

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case Nr: 1637/08

In the matter between:

DIEKETSENG JOSEPHINE MODUTLE

VERSUS

**THE MUNICIPAL MANAGER:
SOL PLAATJE MUNICIPALITY**

1st Respondent

**THE EXECUTIVE MAYOR:
SOL PLAATJE MUNICIPALITY**

2nd Respondent

**THE EXECUTIVE DIRECTOR:
CORPOTATE SERVICES:
SOL PLAATJE MUNICIPALITY**

3rd Respondent

**THE SPEAKER:
SOL PLAATJE MUNICIPALITY**

4th Respondent

SOL PLAATJE MUNICIPALITY

5th Respondent

**NEO MOATSWI EMPLOYEE:
SOL PLAATJE MUNICIPALITY**

6th Respondent

Judgment

Tlaletsi J:

Introduction

[1] This is the return day for the confirmation of the rule *nisi* and interim interdict granted by *Lacock J* on 12 December 2008 in an application brought by the applicant against the respondents. The order which was granted by agreement was on the following terms:-

"1

- 1.1 *Ordering first, third and fifth respondents to forthwith implement the fifth respondent's 2008/2009 Budget provisions regarding applicant's salary scale elevation from scale D3 to D5 of fifth respondent's relevant salary scale provisions with retrospective effect from 1 July 2008;*
- 1.2 *Ordering first, second and fifth respondents to immediately restore applicant to her designated office Manager in the Office of second respondent and to enable her to continue her activities as such;*
- 1.3 *Ordering first, second , fifth and sixth respondents to immediately make available to applicant an appropriate office for her exclusive occupation to enable her to continue her activities as referred to in paragraph 1.2 supra;*
- 1.4 *Ordering first, second, fifth and sixth respondents to immediately return to applicant her personal belongings, that were removed from her office previously occupied by herself, when applicant was vacated there from on 9 October 2008;*

- 1.5 *That fifth respondent pay the costs of this application alternatively those respondents that oppose herein [are] ordered to pay the costs herein, jointly and severally, the one to pay the other to be absolved.*
2. *That the order granted in terms of paragraphs 1.2, 1.3 and 1.4 supra will serve as an interim mandamus and interdict with immediate effect.*
3. *That leave is granted to the parties hereto to amplify their papers. Amplifying supporting affidavits by the applicant (if any) are to be filed by no later than 13 January 2009; amplifying answering affidavits (if any) by the respondents are to be filed by no later than 23 January 2009; and replying affidavits by no later than 30 January 2009."*

[2] Subsequent to the granting of the order the parties filed further papers. The application is opposed by the fifth respondent. The opposing affidavit is deposed to by the first respondent in his capacity as the Municipal Manager of the fifth respondent. A brief factual background is necessary for a better understanding of the issues in this matter.

Factual background

[3] The applicant has been in the employ of the fifth respondent, Sol Plaatje Municipality ("the municipality") and its legal predecessors since 1 September 1989 as a typist. She was later appointed in the office of the mayor from 1 January 1999 as secretary. Her position was graded as Level C2 of the scale

applicable at the municipality. On 25 July 2001 the then Executive Mayor of the municipality directed a letter to the Municipal Manager in which he advised that in terms of the new processes and structures introduced on 18 July 2001 the applicant had assumed greater responsibility as per her job description. The Executive Mayor further advised that he was satisfied that the applicant had a comprehensive knowledge of all the aspects of his office and that of the City Manager and that she had the ability to execute all the responsibilities satisfactorily. The Executive Mayor further instructed that her salary scale be moved from R74 244 to R83 496 per *annum* with effect from 01 August 2001. This motivated request by the Executive Mayor was complied with.

- [4]** The applicant was with effect from 1 September 2003 appointed Acting Office Administrator (D1) in the office of the Executive Mayor. On 22 December 2003 the applicant was appointed Administrator: Political Offices. There is a dispute about whether by this appointment the applicant was now a so called “political deployee”. However, it is not in dispute that she was also tasked to administer the political component in the office of the Executive Mayor. Nothing however, turns on this aspect for the purpose of this application.
- [5]** On 12 March 2007 the applicant applied and was appointed to the position of “Executive Mayor Office Manager: Mayor’s Office” with effect from 1 October 2006 on post level D3. The position was a contractual appointment for a period of five years.
- [6]** On 1 October 2008 the second respondent took office as the new Executive Mayor of the municipality. On or about the same date

the second respondent called the personnel he found in office, including the applicant, to a meeting. Some of the members of the Mayoral committee were present. At this meeting the second respondent introduced himself as the new Executive Mayor. He mentioned that there would be changes to the personnel structure of his office which would result in some of the staff being affected; that there was a possibility of transfer of some of the staff to other offices or directorates but that a final decision had not been taken yet. The employees were also told to remain in their existing offices and must, if necessary, help and assist until the executive Mayor had decided when and where were the employees to be transferred. It is common cause that the applicant had an opportunity to say something at this meeting. Although there is a dispute as to what she exactly said, it is however common cause that there was an understanding that no final decision on the transfer of staff had been taken and that all employees would be engaged if they were to be transferred. Among the disputed versions, is the applicant's averment to the effect that the second respondent called the applicant back into his office after the meeting under discussion and told her that he would speak to her the following day (2 October 2008) about her matter. However, she continued, the second respondent did not call her as promised. These averments are denied by the second respondent who contends that he would not have agreed to hold separate discussions with the applicant when all other employees were also involved.

