

## A Common-Law Hydra Emerges from the Forum-Shopping Swamp (2010) 31 ILJ 21 <sup>1</sup>

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'The second labour of Hercules was to kill the Lernean Hydra. From the murky waters of the swamps near a place called Lerna, the hydra would rise up and terrorise the countryside. A monstrous serpent with nine heads, the hydra attacked with poisonous venom. Nor was this beast easy prey, for one of the nine heads was immortal and therefore indestructible.'

<http://www.perseus.tufts.edu/Herakles/hydra.html>

A metaphor, like a joke, should need no explanation. Unpacking the above title, however, will help to clarify the assumptions which the article sets out to test. For the 'hydra' is nothing more than the judge-made system of (y) contractual rules replicating and substituting the statutory backbone of employment law that has emerged over the last few years, its burgeoning heads seemingly resistant to all efforts by critics at cutting it down to size. And it is suggested that this 'monstrous serpent' springs from nothing more profound than the murky depths of forum-shopping, the amorphous fluidity of which stands in stark contrast to the well-structured clarity which the law is supposed to possess. The article will not reiterate the debate which this development, and various questions arising from it, has produced. <sup>2</sup> Rather, it will focus on the question of its constitutionality; to be precise, it will try to show that this development is fundamentally unconstitutional. And it will suggest that something else should have emerged from the proper interpretation of the Constitution and the Labour Relations Act (LRA). <sup>3</sup>

The starting-point is that s 23 of the Constitution (the 'labour section') is the foundation of all our labour law - that is, of our labour legislation as well as the common law where legislation is silent. The first part of this statement is uncontentious. This article is devoted, in essence, to establishing the import of the last four words.

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### The First Head Emerges

The problem first emerged in a specific area of the law of dismissal. It was formulated as follows by the majority of the Supreme Court of Appeal (SCA) in *Fedlife Assurance Ltd v Wolfaardt*: <sup>4</sup>

'[T]here can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment. Thus *irrespective of whether the 1995 [Labour Relations] Act was declaratory of rights that had their source in the interim Constitution or whether it created substantive rights itself*, the question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for 'unlawful dismissal' as provided for in the 1995 Act. . . .

In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and a fortiori, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication . . . . The continued existence of the common-law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature

termination by their employers of fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.'

With respect, however, these 'indications' are less than clear. The first one is the fact that *non-renewal* of a fixed-term contract may under certain circumstances amount to 'dismissal'<sup>5</sup> (which may be either fair or unfair), which the court took to mean that the legislature intended<sup>6</sup> to preserve the common-law remedies available to employees whose fixed-term contracts are *terminated prematurely* (ie, unlawfully), regardless of fairness. The possibility that an employee on a fixed-term contract might have exactly the same remedies for dismissal as an employee on an indefinite contract is brushed aside as an 'absurdity'. No less 'absurd', in the eyes of the majority, is the proposition that an employee on a fixed-term contract who is dismissed for a *fair* reason and in accordance with a *fair* procedure should *not* be entitled to

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compensation for *unfair* dismissal. 'Such a result', it was held, 'could never have been the intention of the legislature'.<sup>7</sup>

The second 'indication' relied on by the majority of the SCA is the fact that '[a]n order or award of compensation made in terms of this chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment'.<sup>8</sup> This was taken to mean that an employee must necessarily be able to claim damages for *breach* of contract (as opposed to, for example, entitlements stipulated in a contract) over and above - or, apparently, instead of - any claim for compensation for unfair dismissal in terms of s 193 of the LRA.<sup>9</sup>

With hindsight, what characterizes the reasoning of the majority is the certainty with which it makes assumptions that are, to say the least, tenuous. The first assumption is that the LRA, though its wording in no way suggests it, set out to create separate regimes for employees on fixed-term contract and those on indefinite contract. Only the latter, in this approach, are 'limited' to the statutory remedies laid down for unfair dismissal. The second assumption is that premature ('unlawful') termination of a fixed-term contract is, in and of itself, 'manifestly unfair'.<sup>10</sup> 'Unlawfulness' *in terms of common law*, in other words, is equated with 'unfairness' *regardless of the fairness of the reason for dismissal or the procedure followed*. To this extent, it seems, common law trumps statute by ring-fencing certain contractual remedies (unlike their administrative law counterparts, as noted below) against remedies created by the legislature in giving effect to the Constitution, unless the latter expressly or 'by necessary implication' overrides them. And enacting a policy driven remedy in an area where a common-law remedy already exists, in the view of the SCA, evinces no constitutional purpose or legislative intention of superseding the latter; on the contrary, it is assumed, the purpose as well as the intention is that two overlapping or competing remedies should continue to exist side by side.

