IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Reportable

Case No: 18733/2007

In the matter between:

ANDRE JOHANN DE VILLIERS	**APPLICANT**
and	
THE MINISTER OF EDUCATION WESTERN CAPE PROVINCE	**FIRST RESPONDENT**
THE HEAD OF DEPARTMENT: EDUCATION WESTERN CAPE PROVINCE	**SECOND RESPONDENT**

JUDGMENT DELIVERED 29 OCTOBER 2008

DAVIS AND ALLIE JJ

[1] The applicant has brought an application to review the decision of the second respondent not to reinstate him in terms of Section 14(2) of the Employment of Educators Act No 76 of 1998. The application is brought in terms of Section 6 of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA).

[2] Briefly the background to this application can be summarised thus: On 13 October 2003, applicant was suspended from service, pursuant to charges of sexual harassment brought against him. On 3 November 2004, he was found guilty at a disciplinary hearing, which had been conducted in his absence, on

charges of sexual harassment, *crimen injuria* and an alleged contravention of the rules relating to housing subsidies in that it had been found that he rented out property in respect whereof he had received a housing subsidy.

[3] On 28 February 2006, Ms Singh-Bhoopchand who had been appointed as an arbitrator, delivered an award in which she found that the dismissal of applicant had been procedurally and substantially unfair. She thus ordered that second respondent reinstate applicant on the same terms and conditions as those which had applied to his employment immediately prior to his dismissal.

[4] On 1 August 2006, second respondent instructed the applicant to report for duty at Elswood Secondary School in Elsies River. On the advice of his trade union that the instruction had contravened the terms of the 'Bhoopchand' award, applicant failed to take up this appointment. He was subsequently deemed to have been discharged in terms of section 14(1) of the Employment of Educators Act 76 of 1998 (the 'Act') in that he had failed to report for duty for a period exceeding 14 consecutive days. In terms of section 14(2) of the Act he applied to second respondent for reinstatement but exercising his discretion, second respondent declined to reinstate applicant. This application is now brought in terms of the provisions of section 6 (2) of PAJA in respect of second respondent decision to decline to reinstate the applicant.

In limine objection:

[5] Second respondent has raised the objection that this court lacks the necessary jurisdiction to consider the matter in as much as the second respondent's decision not to reinstate the applicant in terms of section 14(2) of the Act was taken in his capacity as applicant's employer in terms of section 3 (1) (b) of the Act. Accordingly, the impugned decision relates to the employment relationship between second respondent and applicant and does not constitute administrative action in terms of PAJA as the decision was not taken as an exercise of a public power by an organ of State. Thus, the question of jurisdiction requires determination before any examination of the merits can take place. In short, respondents contend that this dispute falls to be determined by reason of the provisions of the Labour Relations Act 66 of 1998 ('LRA') and thus this court has no jurisdiction to hear a dispute, which stands properly to be heard by the Labour Court.

[6] Most recently the scope of PAJA and its relationship to the LRA has been examined by the Constitutional Court in **Chirwa v Transnet Limited and others 2008 (3) BCLR 251 (CC).** Applicant had been dismissed by her former employer. Transnet Limited. She then referred the dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA') alleging that her dismissal was procedurally unfair. When conciliation failed to resolve the dispute she did

not pursue arbitration of the dispute through the CCMA but approached the High Court on the basis that the dismissal had violated her constitutional right to fair administrative action as contemplated in PAJA. The High Court held that the dismissal was unfair and ordered reinstatement. The matter went on appeal to the Supreme Court of Appeal where a majority upheld the appeal on the basis that the applicant's dismissal did not fall to be reviewed under the provisions of PAJA.

