



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 21/08

In the matter between:

PETER GOUSSARD

Applicant

and

IMPALA PLATINUM LIMITED

Respondent

Heard: 14 November 2011

Delivered: 07 May 2012

Summary: Statement of case-contractual and delictual damages unfair dismissal-operational reasons and incompatibility. Jurisdictional points: Cause of action based on implied terms of contract. Damages based on based on section 23 of

the Constitution.

JUDGMENT

MOLAHLEHI J

Introduction

- 1] This is an interlocutory application in terms of which the respondent has raised various points *in limine* regarding the jurisdiction of this Court to entertain a number of causes of actions raised by the applicant in his statement of case. The claims raised by the applicant in his statement of case arose from his dismissal by the respondent.
- 2] The claims of the applicant are based on a number of causes of action. Those causes of action can broadly speaking be categorised into:
 - a. Contractual and delictual claim;
 - b. Breach of settlement agreement;
 - c. Unfair dismissal for reason related to operations;
 - d. Dismissal due to incompatibility
 - e. Constitutional damages arising from the breach of contract.
- 3] One of the Respondent's preliminary points was that the Court did not have jurisdiction because the termination of the employment contract was by mutual consent between the parties. The respondent has since conceded that the termination of the employment contract was not as a result of mutual separation.

The respondent's preliminary points

- 4] The respondent contends that this Court does not have jurisdiction to entertain the applicant's claim on the following grounds:

4.1. Claim A: Contractual and Delictual Damages- The Respondent contends that the Court lacks jurisdiction and that the claims are bad in law, i.e are not valid and do not constitute good causes of action.

4.2. Claim B: Breach of Settlement Agreement- The respondent accepts that there was no settlement agreement.

4.3. Claim C: dismissal due to Operational Requirements-The Respondent submits that this Honourable Court is entitled to enquire into the true nature of the dispute between the parties in order to determine whether it has jurisdiction, and that the facts show that the Applicant's services were not terminated due to operational requirements. Hence it is respectively submitted that properly construed this is a matter for arbitration and this Honourable Court does not have jurisdiction in respect of claim C, due to section 157(5) of the LRA.

4.4. Claim D: Dismissal due to incompatibility - It is submitted that this claim is relates to termination of services due to incompatibility, hence this Honourable Court does not have jurisdiction in terms of section 191(5) of the LRA read with section 157(5) of the LRA.

4.5. Claim E:Constitutional damages - The Respondent submits that the Court lacks jurisdiction in respect of constitutional claims arising out of the alleged unfair termination of the Applicant's claims arising out of the alleged unfair termination of the Applicant's services, and further that this claim is bad in law.'

Contractual and delictual claims

- 5] The contractual and delictual claims which the applicant relies on are set out under claim A of the statement of claim which has been amended. In the first

instance, the applicant contends that the respondent breached a material implied term of the contract of employment. In this respect, the applicant bases the cause of action on the implied incorporation of the provisions of the Labour Relations Act of 1995 (LRA) and the Basic Conditions of Employment Act of 1997 (BCEA) into his contract of employment.

- 6] The other aspect of the case of the applicant is that it was also a tacit term of the contract of employment that his contract of employment would not be terminated as long as he had “complied with the respondent's procedures and directives until his age of retirement” which is 62 years of age. The alternative claim is that it is implied in the contract of employment that he would be employed for an indefinite period until he retires and that he would not be dismissed unfairly for reasons related to misconduct, insanity and or retrenchment. It was for the same reason that he contends that he had reasonable expectation that the shares which had been offered to him would have vested during the course of his employment.
- 7] In essence the case of the applicant is that termination of his contract of employment by the respondent amounted to breach of the employment contract and breach of the tacit term that there was reasonable expectation that the contract of employment would not be terminated. The applicant contends that as a result of the breach of contract by the respondent, he has suffered damages in the amount of R3.9 million
- 8] In support of his case in relation to the above points, the applicant relies on the case of *Parry v Astral Operations Limited*,¹ where the Labour Court dealt with the conflict of laws as to which law should apply between Malawi and South Africa in an employment dispute. In that case, the applicant had claimed damages for breach of contract on the basis that there was an implied or tacit term of the contract that the South African law would apply to their dispute. It would seem it

1 (2005) 26 ILJ 1479 (LC) at para 28

was on that basis that the Court resolved the conflict of laws and assumed jurisdiction over the dispute. The Court *per* Pillay J observed:

‘The applicant did not take issue with the respondent on extra-territoriality and the doctrine of effectiveness. Principally, the applicant's stance was that it was evident from the contract that the parties had tacitly, alternatively impliedly, chosen South African law as the proper law of the contract. From this, the presumption arises that the parties chose South African courts as the forum to adjudicate their dispute. Alternatively, the parties and the contract had a real connection to South Africa. The parties could not contract out of the LRA and there is nothing in the contract that suggests that they did. Mr Kahanovitz then proceeded to identify the factors connecting the dispute to South Africa.’
[Footnote omitted]

- 9] The above decision was overturned on appeal in *Astral Operations Ltd v Parry*.² The Labour Appeal Court did not consider the issue of the implied term in the contract of employment regarding the choice of law. In overruling the decision of the court *a quo* the Labour Appeal Court held that:

‘The court below reached the conclusion that the BCEA and the Act (the LRA) applied to this case. I have taken a different view. I wish to make two observations which in my view are responsible for the different outcome in the court below. The first is that it seems to me that, as counsel for the appellant submitted, the court *a quo* dealt first with the question of the proper choice of law and once it had concluded that the parties had chosen the South African law as the law that would apply, it seemed to it that it followed that the Labour Court had jurisdiction. In my view this did not follow. Parties are able to choose whatever law as the law that must be applied in resolving a dispute between them arising out of some agreement between them. That law may be invoked by a court in a foreign jurisdiction to adjudicate a dispute. In this case a Malawian court could have applied South Africa law including the BCEA and the Act in adjudicating the respondent's claims against the appellant.’³

² (2008) 29 ILJ 2668 (LAC)

³ *Astral Operations Ltd v Parry* at para 22.

10] In any case, besides the fact that the Labour Appeal Court, did not deal with the issue of the effect of an implied term of the contract, the decision is no longer good law in the face of the decision of the Supreme Court of Appeal in *SA Maritime Safety Authority v Mc Kenzie*,⁴ the details of which are discussed later in this judgment.

11] It is now trite that the issue of jurisdiction whenever raised has to be determined on the basis of the pleadings and not the merits of the case.⁵ In labour disputes, the Labour Court in general has jurisdiction in terms of both the provisions of section 157 of the Labour Relations Act⁶ and section 77 of the Basic Conditions of Employment Act.⁷

12] The applicant in defending his claims against the points raised by the respondent contends that the Court has jurisdiction. In this respect, the applicant contends that he has formulated his claims in such a manner that once jurisdiction is found in one claim then it would automatically follow that jurisdiction

4 (2010) 31 ILJ 529 (SCA).

5 See *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 169 and *Mahumani v Member of the Executive Council: Finance, Economic Affairs and Tourism, Limpopo* (2010) 31 ILJ 2009 (NGP)

6 66 of 1995 (LRA). Section **157. Jurisdiction of Labour Court** reads as follows:

- (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 No. 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.

7 75 of 1997. Section 77 (3) of the BCEA provides: (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.

would be found in relation to the other claims based on the concepts such as, *causa continua*, *conjunction causarum connexitas causarum* and “the once and for all” rule. In support of his contention that these concepts applies to the present case the applicant relied on several cases in that regard.⁸

13] The above rules do not generally apply in labour matters simply because of the structure and the nature of the dispute resolution mechanisms set out in the various labour legislation. In labour disputes, a number of causes of action may arise from the same set of facts and those disputes may be heard by various dispute resolution bodies set out in particular in the LRA.

14] In *Dial Tech CC v Hudson and Another*,⁹ this Court was faced with having to resolve the question whether the employee who successfully obtained compensation for constructive dismissal based on the allegations of sexual harassment at the CCMA was entitled to later claim for damages based on the same sexual harassment facts in terms of the Employment Equity Act. The court held that:

‘Whilst the cause of action in both the constructive dismissal and the sexual harassment cases may arise in the same facts and circumstances, their remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.

In terms of the constructive dismissal, the matter is firstly, before reaching arbitration or adjudication, processed through conciliation in terms of section 135 of the LRA. If conciliation failed the employee is entitled to refer the matter to

⁸ The *causa continuation* principle was applied in *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A), where the Orange Free State Provincial Division held that it had jurisdiction in a matter involving allegations of misrepresentation in the building of a bridge where the girders of a bridge across the river on the of both Orange Free State and the Cape. The rule was also applied in *N.C.S Plastics (Pty) Ltd v Erasmus and Others* 1973 (1) SA 275 where at 278 A-B, the court held that the underlying reason for this rule was to avoid multiplication of actions concerning the same subject matter. The rule *causae continetia* is discussed in *Berger and Others v Aiken and Others* 1964 (2) SA 396 at page 402. For a discussion and authorities regarding the “once and for all” rule see *Dial Tech CC v Hudson and Another*, (2007) 28 ILJ 1237 (LC) at paragraph [57] to [59].

