]

In *SA Maritime Safety Authority v McKenzie,*[107] the court held that in so far as the LRA establishes a special remedy for unfair dismissal, it is not necessary to imply terms into the contract of employment to protect the dismissed employees.[108] Although the court was at pains to explain that civil courts retained the jurisdiction to entertain common-law disputes associated with contracts of employment.[109]

---

publication, and the article by Paul Pretorius and & Myburgh "A dual system of dismissal law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA)" published in (2007) 28 *ILJ* 2172.

[97] *Ibid*.

[98] Cheadle (96) 15.

[99] Du Toit "A common law hydra emerges from the forum-shopping swamp" 2010 ILJ 21.

[100] *Ibid* 86.

[101] *Ibid*.

[102] *Ibid*.

[103] 2009 8 BLLR 721 (SCA).

[104] *Makhanya v University of the Zululand* (n 103) 15.

[105] Van Niekerk and Smith *Law@work* (2017) 102.

[106] *Eastwood & another v Magnox Electric plc* 2004 35 UKHL 488.

[107] 2010 5 BLLR 488 (SCA).

[108] *SA Maritime Safety Authority v McKenzie* (n 107) 57.

[109] *Ibid* 58.

The *SA Maritime Authority* judgment seems to be taking a contrary view from the previous judgments such as *Fedlife* in concluding that the contract of employment has not been developed so as to include an implied or tacit term that gives an employee the right to a disciplinary enquiry prior to termination of the contract of employment.[110]

Section 77 of the BCEA confirms the fact that common-law remedies have not been all altogether destroyed by the statutory remedies.[111] The Act confers concurrent jurisdiction on the labour and high courts to "determine any matter concerning a contract of employment".[112] In *Rand Water v Soop*,[113] Rand Water dismissed two of its employees after a disciplinary hearing found that they had defrauded the employer of more than R8 million.

The employees claimed that they had been unfairly dismissed in terms of the LRA and Rand Water instituted a counterclaim in terms of section 77(3) of the BCEA for their breach of the contract of employment. The court relied on the principle that "it is an implied term of the contract of employment that the employee will serve the employer honestly and faithfully and ruled that it had jurisdiction to award contractual damages against employees when claims based on unfair dismissal and breach of contract relate to the set same of facts".[114]

The 2014 amendments brought by the LRAA in 2014 make a serious attempt to improve the protection extended to the fixed-term employees.[115] Section 198B (1) defines a fixed-term contract as a contract of employment on—

> "(a) the occurrence of specific event;
> (b) the completion of a specified event; or
> (c) a fixed date, other than the employee's normal or agreed retirement age, subject to section 3."

Van Niekerk argues that the definition has potential to cover the following three scenarios.[116] An election official's contract could, for instance, provide that it comes to an end once the national election results have been made available.[117]

---

[110] Van Niekerk and Smith *Law@work* (2017) 103.
[111] Act 75 of 1997.
[112] Section 77 of the BCEA.
[113] 2013 34 ILJ 576 (LAC).
[114] *Rand Water v Soop* (n 103) 16.
[115] Van Niekerk and Smith *Law@work* (2017) 76.
[116] Van Niekerk *and* Smith *Law@work (2017)* 80.
[117] *Ibid*.

Secondly, a construction worker's contract could provide that it terminates once all of the retention work on a dam-building project has been completed.[118] Thirdly, a contract can, for example, come to an end if it stipulates that it continues for a fixed term of three months or one year, as the case may be.[119]

Under the new LRAA, an employer may not conclude a fixed-term contract with an employee which exceeds three months in duration unless the employer can demonstrate a justifiable reason for the fixed term.[120] The LRA specifies a number of justifiable grounds which include but not limited to, the employee is replacing another employee who is temporarily absent from work, the employee is a non-citizen who has been granted a work permit for a specific period and if the employee is performing a seasonal work.[121]

The most significant consequence of employing a worker beyond three months without justification is that such employment is deemed to be indefinite employment.[122] Employees employed for longer than three months may not be treated less favourable than employees employed on an indefinite basis performing similar work unless there is a justifiable reason for differentiation in treatment.[123] It simply implies that the employee will be entitled to remain in the service of the employer until such time as the contract may be terminated on recognised grounds such as misconduct, operational requirements, incapacity or until the employee reaches his or her retirement age.[124]

However, it appears that in the field of administrative law, the test has been set as the Constitutional Court has laid down this principle clearly in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others*[125] as follows:

> "There are no two systems of law regulating administrative action -common law and the Constitution - but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, or in the doctrine neither of parliamentary sovereignty, nor in common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter.

[118] *Ibid*.
[119] *Ibid*.
[120] Section 198B(3) of the LRA.
[121] Section 198B(4) of the LRA.
[122] Section 198(5) of the LRA.
[123] Section 198B(8) of the LRA.
[124] Van Niekerk and Smith *Law@work* (2015) 78.
[125] 2004 4 SA 490 (CC).

> The extent to which common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution".[126]

The Promotion of Administrative Justice Act (PAJA),[127] like the LRA, was enacted to give effect to a constitutional right.[128] PAJA, like the LRA, contains no provision expressly abolishing the pre-existing common-law remedies; like the LRA it is silent on the issue. However, unlike the LRA, PAJA contains no provision giving it precedence over other laws in the event of conflict.[129]

The Constitutional Court in *Bato Star* had no difficulty in finding that; for all intents and purposes, provisions of PAJA had taken precedence over competing common law by necessary implication.[130] However, this is not the same position in terms of the LRA, as one would have thought, should apply to provisions of the LRA in relation to pre-existing common-law remedies.[131]

The forum shopping pertaining to the dispute between the employer and employee in respect of administrative law was eventually put to rest in *Chirwa v Transnet Ltd & others*,[132] the court held that, with reference to section 210 of the LRA, the LRA is the pre-eminent legislation in labour matters that are dealt with by that Act. The court further reasoned that:

> *"*Ms Chirwa is not afforded an election [between the LRA and PAJA]. She cannot be in a preferential position simply because of her status as a public sector employee. There is no reason why this should be so, as Section 23 of the Constitution, which the LRA seeks to regulate and give effect to, serves as the principal guarantee for all employees. All employees (including public service employees, save for the members of the defence force, the intelligence agency and the secret service, academy of intelligence and COMSEC), are covered by unfair dismissal provisions and dispute resolution mechanisms under the Act .The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion".[133]

Ncgobo J held that the LRA caters for all employees, whether employed in the public sector or private sector. Accordingly, the powers given to the labour court under section 158(1)(h) to review the executive or administrative acts of the state as an

[126] *Ibid* 22.
[127] Act 3 of 2000.
[128] Section 33 of the Constitution.
[129] Section 210 of the LRA.
[130] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* (n 125) 22.
[131] *Ibid*.
[132] 2008 29 ILJ 73 (CC).
[133] *Ibid* 66.

employer is a manifestation of the intention to bring public sector employees under the ambit of one comprehensive framework of law regulating employees from all sectors.[134]

More clarity was provided by the Constitutional Court in *Gcaba v Minister of Safety and Security & Others,*[135] the court held firstly that while the claim in *Fredericks* "removed it from the purview of labour law", that could not be the case with *Chirwa*. *Chirwa* was a labour matter and it had to be resolved through specialised processes (and fora) under the LRA.[136]

Further that the failure by the National and Provincial Commissioners of the South African Police Service to promote Mr Gcaba did not amount to administrative action because it had few or no direct implications for other citizens.[137] The Constitutional Court has indeed put to rest and clarified any misconception pertinent to the forum shopping in the labour and administrative law fraternity.