- [7]** It is not disputed that the applicant met one Duma Lebakeng ("*Lebakeng*"), her union organizer during the afternoon of 1 October 2008 and reported to him that she had noticed that

someone was performing her functions already and that he (*Lebakeng*) should ensure that her transfer is done properly as she was not a political deployee. The applicant mentioned that she also requested *Lebakeng* to "*ensure that her transfer is only done if the amount budgeted to my position which I was supposed to have been progressed to which is a D5 (from D3) is implemented retrospectively from 1 July 2008.*" None of the respondents was a party to these discussions.

- [8]** The applicant states that on 8 October 2008 *Lebakeng* held a meeting with second respondent at which her progression to D5 level as well as her possible transfer was discussed. She states further that at this meeting second respondent mentioned that he agreed to the proper implementation of a possible transfer together with a D5 progression and that a meeting should be arranged with third and first respondents as well as "*two shop stewards*" to discuss and facilitate the implementation of her salary progression and transfer. The Municipality's version on this aspect is that second respondent did have a meeting with *Lebakeng* and that he also requested him to arrange a meeting with the other shop stewards as well. He mentioned that the meeting he held with *Lebakeng* was about the employees in general. He denies that any undertaking was given to either *Lebakeng*, the applicant or any other union official that the applicant will be progressed from her existing D3 level to a D5 salary level. He further denies that a progression in salary was made a condition for the applicant's transfer. The deponent states that the second respondent did not have any background on the applicant's performance as he only found her in the office on his appointment and could, therefore, not make any undertaking to promote her. It is the Municipal Manager, he

continued, who, with the duties and delegations afforded to him in terms of, *inter alia*, sec 55(2) of the Local Government: Municipal Systems Act,¹ and as the accounting officer of the Municipality, would have been the person to approve or support the promotion or salary progression of the applicant after a proper process had been followed. He further states that the shop stewards' meeting suggested by the second respondent did take place and that the shop stewards threatened to resign from the union in the event of their union representing the applicant in her present dispute with the Municipality. He states that what prompted the shop stewards' conduct is their unhappiness about a previous application that the union launched against the Municipality in which they sought the applicant's appointment to her current position at the Municipality.

- [9]** On 9 October 2008 the applicant was not present at work. According to her she had completed a leave application form the previous day, taking leave to enable her to attend court for an unrelated private matter. On her return on 10 October 2008 she found her office door open. She discovered that all her personal belongings and furniture were removed. The Municipality's version on this aspect is that on a previous occasion a decision was taken to the effect that the Executive Mayor would move his office to a new 'wing' or building and that the Speaker was to occupy the offices that had been occupied by the Executive Mayor. He states that on 7 October 2008 a certain *Piet Louw* whose functions are that of a caretaker, approached the applicant in her office and informed her of the decision to move her to a new office. The applicant is said to have informed *Piet Louw* that she would not vacate the office until she received a

¹ Act 32 of 2000

formal instruction to do so. He mentions further that the removal of the applicant's property and the furniture in her office was supervised by a security officer. He also states that all these items were taken to a safe place because the applicant was absent and a move had to be done regardless of her absence. The applicant's attitude is that the respondents ought to have known where she had gone to as she completed a leave application form before her absence. She denies that *Piet Louw* spoke to her about her relocation.

[10] The personal items that the applicant claims were removed were three sealed envelopes containing cash in the amounts of R5000-00, R900-00 and R200-00 respectively, a pair of spectacles, framed graduation photographs, personal insurance documents, contracts, office decorations consisting of African art and baskets as well as personal notes. It is common cause that subsequent to the removal of these items the applicant laid criminal charges with the South African Police Services and the matter is apparently pending.

[11] It is common cause that on 14 October 2008 a meeting between the second respondent, the applicant as well as her attorney of record, Mr *Lekena Bosiu* ("Bosiu") could not be held. The Municipality's version is that this meeting was never arranged with any of its personnel. However, the applicant states that the meeting was arranged. On 21 October 2008 *Lebakeng, Bosiu* and the applicant met one of the councillors in the absence of the second respondent. Although the second respondent states that he was not aware of this meeting, the applicant insists that the meeting was arranged with him and he agreed to attend.

Nothing, for the purpose of the present dispute, turns on the discussion that took place at this meeting.

[12] It was the applicant's view that she has not been allocated an office and that she has no place to work from. On the contrary, the first respondent contends that there was an office available that the applicant could work from but she remained dissatisfied that her property had been removed from her office without her consent and is refusing to occupy a new office. It is common cause that the applicant completed leave application forms requesting vacation leave from 22 October 2008 to 31 October 2008 as well as from 1 November 2008 to 12 November 2008. The applicant's version is that she applied for leave on the suggestion by the first respondent when *Lebakeng*, during a meeting she held with the first respondent, raised a concern that the applicant had no place to work from. She further states that it was then agreed that the applicant should go to the third respondent to complete the necessary forms. This version is vehemently denied by the first respondent who contends that there was no reason for the applicant to take leave. He contends that applicant applied for leave in the normal and usual way and her leave was approved by the third respondent as the officer responsible for these matters. He denies his involvement in the arrangements regarding the applicant's application and approval of her leave.