⁹ (2007) 28 ILJ 1237 (LC).

arbitration under the auspices of the CCMA or a bargaining council whichever is applicable. However, dismissal disputes, referred to conciliation in terms of section 187 of the LRA, are adjudicated by the Labour Court if conciliation fails.’¹⁰

15] The above approach was followed in *Ditsamai v Gauteng Shared Services Centre*.¹¹ In that case after accepting payment of compensation in terms of the arbitration award, the applicant referred a further dispute, this time seeking damages for unfair discrimination under the Employment Equity Act 55 of 1998 (“the EEA”). The respondent claimed that the matter was *res judicata* because it had already been determined at the arbitration stage. The Court dismissed the point in *limine* and reasoned that although the facts upon which the applicant relied on in both actions were the same, the causes of action were different. The approach adopted by the Court in that matter was upheld on appeal in the soon to be published case of *Gauteng Shared Services v Titus Ditsamai*,¹² where in dismissing the appeal Davis J held:

‘When the relevant facts are set out thus, the end of the second case brought by the respondent was predicated on an allegation of unfair discrimination as set out in section 6 of EEA. This dispute requires a completely different determination to that which confronted the arbitrator, which turned on the fairness of an early termination of the contract. In the case based on the EEA, the court was required to make a determination as to whether there had been unfair discrimination in the refusal to appoint the respondent to a permanent position and concomitant preference given to other applicants who were of a different racial group.’

[18] In *Gcaba v Minister for Safety and Security and Others*,¹³ the Constitutional Court in addressing the issue of the multiplicity of causes of action that may arise in labour disputes observed:

‘First, it is undoubtedly correct that the same conduct may threaten or violate

10 *Dial Tech CC v Hudson and Another* at paras 63-64.

11 [2009] 5 BLLR 456 (LC).

12 Unreported case number JA 44/09 at para 17.

13 (2009) 30 ILJ 2623 (CC) at para 53.

different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the *actio iniuriarum* in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalization should be avoided.'

Implying statutory rights into the employment contract

- [19] The issue similar to the one raised in this matter received attention in *Mc Kenzie*, where the Supreme Court of Appeal had to determine whether the right not to be unfairly dismissed as envisaged in the LRA can be implied into the contract of employment.

- [20] In that case after resolving the dispute which the employee had referred to the CCMA concerning an alleged unfair dismissal dispute, the employee instituted a claim for damages in the High Court. The employee pleaded in his papers that his employment contract could not be terminated "without just cause" because of either the explicit or implied term of the contract. The employee claimed damages because according to him had the employer not breached an implied term of his contract he would have been in the employ of the employer until his retirement.

- [21] The employer at the High Court raised a special plea contending that the Court did not have jurisdiction to hear the matter. The special plea was dismissed including leave to appeal against that decision. On petition for leave to appeal, the Supreme Court of Appeal granted leave and in following the decision in

Gcaba held that the question in cases of this nature was whether the Court had jurisdiction over the pleaded case and not some other case that has not been pleaded.

- [22] After restating the test for determining the existence of a tacit term in a contract, the Court in *McKenzie* held that the foundation for the pleaded allegation of an implied term in the contract could either flow from the provisions of section 185 of the LRA dealing with the unfair dismissal or could lie in the development of the common law in accordance with the provisions of section 39 of the Constitution. Having found that the case of the employee in that case was based on the implied term the court proceeded to deal with the difference between rights flowing from statutes and those arising from contract. In this respect, the court had the following to say:

'The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation. The nature of the latter rights may vary. They may be conferred by way of mandatory injunctions, such as the provision in the Truck Acts in England, which have been carried over into South African legislation dealing with employment, in terms of which an employee's wages must be paid in cash in the currency of the country. Alternatively they may prohibit or regulate conduct that might otherwise be permissible such as the making of deductions from an employee's remuneration. Rights to safe working conditions and to compensation for injuries at work are protective in nature. All of this has limited the extent to which employers and employees are free to determine the terms of their relationship. In most instances the employee cannot waive such statutory rights because it would be contrary to public policy to permit such a waiver, although the parties to the contract can stipulate for more favourable rights to vest in the employee.

A relevant feature of some legislation of this type is that it not only confers rights but also provides a mechanism for the enforcement of those rights. Where that

happens the question arises whether those means are exclusive and provide the sole means of enforcement or whether it is open to the beneficiary of the right to use the ordinary processes of the courts in order to enforce them. Another question that arises is whether the beneficiary of the right enjoys not only the benefit of the right itself but also a right to claim damages if the right is infringed. Our courts have frequently grappled with these questions and the jurisprudence in that regard casts light upon the present problem.