2.4 Conclusion

This chapter explored the origin of the developments relating to the overlapping jurisdiction between the labour and civil courts. From a case perspective, the problem seems to be compounded by the fact that the enactment of the LRA did not abrogate the civil courts to adjudicate over labour disputes pertaining to the contract of employment. Thus, the civil courts' persistence to adjudicate labour disputes based on contract of employment appears to be justified on the grounds of common law.

The *Fedlife* case and its predecessors such as *Mogothle, Gumbi* and *Boxer* captures this development and emphasises the mutual relationship of trust and confidence that the common-law contract of employment imposes on both employers and employees. The *Makhanya* judgment seems to have settled the matter for now, until the apex court otherwise makes an adequate assessment of the issue at hand. But the *Makhanya* judgment makes matters even worst by suggesting that a litigant can pursue two courses of action in two different structures emanating from a single act. However, the LRAA has brought some protection regarding the fixed-term contract which could be a set-off for those seeking for a remedy within the structures created

[134] *Ibid* 102.
[135] 2009 12 BLLR 1145 (CC).
[136] *Ibid* 66.
[137] *Ibid*.

by the LRA.

However, the conflict has been settled between the administrative and labour law matters. The Constitutional Court put the debate to bed in *Bato Star,* by stating that there are no two systems of law regulating administrative action – common law and the Constitution – but only one system of law grounded in the Constitution.[138] The court's power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself.[139]

The court in *Makhanya* judgment summarised the Labour Forums have exclusive power to enforce LRA rights (to the exclusion of the high courts), the high court and the Labour Court both have the power to enforce common law contractual rights and the high court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.[140]

The debate relating to the adjudication of labour disputes emanating from the contract of employment by both courts is not yet settled. Section 77 of the BCEA confirms the fact that common-law remedies have not been abolished by the statutory remedies. With this in mind, both courts will continue to adjudicate over the labour disputes pertinent to contracts of employment.

[138] *Ibid* 125.
[139] *Ibid*.
[140] *Makhanya v University of Zululand* (n 103) 18.

CHAPTER THREE

3. THE JURISDICTION OVER LABOUR DISPUTES

3.1 Introduction

The LRA created institutions such as Labour and Labour Appeal Courts, CCMA and bargaining council to adjudicate and resolved labour disputes.[141] The main objective for the establishment of specialist dispute resolution structures included the need for expeditious, efficient and affordable procedures, and easily accessible, specialist but informal institutions.[142] Speedy justice is, of course, one of the fundamental purposes of the LRA.[143] It is also a convenient clarion call.[144] But like all clarion calls, "speedy justice" runs the risk of becoming yet another platitude serving not to promote the cause but, on the contrary, to mask a reality in which the expeditious resolution of labour disputes remains elusive.[145] For example, in the Johannesburg Labour Court, parties to three-day trials and opposed reviews ready for set down have to wait at least 12 months to be heard.[146]

3.2 Commission for Conciliation, Mediation and Arbitration

The CCMA is established as a juristic person with the mandate to resolve labour disputes.[147] It has national jurisdiction[148] with footprints in all nine provinces in the Republic of South Africa.[149] The CCMA's statutory functions include, among others:

- attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;[150]
- if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if[151] – this Act requires arbitration and any party to the

[141] Van Niekerk and Smith *Law@work* (2017) 471.
[142] See The Complete Wiehahn Report Part 1-6 (1982).
[143] Van Niekerk "Speedy social justice: Streamlining the statutory dispute resolution processes" 2015 ILJ 837.
[144] Van Niekerk (143) 3.
[145] *Ibid.*
[146] *Ibid.*
[147] Section 112 of the LRA.
[148] Section 114(1) of the LRA.
[149] Section 114(3) of the LRA.
[150] Section 115(1)(a) of the LRA.
[151] Section 115(1)(b) of the LRA.

dispute has requested that the dispute be resolved through arbitration; or[152]

- all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission;[153]
- assist in the establishment of workplace forums in the manner contemplated in Chapter V; and[154]
- compile and publish information and statistics about its activities.[155]

The LRA empowers the CCMA to give advice to the parties, assist them to get legal advice, make rules pertaining to various proceedings, supervise ballots, publish guidelines and conducting and publishing research.[156]

However, the CCMA has previously declined to entertain certain labour disputes referred to it, citing lack of jurisdiction. In *Kylie v CCMA & others,*[157] the CCMA confined its jurisdictional powers within the ambit of the LRA and its definition of employee, the commissioner ruled that the CCMA did not have jurisdiction to adjudicate over the matter. However, *Kylie* was vindicated by the Labour Appeal Court in which it was concluded that on the basis of the constitutional guarantee of labour rights, she was in an employment relationship notwithstanding the non-existence of a valid contract of employment.[158] The Labour Appeal Court concluded that the relationship in question fell within the scope of application of the LRA.[159]

The Labour Appeal Court's ruling adopted a purposive interpretation of the LRA in giving effect to the constitutional rights entrenched in section 23.[160] The ruling paved a way forward for the CCMA to adopt the purposive interpretation when dealing with cases of such nature, with the intention to protect the rights of the vulnerable workers. In principle, the CCMA had the jurisdiction to dispose of the referral that was made by *Kylie*. What the CCMA ought to have done from the onset was to ascertain if *Kylie* was in an employment relationship, notwithstanding the non-existence of the valid contract of employment. To ascertain if *Kylie* was in an employment relationship, the court suggested that the proper methodology to be used was the purposive interpretation of the LRA to in giving effect to section 23 of constitution.

[152] Section 115(1)(b)(i) of the LRA.
[153] Section 115(b)(ii) of the LRA.
[154] Section 115(c) of the LRA.
[155] Section 115(d) of the LRA.
[156] Section 115(2) of the LRA.
[157] 2007 4 BLAR 338 (CCMA).
[158] Van Niekerk and Smith *Law@work* (2017) 82.
[159] *Ibid*.
[160] *De Beer NO v North-Central Council and South-Central Local Council & others* 2002 1 SA 429 (CC).