Both these assumptions are open to serious question. To begin with, the notion that 'the legislature did not intend to interfere with existing [common] law' when creating new statutory rights can, as a general proposition, no longer be sustained. While this may have been true in the pre-constitutional dispensation, it can hardly be said of statutes

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which are enacted for the express purpose of giving effect to fundamental rights. Pre-existing common-law remedies, by implication, are deemed insufficient for this purpose; and, this being so, there are no clear grounds for assuming that those remedies will automatically continue to coexist with their statutory counterparts. Rather, the opposite may be inferred. In the field of administrative law the Constitutional Court (CC) has laid down this principle clearly, and uncontroversially, as follows:

'There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA <sup>11</sup> and the Constitution itself. The *grundnorm* of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.'<sup>12</sup>

The Promotion of Administrative Justice Act (PAJA), like the LRA, was enacted to give effect to a constitutional right. <sup>13</sup> PAJA, like the LRA, contains no provision expressly abolishing the pre-existing common-law remedies; like the LRA it is silent on the issue. Indeed, unlike the LRA, PAJA contains no provision giving it precedence over other laws in the event of conflict. <sup>14</sup> Yet, despite PAJA's reticence, the CC in *Bato Star* had no difficulty in finding that, to all intents and purposes, PAJA had taken precedence over competing common-law provisions - as it were, 'by necessary implication'.

Exactly the same, one would have thought, should apply to provisions of the LRA in relation to pre-existing common-law remedies. <sup>15</sup> This proposition is fortified by s 210 of the LRA (cited in fn 14): if the LRA must prevail over any other legislation in the event of conflict, it would be incongruous if it did not also prevail over common-law rules in the event of conflict. Yet this incongruity went unnoticed in the majority judgment in *Fedlife v Wolfaardt*.

And the *Fedlife* judgment does create conflict between its interpretation

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of the common law and the regime created by the LRA. In particular:

- (a) It creates inequality between employees on fixed-term contract and those on indefinite contract by immunizing the former against dismissal based on a fair reason other than gross misconduct (ie, fundamental breach of contract) and in accordance with a fair procedure. <sup>16</sup> Thus, an employer faced with the need to carry out dismissals based on operational requirements will be precluded from selecting employees on fixed-term contract and limited to selecting employees on indefinite contract, in possible violation of the latter's right to substantive or procedural fairness.
- (b) It further privileges employees on fixed-term contract by exempting them from those limitations which the legislature, in a considered effort to give effect to the purposes of the LRA and strike a fair balance between the interests of employers and workers, decided to place on the procedure for resolving dismissal disputes. <sup>17</sup> Notably, employees pursuing a contractual remedy are not required to do so within 30 days <sup>18</sup> but are allowed three years in which to issue summons. <sup>19</sup> This, needless to say, severely undermines the statutory objective of promoting 'the effective resolution of labour disputes'. <sup>20</sup> Employees on fixed-term contract are also not restricted to claiming compensation in the amounts laid down in s 194 of the LRA but may claim any amount of remuneration due in respect of the unexpired period of the contract, irrespective of the fairness of the employer's actions.

The constitutional implications of these incongruities are only too clear. The LRA, in giving effect to s 23(1) of the Constitution, permits an employer to dismiss an employee for a fair reason after following a fair procedure. Though not expressed as a 'right', it is a manifestation of the employer's right to fair labour practices which, at the same time, defines the limit of the employee's right not be dismissed 'unfairly'. <sup>21</sup> By excluding an employer's right to dismiss an employee on fixed-term contract under *any* circumstances, except for fundamental

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breach or if the contract expressly permits it, the SCA is limiting the employer's right to fair labour practices as well as redefining the content of s 185 of the LRA in respect of employees on fixed-term contract. Basic rights, however, may only be limited by 'law of general application', <sup>22</sup> and no basis for such a limitation can be found in the LRA. The inference is therefore that the common law is the source of the limitation - which, again, would amount to asserting the common law in the face of the LRA's provisions allowing an employer to dismiss fairly. And, even if it were permissible for the common law to limit the employer's statutory entitlements, the question would be whether such a limitation meets the criteria laid down by s 36(1) of the Constitution. Given the remoteness of the issue it is not proposed to pursue that exercise save to suggest that the limitation would fail the test. What is significant, however, is that the SCA in *Fedlife* also made no attempt to apply the constitutional test nor, indeed, to consider the questions already noted. These questions thus remain unanswered.