Where a statute creates both a right and a means for enforcing that right the position is that:

“We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.”

If on a proper interpretation of the statute in question the legislature has confined a person harmed by a breach of the right conferred therein to the statutory remedy then resort to other means of enforcement is excluded. Accordingly both the scope of the right itself and the means of enforcing that right are determined by the intention of the legislature as ascertained on a proper interpretation of the legislation. It follows from the authorities mentioned in para 7 of this judgment that it is now clearly established that in order to enforce the statutory right not to be unfairly dismissed as embodied in s 185 of the LRA an injured party must have resort to the tribunals established under the LRA, being either the CCMA or in some instances the Labour Court.

Similarly whether a breach of a statutory right or a failure to observe a statutory obligation gives rise to a claim for damages is to a substantial measure determined by the intention of the legislature as it emerges from the statutory provision under consideration. Whilst the interpretation of the statute may not be

the only feature in the analysis it is the proper starting-point.’¹⁴ [Footnote omitted]

[23] The learned judge further observed:

‘I am not sure that the common law required development in order to reach that conclusion, but that is by the by. What is important to bear in mind is that the effect of any extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices. The constitutional rights that were drawn upon in that case for importing into the contract a term protecting the employee against constructive dismissal are given full effect in relation to employees falling under the LRA by the definition of “dismissal” in s 186(1). *Murray* seems to me to be authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said en passant. It is possible that there is some need to develop the common law by importing into the contract of such employees terms that give effect to their right to fair labour practices but that is not a matter that need now concern us.

I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act). The obiter dictum in *Gumbi*, which has been reiterated without elaboration, and without apparent consideration of the matters that have been dealt with in this judgment, cannot be considered to be authoritative.’¹⁵ [Footnote omitted]

[24] The Court concluded that the plea about jurisdiction should have been upheld not

¹⁴ *McKenzie* at paras 14-17.

¹⁵ *McKenzie* at paras 54-55.

on the basis of jurisdiction but that the pleaded case was bad in law.

[25] The applicant in the present case sought to have it be inferred that there was an implied term in his employment contract entitling him to claim both delictual and contractual damages. As stated earlier the Court in *McKenzie* found this to be bad law. This approach is informed by the fact that, in, common law the right not to be unfairly dismissed is not recognised. The right not to be unfairly dismissed derives from the provisions of the statute and therefore any enforcement of that right must be located in that statute. In other words, in the present case there is no basis for the contention by the applicant that the breach of the LRA gave rise to claim for breach of contract. Thus the applicant's remedies in as far as the alleged unfair dismissal is concerned is confined to those provided for in the LRA or the BCEA. To the extent that the BCEA confers jurisdiction on the Labour Court the powers of the Court are strictly limited to determine rights arising from the common law of contract and nothing more.

[26] In light of the above, I am of the view that the applicant's plea that he is entitled to both contractual and delictual damages because the provisions of the LRA and the BCEA are impliedly incorporated into his contract of employment is bad in law and he is also not entitled in law to circumvent the provisions of section 194 of the LRA.

Unfair dismissal due operational reasons

[27] In terms of claim C the applicant contends that his dismissal was in breach of section 189 (1) of the LRA. Section 189 of the LRA deals with both the procedural and substantive fairness of a dismissal based on operation reasons._

[28] The respondent contends that the court does not have jurisdiction to entertain this claim because the facts show that the applicant was dismissed for incompatibility and not for operational reasons as contended by the applicant.

[29] The issue under claim C has to do with the categorisation of the dispute by the employee. The party that has to indicate the reasons for the dismissal for the purposes of section 195 [5] of the LRA is the employee. The reasons provided for by the employee for the alleged unfair dismissal determines in the initial stage the forum to which the dispute should be determined once the conciliation has failed. The labelling of the reason for the dismissal triggers the process of arbitration or adjudication by the Court. It does not however determine in the final analysis the jurisdiction of that particular forum. The allegation of the reason for the dismissal provides the forum to which the dispute should serve and in that regard simply provide that forum with the provisional jurisdiction. The forum which assumes the initial jurisdiction over the dispute may in due course once the jurisdictional facts are place before it determines the true nature of the dispute and thereby also determines which forum has the appropriate jurisdiction.

[30] In terms of this approach, the assumption is that the reasons given by the employee for the alleged unfair dismissal are correct and therefore the dispute has been correctly categorised for the purposes of the jurisdiction of the forum before which the dispute has been presented. This approach is stated in *Wardlaw v Supreme Mouldings (Pty) Ltd*,¹⁶ as follows:

'In the light of the above, it seems to us that the employee's allegation of the reason for dismissal as contemplated by s 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to resolve the dispute on the merits finally. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits.'