[7] The matter then reached the Constitutional Court. The majority of that court decided that the Constitution (Republic of South Africa Constitution Act 108 of 1996) drew a distinction between a right to administrative action (section 33 of the Constitution) and the right to fair labour practises (section 23 of the Constitution) together with the laws giving effect to both, being in the case of section 33, PAJA, and in the case of section 23, the LRA. The court held that the right to fair administrative action as embraced in section 33 did not deal with employment and labour relations because these matters had been comprehensively protected under section 23 of the Constitution. On this basis, an employee in the public service no longer has a choice between a cause of action based on the LRA and on PAJA. Hence, such an employee cannot circumvent the dispute procedures which were set out in LRA.

[8] In a somewhat controversial finding, Froneman J, in **Nakin v MEC The Department of Education Eastern Cape Province and another [2008] JOL 21**

482 (CK) declined to follow **Chirwa** and relied on an earlier decision of the Constitutional Court in **Fredericks and others v MEC of Education and Training Eastern Cape and others 2002 (2) SA 693 (CC)**. Froneman J was faced with the following dispute. Applicant lost his post as school principal. Instead of being transferred to another post at the same level as he was entitled to be, the applicant was transferred to a post which carried a lesser status, which resulted in a lower salary and other benefits. Although the Department of Education approved a recommendation that the applicant be reinstated to his former post, that recommendation was not implemented. The applicant therefore sought the review of the failure not to give effect to the recommendation and ancillary relief.

Hence the question of jurisdiction arose. The court, after a careful analysis of the judgment in Chirwa and Fredericks held that the approach adopted in Fredericks had to be applied. Froneman J reasoned this:

> *"At the very least the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedom underlie the application of the constitutional section 33 right to just administrative action, the constitutional section 33 right to fair labour practices, and the possible application of these rights in the direct or indirect development of the common-law contract of employment under either section 8 or 39 (2) of the Constitution, in whatever court this might happen. Fairness in public employment may conceivably have a different content to that in the private sector, for reasons relating to constitutional*

demands of responsiveness, public accountability, democracy and efficiency in the public service. From that perspective, the substantive coherence and development of employment law can only gain from insights derived from administrative law concerns."

Accordingly, the learned judge concluded:

"The applicant seeks relief in the present matter 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. He does not rely on any allegation of unfairness under the LRA as the cause of his application. On authority of Fredericks *the High Court has jurisdiction to determine whether, on the merits, he does have a claim based on alleged unlawful administrative action." (*At para 39)

[9] In the light of this judgment it becomes necessary to analyse the judgment in **Fredericks** as well as the factual matrix on which it was predicated.

[10] In **Fredericks** the applicant teachers challenged the MEC's refusal to accept their applications for voluntary retrenchment under a collective agreement. Their cause of action was expressly predicated on a violation of the right to administrative action as well as the right to equality. It was not based on any contravention of section 23 of the Constitution. The MEC opposed the application on the basis that the Labour Court enjoyed exclusive jurisdiction in all

employment and labour matters. Accordingly, a dispute over the interpretation or the application of a collective agreement had to be determine in the first place by the CCMA and then by the Labour Court. The Constitutional Court held that the Labour Court did not have exclusive jurisdiction in respect of all employment and labour matters and that its exclusive jurisdiction to review the CCMA's decision in respect of collective agreements did not constitute an assignment of a constitutional matter arising from such an agreement to that court under section 169 of the Constitution, which should be read with section 157 (2) of the LRA.

[11] Section 169 of the Constitution reads:

A High Court may decide-

(a) any constitutional matter except a matter that-

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

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(b) any other matter not assigned to another court by an Act of Parliament

Section 157 of the LRA reads:

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.

[12] In essence, the court in **Fredericks** held that when the application of a collective agreement (in this case the MEC's refusal to accept that applications were voluntarily retrenchment fell under the collective agreement) amounts to a contravention of the right to equality and to fair administrative action and that, further, labour rights under section 23 of the Constitution are not implicated, then any decision which applies to a collective agreement constitutes a constitutional matter which can be entertained by the High Court in terms of section 169 of the Constitution read together with section 157 (2) of the LRA.

