IN THE LABOUR COURT OF SOUTH AFRICA

DURBAN

REPORTABLE CASE NO: D76/09

DATE: 2009-03-16

In the matter between

WILLIAM ADRIAAN COETSEE	First Applicant
COLLEEN SUSAN EVENS	Second Applicant
And	
TRANSNET LIMITED	First Respondent
THE TRANSNET BARGAINING COUNCIL	Second Respondent
LESLIE OWEN N.O.	Third Respondent

J U D G M E N T

PILLAY D, J:

The Issue

1. In *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) *(Chirwa*), the jurisdictional contest was between the High Court and the Labour Court, between administrative law and labour law. In this case the jurisdictional contest is between the second respondent Bargaining Council and the Labour Court, between the common law and labour law, between litigation and arbitration.

Central to the contest in both cases is the "concurrent" jurisdiction of the Labour Court with the Civil Court. In *Chirwa* it turned on the interpretation and application of section 157(2) of the Labour Relations Act No. 66 of 1995 (LRA). In this case, it turns on the interpretation and application of section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 (BCEA).

The Facts

2. The facts of the case are that the applicants, both managers, allegedly committed misconduct on 13 November 2007. More than a year later, the first respondent employer, Transnet, notified the applicants to attend a pre-dismissal arbitration on 29 January 2009. On 13 February 2009, the parties consented to an order in terms of which Transnet undertook not to proceed with the disciplinary action against the applicants until these proceedings are concluded.

3. Miss Nel, appearing for the applicants, described the applicants' cause of action as a "purely contractual complaint … still capable of being enforced by a declarator and interdict in terms of Section 77(3) of the BCEA",[1] This was so because the competing bases for jurisdiction under the provisions of the LRA, BCEA and common law, had to be undone through legislation.[2] *Boxer Superstores Mthatha and Another v Mbenya 2007* (28) ILJ 2209 (SCA) 11 confirmed that the High Court has jurisdiction over a purely contractual dispute that bears no reference to unfairness.[3]

[1] Paragraph 2 of the Applicants' Supplementary Heads
[2] Paragraph 2 of the Applicants' Further Submissions
[3] Paragraph 2 of the Applicants' Further Submissions

4. She emphasised that this application was not founded on unfairness; it was founded on unlawfulness. Unlawfulness is not necessarily unfairness.[4] She submitted that *Chirwa* considered both *Boxer* and *Langeveldt v Vryburg Transitional Local Council and Others (2001) 5 BLLR 501; 2001 21 ILJ 1116 LAC* and did not overturn either of them.

Analysis

5. Both *Langeveldt* and *Boxer* preceded *Chirwa*. Ngcobo J, in his separate judgment in *Chirwa,* echoed the lament of the Labour Appeal Court in *Langeveldt* about problems that plague labour law jurisprudence as a result of the concurrent jurisdiction of the Labour Court and the High Court. He also noted that the impugned provisions remained on our statutes despite the LAC's call in 2001 for them to be eradicated so as to deprive the High Court of jurisdiction in employment and labour matters.

6. Ideally, legislation should be clear so as to avoid multiple interpretations, in this instance, about jurisdiction. Until that occurs, the courts have to do their best to interpret the legislation to give effect to its primary objects.[5] That is precisely what Ngcobo J set out to do in *Chirwa*.[6] The following extracts from Chirwa show how Ngcobo J accomplished this:[7]

"All of this prevented the development of a coherent labour and

[4] *Langeveldt v Vryburg Transitional Local Council and Others* (2001) 22 ILJ 1116 (LAC) 44, 46-48, 54, 56, 58-59, para 4 of the Applicants' Further Submissions
[5] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 123
[6] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 115
[7] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 103

employment relations jurisprudence."

"[104] To address this problem, the LRA creates a specialised set of forums and tribunals to deal with labour and employment related matters. It establishes an interlinked structure consisting of, among others, various bargaining councils, the CCMA, the Labour Court and the Labour Appeal Court. It also creates procedures designed to accomplish the objective of simple, inexpensive and accessible resolution of labour disputes, which is one of the purposes of the LRA"

"A dispute about the procedural fairness of a dismissal must, like all other disputes, be dealt with in terms of s 191. The bargaining council having jurisdiction or the CCMA must attempt to resolve the dispute through conciliation.[8] If the dispute remains unresolved for a period of 30 days and if, as in this case, a dispute relates to the conduct of an employee, the dispute must be referred for arbitration."[9]

"It is in this context and in the light of these primary objects of the LRA that the provisions of section 157 must be understood and construed."[10]

"The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the

[8] Section 191(1).
[9] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 108
[10] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 109

objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA. The clear intention of the legislature was to create specialised forums to deal with labour and employment matters and for which the LRA provides specific resolution procedures."[11]