3.3 Jurisdiction of the labour courts

The LRA established the labour court to adjudicate over labour issues.[161] The court is perceived to act as a court of equity with an equitable jurisdiction to take account of principles of fairness and other extra-legal considerations that would not be taken into account by a civil court, to depart from legal rules, and to refuse to allow a party to enforce their full common-law rights or remedies where necessary to ensure a fair and equitable outcome.[162] Section 157 of the LRA stipulates that:

> "1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.[163]
>
> 2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from[164]—
>
> a) employment and from labour relations;[165]
>
> b) any dispute over the constitutionally of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and[166]
>
> c) the application of any law for the administration of which the Minister is responsible."[167]

The BCEA[168] also empowers the labour court to adjudicate over appeals against a compliance order made by the Director General of Labour and the Director General may apply to the court to have a compliance order made an order of court.[169] The EEA also empowers the labour court to adjudicate over disputes pertaining to the unfair discrimination should the conciliation fail by the CCMA.[170] In *Mondi Paper v Printing Wood and Allied Workers Union & Others*,[171] the court had to determine the jurisdiction of the high court *vis-à-vis* the labour court in interdicting employees who engaged in improper picketing. The court held that the onus to show that the jurisdiction of the high court has been ousted (or excluded as the wording of section

[161] Section 151 of the LRA.
[162] Idensohn "The Labour Courts' jurisdiction over claims for alleged employee breaches of fiduciary duty" 2015 36 *ILJ* 2495.
[163] Section 157(1) of the LRA.
[164] Section 157(2) of the LRA.
[165] Section 157(2)(a) of the LRA.
[166] Section 157 (2)(b) of the LRA.
[167] Section 157(2)(c) of the LRA.
[168] Act 75 of 1997.
[169] Section 72 of the BCEA.
[170] Section 10(2)(7) of the EEA.
[171] 1997 18 ILJ 84 (D).

157 dictates) is a very heavy one.[172] This approach was adopted in *Sappi Fine Papers v PPWAWU*.[173] In *Fienberg v African Bank Ltd*,[174] the High Court held that the conduct of a disciplinary hearing was not a matter in respect of which the LRA conferred exclusive jurisdiction to review the disciplinary proceedings instituted by an employer against one of its employee.[175]

In *Fredericks & others v MEC for Education & Training, Eastern Cape & others*[176] it was held that the labour court does not have exclusive jurisdiction in all labour matters and that the high court retains jurisdiction in labour disputes involving the violation of constitutional rights which have not been assigned to the exclusive jurisdiction of the labour court.[177]

In essence, the labour court has the jurisdiction to adjudicate matters contemplated in section 157 of the LRA, which includes the exclusive jurisdiction in respect of all matters that elsewhere in terms of this LRA or in terms of any other law are to be determined by the labour court.[178] The labour court also has concurrent jurisdiction with the high court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution.[179] The "equitable jurisdiction" of the court to take account of principles of fairness and other extra-legal considerations that would not be taken into account by a civil court, to depart from legal rules, and to refuse to allow a party to enforce their full common-law rights is expanded to protect vulnerable employees.[180]

The labour court has the jurisdiction to review awards issued by the CCMA under section 145[181] and any other functions performed in terms of the LRA may be reviewed in terms of section 158(1)(g).[182] Under section 145 of the LRA, any party who alleges a defect in respect of arbitration proceedings under the auspices of the CCMA may apply to the labour court for an order setting the award aside.[183] The application must be filed within six weeks of the date that the arbitration award is

[172] *Mondi Paper v Printing Wood and Allied Workers Union & Others* (n 171) 33.
[173] 1998 19 ILJ 286 (SE).
[174] 2004 21 ILJ 217 (LC).
[175] See *Mhlambi v Maatjhabeng Municipality and another* 2003 24 ILJ 1659 (O).
[176] 2002 23 ILJ 81 (CC).
[177] *Fredericks & others v MEC for Education & Training, Eastern Cape & others* (n 176) 84.
[178] Section 157 of the LRA.
[179] Section 157(2) of the LRA.
[180] Van Niekerk "Speedy social justice: Streamlining the statutory dispute resolution processes" (n 143) 5.
[181] Section 145(1) of the LRA.
[182] Section 158(1)(g) of the LRA
[183] Van Niekerk and Smith *Law@work* (2017) 488.

served on the party who wishes to take the matter to review.[184] The labour court has the jurisdiction to condone, however, on good cause shown, the late filing of an application for review.[185] Section 145(2) describes the defects that are reviewable and it covers the situation where the commissioner:

(1) committed misconduct with regard to the duties of a commissioner as arbitrator;[186]
(2) committed a gross irregularity in the conduct of the arbitration proceedings;[187] or
(3) exceeded his or her powers as arbitrator.[188]

The courts initially grabbled with the narrow grounds of review until the Labour Appeal Court intervened in *Carephone (Pty) Ltd v Marcus NO & others*[189] and *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*.[190] The court categorised the CCMA as an organ[191] of state that exercises public power and functions when it resolves disputes in terms of the LRA.[192] The important implication of the judgment is that the Bill of Rights and the Constitutional rights to fair administrative action bind the CCMA when performing its dispute resolution functions.[193] The court held that the constitutional right to fair administrative action has broaden the scope of judicial review in respect of the arbitration award in as far as an element of rationality or justifiability must be present. This calls on the labour court to consider if the reasons given for the award are rational and justifiable.[194]

In *Rustenburg Platinum Mines Ltd v CCMA & others*[195] the Supreme Court of Appeal had held that CCMA arbitration awards constitute administrative action and, as such, they are reviewable in terms of PAJA, and that PAJA overrides the more limited provisions of section 145 of the LRA. The Constitutional Court upheld an appeal against the Supreme Court of Appeal's judgment.[196] The majority of the Constitutional Court judges found that the arbitration by the CCMA constitute an

[184] Section 145(1)(b) of the LRA.
[185] Section 145(1A) of the LRA.
[186] *Coates Brothers v Shanker* 2003 12 BLLR 189 (LAC).
[187] *MEC Public Works, Northern Province v CCMA & others* 2003 10 BLLR 1027 (LC).
[188] *Le Roux v CCMA & others* 2000 6 BLLR 680 (LC).
[189] 1998 11 BLLR 1093 (LAC).
[190] 2001 9 BLLR 1011 (LAC).
[191] Section 239 of the Constitution.
[192] *Carephone (Pty) Ltd v Marcus NO & others* (n 189) 11.
[193] Section 33(1) of the Constitution.
[194] *Carephone (Pty) Ltd v Marcus NO & others* (n 189) 36.
[195] 2006 11 BLLR 1021 (SCA).
[196] *Sidumo & others v Rustenburg Platinum Mines Ltd & others* 2010 31 ILJ 1556.

administrative action within the meaning of section 33 of the Constitution.[197] However, the court held that PAJA does not apply to the review under section 145(2) of the LRA. Section 145 is a specialised provision that trumps the more generalised provisions of PAJA.[198]

3.4 Jurisdiction of the Labour Appeal Court

The Labour Appeal Court is established in terms of the LRA as the court of equity and law,[199] and constituted before three judges designated by the judge president.[200] A decision on which two judges agreeing is the decision of the court.[201] Subject to the Constitution, the Labour Appeal Court may hear and determine all appeals against the final judgments and orders of the labour court, and may decide any question of law that is reserved for it to decide.[202]

The Labour Appeal Court is vested with the power to receive further evidence, remit the matter to the labour court with instructions, or confirm, amend or set aside the judgment or order that is the subject of the appeal. The judgments of the Labour Appeal Court are legally binding to the labour court and the CCMA.[203]

3.5 Overlapping jurisdiction

Constitutionally, the high court may decide any constitutional matter except a matter that only the Constitutional Court may decide or is assigned by an Act of Parliament to another court of a status similar to a high court and any other matter not assigned to another court by an Act of Parliament.[204] Over and above the high court's constitutional power to decide constitutional matters or matters assigned to it by an Act of Parliament, the high court has jurisdiction under the auspice of common law to adjudicate over labour disputes pertaining to the employment contract.[205] The Supreme Court of Appeal may decide appeals in any matter, excluding labour appeal matters.[206]

[197] The Constitution of the Republic of South Africa, 1996.
[198] *Sidumo & others v Rustenburg Platinum Mines Ltd & others* (n 196) 57.
[199] Section 167(1) of the LRA.
[200] Section 168(2) of the LRA.
[201] 2010 5 BLLR 488 (SCA).
[202] Section 173(1) of the LRA.
[203] Section 182 of the LRA.
[204] Section 169 of the Constitution.
[205] *Ibid* 111.
[206] *Ibid* 6.

