

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case no:	1672/09
Date heard:	2009-10-23
Date delivered:	2009-11-06

In the matter of:

DOCTOR THABO MTHUNZI SIBEKO

APPLICANT

versus

**THE PREMIER FOR THE PROVINCE OF
NORTHERN CAPE**

1ST RESPONDENT

**THE MEC: DEPARTMENT OF HEALTH,
NORTHERN CAPE**

2ND RESPONDENT

Coram: **MAJIEDT J**

JUDGMENT

MAJIEDT J:

[1] The Applicant, a qualified medical doctor and previously employed as the Head of the Department of Health in this province, seeks the following relief in this application:

- “1. Condoning non-compliance with the General Law Amendment Act, 1995 and with the Uniform Rules of Court, pertaining to Notice, form and/or service and directing that this application be heard as an urgent application.*
- 2. That a Rule nisi do and is hereby issued calling upon the First and Second Respondents to show cause why an Order should not be*

*confirmed on the 6TH day of **NOVEMBER 2009**, in the following terms:*

- 2.1 Declaring the termination of the Applicant's employment by the First and Second Respondents to be invalid, unlawful and a breach of his contract of employment with the First Respondent;*
- 2.2 That the abovementioned decision to terminate the Applicant's employment is hereby set aside;*
- 2.3 Directing the First Respondent to reinstate the Applicant into its employment under the same terms and conditions that applied prior to the unlawful termination of his contract of employment;*
- 2.4 Interdicting the First and Second Respondents from appointing any other person to the position held by the Applicant as Head of Department of the Department of Health, Province of the Northern Cape;*
- 2.5 Directing the First and Second Respondents to pay the costs of this application jointly and severally, such to include the costs of two (2) Counsel, where applicable;*
- 2.6 Such further and alternative relief as this above Honourable Court deems meet;*
- 3. That the relief sought in paragraphs 2.1, 2.2, 2.3 and 2.4 shall operate as interim orders forthwith.*
- 4. Further and alternative relief."*

[2] The Respondents oppose the application and have also raised two preliminary points, namely this Court's lack of jurisdiction to hear the matter and the question of urgency. Mr. Pillay appeared for the Applicant and Mr. Nthai SC, assisted by Mr. Mphahlele, for the Respondents.

[3] The salient facts, most of which are either common cause or not seriously placed in issue, are as follows:

- 3.1 The Applicant was interviewed for the said post in July 2007 and was appointed from 1 October 2007 (there is a dispute as to whether he was permanently employed in this post or not).
- 3.2 This appointment was subject to certain provisions in the Public Service Act, 103 of 1994, as amended, the Public Service Regulations and applicable directives as well as the Labour Relations Act (66 of 1995, “the LRA”) and Senior Management Service Handbook (“the SMS Handbook”).
- 3.3 No contract of employment or performance agreement, as envisaged in the Applicant’s letter of appointment, had been concluded between the parties.
- 3.4 On 20 July 2009 the Applicant, having declined a request that he resigns, which request was made on the same date, was suspended with immediate effect, pending disciplinary proceedings against him.
- 3.5 A disciplinary hearing, scheduled for 28 August 2009, was postponed to 21 September 2009 at the Applicant’s request.
- 3.6 By letter dated 9 September 2009, signed by both Respondents, the Applicant’s employment was terminated with immediate effect. The termination was effected on the basis that since no employment contract had ever been signed, the Applicant’s contract with the Department had been on a month to month basis and the employer had

decided to terminate same.

[4] As can be gleaned from the relief sought by the Applicant, he seeks:

4.1 to enforce his employment contract;

4.2 to have the decision to terminate his employment set aside;
and

4.3 an interdict prohibiting the Respondents from filling the post formerly held by him.

[5] The Respondents have answered fully the Applicant's case on the merits, but I consider first the two preliminary issues raised by the Respondents.