"When enacting the LRA, parliament did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply the law. It went on to entrust the primary interpretation and application of its rules to specific and specially constituted tribunals and forums and prescribed a particular procedure for resolving disputes arising under the LRA. Parliament evidently considered that centralized administration and adjudication by specialised tribunals and forums was necessary to achieve uniform application of its substantive rules and to avoid incompatible and conflicting decisions that are likely to arise from a multiplicity of tribunals and diversity of rules of substantive law."[12]

"When a proposed interpretation of the jurisdiction of the Labour Court and the High Court threatens to interfere with the clearly indicated policy of the LRA to set up specialised tribunals and forums to deal with labour and employment relations disputes, such a construction ought not to be preferred. Rather, the one that gives full effect to the policy and the objectives of the LRA must be preferred. The principle involved is that where parliament in the exercise of its legislative powers and in fulfilment of its constitutional obligation to give effect to a constitutional right, enacts the law, courts must give full effect to that law and its purpose. The provisions of the law should not be construed in a manner that undermines its primary objectives. The provisions of subsections (1) and (2) of s 157 must therefore be construed purposively in a

[11] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 110
[12] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 111

> manner that gives full effect to each without undermining the purpose of each."[13]
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> "The purpose of s 157(1) was to give effect to the declared object of the LRA to establish specialist tribunals 'with exclusive jurisdiction to decide matters arising from [it]'.[14]

7. In the opinion of Ngcobo J, the only way to reconcile the regrettable consequences of the use of the word "concurrent" is to reconcile the provisions of the statute with the primary objects of the LRA.[15] Although the learned judge was there referring to section 157 (1) and (2) of the LRA, his opinion is also apposite for section 77 (3) of the BCEA.

8. With regard to cases in which an applicant has more than one cause of action Ngcobo J said:[16]

> "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). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'.

[13] *Chirwa* v *Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 112
[14] *Chirwa* v *Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 113
[15] *Chirwa* v *Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 122 to 123
[16] *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) para 124

Here too, the learned judge's comments are apposite in the contest between the LRA and the BCEA read with the common law, even though he was referring to the LRA and the Constitution.

9. In this case, the facts that found the cause of action under the LRA and the BCEA read with the common law of contracts are exactly the same. They are about the propriety of the applicants' conduct and Transnet's decision to take disciplinary action. That is precisely a cause of action that is expressly regulated under the LRA. It is a cause of action that must be ventilated through the dispute resolution mechanism under the LRA. The alleged breach of contract that arises from the same facts is now comprehensively codified for conduct related dismissal.

10. This conduct related dismissal case is no different from any other misconduct dismissal. It challenges procedural and substantive infringements of the applicants' labour rights. If the court grants the application, it will open the floodgates to applications to the Labour Court to adjudicate misconduct cases. It will also open the floodgates to *status quo* orders. The LRA was a decisive policy shift away from *status quo* orders under the old LRA of 1956.

11. Disputes about misconduct dismissals are resolved through conciliation and arbitration. Section 158(2) of the LRA give the Labour Court the discretion to arbitrate disputes that ought to have been referred to arbitration in the interest of expediting dispute resolution. When the court exercises this power, it sits as an arbitrator. But for this exceptional circumstance, the Labour Court has no arbitral powers.

12. In addition to section 158, the applicants agreed as an express term of their written contracts of employment to submit to arbitration.

13. The principle reason the applicants chose this procedure and this forum seems to be the inconvenience and expense of being unemployed if they are dismissed, of defending themselves against misconduct charges and challenging their dismissal if that eventuates. They also challenge the jurisdiction of the Bargaining Council and the third respondent arbitrator on the ground that Transnet delayed instituting disciplinary proceedings for more than a year. However compelling the merits of the applicants' case is, they are not jurisdiction-conferring considerations.

14. A good defence is all the more reason why the applicants should subject themselves to the disciplinary proceedings initiated by Transnet instead of avoiding it. At that forum, whether it takes the form of a disciplinary inquiry or pre-dismissal arbitration, the applicants can raise all the jurisdictional objections and complaints on procedural and substantive grounds, including grounds that give rise to unlawfulness and unfairness, the very grounds on which they rely in this case to persuade the Labour Court to grant them relief. They may approach the Labour Court only on review.

15. The paucity of decisions on applications to interdict disciplinary proceedings is an indication that by far the majority of litigants acknowledges and accepts the labour relations system and the demarcation of jurisdiction between various labour dispute forums.

16. Given the supremacy of the decision in *Chirwa,* the Court does not have to consider

any of the other issues and authorities raised by either of the parties in argument.

17. **In the circumstances, the application is dismissed with cost.**

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Pillay D, J

Date of Editing: 30 March 2009

10 Appearances:

For the Applicant: Adv C. Nel instructed by Jacobs & Partners

For the Respondent: R Haslop – Woodhead, Bigby and Irving