It should be emphasized before going further that the above criticism by no means denies the vulnerable position in which many employees on fixed-term contract find themselves nor the need to provide them with all possible protection. On the contrary, this very important question will be returned to later on. At this point the argument is only that the majority judgment in *Fedlife* flies in the face of established principles of constitutional interpretation (as will be discussed below) and the system by which the legislature sought to give effect to the right to fair labour practices. In effect, it allows litigants to circumvent that system at will. Worse, it may inadvertently have laid a basis for separate systems of labour dispute resolution: one for the rich and one for the poor. Common-law remedies can only be pursued by employees who have access to the resources to litigate in the courts; for the vast majority of employees the system created by the LRA offers the only redress.

This interpretation is underlined by the majority view in *Fedlife* that it would be 'bereft of any rationality' to 'confine' an employee whose fixed-term has been unlawfully terminated 'to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194' of the LRA. <sup>23</sup> 'Bereft of any rationality' or not, the LRA in giving effect to s 23(1) of the Constitution deliberately limits compensation for unfair dismissal to these 'limited and entirely arbitrary' amounts. The question here is not whether it behoves any court to be quite so dismissive of the constitutional scheme which it is bound to uphold. The point is rather that it accentuates the inequality being created between different classes of litigants - in effect, between

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more and less generous remedies based on litigants' access to resources. Truly vulnerable workers on fixed-term contract hardly benefit from the theoretical possibility of pursuing claims for contractual damages in the High Court (HC) or the Labour Court (LC).

## More Heads Appear

It might be argued that the problem described above can be avoided simply by inserting clauses in fixed-term contracts regulating their premature termination. This is true; but in a series of later judgments the SCA (followed by some lower courts) extended the incursion of common law into the domain of the LRA well beyond the bridgehead carved out by *Fedlife*. As a result, labour law has been left in a state that can best be described as uncertain. Van Niekerk J in *Mogothle v Premier of the Northwest Province & another* <sup>24</sup> captures this development, and some of the questions it raises, in terms that deserve to be quoted at some length:

'In a trio of recent decisions by the Supreme Court of Appeal, that court has emphasized the mutual relationship of trust and confidence that the common-law contract of employment imposes on both employers and employees. In *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA); [2007] 8 BLLR 699 (SCA), the SCA ruled that the common-law contract of employment should be developed in the light of the Constitution, specifically to include a contractual right to a pre-dismissal hearing. The court reasoned as follows at para 5:

'It is clear, however, that coordinate rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2)) to harmonize the common law into the Bill of Rights (which itself includes the right to fair labour practices (s 23(1)).'

The *Gumbi* judgment was confirmed in *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA); [2007] 8 BLLR 693 (SCA). In that case, the court held at para 6:

"This court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include a right to a pre-dismissal hearing (*Old Mutual Life Assurance Co SA Ltd v Gumbi*). This means that every employee now has a common-law contractual claim - not merely a statutory unfair labour practice right - to a pre-dismissal hearing."

More recently, in *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA); [2008] 6 BLLR 513 (SCA), the SCA derived a contractual right not to be constructively dismissed from what it held to be a duty on all employers of fair dealing at all times with their employees (at 517C). This obligation, a continuing obligation of fairness that rests on an employer when it makes decisions that affect an employee at work, was held by the court to have both a procedural and a substantive dimension.