[6] The Respondents submit that the matter is not urgent and stands to be dismissed or struck from the roll. I am of the view that events have overtaken the question of urgency. By agreement between the parties the matter was postponed from 2 October 2009 to 23 October 2009. The Applicant was granted an opportunity to make (as it were, *ex post facto*) representations regarding the termination of his employment, failing which, agreement was reached regarding the filing of further affidavits. As it turned out, the Applicant did not avail himself of the opportunity to make representations. Consequently, the matter has been fully ventilated on the papers and the adjudication thereof is in the interests of not only the parties, but also of the broader public, given that this concerns a senior post in the public

service.

- [7] The second preliminary issue concerns this Court's jurisdiction. In his papers the Applicant seeks to enforce his employment contract and he avers that, in the absence of a fair pre-dismissal hearing, the termination of his employment is unlawful, invalid and a breach of contract. The Applicant submits that this Court has the requisite jurisdiction to hear the matter. On the other hand, the Respondents have adopted the stance that the Applicant is actually alleging an unlawful dismissal and this Court does not have jurisdiction in view of the provisions in sec 157(1) and sec 158 of the LRA.

- [8] Section 157 of the LRA reads as follows:

"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."

- [9] The decisions of the Constitutional Court in **Fredericks and others v MEC for Education and Training, Eastern Cape and others** 2002(2) SA 693 (CC) and in **Chirwa v Transnet Ltd and Others** 2008(4) SA 367 (CC), have led to a great jurisprudential divide in various Courts of our country relating to the meaning and effect of these decisions. Recently, in an as yet unreported decision of that Court, **Gcaba v Minister of Safety and Security and Others**, case no CCT 64/08, [2009] ZACC 26, delivered on 7 October 2009, Van der Westhuizen J, writing for an unanimous Court, sought to finally dispel conflicting opinion on the matter. Intriguingly, both Mr. Pillay and Mr. Nthai SC rely on this latest judgment to support their respective contentions.
- [10] In **Fredericks**, O'Regan J, writing for an unanimous Court, approved the decision in **Fedlife Assurance Ltd v Wolfaardt** 2002(1) SA 49 (SCA) at par. [25] that “*section 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees*” (per Nugent JA).
- [11] In **Fedlife**, the Court was seized with the issue whether the High Court had jurisdiction to adjudicate a claim for damages arising from breach of a contract of employment. The majority (per Nugent AJA), pertinently considered the provisions of sec 157(1) of the LRA and came to the conclusion that the claim for damages can indeed be adjudicated in the High Court. At par. [27] of the judgment, Nugent AJA held that:

“[27] *Whether a particular dispute falls within the terms of s 191 depends*

upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a 'dismissal' as defined in chap 8). In those circumstances the respondent's action is not a 'matter' that is required to be adjudicated by the Labour Court as contemplated by s 157(1) and the special plea was correctly set aside."

- [12] In a dissenting judgment in **Fedlife**, Froneman AJA emphasized the pre-constitutional rigid distinction between a common law contract of employment and a statutory labour dispensation or put differently, the distinction between lawfulness and fairness. This is best illustrated by the following *dictum* of Nienaber JA in **National Union of Mineworkers of SA v Vetsak Co-operative Ltd and Others** 1996(4) SA 577 (A) at 591 F-H (cited by Nugent AJA in **Fedlife**):

"The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them - and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair - and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair".