[13] It is common cause that the applicant referred her dispute with the Municipality to the South African Local Bargaining Council ("the bargaining council"). On 4 November 2008 the dispute was set down for conciliation in terms of the provisions of the

*Labour Relations Act*² (the LRA). The dispute remained unresolved and the relevant certificate of outcome confirming that the dispute remained unresolved was issued by the bargaining council. On the same day the applicant's attorneys of record forwarded a letter to the first respondent in which they confirmed that the dispute had not been resolved and informing him that their client required and would apply for the extension of her leave for a further period of sixteen days to enable her to take further steps to bring the matter to finality. The necessary application form for vacation leave for the period 13 November 2008 to 28 November 2008 was signed by the applicant on 7 November 2008. The applicant maintains that the leave that she took on all these occasions was sick leave and not vacation leave despite the fact that on the application form it is indicated that she applied for vacation leave.

[14] On 18 November 2008 the applicant issued papers for this application that was to be heard on 12 December 2008 wherein she was seeking the orders set out in paragraph one above. She based her application on the following facts:

- 14.1 She is still the manager of second respondent's office;
- 14.2 She has not been transferred to any other section away from second respondent's office;
- 14.3 She has been relocated from her office without her knowledge and permission and without being allocated another office.

² Act 66 of 1995

- 14.4 A situation has been created where she is not in a position to do her work and this situation is unbearable and she must be restored to her position;
- 14.5 She is available and willing to do her work as manager of the office of the second respondent which work she has been appointed to perform;
- 14.6 That until to date she has not been informed that her office, from which she has been vacated, is not her office any longer or that she is not authorised to fulfil her duties from that office;
- 14.7 That she is thus entitled to continue her duties as manager of the office of the second respondent and to continue doing such functions from her office as before;
- 14.8 That she has not been afforded any opportunity to state her case why she should not be transferred with or without conditions;
- 14.9 That she is entitled to the salary scale D5 from 1 July 2008 and that the non-implementation of her salary elevation is unlawful and contrary to the Municipality's own budget;
- 14.10 That she approached the bargaining council without any success and she is therefore entitled to approach this court for assistance and relief.

[15] The applicant concludes that she has been forced into a situation where she had to take sick leave or even "absorb" her own leave

which is now exhausted and that she is not medically unfit to do her work.

[16] The Municipality's response to the applicant's contentions may be summarised as hereunder.

- 16.1 That the applicant still carries her designation in terms of her contract of employment and her status has not been affected and that she still receives her remuneration and benefits;
- 16.2 Her office had to be moved together with the other staff in the office of the Executive Mayor and that her furniture and belongings had to be stored in the safe place pending the allocation of an office to her which office has now been allocated and is still tendered;
- 16.3 That the applicant was informed that she may be transferred but such decision has not been taken yet;
- 16.4 That there rest no obligation on an employer to provide work to an employee in the position of the applicant and that nevertheless as an employee she remains obliged to place her full labour potential at the disposal of her employer;
- 16.5 She cannot prescribe to the fifth respondent where and how she will fulfil her employment obligations;
- 16.6 The applicant is not entitled to sick leave due to the fact that she is clearly not medically unfit to do her work and

that her conduct constitutes a misuse of leave which may justify disciplinary action;

- 16.7 The applicant is not entitled to an automatic progression from D3 to D5 salary level, and her progression would amount to a promotion. That such promotion would require a decision to be made based on a proper motivation for such promotion.

[17] With regard to the fact that applicant's name appears on the document appearing to be an extract from the budget, the Municipality contends that the document was only meant for budgeting purposes and did not serve before council for approval and is not part of the final budget that was approved by the council of the Municipality.

[18] With regard to the draft letter prepared for the signature of the first respondent by third respondent and addressed to herself, stating that the final budget makes provision for the salary progression of the applicant to D5 level and that it should be implemented, the first respondent contends that he would not have approved and signed the letter merely because there is a provision in the budget without following proper procedures that include motivation and reasons for placing the applicant on salary level D5.

Points in limine

[19] The respondents has also raised three in *limine* points. The first in *limine* point is to the effect that this Court lacks jurisdiction to entertain the applicant's dispute with the respondents as the

issues she raises are labour disputes. The respondents contend that the applicant should have proceeded to either refer the dispute to arbitration at the bargaining council or to the Labour Court. The second point in *limine* is that the matter is not urgent as the applicant threatened to take further steps in a letter dated 4 November 2008 and only issued the application on 18 November 2008, relying upon a draft letter dated 7 July 2008. The third point in *limine* is to the effect that all the other respondents excluding the Municipality are not holders of rights or obligations to the applicant in relation to her appointment as an employee, the provision of office space or her appointment or promotion to any higher office and as such their being cited amount to a mis-joinder.

[20] During argument, it was made clear by Mr *Claasen* that much should not be made of the fact that on the first hearing of the matter the interim orders were granted by consent. He mentioned, which makes sense, that the agreement was merely to allow the *status quo* to be maintained and that the parties be afforded an opportunity to file papers so that the issues can be properly argued and adjudicated on the return day. This submission was not disputed by Mr Burger who appeared on behalf of the applicant. Before me the parties were in agreement that the actual issues that require determination are the jurisdiction of this Court to entertain the matter, urgency, mis-joinder and a *prima facie* right. I will now proceed to consider the applicable authorities relating to the jurisdiction aspect.

Legal Framework

[21] The starting point in this matter are the provisions of the LRA. Section 157 of the LRA provides that:-

"157 Jurisdiction of Labour Court

- (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.*
- (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-*
 - (a) *employment and from labour relations;*
 - (b) *any dispute over the constitutionality 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*
 - (c) *the application of any law for the administration of which the Minister is responsible.*
- (3) *Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.*
- (4) *(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is*

not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

- (5) *Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.*”(emphasis added).