The development of the common law by the SCA is not uncontroversial. It has been criticized, amongst other grounds, for opening the door to a dual jurisprudence in which common-law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA (see, for example, Halton Cheadle 'Labour Law and the

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Constitution' a paper given to the annual SASLAW Conference in October 2007 and published in *Current Labour Law 2008*, the comments by P A K le Roux at 3 of the same publication, and the article by Paul Pretorius SC & Anton Myburgh 'A Dual System of Dismissal Law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA)' published in (2007) 28 ILJ 2172). <sup>25</sup> Be that as it may, the SCA has unequivocally established a contractual right to fair dealing that binds all employers, a right that may be enforced by all employees both in relation to substance and procedure, and which exists independently of any statutory protection against unfair dismissal and unfair labour practices. <sup>26</sup> This court is bound by the authorities to which I have referred and is obliged, in the absence of any higher authority, to enforce the contractual right of fair dealing as between employer and employee.' <sup>27</sup>

If anything, these carefully chosen remarks understate the extent of the 'recipe for chaos' inherent in this development. <sup>28</sup> On the one hand, having let the common-law genie out of the bottle (if metaphors may be mixed), there seems to be no reason why the SCA should stop at the contractual remedies it has thus far asserted in the terrain previously governed by the LRA. On the basis of *Fedlife*, for example, there would seem to be no reason why a claim for delictual damages, including future loss of earnings, could not be combined with a claim of unfair dismissal. <sup>29</sup> What we have seen thus far may only be (to

mix metaphors even further) the tip of the iceberg. On the other hand, the depth of the controversy is more profound than may appear at first sight. In a number of well-considered and authoritative judgments the labour courts and the HC as well as the CC have developed an

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approach which goes contrary to that of the SCA and which, it will be argued, is one that ought to prevail.

### Striking Back: From *Naptosa* to *Chirwa*

Even prior to the *Fedlife* judgment warnings had been sounded against the problems inherent in the creation of overlapping jurisdictions by allowing remedies derived from other sources (including common law) to compete with remedies expressly created by the LRA for the purpose of resolving labour disputes. Indeed, already in the Explanatory Memorandum to the Draft Labour Relations Bill of 1995, after noting the different laws applicable to different categories of employees, the following was said:

'Such a multiplicity of laws creates inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion. A single statute that applies to the whole economy but nevertheless accommodates the special features of its different sectors is far preferable.'<sup>30</sup>

An explanatory memorandum, of course, has no legal force (though it does make it more difficult to argue that the legislature, in enacting the ensuing statute, had the exact opposite in mind). However, the same theme has been taken up and restated by the courts in the clearest possible terms. In *NAPTOSA & others v Minister of Education, Western Cape & others*<sup>31</sup> the applicants approached the HC to seek a remedy based directly on s 23(1) of the Constitution in an employment dispute. Conradie and Jali JJ dealt with this aspect of the claim as follows:

'Mr *du Plessis* [for the applicants] candidly admitted that the unfair labour practice regime which the courts would, on his argument, have to apply under s 23 of the Constitution would resemble that developed by the Industrial Court. To grant relief which would encourage the development of two parallel systems would in my view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the workplace. The social and policy issues are too complex for that. The consequences of adopting Mr *du Plessis*'s argument would be dramatic. For example, an unfair dismissal, which is undoubtedly an unfair labour practice would become justiciable in the High Court without having been aired before the CCMA. . . .

Martin Brassey and Carole Cooper writing in Chaskalson et al *Constitutional Law of SA* state at 30-13:

"Yet, in the labour field, the issue of the horizontal application of the labour relations rights to private citizens will be mainly academic. This is because existing labour legislation already regulates, to a large degree, private conduct between employers and employees. The horizontal reach of the labour rights will therefore extend to those matters falling within the scope of the rights but not covered by existing legislation. The exact extent of this reach is particularly

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unclear with regard to the right to fair labour practices because of its open-textured nature. Depending on the scope given to this right, potential areas for its application to private conduct relate to the duty to bargain (which has been deliberately excluded from labour legislation), employment issues beyond the confines of the employer-employee relationship, and employer-employee issues which may be regarded as fair labour practices but are not covered by legislation."