[13] The following passage from the judgment of O' Regan J in **Fredericks** is of particular importance to the present dispute:

> *"[I]n this case the applicant is expressly disallowed any reliance to section 23 (1) of the Constitution, which entrenches the right to fair labour practices. The preamble to the Labour Relations Act makes it plain that the purpose of the Act is to give it statutory effect to this right the question therefore does not arise in this case that the dispute arising or of the interpretation or application of collective agreement gives rise to a constitutional complaint in terms of section 23 (1) that question raises difficult issues of constitutional interpretation that we need not address now."(para 34)*

[14] It is now possible to review the two cases and seek a reconciliation, given that the Constitutional Court in **Chirwa** did not overrule its finding in **Fredericks**. The majority judgment in **Chirwa** answers the issue which was expressly left open in **Fredericks',** namely the position where section 23 of the Constitution can be directly implicated in the dispute. In **Chirwa,** the court found that the right to fair labour practice contained in Section 23 of the Constitution was separate and distinct from the right to just administrative action contained in Section 33 of the Constitution. In considering the applicability of Section 33 Ngcobo J said: *"[t]he conduct of Transnet in terminating the applicant's employment contract involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to Section 33 of the Constitution."* (at para 139)

[15] Relying on the approach adopted earlier by the Constitutional Court in the **President of the Republic of South Africa v SA Rugby Union 2000 (1) SA 1 (CC)** Ngcobo J went on to find:

> *"The subject matter of the power involved here is the termination of 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."* (para 142)

[16] Professor Cheadle, Labour Relations in Cheadle *et al*, South African Constitutional Law: The Bill of Rights 18-11, relies on an article written by Judge O' Regan (2004 (121) SALJ 424) to contend that, in cases which would have been decided under the scope of administrative law prior to 1994, a change has

occurred as a result of our constitution that they now fall under fundamental rights other than the right to administrative law, as the right to equality for instance, and to that extent no longer form part of administrative law. Contrary to Froneman J's approach, Cheadle contends, where rights overlap, the proper right to resort to in each case is the more specific one. Where rights share the same values as fairness does in the right of equality, right to fair labour practices and fair administrative action, the courts have to locate the primary constitutional breach in the more specific right as was the case in the majority judgment in **Chirwa.** Cheadle at pg 18-19

The present application

[17] With this background in mind, we now turn to an analysis of the present application which is concerned with an applicant who contends that there is good cause shown for his reinstatement. The dismissal which triggered this application for reinstatement took effect in terms of Section 14(1) of the Employment of Educators Act. Section 14 reads as follows:

14 Certain educators deemed to be discharged

(1) An educator appointed in a permanent capacity who-

(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;

(b) while the educator is absent from work without permission of the employer, assumes employment in another position;

(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or

(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position,

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or

(ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.

[18] The termination of applicant's employment relationship thus was a deemed dismissal on account of misconduct. An apparent anomaly arises as a result of the provisions of Section 18(2) of the Act. This section provides that, where an educator commits an act of misconduct, the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2. Clearly although Section 14(1) deems an employee to be dismissed on account of misconduct, no express provision is made in this section for the application of the LRA nor for the Disciplinary Code and Procedures of Schedule 2 of the Employment of Educators Act.

[19] The question therefore arises as to the status of the deemed dismissal in terms of section 14(1) and its relationship to a dismissal on the grounds of misconduct as set out in section 18 (2). The legal meaning of the word 'deemed' is to found in **Chotabai v Union Government 1911 AD 33** where Rose Innes JA said as follows:

> *"The use of the word* deemed *was perhaps not a very happy one, because that term may be employed to denote merely that persons or things to which it relates are to be considered to be what really they are not, without in any way curtailing the operation of the statute in respect of other persons or things falling within the ordinary meaning of the language used… The decision in* R v Norfolk Country Council 63 LT 222, *may be*

usefully referred to, and the remarks of Justice Cave are very apposite. So that the word deemed *must be here taken in its general sense as meaning 'considered' or 'regarded'; and the Legislature, when it directed that certain classes of Asiatics shall be* deemed *lawfully resident for the purposes of the statute, intended to exhaust the list of those who were to be included in that expression."*