It is the highest court of appeal except in constitutional matters, and may decide only appeals, issues connected with appeals; and any other matter that may be referred to it in circumstances defined by an Act of Parliament.[207]

Both the high court and Supreme Court of Appeal have had a bite of the cherry in adjudicating over labour disputes relating to employment contract and the Supreme Court of Appeal emerged to have endorsed the developments that suggest that the high court has retained common-law powers to adjudicate over such labour disputes emanating from the employment contract.[208]

In a series of cases such as *Gumbi and Mthatha & another v Mbenya,*[209] the Supreme Court of Appeal confirmed that employees could refer a dispute regarding pre-dismissal procedure to the high court on contractual grounds. Such a matter, the court held, must be labelled as one dealing with the "unlawfulness" of the termination of a contract of employment, whereas a dispute referred to the CCMA and the labour court will be classified as un "unfair dismissal" dispute.[210] In deciding whether a contract of employment had been terminated, it can be accepted that the lack of fair pre-dismissal procedures renders the termination "unlawful".[211]

Section 183 of the LRA provides that "subject to the Constitution and despite any other law" no further right of appeal lies from the Labour Appeal Court. The court initially adopted the view that there was no right of appeal from the Labour Appeal Court to the Supreme Court of Appeal.[212] This view was, initially at least, not sustained.[213] It was overruled by the Constitutional Court in the matter of *NEHAWU V University of Cape Town & others,*[214] and then by the Supreme Court of Appeal,[215] on the basis that section 168 of the Constitution established the Supreme Court of Appeal as the highest court of appeal except in constitutional matters.[216] The Constitutional Seventeenth Amendment Act 72 of 2012 (CSAA) amended section 168(3) to provide that the Supreme Court of Appeal "may decide appeals in any matter arising from the High court of South Africa or a court of a similar status [that of] the High Court of South Africa, except in respect of labour matters or competition matters to such extent as may be determined by an Act of Parliament".

[207] Section 168(3) of the Constitution.
[208] *Jacot-Guillarmod v Provincial Government, Gauteng* 199 20 ILJ 1689 (T).
[209] 2007 8 BLLR 693 (SCA).
[210] *Ibid* 19.
[211] *Ibid*.
[212] *Kem-Lin Fashions CC v Bruton & another* 2001 7 BLLR 597.
[213] Van Niekerk and Smith *Law@work* (2017) 495.
[214] 2003 ILJ 95 (CC).
[215] See *Chevron Engineering (Pty) Ltd v Nkambule & others* 2004 3 BLLR 214 (LC).
[216] *NUMSA and others v Fry's Metals* (Pty) Ltd 2000 5 BLLR 430 (SCA).

Van Eck and Mathiba argue that the effect of these amendments is to restore the intention reflected in section 162 of the LRA that the Labour Appeal Court be the final court of appeal in respect of matters arising from the labour court other than constitutional matters.[217] The CSAA attempts to make the LRA (as it stands) compatible with the Constitution and the amendments seek to resolve the problems highlighted in *Langeveldt, NEHAWU, Chevron* and *Fry's Metals*.[218] The LRA's provision that the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the labour court in respect of the matters within its exclusive jurisdiction will no longer falls foul of constitutional scrutiny as long as it is understood that the Constitutional Court is the highest court.[219]

The constitutional amendment has reinstated the status of the Labour Appeal Court as the apex court in relation to all labour law matter. The amendment is in line with the objectives of the drafters of the LRA. The insistence of the Supreme Court of Appeal to adjudicate the labour appeal dispute as the highest court of appeal was only based on the constitutional mantra, which the drafters of the Constitution did not envisage. The creation of specialist tribunals and courts under the auspices of the LRA was intended to preserve and protect the rights of employees and workers and resolve disputes expeditiously, something that was missing during the era of the Supreme Court of Appeal.[220]

Section 157(1) of the LRA provides that, subject to the Constitution and unless otherwise provided by the LRA, the labour court has exclusive jurisdiction in respect of all matters that are to be determine by the court, either in terms of the LRA or in terms of any other law.[221] In terms of section 157(2), the labour court has concurrent jurisdiction with the high court in respect of any fundamental rights entrenched in the Constitution, arising from employment and labour relations, in any dispute about the constitutionality of any executive or administrative act by the state in its capacity as an employer, and the application of any law for which the Minister of Labour is responsible. Van Niekerk argues that there are two broad views on the interpretation and application of section 157.[222] The first is one that is inclined to give effect to the purpose of the LRA, which is to have labour disputes adjudicated solely within the

[217] See Van Eck and Mathiba "Constitutional Seventeenth Amendment Act: Thoughts on the jurisdictional overlap, the restoration of the Labour Appeal Court and demotion of Supreme Court of Appeal" (2014) 35 *ILJ* 863.
[218] *NUMSA and others v Fry's Metals* (n 216).
[219] *Ibid*.
[220] *Ibid*.
[221] Section 157(1) of the LRA.
[222] Van Niekerk and Smith *Law@work* (2017) 494.

structures created by the LRA.[223] The second, more literal reading of the section is to regard only those matters specifically assigned to the labour court by the LRA as being excluded from the high court's jurisdiction.[224] In the case of *Feinberg v Africa Bank Ltd*,[225] it was held that the conduct of the disciplinary hearing was not a matter in respect of which the LRA conferred exclusive jurisdiction on the labour court, hence, the high court is not deprived of the power to review the disciplinary proceedings instituted by an employer against one of its employees.[226]

There is no clarity from the apex court pertaining to the adjudication of contractual claims emanating from the employment contracts. However, the Supreme Court of Appeal has long set the precedent that the high court retained its jurisdiction to adjudicate over contractual disputes concerning contract of employment.[227] In *Old Mutual Life Assurance Co SA v Gumbi*[228] the court affirmed the referral of disputes pertaining to pre-dismissal proceedings to the high court under the disguise of contractual basis alleging unlawful termination of a contract of employment. In contrast, disputes relating to unfair dismissal could be referred to the auspices created by the LRA for adjudication. But this approach was somewhat brought under scrutiny by the Constitutional Court in *Chirwa v Transnet Ltd & others.*[229] The court held that dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the labour court.[230]