[22] On the subject of jurisdiction, Section 77 of the *Basic Conditions of Employment Act*³ (“the BCEA”) provides that:

“77 Jurisdiction of Labour Court

- (1) *Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.*
- (2) *The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.*
- (3) *The Labour Court has concurrent jurisdiction with the 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 that contract.*
- (4) *Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition*

³ Act 75 of 1997

of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

- (5) *If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.” (emphasis added).*

[23] The powers of the Labour Court are also defined in the LRA. Section 158 provides that:

"158 Powers of Labour Court

- (1) *The Labour Court may-*
- (a) *make any appropriate order, including-*
- (i) *the grant of urgent interim relief;*
 - (ii) *an interdict;*
 - (iii) *an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;*
 - (iv) *a declaratory order;*
 - (v) *an award of compensation in any circumstances contemplated in this Act;*
 - (vi) *an award of damages in any circumstances contemplated in this Act; and*
 - (vii) *an order for costs;*
- (b) *order compliance with any provision of this Act;*
- (c) *make any arbitration award or any settlement agreement an order of the Court;*
- (d) *request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;*

- (e) *determine a dispute between a registered trade union or registered employers' organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with-*
 - (i) *the constitution of that trade union or employers' organisation (as the case may be); or*
 - (ii) *section 26 (5) (b);*
- (f) *subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;*
- (g) *subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;*
- (h) *review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;*
- (i) *hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and*
- (j) *deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law."*

[24] The interpretation and application of sec 157 of the LRA has been the subject of much debate. The debate relevant to this matter is, in which matters does the Labour Court have exclusive jurisdiction and those in respect of which the Labour Court shares jurisdiction with the High Court, in instances where the state or an organ of state is involved as an employer. I deem it unnecessary, for the purpose of this judgment, to discuss the previous judgments of the High Courts, the Supreme Court of Appeal as well as the Labour and the Labour Appeal Court on the subject because of the recent judgment of the Constitutional

Court in *Chirwa v Transnet Ltd and Others*⁴. It is in my view appropriate to deal directly with this judgment of the Constitutional Court as it has made an important and far reaching development on the subject.

[25] The facts in *Chirwa's* case are almost similar to the facts in this case. Ms *Chirwa* was employed by Transnet. She was dismissed by her employer after the initiation of disciplinary proceedings against her. She referred a dispute about her dismissal to the *Commission for Conciliation, Mediation and Arbitration* ("the CCMA"). She contended that her dismissal was unfair. The CCMA was unable to resolve the dispute within the stipulated period of 30 days⁵. The CCMA issued a certificate to the effect that the dispute remained unresolved and recommended arbitration of the dispute in accordance with section 191⁶ of the LRA. Instead of proceeding to initiate arbitration proceedings, Ms *Chirwa* approached the High Court seeking an order setting aside the proceedings that resulted in her dismissal. She also sought an order for her reinstatement to her former position. Her application was successful. Her employer successfully appealed against the order and judgment of the High Court in the Supreme Court of Appeal ("the SCA").

[26] The issues that were to be determined by the SCA were (a) whether dismissal of Ms *Chirwa* was a matter that fell to be

⁴ 2008(4) SA 367; 2008(3) BCLR 251(CC)

⁵ When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-

- (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;
- (b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and
- (c) the commissioner must file the original of that certificate with the Commission.

⁶ Section 191 prescribes the procedures for referral of disputes about unfair dismissals and unfair labour practices to arbitration and the Labour Court as well as the manner of adjudication of such disputes.

determined exclusively by the Labour Court in terms of sec 157(1) of the LRA, and (b) whether her dismissal constituted 'administrative action' as defined in sec 1 of the Promotion of Administrative Justice Act ("PAJA").⁷ On the first issue which I would refer to as the jurisdiction issue, four judges from the panel of five held that Ms *Chirwa* had raised a constitutional issue justifiable in the High Court which had concurrent jurisdiction with the Labour Court in respect of any violation of a constitutional right and that an employee in Ms *Chirwa's* position could therefore institute proceedings in either the Labour Court or the High Court, and having chosen to approach the High Court, that court had jurisdiction. On the second issue relating to the applicability of PAJA two judges (*Mthiyane JA with Jafta JA* concurring) held that in order for an employee to secure the relief she sought, she had to establish that the decision to dismiss her constituted "administrative action" as defined in sec 1 of PAJA, which meant establishing, *inter alia*, that the decision entailed exercising a public power or performing a public function in terms of any legislation.⁸ The two judges held that the nature of the conduct involved was the termination of a contract of employment and not one involving the exercise of any public power or performance of a public function in terms of any legislation. The third judge (*Conradie JA*) held that she had approached the wrong court, while two dissenting judges (*Mpati DP and Cameron JA*) held that public sector dismissals do constitute administrative action.

[27] Ms *Chirwa* applied for leave to appeal to the Constitutional Court. Leave to appeal was granted. However, her appeal was unanimously dismissed by the Constitutional Court. The

⁷ Act 3 of 2000

⁸ Para 13

Constitutional Court was however split on the jurisdictional issue. *Skweyiya J*, writing for the majority, recognized that the purpose of Labour Law as embodied in the LRA is the proved comprehensive system of dispute resolution mechanism, forums and remedies that are tailored to deal with all aspects of employment and that “[i]t was envisaged as a one stop shop for all labour related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes”⁹. The learned judge of the Constitutional Court referred to Section 210 of the LRA which provides that:

“(1) If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.”