The learned Judge then proceeded to discuss the effect which the Constitution has had on our common law of employment. Whilst the employee (respondent) had framed his claim along the lines of breach of contract by the employer (appellant) in the form of an

unlawful anticipatory repudiation (which was accepted by the employee), Froneman AJA took the view that the facts of the case place the employee squarely within the ambit of a dispute concerning the fairness of the dismissal. Consequently, so the learned Judge held, sec 191(1) of the LRA would find application. He explains it thus at par. [10]:

“[10] Is the present dispute a dispute about an unfair dismissal? It certainly appears to me to be the case. In ordinary terms, untrammelled by legal interpretation, it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract of employment arrives. Nienaber JA gave expression to that underlying sentiment when, in National Union of Metalworkers of SA v Vetsak Co-operative Ltd (above para [3]) he noted that it is difficult to conceive of circumstances where an unlawful dismissal would not also be unfair. I have already indicated that, in my view, the right not to be unfairly dismissed is a particular concretised form of the constitutional right to fair labour practices. If that premise is correct then one can only argue that the present dispute is not one about an unfair dismissal if the provisions of the Act do not comprehensively deal with this constitutional right and if the right not to be unfairly dismissed does not form part, in any way, of the common-law contract of employment. In my view, that is not the case in either instance.”

- [13] With reference to the *dictum* of Nienaber JA in **Vetsak**, quoted above, Froneman AJA concluded that it would not easily be conceivable that an unlawful dismissal would also not be unfair, in which instance such a dismissal would fall squarely within the ambit of sec 191(1) of the LRA. He expressly held that

“(d)ismissal upon an unlawful breach of contract by an employer is an unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal” (at par. [14], 66 I).

Froneman AJA consequently held that the Labour Court has exclusive jurisdiction to adjudicate the dispute in terms of sec 157(1) of the LRA.

- [14] I have discussed the **Fedlife** case at some length, because the present matter is in my view quite similar in many respects. It is common cause that, if the Applicant had indeed been permanently appointed, his employment contract would have been for a fixed term of five years. The Applicant's attack is primarily directed at the termination of his employment contract in the absence of a pre-dismissal hearing. It is common cause that no such hearing had been held. The nub of the dispute is therefore: is this merely an allegedly unlawful breach of an employment contract in the form of an unlawful anticipatory repudiation or is it an allegedly unfair dismissal? The Applicant says it is the former (and has pertinently pleaded it thus in his papers), whereas the Respondents say it is the latter. In my view it can be categorised as both an allegedly unlawful breach of contract and an allegedly unfair dismissal.
- [15] I have already cited in paragraph 11 above the *dictum* of Nugent AJA in **Fedlife** at para [17]. As alluded to above, Froneman AJA's dissenting view is based on the contrary view, namely that any unlawful dismissal would conceivably always also be unfair, thus placing the matter within sec 191(1) and within the exclusive jurisdiction of the LRA (sec 157(1)).
- [16] In **Fredericks**, *supra*, the matter concerned a challenge to the refusal of educators' applications for voluntary severance packages (i.e. a matter falling within the sphere of employment relations). The challenge was based on a range of constitutional grounds. The Constitutional Court unanimously held that the High Court had the requisite jurisdiction to adjudicate the matter.

- [17] The abovementioned approach enunciated by the majority in **Fedlife** and the full Court in **Fredericks** has been followed in a number of High Court and Supreme Court of Appeal (“SCA”) decisions. For purposes of this judgment, I make mention of only two of those, since Mr. Pillay relies fairly heavily on them:

Boxer Superstores Mthatha and Another v Mbenya 2007(5) SA 450 (SCA);

Old Mutual Life Assurance Co SA Ltd v Gumbi 2007(5) SA 552 (SCA).

The **Boxer Superstores** matter is by far the more relevant one in this instance. In that matter, the SCA (per Cameron JA) held that an employee can sue in the High Court for relief on the basis of unlawful dismissal, provided that the employee’s claim is formulated in terms of contractual unlawfulness rather than unfairness. In **Gumbi**, *supra*, the SCA (per Jafta JA) confirmed that an employee is entitled to a pre-dismissal hearing.