[31] The above approach has support in the decision of the Constitutional Court in

¹⁶ (2007) 28 ILJ 1042 (LAC) at para 24. See also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others* (2010) 31 ILJ 371 (LC).

CUSA v Tao Ying Metal Industries and Others,¹⁷ where the court at the end of paragraph held:

‘The dispute between the parties only emerge once on evidence is in.’

[32] It is therefore my view that the issue of whether the applicant was dismissed for operational reasons is an issue for which the court has provisional adjudication. The question of whether the true nature of the dispute relates to incompatibility as contended by the respondent and not operational reasons will best be determined by the trial court after considering evidence that the parties may put before it.

Incompatibility

[33] The cause of action under claim D is formulated in the alternative in the event it was to be found that the dismissal was not due to operational reasons but for incompatibility. The claim is based on the provisions of section 188 [1] of the LRA¹⁸ read with section 191] of the LRA.

16] The applicant raised the claim that his dismissal was a result of incompatibility after the respondent in the statement of defence indicated that the dismissal was due to incompatibility arising from allegations of improper behaviour and improper comments which were of a sexual nature made by the applicants.

[34] It is trite that the Labour Court does not have jurisdiction to entertain arbitrable

¹⁷ (2008) 29 ILJ 2461 (CC).

¹⁸ Section 188 (1) of the LRA reads: “ A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.”

disputes¹⁹ unless by the consent of the parties that the Court seats as an arbitrator in terms section 158(2) of the LRA.²⁰ Thus this Court does not have jurisdiction to entertain an alleged unfair dismissal dispute based on incompatibility.

It therefore follows that in the absence of an agreement between the parties as to the issue of incompatibility, the court lacks jurisdiction to entertain this dispute.

Opportunity to be heard in terms of section 23 of the Constitution

[35] The cause of action under claim E which is in the alternative to claims C and D. Under this heading the applicant claims that his dismissal was unfair in that it was in contravention of section 23 of the Constitution in that he was not given an opportunity to be heard before he was dismissed and that was accordingly in breach of job security of employment.

[36] Section 23 of the Constitution provides amongst others that employees have the right to fair labour practices. This right has been given effect in terms of the provision of section 185 of the LRA.²¹ It is for this reason that a litigant cannot by pass the LRA and seek to establish a cause of action in terms of the provision of section 23 of the Constitution unless the cause of action is based on challenging the constitutionality of the provisions of the LRA.²² In this respect, the

19 Section 157 (5) of the LRA provides that: "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."

20 Section 158(2) of the LRA provides: "If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

- (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."

21 Section 185 of the LRA provides: "**Right not to be unfairly dismissed or subjected to unfair labour practice.**

Every employee has the right not to be-

- a) unfairly dismissed; and

subjected to unfair labour practice.

22 See *Mohlaka v Minister of Finance* (2009) 30 ILJ 622 (LC) at 632 F to G.

Constitutional Court in *SANDU v Minister of Defence and Others*, where the Court held that:²³

'Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.'

[37] In dealing with an issue similar to the current, Ngcobo J, in *Chirwa* held that:

'[T]he employee cannot, as the applicant seeks to do, avoid the dispute-resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2).... What is, in essence, a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution'.²⁴

[40] It is therefore my view that the cause of action formulated under claim E is unsustainable as it is also bad in law.

[41] As concerning the issue of costs I do not believe that it would be fair to allow the costs to follow the result.

Order

In the premises the following order is made:

1. The court has no jurisdiction to entertain the contractual and delictual

²³ (2007) 28 ILJ 1909 (CC); [2007] 9 BCLR 785 (CC) at para 51.

²⁴ *Chirwa* at para 124. The same approach was adopted in *Gcaba* at paras 54 and 65.

claim of the applicant under claim 'A' and accordingly the claim in this respect is dismissed.

2. The Court has jurisdiction to entertain the alleged unfair dismissal for operational reasons under claim 'C', and accordingly the parties are directed to hold a pre-trial conference within 14 days of date of this order.
3. The Court has no jurisdiction to entertain the claim of incompatibility under claim 'D'.
4. The Court has no jurisdiction to entertain the claim formulated in terms of section 23 of the Constitution under claim 'E' and accordingly the claim in this respect is dismissed.
5. There is no order as to costs.

Molahlehi J

APPEARANCES:

FOR THE APPLICANT: Adv. Coetzee instructed by Van Niekerk Attorney's

FOR THE RESPONDENT: Adv N Smythe instructed by Edward Nathan Sonnenberg
Inc