As to the meaning and implications of sec 210, the learned judge had the following to say:

“This section heralds the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act. Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters. When PAJA was promulgated, five years after the current LRA came into force, s 210 remained untouched. The legislature, aware of the implications of this provision in the LRA, enacted PAJA without altering s 210. This is significant, in that it would appear that the legislature intended that PAJA should not

⁹ At 382 C-D: par[47]

detract from the pre-eminence of the LRA and its specialised labour disputes mechanisms."¹⁰

[28] In response to the question whether the High Court has concurrent jurisdiction with the Labour Court, *Skweyiya J* held that:

"The starting point for the enquiry as to whether the High Court has concurrent jurisdiction with the Labour Court in respect of Ms Chirwa's claim is s 157(1) of the LRA, which provides that the Labour Court has exclusive jurisdiction over all matters that 'are to be determined by the Labour Court'. Thus where exclusive jurisdiction over a matter is conferred upon the Labour Court by the LRA or other legislation, the 2008 (4) SA p387 jurisdiction of the High Court is ousted. The effect of s 157(1) is therefore to divest the High Court of jurisdiction in matters that the Labour Court is required to decide, except where the LRA provides otherwise. It is apparent from the provisions of s 157(1) that it does not confer 'exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee'. It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the words of s 157(1) 'are to be determined by the Labour Court'. This is evident from s 157(2), which contemplates concurrent jurisdiction in constitutional matters arising from employment and labour relations."¹¹(emphasis added)

¹⁰ At 383 D-E; para 50

¹¹ At 386 H-387A; para 59

The majority of the Court held further that the LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers.¹²

[29] The Constitutional Court was also faced with its earlier decision in *Fredericks & Others v MEC for Education and Training, Eastern Cape and Others*.¹³ In *Fredericks* the Constitutional Court unanimously held that it was clear that the overall scheme of the LRA did not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment and as there is no general jurisdiction afforded to the Labour Court in employment matters the jurisdiction of the High Court is not ousted by sec 157(1) simply because the dispute was one falling within the overall sphere of employment relations. The Court held further that other than sec 157(2), there was no express provision in the LRA affording the Labour Court jurisdiction to determine disputes arising from alleged infringements of constitutional rights by the state acting in its capacity as an employer and that whatever else its import, sec 157(2) could not be interpreted as ousting the jurisdiction of the High Court since it expressly provided for concurrent jurisdiction of the High Court and Labour Court. With regard to the provision of sec 158(1)(h)¹⁴ the Court held that the section could not be read as conferring a jurisdiction on the Labour Court to determine constitutional matters sufficient, when read with sec 157(1), to exclude the jurisdiction of the High Court. The Court accordingly

¹² At 388 E-F; para 64

¹³ 2002(2) SA 693; (2002) 23 ILJ 81; 2002(2) BCLR 113(CC)

¹⁴ See para 23 above quoting the provisions of para 158(1)(h)

held that the applicant's dispute was not excluded from the jurisdiction of the High Court.

[30] *Skweyiya J* found Fredericks' case distinguishable from *Chirwa* in that (a) the applicants in Fredericks expressly disavowed any reliance on sec 23(1) of the Constitution which entrenches the right to a fair labour practice, and that the claimants in *Fredericks* did not rely on the fair labour practice provisions of the LRA or any other provision of the LRA. *Skweyiya J* concluded that the Court in *Fredericks* did not consider, but left open, the question whether a dispute arising out of the interpretation or application of a collective agreement can also give rise to a constitutional complaint as envisaged in sec 157(2) of the LRA.¹⁵

[31] On the issue as to whether Ms *Chirwa's* dismissal constituted administrative action, the Constitutional Court was unanimous that her dismissal did not constitute administrative action and hence was not reviewable under PAJA. The minority (*Langa C J*, *Mokgoro J* and *O'Regan J*) held that the High court could not be deprived of jurisdiction merely because her dismissal did not constitute administrative action. This conclusion was however subject to the qualification that the reasoning does not entail that dismissals of public employees will never constitute administrative action under PAJA.

[32] It is to be noted that the majority of the Constitutional Court in *Chirwa's* case did not specifically consider the situation where the Labour Court lacked jurisdiction to entertain a dispute on the basis that the issue in dispute required that it should be referred to arbitration¹⁶. Also relevant to this aspect, is the fact that

¹⁵ At 386 F-G; para 58

¹⁶ Sec 157(5) of the LRA

section 158(2) provides that the Labour Court may, where it becomes apparent that the dispute ought to have been referred to arbitration, (a) stay the proceedings and refer the dispute to arbitration; or (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make. It is unimaginable that a situation would arise where a party would agree to the Labour Court sitting as an arbitrator where there is an objection to the jurisdiction of the High Court to entertain a dispute.

[33] In *Nakin v MEC, Department of Education, Estern Cape Province & Others*,¹⁷ *Froneman J* considered whether *Chirwa* disturbed or overruled earlier judgments which ruled that the High Court had jurisdiction in matters involving labour disputes between the State and its employees. These decisions includes *Fedlife Assurance Ltd v Wolfaardt*¹⁸; and *Fredericks & Others v MEC for Education and Training, Eastern Cape and others*¹⁹, *Boxer Superstores Mthatha and another v Mbenya*²⁰. In *Nakin* the issue related to a claim by a teacher for remuneration lost as a result of a mistaken demotion. The error was acknowledged by the department and further undertook to reinstate the applicant to his former grade and a correction of his salary with retrospective effect. The employee launched an application seeking orders declaring that the department's failure to comply with its obligations constituted a breach of his right to fair administrative action, reviewing the conduct of the department and directing the department to give effect to the improved

¹⁷ 2008(6) BCLR 643 (CIC)

¹⁸ 2002 (1)SA 49;[2002]2 All SA 295 (A); (2001) 22 ILJ 2407(SCA)

¹⁹ *supra*

²⁰ 2007(5) SA 450 (SCA)

salary benefits. The employee launched the application in terms of the Provisions of the Promotion of Administrative Justice Act²¹. The department relied on *Chirwa's* decision for its opposition, contending that the High Court lacked jurisdiction because the dispute fall under the LRA.