- [18] The law appeared to be fairly well settled, namely that the High Court does have jurisdiction to adjudicate a dispute over the alleged unlawful termination of an employment contract, until the **Chirwa** decision *supra*. In **Chirwa** the employee first referred an alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) and, when the matter was supposed to be referred for arbitration, she approached the High Court for a review of the decision to dismiss her and for reinstatement. She contended that she had two causes of action available to her: one for unfair dismissal under the LRA and another flowing from the Constitution (the right to just administrative action), read with the Promotion of Administrative

Justice Act, 13 of 2000 (“PAJA”) and that the High Court therefore has concurrent jurisdiction with the Labour Court in respect of her claim. Her contentions were upheld in the High Court, but an appeal by the employer to the SCA was successful. The Constitutional Court confirmed the SCA decision. It held that the employee’s claim that she had been unfairly dismissed because her disciplinary hearing was not conducted fairly, raised a dispute within the meaning envisaged by sec 191(1) of the LRA, which could only be adjudicated by the Labour Court exclusively. Skweyiya J held that:

“Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.” (at par. [41]).

- [19] In a separate, concurring judgment, Ngcobo J focused on the scope of operation of sec 157(1) and (2) of the LRA. The learned Judge had a contrary view to that espoused in **Boxer Superstores** at par. [5 ii] and also in **United National Public Servants Association of SA v Digomo NO and Others** (2006) 26 ILJ 1957 (SCA), namely that, provided the employee’s claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could have been formulated as an unfair labour practice. Ngcobo J expressed his reservations with this approach as follows:

“The difficulty with this view is that it leaves it to the employee to decide in which court the dispute is to be heard. By characterising the manner in which the disciplinary hearing was conducted as unfair dismissal, the employee

could have the dispute heard in the Labour Court. Yet by characterising the same dispute as constituting a violation of a constitutional right to just administrative action, the employee could have the same dispute heard in the High Court. It could not have been the intention of the legislature to bring about this consequence.”(at par. [92]).

- [20] In the present matter Mr. Pillay has argued with some force that since the Applicant’s claim is formulated as a breach of an employment contract, this Court has jurisdiction to hear the matter. For this submission, he relies strongly on, *inter alia*, the **Boxer Superstores** decision, where Cameron JA alluded to the fact that the employee has

“.... formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness” (at par. [12]).

Mr. Pillay has also placed much reliance on the minority judgment of Langa CJ in **Chirwa**, where the learned Chief Justice pointed out that:

“.... the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it” (at par. [155]).

On this approach, a Court is required to

“assess its jurisdiction in the light of the pleadings” (at par. [169]).

See also: **Fraser v Absa Bank Ltd (National Director of Public Prosecutions as amicus curiae)** 2007(3) SA 484 (CC).

In **Gcaba**, *supra*, Van der Westhuizen J endorsed this approach (at par. [75]). This is a convenient juncture to discuss in more detail the **Gcaba** decision.

- [21] In **Gcaba** Van der Westhuizen J referred to the divergence of

opinion following upon **Fredericks** and **Chirwa**. Some Courts expressed the view that **Chirwa** had overruled **Fredericks**. Differing interpretations of **Chirwa** followed. Somewhat unusually, in **Makhanya v University of Zululand** [2009] 4 All SA 146 (SCA), Nugent JA sought to qualify the *ratio decidendi* of the judgment in **Chirwa**. According to him, the case did not concern the High Court's jurisdiction at all, but rather involved a finding whether the employee's claim is bad in law. Consequently, so the learned Judge held, the SCA is not bound by **Chirwa** with regard to its dictum on jurisdiction. Nugent JA held (and Lewis and Snyders JJA concurred) that the employee's claim, formulated in the particulars of claim as the enforcement of an employment contract, can be adjudicated in the High Court. In **Makambi v MEC for Education, Eastern Cape** 2008(5) SA 449 (SCA) Nugent JA had deliberated on the same issue and had raised similar concerns on the interpretation of the **Fredericks** and **Chirwa** judgments.