We are not, of course, here concerned with a case of horizontal application of the Constitution. Yet I cannot conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes.' <sup>32</sup>

And in *Langeveldt v Vryburg Transitional Local Council & others* <sup>33</sup> Zondo JP forcefully expressed himself on the subject of competing jurisdictions:

'By virtue of the provisions of s 157(1) only the Labour Court has jurisdiction to adjudicate [disputes about breach of picketing rules]. However, insofar as landlords or property owners such as were involved in *Fourways* <sup>34</sup> cannot approach the Labour Court for relief on the basis that there is no employer-employee relationship between them and the strikers, the result may well be that proceedings may have to be instituted in two separate superior courts for virtually the same acts which are committed by the same people in the same place and at the same time. This could lead to a situation where judges of two different courts of the same status become involved in the adjudication of virtually the same conduct committed by the same party at the same time with the inherent risk that the two courts may give conflicting judgments. This runs contrary to the very purpose of developing a certain and coherent system of law. It is also totally unacceptable in that it is not cost-effective.

To compound the problem, if there were to be an appeal against each of the two judgments of these two courts, such appeals would go to two different appeal courts of the same status, namely, the Labour Appeal Court and the Supreme Court of Appeal. If the two appeal courts were to give conflicting judgments, and there was no constitutional issue to be taken to the Constitutional Court, the result would be an intolerable one. There is no justification for any of this. The dispute resolution system applicable to all employment and labour disputes needs to be streamlined as far as possible.'

Ironically, the judgment in *Fedlife* - as Grogan puts it, '[giving] impetus to the state of affairs which Zondo JP deplored in *Vryburg TLC*' - was handed down some seven months later. But, although the 'discussion' of 'some of the implications' by Zondo JP was mentioned in this judgment, the problems which it identified were not considered. <sup>35</sup>

The CC, as we know, has addressed the issue of competing jurisdictions

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in two important judgments which, unfortunately, have failed to settle it decisively and were widely regarded as being at variance with each other. In *Fredericks & others v MEC for Education & Training, Eastern Cape & others* <sup>36</sup> it was held that the LC does not have exclusive jurisdiction in all labour matters and that the HC retains jurisdiction in labour disputes involving the violation of constitutional rights which have not been assigned to the exclusive jurisdiction of the LC. <sup>37</sup> Significantly, however, O'Regan J added:

'It is important to note that in this case, the applicants expressly disavow any reliance on s 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 statutory effect to this right. The question therefore does not arise in this case whether a dispute arising out of the interpretation or application of a collective agreement gives rise to a constitutional complaint in terms of s 23(1). That question raises difficult issues of constitutional interpretation that we need not address now. <sup>38</sup>

In the more recent case of *Chirwa v Transnet Ltd & others*, <sup>39</sup> however, the CC did have occasion to address those 'difficult issues' - specifically, the reach of the dispute-resolution system created by the LRA and, consequently, the limits of the jurisdiction of the HC in disputes based on the right to fair labour practices. <sup>40</sup> In one of two majority judgments handed down, Skweyiya J held as follows: <sup>41</sup>

'Ms Chirwa's claim is that the disciplinary enquiry held to determine her poor work performance was not conducted fairly and, therefore, her dismissal following such enquiry was not effected in accordance with a fair procedure. This is a dispute envisaged by s 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration and review by the Labour Court. The dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been

created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter.

Ms Chirwa was correct in referring her dismissal to the CCMA as an unfair dismissal in terms of s 191(1)(a)(ii) of the LRA. The constitutional right she sought to vindicate is regulated in detail by the LRA. In this regard, the remarks

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made by Ngcobo J in relation to a specialist tribunal in *Hoffmann v SA Airways*<sup>42</sup> are apposite:

"The question of testing in order to determine suitability for employment is a matter that is now governed by s 7(2), read with s 50(4), of the Employment Equity Act. In my view there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is, therefore, that court which, in the first instance, should deal with issues relating to testing in the context of employment." . . .

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

Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. . . . She was, in my view, not at liberty to relegate the finely tuned dispute-resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.'

The import of this ruling is to address the question left open in *Fredericks* and suggest that it should be answered in the negative: to the extent that the right to fair labour practices is regulated by the LRA, disputes arising from its violation fall to be resolved by the dispute-resolution machinery created by the LRA and are excluded from the jurisdiction of the HC.