Ncgobo J held that the achievement of the objective to develop a coherent and evolving jurisprudence in labour and employment relations lies in the ability of the labour court to deal with all matters arising from labour and employment relations, whether such matters arise from the LRA or directly from the provisions of the Bill of Rights.[231] By extending the jurisdiction of the labour court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights, which arise from employment and labour relations, section 157(2) has brought within the reach of the labour court, employment and labour relations disputes that arise directly from the

[223] *Ibid* 222.
[224] *Ibid.*
[225] 2004 21 ILJ 217 (LC).
[226] *Mhlambi v Matjhabeng Municipality and others* 2003 24 ILJ 1659 (O).
[227] *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 20 ILJ 1689 (T).
[228] 2007 8 BLLR 699 (SCA).
[229] 2008 29 ILJ 73 (CC).
[230] *Chirwa v Transnet Ltd and others* (n 229) par 116.
[231] *Ibid* par 117.

provisions of the Bill of Rights.[232] The power of the labour court to deal with such disputes is essential to its role as a specialist court that is charged with the responsibility to develop coherent and evolving employment and labour relations jurisprudence.[233] Section 157(2) enhances the ability of the labour court to perform such a role.[234]

Ncgobo J emphasised that the objective to establish a one-stop shop for labour and employment relations is apparent in other provisions of the LRA.[235] Section 157(3) of the LRA confers on the labour court jurisdiction to review arbitrations conducted under the Arbitration Act of 1965 "in respect of any dispute that may be referred to arbitration in terms of the LRA". The labour court has the power to review the performance of any function which is provided for in the LRA; and to review any decision taken or any act performed by the State in its capacity as an employer.[236] All these provisions are designed to strengthen the power of the labour court to deal with disputes arising from labour and employment relations.[237] The judge records that in *Boxer Superstores*, the Supreme Court of Appeal had considered that what mattered was not the form of the employee's complaint, but rather the substance.[238]

Ncgobo J observed that the employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights.[239] It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2).[240] To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA.[241] This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case "for practical considerations".[242] What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a

[232] *Chirwa v Transnet Ltd and others* (n 229) par 117.
[233] *Ibid*.
[234] *Ibid* par 118.
[235] *Ibid*.
[236] Section 157 of the LRA.
[237] *Chirwa v Transnet Ltd and others* (n 229) par 119.
[238] *Ibid* par 124.
[239] *Ibid*.
[240] *Ibid* par 125.
[241] *Ibid*.
[242] *Ibid*.

right entrenched in the Constitution.[243]

At a policy-orientated level, the *Chirwa* judgment might be read to require that all employment-related disputes involving allegations of unfair conduct by both public and private sector employees ought to be dealt with within the jurisdiction of the dispute resolution institutions and mechanisms established under the LRA.[244] This reading of *Chirwa* judgment requires that in a labour-related dispute, any remedy established by the LRA must be pursued to the exclusion of any other that might previously have been thought to exist.[245] Put another way, it suggests that the objective of the LRA was to be exhaustive of all rights arising from employment.[246]

The interpretation in the *Chirwa* judgment has spawned a complex and controversial debate; this much is evident from the judgments of the full bench of the High Court in *Nonsamo Cleaning Service v Appie & others*[247] and *Nakini v MEC, Department of Education, Eastern Cape Province & another.*[248] In the judgment by the SCA in *Makambi v MEC Department of Education, Eastern Cape*,[249] the court held that the Constitutional Court judgment in *Chirwa* is an obvious and clear endorsement of the virtues of the mechanisms, institutions and remedies created by the LRA and the merits of what Skweyiya J (referring to the explanatory memorandum accompanying the LRA) termed a "one-stop shop" for all labour-related disputes established by the statute.[250]

To this end, the *Chirwa* judgment resolved one critical legal issue which had to do with the jurisdiction of civil courts in adjudicating over labour law disputes pleaded under the ambit of PAJA.[251] Besides, the *Chirwa* judgment strongly support the pursuit of labour disputes under the mechanisms created by the LRA, the judgment does not imply to do away with the common-law rights which could be pursued in a civil court by any litigant.[252] To suggest that the *Chirwa* verdict had abolished employees' common-law rights would constitute an unfounded misconception and is contrary to the provisions of the BCEA[253] which confers concurrent jurisdiction on the labour court with the civil courts "to hear and determine any matter concerning a

[243] *Chirwa v Transnet Ltd and others* (n 229) 98.
[244] Du Toit "A common law hydra emerges from the forum shopping swamp" (n 99) 16.
[245] *Ibid*.
[246] *Ibid*.
[247] 2008 9 BLLR 901 (CK).
[248] 2008 5 BLLR 489 (CK).
[249] 2008 8 BLLR 711 (SCA).
[250] *Ibid*.
[251] Du Toit "A common law hydra emerges from the forum shopping swamp" (n 99) 18.
[252] *Ibid*.
[253] Section 77(3) of the BCEA.

contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract".[254] Thus, the judgment does not suggest the consequence of restricting an employee to the remedies contained in the LRA. The employees are at liberty to seek any contractual remedy in civil courts relating to labour disputes emanating from unlawful termination of employment contract.

In *Gcaba v Minister for Safety & Security & others,*[255] the Constitutional Court confirmed that the LRA should be a litigant's first port of call in employment disputes. The only way to reconcile the provisions of section 157(2) and harmonise them with those of section 157(1) and the primary objects of the LRA, is to give section 157(2) a narrow meaning.[256] The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights.[257] In *Gcaba*, Van der Westhuizen J ruled that the applicant's claim was not based on administrative action and ordered that it fell within the exclusive jurisdiction of the labour court.[258] More significantly for the present purposes, however, it is the way in which the court sought to reconcile the tension between the *Fredericks* and *Chirwa* judgments.[259] Recapitulating its reasoning in both matters at some length emphasising the importance of precedent in the interests of legal certainty, the judgment reiterates the "narrow" interpretation of section 157(2) of the LRA as laid down by Ncgobo J in *Chirwa*.[260]

It also reiterates the argument against forum-shopping at the expense of "the finely tuned dispute-resolution structures created by the LRA", to that extent fortifying the case for a narrow interpretation of the role of the high court in labour matters in terms of section 157(1).[261] The judgment "confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it".[262] That includes, amongst other things, reviews of the decisions of the CCMA under section 145. Section 157(1) should, therefore, be given expansive content to protect the special status of the labour court, and section 157(2) should not be read to permit the high court to have jurisdiction over these matters as well.[263] Besides reiterating the argument against forum shopping, the court did not expressly excluding the right of an employee to pursue a contractual claim, either in labour

[254] Du Toit "A common law hydra emerges from the forum shopping swamp" (n 89) 23.
[255] 2009 12 BLLR 1145 (CC).
[256] *Ibid* par 37.
[257] *Ibid* par 38.
[258] *Ibid*.
[259] Ibid 39.
[260] *Ibid*.
[261] *Ibid* 89 para 25.
[262] *Ibid*.
[263] *Ibid*.