- [22] Into this swirling dust of obfuscation, stepped Van der Westhuizen J in **Gcaba**. Having acknowledged the confusing divergent views on the proper interpretation and application of overlapping constitutional, administrative and labour law provisions, particularly in the sphere of disputes between public sector employees and their employer, Van der Westhuizen J saw **Gcaba** as:

"... an opportunity to provide some clarity and guidance, based on a proper interpretation of the relevant provisions of the Constitution, the (LRA) and (PAJA)" – see par. [3].

- [23] After a detailed discussion of the various decisions, in particular **Fedlife**, **Chirwa** and **Makhanya**, the learned Judge concluded that **Chirwa** did not in fact “*overrule*” **Fredericks**, but that the two decisions are consistent in its findings, based on its particular set of facts. In particular, Van der Westhuizen J expressed the view that the point decided in **Chirwa**, namely that the employer’s decision to dismiss the employee did not amount to administrative action, had been left open in **Fredericks**.
- [24] Mr. Nthai SC has submitted that on the Applicant’s papers, regardless of its purported formulation of the claim as the enforcement of a contract of employment, the relief which the Applicant seeks amount to the assertion of a claim based on unfair dismissal under the LRA. Thus, he contends, it is a matter to be adjudicated in the Labour Court. Mr. Pillay on the other hand has contended that the nature of the dispute must be assessed on the pleadings, that the Applicant has carefully and deliberately framed his claim as the enforcement of an employment contract and that consequently, this Court has jurisdiction to adjudicate the matter.
- [25] It is of some significance that the Applicant himself declares in par. 5.4 of his founding affidavit that “*the issue of my suspension is best dealt with through the Labour Relations Act*”. The question which immediately arises is – how is his dismissal (which he avers is unfair in the absence of a pre-dismissal hearing) different from his suspension? Why is the dismissal (or, in his nomenclature, the termination of his employment contract) not also best dealt with through the LRA? The answer to these questions is formulated thus by the Applicant in his founding affidavit in the sentence

immediately following upon the abovequoted extract:

“I have approached this Honourable Court to enforce the contractual rights I am afforded by virtue of my contract of employment, which can only be done through this Honourable Court. There is no reason for me to approach the CCMA, Bargaining Council and/or the Labour Court.”

When pressed on this aspect during argument, Mr. Pillay provided the same explanation in broad terms, which I find rather unpersuasive.

[26] Mr. Pillay is undoubtedly correct in his submission that **Makhanya** is the latest in a long line of cases which supports his argument that the High Court has the requisite jurisdiction to enforce common law contractual rights, including employment contracts. But has **Chirwa** and/or **Gcaba** changed that? Mr. Nthai SC has argued forcefully that they have.

[27] It is plain that the majority in **Chirwa** ruled that the Labour Court has exclusive jurisdiction in that instance. Skweyiya J made it clear that in instances where an alternative cause of action may exist in matters arising out of an employment relationship (i.e. alternative to the LRA processes), in which an employee alleges unfair dismissal or an unfair labour practice by the employer, the mechanisms established by the LRA should be such an employee's first port of call;

See: **Chirwa**, *supra*, at par. [41], 380 D-E.

Ngcobo J expressed similar views, stating that:

“Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal (was held), has two causes of action, one flowing from the

LRA and another flowing from the Constitution and PAJA” (at par. [149], 417 G-H).

The learned Judge also warned against “*forum-shopping*”, i.e. choosing another forum when the shoe pinches in one forum.

- [28] These views were endorsed in broad terms by Van der Westhuizen J in **Gcaba** (compare, *inter alia*, paragraphs [56] and [57] of the judgment). The following *dictum* of the learned Judge is particularly instructive in the present matter:

*“[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba’s case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. **If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.**”*”(emphasis added).