What, then, of s 157(2) of the LRA, which confers concurrent jurisdiction on the HC and the LC in respect of disputes arising from the violation of basic rights in the employment context? In a further majority judgment Ngcobo J interpreted this provision as follows:

'While s 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view, the only way to reconcile the provisions of s 157(2) and harmonize them with those of s 157(1) and the primary objects of the LRA, is to give s 157(2) a narrow meaning. The application of s 157(2) must be confined to *those instances, if any, where a party relies directly on the provisions of the Bill of Rights*. This, of course, is subject to the constitutional principle that we have recently reinstated, namely, that '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'.

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The 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. . . . 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.'<sup>43</sup>

A clearer affirmation of the primacy of the rights and remedies contained in the LRA in resolving labour disputes (that is, disputes based on alleged violations of the right to fair labour practices to the extent that this right is regulated or 'envisaged' by the LRA) is difficult to imagine. To the extent that the court distinguished *Fredericks* rather than



expressly overruling the inference that the LRA may indeed be 'bypassed' by 'alleging a violation of a constitutional right in the Bill of Rights', however, scope has remained for judges of the HC to continue to entertain labour disputes framed in terms of basic rights other than s 23. The result has been a degree of uncertainty, manifested in the emergence of conflicting decisions - a further twist in the scenario deplored by Zondo JP on the eve of the *Fedlife* judgment. <sup>44</sup>

### Missing the Immortal Head

In *Gcaba v Minister of Safety & Security & others* <sup>45</sup> the CC acknowledged the uncertainty that had arisen and set out to 'provide some clarity and guidance'. <sup>46</sup> Once again the issue before the court was conduct by the state in its capacity as employer which, according to the applicant, amounted to administrative action and, as such, fell within the jurisdiction of the HC. Van der Westhuizen J, writing for a unanimous court, had no difficulty in deciding that the applicant's claim was not based on administrative action and ruled that it fell within the exclusive jurisdiction of the LC. More significant for present purposes, however, is the way in which the court sought to reconcile the tension between *Fredericks* and *Chirwa*. Recapitulating its reasoning in both matters at some length <sup>47</sup> and emphasizing the

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importance of precedent in the interests of legal certainty, <sup>48</sup> the judgment reiterates the 'narrow' interpretation of s 157(2) of the LRA laid down by Ngcobo J. <sup>49</sup> It also reiterates the argument against forum-shopping at the expense of 'the finely tuned dispute-resolution structures created by the LRA', <sup>50</sup> to that extent fortifying the case for a narrow interpretation of the role of the HC in labour matters. Section 157(1), the judgment concludes-

'confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under s 145. Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and s 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well'. <sup>51</sup>

The judgment is, however, silent as to the validity of contractual claims (falling within the concurrent jurisdiction of the LC and the 'civil courts') <sup>52</sup> competing with statutory remedies (excluded from the jurisdiction of the HC) - for the very good reason, no doubt, that this was not a question it was called upon to answer. But, as with *Chirwa*, certain inferences can be drawn from its characterization of the jurisdictional dividing line between the LC and the HC. Unfortunately, the further statements made by the court in this regard may at first sight appear to introduce a note of ambiguity:

'[S]ection 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s 157(2)(a), (b) and (c).

Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. *Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour and employment related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the*

*High Court and Equality Court, can no longer be adjudicated by those courts.* If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.' <sup>53</sup> (Emphasis added.)

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The final statement is inaccurate in that s 77(3) of the Basic Conditions of Employment Act (BCEA) confers jurisdiction on the LC 'to hear and determine any matter concerning a contract of employment'. This, however, is irrelevant to the question whether either the LC or the HC has jurisdiction to entertain a contractual claim where a statutory remedy has been enacted. On this question it will be seen that the italicized sentences are open to conflicting interpretations. The first sentence may be read as implying the exclusive nature of the 'specific remedies' created by the LRA (especially if it is assumed, as the court apparently did, that contractual remedies are excluded from the jurisdiction of the LC). Disputes concerning termination of the contract of employment clearly fall within this category. <sup>54</sup> The second italicized sentence, however, could be interpreted as meaning that contractual claims arising from the contract of employment, including its termination, remain within the jurisdiction of the HC. On the first reading *Fedlife* would have been wrongly decided while, on the second, it was correct.