[34] *Froneman J*, held (with hesitation) that *Chirwa* may have disturbed a “settled state of affairs” but that it did not have the effect of overruling the existing state of the law. The learned judge held that *Chirwa* concerned a dismissal, while the case before him concerned a dispute about remuneration and benefits which possibly distinguished *Chirwa* from *Nakin*. The Court noted that *Nakin* was seeking relief on the basis that the failure by the department to implement his properly approved reinstatement to post level 4 status amounts to unlawful administrative action and that he is entitled to certain relief in that regard; that *Nakin* was not relying on any allegation of unfairness under the LRA as the cause of his application. The Court thereafter found, on the authority of *Fredericks* (supra) that the High Court had jurisdiction to determine whether, on the merits, *Nakin* does have a claim based on alleged unlawful administrative action.

[35] The Supreme Court of Appeal also had an opportunity to consider the effect of the Constitutional Court’s judgment in *Chirwa* in *Makambi v Member of the Executive Council of the Department of Education Eastern Cape Province*²². The facts in this case were that *Makambi* had worked as a teacher for about seven years. She was transferred to another school in a temporary capacity. She was, a few months later, told that she

²¹ Act 3 of 2000

²² 2008(5) SA 449,[2008](SCA)

was in a post additional to the establishment of the school from which she had been transferred. Her salary was then stopped because her earlier application for appointment as a permanent educator was not approved. She approached the High Court for orders reviewing the decisions to stop her salary and declaring her status as an educator to be permanent in nature. Her application was dismissed on the basis that she had not exhausted her internal remedies and further that the court lacked jurisdiction to determine the “administrative action” under review as it constituted an unfair labour practice as contemplated in section 23(1) of the Constitution. She appealed to the Supreme Court of Appeal and the hearing of her appeal was delayed pending the judgment of the Constitutional Court in *Chirwa*.

[36] In the Supreme Court of Appeal, *Makambi* contended that her case was distinguishable from *Chirwa* in that *Chirwa* had initiated her claim under the LRA and subsequently approached the High Court with a claim under PAJA. Her second contention was that the High Court retained jurisdiction to entertain her matter relying, *inter alia*, on *Nakin’s* case in which it was held that the Constitutional Court in *Chirwa* did not overrule its earlier decision in *Fredericks* and that *Makambi* was entitled on the strength of that decision to bring her claim in the High Court.

[37] *Farlam JA* who wrote the judgment for the majority, found the distinction sought to be made between *Makambi* and *Chirwa* to be immaterial as he understood the Constitutional Court in *Chirwa* to have held that a claimant in the position of *Makambi* (and *Chirwa*) does not have an election, and that the fact that

Makambi did not make an election to be immaterial. With regard to the second contention, *Farlam JA* held that:

"It is true that the majority in Chirwa did not overrule Fredericks but were content to distinguish it. For the purposes of considering Ms Collett's submission on this point it is necessary to have regard to the basis on which Fredericks was distinguished in Skweyiya J's judgment in order to ascertain where he drew the line between the two cases and on which side of that line the present case falls. The matter was dealt with in paras 56 - 61 of Skweyiya J's judgment. Paragraph 58 includes the following:

'Notably, the applicants in Fredericks expressly disavowed any reliance on s 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in Fredericks rely on the fair labour practice provisions of the LRA [the Labour Relations Act 66 of 1995] or any other provision of the LRA.'

It is correct that the appellant did not rely on any of the provisions of the LRA but she did in terms rely on s 23(1) of the Constitution, which entrenches the right to fair labour practices. As Skweyiya J put it (at para 66), 'the LRA seeks to regulate and give effect to' this section of the Constitution.

[16] It is instructive in this regard to examine Ms Chirwa's claim, which it was held she could not bring in the High Court. As appears from para 157 of the dissenting judgment of Langa CJ, with whom Mokgoro and O'Regan JJ concurred, she contended that her dismissal was administrative action as understood by the Promotion of Administrative Justice Act 3 of 2000 (which I shall call in what follows 'PAJA'). The administrative action of which she complained contravened, so she alleged, (i) s 3(2)(b) of PAJA for failing to provide proper notice; (ii) s 6(2)(a)(iii) of PAJA because the administrator who took the decision to dismiss her was biased; (iii) s 3(3)(a) of

PAJA because she was prevented from obtaining assistance or representation; (iv) s 6(2)(b) of PAJA because a mandatory and material procedure prescribed by an empowering provision was not complied with; and (v) s 6(2)(f)(i) because the action taken against her contravened another law. Ms Chirwa sought in respect of the last two complaints to rely on items 8 and 9 of Schedule 8 to the LRA. Because of this Skweyiya J held (at para 61) that 'when she approached the High Court she made it clear that her claim was based on a violation of the provisions of the LRA'.