- [29] In this matter the Applicant’s cause of complaint as set out in his founding affidavit is the lack of a pre-dismissal hearing, as is required by law in the case of fixed term contracts. Put differently, he is alleging an unfair dismissal thus asserting a claim which really should fall under the LRA mechanisms. In my view it matters not that the Applicant calls his claim “*the enforcement of an employment contract*.” In **Makambi**, *supra*, Nugent JA puts it as follows:

“But things cannot be made to be what they are not merely by calling them something else and that applies as much to legal claims as to other things.” (at par [32], 458 E).

See also: **Modutte v The Municipal Manager: Sol Plaatje Municipality and Others**, unreported, Northern Cape High Court, case number 1637/08, delivered on 13 March 2009 (Tlaletsi J), at par [42].

A close scrutiny of the pleadings and a proper interpretation thereof leads me to the inescapable conclusion that this matter belongs in LRA forae and not in this Court. I am fortified in this conclusion by the fact that, as was the case in **Chirwa** and **Gcaba**, the Applicant had first submitted himself to an internal (labour) process, i.e. the disciplinary hearing, before turning to this Court, while that internal process was still pending. It is striking that he did not at the outset approach this Court for relief if his cause of action was purely contractual in nature as he avers now. Moreover, this view is further fortified by sec 17 of the Public Service Act, Proc 103 of 1994, expressly which provides that”

“... the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act”.

It is common cause that the Applicant’s employment is governed by, *inter alia*, the Public Service Act.

- [30] I am acutely aware that the foregoing conclusion is directly in conflict with the decision in **Makhanya**. In my view, Nugent JA with respect, erred in seeking to distinguish **Chirwa** in order to avoid the *stare decisis* principle. Moreover, **Gcaba** firmly re-establishes the principles enunciated by the majority in **Chirwa**. It

is rather unusual but, with respect, understandable that Van der Westhuizen J concludes his judgment as follows in par. [77]:

“[77] As stated earlier, this Court’s decision in Chirwa has been interpreted to have “overruled” its previous decision in Fredericks, but also as not to have done so. This term was not used in Chirwa, however. The distinction between the two cases was pointed out, as indicated earlier. In this judgment the relevant factual and procedural similarities and differences between Fredericks, Chirwa and Gcaba are highlighted. To the extent that this judgment may be interpreted to differ from Fredericks or Chirwa, it is the most recent authority”.

- [31] In holding that the employee in **Gcaba** should have proceeded in the Labour Court, Van der Westhuizen J makes the following observation at par [76]:

“The applicant’s complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour practices.”

The position is exactly the same in the present matter.

- [32] After judgment had been reserved, the Applicant’s attorneys sought leave to place before me a judgment by Hollis AJ in the Kwazulu-Natal High Court, Pietermaritzburg handed down on 23 October 2009 (i.e. the date on which the matter was heard before me). Despite the Respondents’ attorneys’ objection, I acceded to the request and granted the parties an opportunity to file supplementary heads of argument on this new judgment only. The Respondents have filed brief supplementary Heads of Argument, but the Applicant have not.
- [33] In the said judgment, **Mannya v Premier for the Province of Kwazulu-Natal & Another**, case no 6309/2009, Hollis AJ had to

adjudicate on an application of an employee for an interdict pending review proceedings to be instituted against the second respondent in that matter (the second respondent was the chairperson of a disciplinary inquiry against the employee/applicant instituted by the employer/first respondent). The Court had to decide, *inter alia*, the question of jurisdiction and also whether the employee/applicant can have a decision reviewed outside the parameters of PAJA. Hollis AJ found for the employee/applicant on both these issues. It is of course the decision on the first issue, relating to jurisdiction, which is germane in the present matter. For the reasons that follow I am of the view that this judgment does not assist the Applicant herein at all.

[34] Firstly I consider the facts in the present matter to be distinguishable on the facts. In **Mannya**, the employee/applicant had not been dismissed. The application for an interdict *pendente lite* was premised on challenging in the main (review) application the fairness of the disciplinary hearing (and more particularly the presiding officer's [2nd respondent's] alleged bias). In the present matter the cause of complaint is a dismissal without a prior hearing.