court by virtue of the provisions of BCEA or in civil court. However, silent as to the validity of contractual claims (falling within the concurrent jurisdiction of the labour court and the civil courts) competing with statutory remedies (excluded from the jurisdiction of the high court), for the very good reason, no doubt, that this was not a question it was called upon to answer.[264]

The LRA does not intend to destroy causes of action or remedies derived from common law and, section 157 should not be interpreted to do so.[265] Where a remedy lies in the high court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much.[266] Where the judgment of Ncgobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the high court and equality court can no longer be adjudicated by those courts. If only the labour court could deal with disputes arising out of all employment relations, remedies would be wiped out.[267]

Cheadle's view was endorsed by the court in *Makhanya*.[268] He points out that the majority in *Chirwa* did two things, one of which was to "decide as a matter of constitutional interpretation to limit the scope of the right to administrative action so as to exclude labour practices".[269] He advances persuasive grounds for concluding that it was correct. In that respect the author lays heavy store on what he considers to be a policy encapsulated in the LRA that grievances that an employee in the public sector might have arising from dismissal should be the subject only of claims under the LRA.[270]

Against the background of *Chirwa* and *Gcaba*, the Supreme Court of Appeal in *Makhanya* held that it is not an unusual for two rights to be asserted on the same facts.[271] A claimant in each case is capable of pursuing both claims in the labour court, either simultaneously or in succession (because they were different claims).[272] In one claim the labour court (as one of the labour forums) would be asked to

[264] *Makhanya v University of Zululand* (n 103) par 60.
[265] *Ibid* 61.
[266] *Ibid*.
[267] *Chirwa v Transnet Ltd and others* (n 229) par 136.
[268] *Makhanya v University of Zululand* (n 103) par 73.
[269] *Ibid*.
[270] *Ibid*.
[271] *Ibid*.
[272] *Makhanya v University of Zululand* (n 103) 38.

enforce an LRA right (falling within the exclusive power of the labour forums).[273] In the other claim it would be asked to enforce a right falling outside the LRA (but within the concurrent jurisdiction of the labour court).[274] Similarly the claimant would have been capable of bringing one claim (the claim to enforce an LRA right) in a labour forum and to bring the other claim (for enforcement of the right arising outside the LRA) simultaneously, or sequentially, in the high court.[275]

The court expressed its observation that none of the above should evoke surprise, that it is the natural consequence of a claimant asserting two claims, each of which is capable of being brought in a different forum.[276] That two claims arising from common facts might be asserted, whether separately or in the alternative, is not unusual. Whether the assertion will succeed is another matter, but that is irrelevant to the jurisdictional question.[277]

Du Toit stated that:

> "[T]he above position is advocated not simply because it is seen as being in accordance with the principles of constitutionalism. Taking a step back, it can be argued that the two approaches that manifested in the SCA judgments discussed above as opposed to that adopted in Chirwa and Mohlaka emanate from different conceptions of the purpose of labour law. In Fedlife the SCA proceeded from the role of labour law in protecting employees against the employer's common-law right to terminate the contract at will. The judgment appears to be premised on the need to maximize such protection and, hence, the logic of not removing a contractual remedy that is available to certain employees. Broadly speaking, this approach is in line with the traditional explanation of the role of labour law as developed by Kahn-Freund[278]: The relation between an employer and an isolated employee or worker', as it has famously been put, 'is typically a relation between a bearer of power and one who is not a bearer of power'."[279]

The court observed that both in *Chirwa* and *Gcaba* the right that was (and is now) asserted, is not an LRA right, but is one that falls within the ordinary power of the high court to enforce.[280] In this case it falls within the ordinary power that the high courts have to enforce contractual rights (expressly preserved by the BCEA).[281] In *Chirwa* it fell within the ordinary power that the high courts have to enforce constitutional rights (expressly conferred by the Constitution and preserved in

[273] *Ibid.*
[274] *Ibid*.
[275] *Ibid*.
[276] *Ibid* 39.
[277] *Ibid*.
[278] Davies and Freedland Kahn-Freund *Labour and the Law* (1983).
[279] Du Toit (n 99) 18.
[280] *Makhanya v University of Zululand* (n 103) 78.
[281] *Ibid*.

section 157(2) of the LRA).[282] Controversially, the court concluded that once more, so it seems, *Chirwa*, like all the cases that preceded it, was not about jurisdiction at all.[283]

It was about whether there was a good cause of action.[284] It is submitted that the less said about jurisdiction in such cases the better because, once that red-herring is out of the way, courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA.[285]

Section 183 of the LRA provides that, subject to the Constitution and despite any other law, no further appeal lies from the Labour Appeal Court. The Labour Appeal Court initially adopted the view that there was no right of appeal from the Labour Appeal Court to the Supreme Court of Appeal.[286] However, the Supreme Court of Appeal and the Constitutional Court previously ruled that on the basis of section 168 of the Constitution the Supreme Court of Appeal was created as the highest court of appeal except in constitutional matters.[287]

In the Constitutional Seventh Amendment Act,[288] section 168 (3) was amended to provide that the Supreme Court of Appeal may decide appeals in any matter arising from the high court of South Africa or a court of a status similar to that of a high court, except in respect of labour matters or competition matters to such extent as may be determined by an Act of Parliament. The effect of the amendment is to restore the intention reflected in section 162 of the LRA that the Labour Appeal Court be the final court of appeal in respect of matters arising from the labour court other than constitutional matters.[289]

3.6 Conclusion

This chapter explored the jurisdiction to adjudicate over labour disputes and the jurisdictional overlap between the labour and civil courts pertaining to the adjudication of labour matters. It is evident that civil courts have retained their common-law duty to adjudicate over the contract of employment disputes as

[282] *Ibid* 78.
[283] *Ibid* 90.
[284] *Makhanya v University of Zululand* (n 109) 90.
[285] *Ibid* 93.
[286] *Kem-Lin Fashions CC v Brunton another* 2002 7 BLLR (LCA).
[287] *See NEHAWU v University of Pretoria & others* 2003 24 ILJ 95 (CC).
[288] Act 72 of 2012.
[289] *Ibid* 6.

reaffirmed in the Supreme Court of Appeal in *Makhanya* judgment. In *Fedlife*,[290] where the court held that the purpose of the LRA is to "provide an additional right to an employee whose employment might be terminated lawfully, but in circumstances that were nevertheless unfair", the employee's common-law rights still exist. In *Gcaba*'s case the court confirmed that "legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights".[291] However, the court suggested that following the labour law dispute resolution mechanisms as provided for in the LRA should be observed in the spirit of resolving labour disputes expeditiously; this suggestion is similar to what the Constitutional Court in *Chirwa* observed. The *Gcaba* verdict reiterates the argument against forum-shopping that 'the finely tuned dispute-resolution structures created by the LRA', should be followed to adjudicate labour disputes.[292]

However, what is clear now is that the CSAA has had a more significant effect regarding the rectification of problems in relation to overlapping jurisdiction between the Labour Appeal Court and the Supreme Court of Appeal.[293] The constitutional amendment has removed the description of the Supreme Court of Appeal (formerly contained in the Constitution), which described it as being the highest court of appeal except in constitutional matters. This previously had the effect that the LRA was interpreted in such a manner that the Supreme Court of Appeal was deemed to be a court of higher status than the LAC. The changes brought about by the CSAA have had the positive effect of restoring the original status of the Labour Appeal Court envisaged by the architects of the labour dispute-resolution framework in the LRA.