[17] When one compares the complaints set out in the appellant's founding affidavit, which I have summarised in para [9] above, with those on which Ms Chirwa relied it is clear that it is not possible to hold that this case falls on the Fredericks side of the line of distinction drawn in the Chirwa case. It follows that Ms Collett's submission that Fredericks applies cannot be upheld."

[38] The majority of the Court concluded that *Makambi* could not pursue her claim in the High Court and the appeal was accordingly dismissed. *Nugent JA* concurred in the order by *Farlam JA* and set out the reasons for his concurrence in a separate judgment. *Nugent JA* found that the court was confronted with conflicting decisions of the Constitutional Court in *Frederiks* and *Chirwa* and held that whilst the outcome in *Chirwa* might be desirable he is not at all sure that the court was "bound- or even permitted- to adopt and apply a supposed policy if the legislature has not embodied that policy in law."²³ The learned judge shared the reservation expressed by the Chief Justice in his dissenting judgment in *Chirwa*:

²³ At 460 D-E; para 39

*"We must be careful as a court not to substitute our preferred policy choices for those of the legislature. The legislature is the democratically elected body entrusted with legislative powers and this court must respect the legislation it enacts, as long as the legislation does not offend the Constitution."*²⁴

On the issue as to whether the conduct constituted administrative action *Nugent JA* held the view that the conduct complained of in *Makambi* is not materially distinguishable from the conduct that was in issue in *Chirwa* and agreed that the appeal should be dismissed.

[39] In response to the point in *limine* on jurisdiction, counsel for the applicant submitted that this Court is clothed with jurisdiction in terms of sec 157(2) of the LRA and sec 77(3) of the BCEA. He submitted that the fact that the dispute relating to elevation to a higher salary scale served in the Bargaining Council does not detract from the jurisdiction of this Court. He further submitted that the failure by the Municipality to implement the salary progression of the applicant from salary level D3 to D5 is an "administrative act" as defined in sec 1 of PAJA²⁵. It shall be convenient to deal with the issue whether the actions taken or failure thereof by the Municipality amount to administrative action.

Did failure to progress the applicant from salary level D3 to D5 amount to administrative action?

²⁴ *Chirwa*(supra) at 426 C-D, para 174

²⁵ Section 1 of PAJA defines administrative action as follows:

"In this Act, unless the context indicates otherwise 'administrative action' means any decision taken , or any failure to take a decision, by-

(footnote ²⁵ continued) (a)an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or*
- (ii) exercising a public power or performing a public function in terms of any legislation;"*

[40] In response to this question, it is appropriate to consider the real issue and the conduct complained of in the founding affidavit. As shown above, the applicant's cause of action related to three issues, being her transfer (which included other staff members in the office of the Executive Mayor), her progression from a D3 to D5 salary level, the relocation of her office from one building to the other where the new Executive Mayor is to be accommodated and the removal of furniture and her personal belongings from such office in her absence. She complained that there is no indication that the Municipality and or the first, second and third respondents *"have any intention to assist her with the implementation of my salary elevation or to resume my duties as office manager of second respondent or to re-occupy my office"* hence the relief sought. She further stated that the non-implementation of the salary elevation is unlawful and "contra" fifth respondent's own budget and the implementation thereof.

[41] It is evidently clear that nowhere in her founding affidavit did the applicant rely on any administrative action or failure thereof on the part of the Municipality as her cause of action. It was only in the replying affidavit where the applicant introduced a new cause of action when she claims that the dispute concerns both her right not to have her constitutional rights infringed unreasonably and unjustifiably as well as her contractual rights based on her contract of employment. She further refers to her right not to be deprived of her property arbitrarily, her right to human dignity and right to fair administrative action in terms of sections 10, 25 and 33 of the Constitution. Notably all those facts are raised only after the Municipality had raised the points in *limine*

referred to above in the answering affidavit. It is a well established principle of our law that a party should make its case in the founding affidavit. The applicant should not be permitted to make out a new case in reply. Nowhere in her papers does the applicant allege that she is bringing her application in terms of PAJA.

[42] It cannot be disputed that all that the applicant is complaining about arise from her employment relationship with the Municipality. The applicant would not have found herself in this situation had it not been for the fact that she is employed by the Municipality. In all the instances complained about, the Municipality was acting in its capacity as the employer of the applicant. The source of the power involved is the contract of employment between the applicant and the Municipality. The following instructive words of *Ngcobo J* are apposite:

"The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration

performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33."²⁶

The conclusion that Transnet in *Chirwa's* dismissal was not exercising administrative action as defined in PAJA is the same conclusion reached by the minority in that case. Similarly, the mere fact that the Municipality is an organ of state which exercises public power does not transform its conduct in failing to elevate the applicant to salary level D5 into administrative action. The conduct relates to labour and employment relations. She has disguised her demand for an increase in salary as a demand for the implementation of a budget provision. I therefore conclude that the Municipality's action did not constitute administrative action as defined in PAJA or under sec 33 of the Constitution.²⁷

Does the High Court have jurisdiction to determine the dispute?