[35] Even if I am wrong in the foregoing conclusion, I am of the view that Hollis AJ is, with respect, wrong in his findings. His *ratio decidendi* is that the employee/applicant's cause of action is founded upon the enforcement of a tacit term relating to his employment contract (i.e. that a **fair** disciplinary hearing should precede his dismissal). This finding was made, notwithstanding

the fact that the employee/applicant made reference in the founding affidavit to the provisions of the LRA, the Constitution and PAJA. Hollis AJ relied on **Makhanya** and also on **Transman (Pty) Ltd v Dick and Another** 2009(4) SA 22 (SCA), per Jafta JA, where the learned Judge held as follows at par. [18], 29 F-H:

*“[18] It is important to note that in Chirwa the Constitutional Court deprecated the proposition that civil servants have two causes of action, but only insofar as the second cause of action is based on s 33 of the Constitution or the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The decision in Chirwa prohibits the use of review process in challenging the validity of a dismissal from employment. **What this means is that a cause of action based on a contractual breach is still permissible.** But for purposes of determining jurisdiction the fact that incompetent relief is sought is immaterial. Such enquiry does not entail the outcome of an adjudicative process. The issue that is essential to the enquiry is whether the court has authority to adjudicate a particular dispute. The incompetence of the claim made in the present case, therefore, plays no part in the determination of the High Court's jurisdiction. As stated earlier, the employee has instituted review proceedings over which the High Court unquestionably has jurisdiction.”*(emphasis added).

Jafta JA referred to **Fedlife** for support of the proposition highlighted above. Not only is this part of the *dictum* which I have highlighted in my view *obiter* (the matter concerned a review, not the enforcement of a contractual claim), but it also respectfully seems to me to be in conflict with the dictae in **Chirwa** and **Gcaba** to the effect that the pleadings must be properly interpreted to ascertain what the actual claim is which the litigant asserts.

- [36] If the Applicant's contentions are to be upheld and if Hollis AJ is correct in **Mannya**, it means that a litigant can simply approach Court and call his/her claim by another name to avoid the LRA mechanisms, whereas in truth and in fact the claim is one governed by the LRA. Surely the law cannot countenance such

semantic subterfuge. This is exactly what Skweyiya J and Ngcobo J cautioned about in **Chirwa**, endorsed by Van der Westhuizen J in **Gcaba**. I am therefore not persuaded that **Mannya** supports the Applicant's case.

- [37] It follows that the objection *in limine* concerning this Court's lack of jurisdiction is good in law and it ought to be upheld. The aforementioned finding makes it unnecessary to consider the merits. I am, however, constrained by the papers before me to make the observation that it seems to me a quite startling proposition that the Applicant can be said to have been on a month to month employment contract. In my *prima facie* view this stance is strongly controverted by not only clause 6.3 of the SMS Handbook (which envisages a fixed term of 5 years for Heads of Departments), but also by the general probabilities.
- [38] In summary and in conclusion: this dispute concerns an alleged unfair dismissal and belongs exclusively in the LRA forae. This Court lacks the requisite jurisdiction by reason of the provisions in sec 157(1) of the LRA.
- [39] As to the costs, while the matter was of a certain measure of complexity, the **Gcaba** decision clarified the legal position considerably and the employment of two Counsel by the Respondent is a luxury which the Applicant should not be required to pay for.

[40] The application is dismissed with costs, including the costs of 2 October 2009.

ADV I PILLAY FOR THE APPLICANT INSTRUCTED BY DUNCAN & ROTHMAN
ATTORNEYS, KIMBERLEY AS CORRESPONDENTS FOR KNIGHT TURNER
ATTORNEYS, LA LUCIA

ADV S NTHAI SC AND ADV MS MPHABLELE FOR THE RESPONDENTS
INSTRUCTED BY MJILA & PARTNERS, KIMBERLEY