Finally, the BCEA confers concurrent jurisdiction on the labour and civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of contract.[294] The SCA is not willing to forego its jurisdiction to entertain such disputes, but at the very least, the SCA has retreated insofar it has accepted that the LRA does provide adequate remedies in relation to unfair dismissal to the exclusion of the further development of parallel remedies by the civil courts.[295]

[290] See (n 6) above.
[291] *Gcaba v Minister for Safety and Security* (n 236) par 55.
[292] *Ibid* par 45.
[293] See (n 6) above.
[294] Section 77(3) of the BCEA.
[295] Van Eck and Mathiba (n 6).

CHAPTER FOUR

4. Conclusion and recommendations

With regard to labour law and administrative law, the Constitutional Court has resolved the dispute for good in *Bato Star Fishing*, namely that there are no two systems of law regulating administrative action, common law and the Constitution, but only one system of law grounded in the Constitution.[296] The *Chirwa* decision clarified the position regarding PAJA that public servants can no longer invoke administrative review to proceedings to challenge the validity of dismissals.[297] It would be prudent for employees to refer their employment disputes to the CCMA and labour court which both have statutory jurisdiction to adjudicate over labour disputes emanating from alleged unfair dismissal. In the spirit of the *Chirwa* and *Gcaba* decisions, "the employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights".[298] It can be safely said that the long winded debate pertaining to the overlapping jurisdiction between the administrative law and labour law in resolving labour disputes is finally resolved and put to rest.

Regarding contractual claims, the high court has retained its jurisdiction.[299] The Supreme Court of Appeal has broadly endorsed these developments, stating that conduct by an employer may give rise to a number of causes of action, and it is the cause of action relied on and not the background to the dispute that is relevant.[300] In *Gumbi* and *Boxer* the Supreme Court of Appeal confirmed that employee could refer a dispute regarding pre-dismissal procedures to the high court on contractual grounds.[301] Such matters, the court held, must be labelled as dealing with the unlawfulness of the termination of a contract of employment, whereas a dispute referred to the CCMA and the labour court will be classified as an unfair dismissal dispute.[302]

Most of the jurisdictional uncertainties that have engulfed labour-related dispute resolution have been resolved to a certain extend, and the dual systems of

---

[296] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* (n 125).
[297] *Chirwa v Transnet Ltd and others* (n 133) 98.
[298] *Ibid*.
[299] *Makhanya v University of Zululand* (n 103).
[300] *United National Public Servants Association of SA v Digomo NO & Others* 2005 12 BLLR 1669 (SCA).
[301] *Boxer Superstores Mthatha & Another v Mbenya* (n 91).
[302] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (n 89).

jurisprudence appear to have been abolished.[303] The *Gcaba* judgment can certainly be read to call into question the assumption of jurisdiction by the high court in adjudicating disputes that are regulated by labour legislation, and it reinforces the role of the labour court as the sole forum for their resolution.[304] The Supreme Court of Appeal recently summarised the approach to be followed:[305]

> "[S]ection 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in work place issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. The forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the constitutional provision itself".

Another pertinent development is that it is clear that the combined effect of the Constitutional Seventeenth Amendment Act 72 of 2012 is that leeway is created for the LRA and the Competition Act to provide that the Labour Appeal Court and may, subject to the authority of the Constitutional Court, have the "final say" in respect of disputes emanating from legislation as long as such legislation so provides and that the SCA has no role in appeals that pertains to the labour matters.[306]

It is evident that the jurisdiction of high court is not ousted simply because the matter involves the relationship between the employer and the employee. The willingness of civil courts to decide on labour disputes does not undermine the intentions of the drafters of LRA. However, the Constitutional Court gave a judgment pertaining to the jurisdictional battle in *Fredericks*. The Constitutional Court held that disputes which must, in terms of the LRA, be referred for arbitration by CCMA or bargaining councils may be adjudicated by the high court, because the fact that a statute confers exclusive jurisdiction on a quasi-judicial authority cannot ouster the high court from its inherent and constitutional jurisdiction. The approach adopted by the majority of the SCA in *Wolfaardt* remains intact post *Chirwa*; the LRA does not expressly or implicitly abrogate employee's common-law entitlement to enforce contractual rights.[307] As controversial as the judgments in *Gumbi, Boxer Superstores* and *Murray* might be as a matter of law or policy, they unequivocally acknowledge a common

[303] Van Niekerk and *Smith Law@work* (2017) 494.
[304] *Ibid*.
[305] *Motor Industry Staff Association v Macun* NO & others 2016 37 ILJ 625 (SCA).
[306] Mathiba and Van Eck (n 6).
[307] Du Toit (n 99).

law "contractual obligation on an employer to act fairly in its dealings with employees".[308]

Van Eck and Mathiba point out that the Constitution makes provision that the jurisdiction of the high court can be limited by means of national legislation regarding its function to entertain constitutional matters. [309] Such a limitation would have put an end to a situation in terms of which employment-related matters are brought before the high court on constitutional or administrative law grounds based on the concurrent jurisdiction of the high court and labour court.[310] The saga which led to *Chirwa* and *Gcaba* would not have occurred had the labour court been clothed with exclusive jurisdiction as suggested.[311] However, the thrust of *Chirwa* and *Gcaba* judgments are generally that if employees have remedies under the LRA they must pursue their actions under that Act.[312] The reality is that, despite both judgments, the high court still retains its original jurisdiction to entertain claims for "unlawful termination" of contract of employment.[313] With no contrary view from the Constitutional Court as the highest court in the Republic of South Africa, it can only be concluded with no assumptions or hesitation that the *Makhanya* judgment is binding and its principles remain intact.

Van Eck submitted that the main weakness in the current set of changes is the fact that the original status of the labour court with its concurrent jurisdiction with the high court in constitutional matters has been left intact.[314] For reasons unknown, the drafters of the current amendments were not prepared to address problems in relation to where constitutional law, common law, labour law and administrative law overlaps.[315] The legislature could have resolved the complexities by opting to follow one, or a combination, of a number of avenues.[316] Firstly, section 157(2) of the LRA could have been amended to read:

> "(2) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive [concurrent] jurisdiction [with the High Court] in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—
> (a) employment and from labour relations;

[308] *Ibid*.
[309] See (n 6) above.
[310] *Ibid*.
[311] *Ibid*.
[312] See (n 229) above.
[313] See (n 6) above.
[314] *Ibid*.
[315] *Ibid*.
[316] *Ibid*.

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any the threatened executive or administrative act or conduct, by the State in its capacity as employer; and

(c) the application of any law for the administration of which the Minister is responsible.'