[43] I have already found that the nature of the dispute between the applicant and the Municipality is an employment and labour dispute. What matters is the substance of the dispute and not what the applicant defines it to be. The essence of the dispute relate to the transfer of the applicant from the Executive Mayor's Office and her progression in salary. Her relocation from her office is related to her transfer as well as her demand that she be allowed to retain her office. Her complaint centres around

²⁶ *Chirwa v Transnet* (supra) at 415D-G; para 142

²⁷ See: *De Villiers v Minister of Education* [2009]1 ALL SA 362 (C)

the fact that the sixth respondent is now doing her functions, that the sixth respondent has been progressed or promoted to level D5 from D1 despite the fact that there is an alleged moratorium on promotions; that she is not provided with some work to do, and that her transfer would amount to a demotion. There is also a dispute as to whether she was prepared to accept an offer of an alternative office occupied by one *Horatius Seekoei* and whether she was offered to take back her belongings. In my view, her complaint relate to an unfair act or omission by the employer involving her promotion, demotion or provision of benefits which conduct may potentially constitute unfair labour practice as defined in the LRA²⁸. Furthermore, her complaint seems to relate to a supposed restructuring process based on the employer's operational requirements, after the change in the political leadership of the Municipality which may have an impact on the employees.

[44] In my view all these matters are fully provided for under the LRA regime as well as the collective agreement applicable at local government level. It is common cause that the applicant is a member of the South African Municipal Workers Union ("SAMWU"), a representative trade union which is a party to the collective agreement concluded with the South African Local Government Association ("SALGA") (to which the Municipality is affiliated) under the auspices of the South African Local Government Bargaining Council relating to the Grievance Procedure. Admittedly, the applicant had been represented by a

²⁸ Sec 186(2)(a) reads:

"Unfair Labour Practice" means any unfair act or omission that arises between an employer and an employee involving-;

(a) *Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;"*

shopsteward of SAMWU (*Lebakeng*) and had referred her dispute to the Bargaining Council until the unsuccessful resolution thereof. Furthermore, the dispute that was referred to the bargaining council as contained in a statement attached as Annexure DJ 1, covers all the complaints that the applicant is having against the Municipality, including the removal of her property from her office. The applicant is therefore bound by the terms and conditions of the collective agreement unless she has obtained an exemption from the Bargaining Council. It is not her case that she has obtained such exemption.

[45] On a reading of the founding affidavit and the amplifying affidavits, as well as the letter from her legal representative about the failure to reach settlement at Conciliation, and the applicant's intention to apply for the extension of her leave, it is clear that the applicant is relying on employer/employee relationship as well as the employment contract. Her dispute, if properly characterised relates to salary increase, transfer or demotion. In addition her letter of appointment to her current position of Office Manager: Executive Mayor's Office states that her remuneration package will be adjusted annually in accordance with the National Bargaining Council agreement. This begs the question whether her salary can be progressed through a pure administrative action outside what has been agreed upon.

[46] Counsel for the applicant referred to section 77(3) of the BCEA as well to the decision of the Labour Court in *Penta Publication (Pty) Ltd v Schoombie and Others*²⁹ in which it was held that the Labour Court has concurrent jurisdiction with civil courts to hear

²⁹ (2000) 21 ILJ 1833(LC)

and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constituted a term of that contract. The reference relate to the headnote on the judgment at page 1834. The *Penta Publishing* case that I am referred to did not deal with the issues raised in *Chirwa*. In that case, the Labour Court had to consider whether it would have jurisdiction in circumstances where the employer-employee relationship had terminated and the LRA not conferring jurisdiction on the Labour Court to entertain the dispute based on the contracts of employment between the applicant and its former employees. Finally, the applicant in this case has not made out a case in her papers for her reliance on the BCEA.

[47] In conclusion, the applicant had sought redress under the machinery provided for by the LRA. She should have proceed to finality on the same route. The fact that a dispute could not be resolved during conciliation proceedings on the basis that the Municipality representatives indicated that they had no mandate, does not mean the end of the road under the LRA. The applicant cannot now be heard to say that she has instituted the dispute resolution procedures as prescribed by the LRA and the collective agreement and does not have any other remedy. The Labour Court has wide powers including the granting of orders the applicant is seeking in this application.³⁰

[48] On the basis of *Chirwa* and *Makambi* decisions, this Court lacks jurisdiction to entertain the applicant's dispute. It shall not be necessary, in the view that I have taken of this matter, to deal with the other points in *limine*. It is also not necessary to

³⁰ Section 158 of the LRA

consider whether, if this Court had jurisdiction, the applicant would have been entitled to the orders she is seeking. Various factors such as her remedy of laying criminal charges with the police regarding her removed personal belongings was not adequate, whether the employer can be forced by an order of court to provide its employee with work and duties to perform or compel the employer to provide its employee with a particular office to work from would play an important role. Without deciding these issues they are operational matters best suited to be determined through the available labour and employment regime.

[49] What remains is the issue of costs. The Constitutional Court in *Chirwa* adopted the view that Ms *Chirwa* had raised important constitutional issues and although she was unsuccessful, found it appropriate not to award costs against her. In *Makambi*, the SCA adopted the view that because *Makambi* had come to court to assert what she perceived to be her rights under the Constitution, found that no order as to costs should have been made against her in the High Court as well as in the SCA. I am also inclined to adopt the same view in this matter. I must add also that in the Labour court the order of costs would have been made in accordance with the requirements of the law and fairness³¹.

In the result it is ordered as follows:

- (1) **The rule nisi granted on 12 December 2008 is hereby discharged.**

³¹ Sec 179 of the LRA

- (2) **Each party is to pay its costs.**

**L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE, Kimberley**

On behalf of the Applicant:	Adv A H Burger
Instructed by:	Duncan & Rothman Attorneys
On behalf of the 5th Respondent:	Adv J Y Claasen SC
Instructed by:	Van De Wall & Partners

Delivered: 13 March 2009