[20] Viewed accordingly, a discharge in terms of section 14(1), being a deemed dismissal on account of misconduct, should be treated in similar fashion to a dismissal on a count of misconduct as in section 18(2). Thus, those provisions of the Act that govern dismissal due to misconduct ought to apply in similar fashion. Schedule 2 of the Act lists as among its purposes in section 1 (a) 'to support constructive labour relations in education' (section 1(g)) and 'to prevent arbitrary or discriminatory actions by an employers towards educators (section 1(e)). Section 3 of Schedule 2 headed 'code of good practice' specifically incorporates section 8 of the LRA by reference insofar as it relates to discipline.

[21] In our view, therefore the employer's conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal as provided by section 14 (1) ought to be subjected to the same scrutiny as conduct in terms of section 18(3) (i). Such conduct is therefore capable of being tested against the Code of Good Practice contained in section 8 of the LRA.

[22] The conduct of the employer which gave rise to the impugned conduct commenced after the Bhoopchand award. An enquiry into the refusal of the employer to reinstate the applicant in accordance with the provisions of section 14 (2) manifestly necessitates an enquiry into the conduct of the parties after that award had been delivered.

[23] To return to the approach adopted by Ngcobo J in **Chirwa,** being the majority judgment, the question arises as to the powers invoked pursuant to an investigation into the dispute. As has been analysed, the power concerns the termination of a contract of employment. The source of the power therefore is the employment contract between the applicant and respondents. The nature of the power involved concerns the employment relationship. The mere fact that the employer was an organ of State which exercises public powers does not, on this approach, convert the impugned conduct into administrative action.

[24] It is a matter which falls broadly under section 23 of the Constitution rather than section 33 which is concerned with acts of administration performed by an organ of state. The following passage of Ngcobo J's judgment is expressed in clear terms:

> "*Consistently with this objection, the LRA brings all employees, whether employed in the public sector or private sector under it, except those*

specifically excluded. The powers given to the Labour Court under section 158(1) (h) to review the executive or administrative acts of the State as an employer give effect to the intention to bring public sector employees under one comprehensive framework of law governing all employees. So, too, is the repeal of the legislation such as Public Service Labour Relations Act and the Education Labour Relations Act. One of the manifest objects of the LRA is, therefore, to subject all employees, whether in the public sector or in the private sector, to its provisions except those who are specifically excluded from its operation." (at para 102)

[25] The majority in **Chirwa** requires an examination of the substance of the dispute; in this case it is a dispute based upon an employment relationship and its termination. Our finding can be elucidated, to an extent, by reference to the minority judgment in **Chirwa** of Langa CJ. The learned Chief Justice says:

"The implication is that there is no constitutional reason to prefer adjudication of a claim that may simultaneously constitute both a dismissal and administrative action, under the LRA rather than under PAJA. I should add that the Legislature could resolve any potential problems of duplication by conferring sole jurisdiction to deal with any disputes concerning administrative action under PAJA arising out of employment upon the Labour Court. So far the Legislature has not chosen this route." (at para 175)

[26] Whereas the Chief Justice considers that rights overlap between the LRA and PAJA and hence both pieces of legislation should apply, the approach we have adopted, and which is congruent with the majority judgment of **Chirwa,** is that the right to which resort should be made in the present case should be based upon the following considerations:

(1) examine the substantive nature of the dispute;

(2) if it is a dispute that falls under the LRA, then

(3) rely upon the more specific right; in this case the right to fair labour practices as opposed to the more general right of fair administrative action.

[27] For this reason therefore, the applicant has chosen to launch his application in the incorrect forum by relying on PAJA rather than upon the Employment of Educators Act read together with the LRA. Consequently, the Labour Court has exclusive jurisdiction to determine the outcome of this application. In the light of this conclusion, there is no need for this court to canvas any of the various arguments which were raised concerning the substantive merits of the application. For these reasons, the application is dismissed with costs.

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DAVIS J

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ALLIE J