The second option would be to extend the exclusive jurisdiction of the labour court even further by adapting section 77 of the Basic Conditions of Employment Act 1997 (BCEA). Section 77(1) of the BCEA provides that, subject to the Constitution, "the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act".[317] However, section 77(3) provides that "the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment". Policymakers could have considered the possibility of clothing the labour court with exclusive jurisdiction to entertain disputes emanating from contracts of employment as well.[318] Section 77A (e) of the BCEA in any event provides that the Labour Court has the power to make any appropriate determination

"including an order—

(e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation".

It seems rational to accord one set of court the jurisdiction to determine labour related disputes concerning both considerations of fairness and lawfulness. Such a construction would prevent the recurrence of discourses regarding the issue of developing the common-law contract of employment to include the requirement of pre-dismissal proceedings.[319]

Lastly, section 167(2) of the LRA should have been amended to make it clear that the Constitutional Court is the apex court in respect of issues to be decided in terms of the LRA.[320]

[317] See (n 6) above.
[318] *Ibid*.
[319] *Ibid*.
[320] *Ibid*.

BIBLIOGRAPHY

1. Benjamin “A termination for operational requirements? Some thoughts on the end of the Labour Court” 2003 *ILJ* 1869.
2. Benjamin “An accident of history: Who is an employee under South African labour law” 2004 *ILJ* 787.
3. Bezuidenhout *The Powers of the Labour Court to Review Arbitration Awards of the Commission for Conciliation, Mediation and Arbitration: A Comparative Study* (LLM dissertation UNISA 2004).
4. Du Toit “A Common law hydra emerges from the forum-shopping swamp” 2010 *ILJ* 21.
5. Hoexter *The Future of Judicial Review in South African Administrative Law* (2000).
6. Idensohn “The Labour Courts' jurisdiction over claims for alleged employee breaches of fiduciary duty” 2015 *ILJ* 2495.
7. Kerr *The Principles of the Law of Contract* (2016).
8. Ngcukaitobi “Life after *Chirwa*: Is there scope for harmony between public sector labour law and administrative law” 2008 *ILJ* 849.
9. Pretorius and Myburgh “A dual system of dismissal law: Comment on *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA)” 2007 *ILJ* 2172.
10. Van Eck and Diedericks “Are magistrates without remedy in terms of labour law?” 2014 *ILJ* 111.
11. Van Eck and Mathiba “Constitutional Seventeenth Amendment Act: Thoughts on the jurisdictional overlap, the restoration of the Labour Appeal Court and demotion of Supreme Court of Appeal” 2014 *ILJ* 863.
12. Van Niekerk “Speedy social justice: Streamlining the statutory dispute resolution processes” 2015 *ILJ* 837.
13. Van Niekerk and Smith *Law@work* (2017).

Table of cases

1. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).
2. *Borcherds v CV Pearce & Shewards t/a Lubrite Distributiors* 1991 12 IJL 383 (IC).
3. *Boxer Superstores & Another v Mbenya* 2007 5 SA 450 (SCA).
4. *Carephone (Pty) Ltd v Marcus NO & Others* 1998 19 ILJ 1425 (LAC).

5. *Checkers (Pty) Ltd v Ramdaw NO & others* 2001 9 BLLR 1011 (LAC).
6. *Chevron Engineering (Pty) (Ltd) v Nkambule* 2004 3 BLLR 214 (SCA).
7. *Chirwa v Transnet Ltd & Others* 2008 8 BLLR 97 (CC).
8. *Coates Brothers v Shanker* 2003 12 BLLR 189 (LAC.)
9. *Colonial Mutual Life Assurance v MacDonald* 1931 AD 412.
10. *De Beer NO v North-Central Council and South-Central Local Council & others* 2002 1 SA 429 (CC).
11. *Denel (Pty) Ltd v Vorster* 2005 4 BLLR 313 (SCA).
12. *Eastwood & another v Magnox Electric plc* 2004 35 UKHL 488.
13. *Fedlife Assurance Ltd v Wolfardt* 2001 22 ILJ 2407 (SCA).
14. *Feinberg v Africa Bank Ltd* 2004 21 ILJ 217 (LC).
15. *Fienberg v African Bank Ltd* 2004 21 ILJ 217 (LC).
16. *Fredericks & Others v MEC for Education & Training, Eastern Cape & Others* 2002 2 SA 693 (CC).
17. *Gcaba v Minister of Safety and Security & Others* 2009 12 BLLR 1145 (CC).
18. *Jacot-Gillarmod v Provincial Government, Gauteng* 1999 3 SA 549(T).
19. *Jacot-Guilmarmod v Provincial Government*, Gauteng 1999 20 ILJ 1689 (T).
20. *Kem-Lin Fashions CC v Bruton & another* 20027 BLLR 597 (LAC).
21. *Kylie v CCMA & others* 2010 7 BLLR 705 (LAC).
22. *Langeveldt v Vryburg Transitional Local Council & Others* 2001 22 ILJ 1116 (LAC).
23. *Le Roux v CCMA & others* 2000 6 BLLR 680 (LC).
24. *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC).
25. *Makambi v MEC for Education, Eastern Cape* 2008 5 SA 449 (SCA).
26. *Makhanya v University of Zululand* (2009) 8 BLLR 721 (SCA).
27. *MEC Public Works, Northern Province v CCMA & others* 2003 10 BLLR 1027 (LC).
28. *Meyers v Abramson* 1952 3 SA 121 (C).
29. *Mhlambi v Maatjhabeng Municipality and another* 2003 24 ILJ 1659 (O).
30. *Mogothle v Premier of the Northwest Province & another* 2009 30 ILJ 605 (LC).
31. *Mondi Paper v Printing Wood and Allied Workers Union & Others* 1997 18 ILJ 84 (D).
32. *Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA).
33. *Nakini v MEC, Department of Education, Eastern Cape Province & another* 2008 5 BLLR 489 (CK).
34. *NEHAWU V University of Cape Town & others* 2003 24 ILJ 95 (CC).
35. *Nonsamo Cleaning Service v Appie & others* 2008 9 BLLR 901 (CK).
36. *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 28 ILJ 1499 (SCA).

37. *Rand Water v Soop* 2013 34 ILJ 576 (LAC).
38. *Rustenburg Platinum Mines Ltd v CCMA & others* 2006 11 BLLR 1021 (SCA).
39. *Sappi Fine Papers v PPWAWU* 1998 19 ILJ 286 (SE).
40. *Schierhout v Minister of Justice* 1926 AD 99.
41. *Sidumo & others v Rustenburg Platinum Mines Ltd & others* 2010 31 ILJ 1556.
42. *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).
43. *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A).
44. *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & others 2018 1 JOL 39496 (LC).*
45. *United National Public Servants Association of SA v Digomo NO & Others* 2005 12 BLLR 1669 (SCA).
46. *Universal Church of the Kingdom of God v Myeni* 2015 9 BLLR 918 (LAC).

Table of statutes

1. Basic Conditions of Employment Act 75 of 1997.
2. Constitution of the Republic of South Africa, 1996.
3. Constitutional Seventh Amendment Act 72 of 2012.
4. Employment Equity Act 55 of 1998.
5. Labour Relations Act 66 of 1995.
6. Labour Relations Amendment Act 127 of 1998.
7. Labour Relations Amendment Act 12 of 2002.
8. Skills Development Act 97 of 1998.