On closer inspection, however, the second sentence is not quite as broad as it seems. Earlier in the judgment the following explanation was offered of 'other remedies which might lie in other courts':

'[I]t is undoubtedly correct that the same conduct may threaten or violate 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.' <sup>55</sup>

It will be noted that the chosen example is not a dispute contemplated by the LRA for which the legislature designed a specific remedy intended to give effect to the right to fair labour practices - in other words, striking a careful balance between the rights of employers and employees. <sup>56</sup> Sexual aggression is capable of giving rise to different causes of action, rooted in different constitutional

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rights, which can be sustained independently of one another and do not result in a blurring of jurisdictional lines between different forums. Or, to put it differently, if the labour law exercise of determining 'the real dispute between the parties' <sup>57</sup> were to be applied in a case such as this, it would be impossible to boil it down to just a single cause of action. This is so, primarily, because the legislature has not attempted to codify the applicable law and create a specific remedy. On the contrary, the perpetrator's conduct triggers various causes of action intended to protect the various rights that have been violated. This is clearly a different proposition from the remedies created by the LRA for the purpose of protecting a specific right - the right to fair labour practices - or, more precisely, a specific violation of that right in the form of unfair dismissal. It is where such remedies exist, as the court went on to hold in the passage cited above, that 's 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well'.

In the absence of an explicit ruling on the issue, however, the dividing line between common law and statute in dismissal disputes remains unsettled. Perhaps inevitably, given the tension between the position adopted by the SCA and that of the CC in *Chirwa*,

'differences of opinion' as stark as those addressed in *Gcaba* have emerged in recent case law dealing with the issue. In *Mogothle v Premier of the Northwest Province & another*,<sup>58</sup> as noted already, Van Niekerk J found that the decisions of the SCA in *Gumbi*, *Boxer Superstores* and *Murray* remained intact and therefore binding.<sup>59</sup> It is, however, significant that the judgment reflects criticism of those decisions and accepts their authority not because they are considered to be correct but because they were handed down by a higher court. In *Mohlaka v Minister of Finance & others*,<sup>60</sup> on the other hand, Pillay J arrived at a different conclusion. Basing herself on the primacy of the statutory regime created by the LRA, the learned judge found that scope for developing the common law of employment is practically confined to situations where there is no legislation implementing the right to fair labour practices or where 'a mechanical application of the text of legislation has the effect of denying or diminishing rights in conflict with the Constitution'.<sup>61</sup> In

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*Gumbi* and *Boxer Superstores*, therefore, reliance on common law in claiming a right to procedural fairness in dismissal was 'misplaced' in that-

[t]his cause of action fell squarely within the LRA, which codified the common law. The SCA should not have accepted jurisdiction. . . . This was quite unnecessary. In the LRA, the legislature codified best practice and policy and took into account international standards of not only the ILO, but other international instruments such as the United Nations Universal Declaration of Human Rights and the directives of the European Union. The codification of labour law under the LRA extended over more than a year. Consultation with experts from the ILO, with trade unions, employers' organizations and other stakeholders chiselled numerous drafts of the LRA until it was whittled to a state [that] was acceptable to all stakeholders.

The richness of the process of legislative law-making therefore far outweighs judicial law-making. Judicial law making arises when the law does not regulate a situation, not when the legislature exercises its prerogative to legislate, as it did for labour law'.<sup>62</sup>

As it was, Pillay J observed, *Gumbi* and *Boxer Superstores* 'together resuscitated all the problems that the LRA and the BCEA sought to avoid: competing jurisdiction, multiplicity of forums, high costs of protracted litigation, uncertainty about process, its costs, timing and outcome'.<sup>63</sup> In the light of *Chirwa* and the principle enunciated by the SCA in *Makambi*,<sup>64</sup> however, the court found that it was not bound to follow these decisions.<sup>65</sup> From what has already been said, and for the reasons discussed below, it will be evident that the writer considers the approach of the court in *Mohlaka* preferable in that it is more consistent with (to use the language of the court in *Gcaba*) 'the proper interpretation and application of overlapping constitutional . . . and labour law provisions and principles'.<sup>66</sup>

The fundamental principle, it is submitted, is that enunciated in *Bato Star*,<sup>67</sup> restated in *SANDU v Minister of Defence & others*<sup>68</sup> and relied on by Ngcobo J in *Chirwa*. It was spelled out in the following terms by the majority of the CC in *Minister of Health & another v New Clicks SA (Pty) Ltd & others*:<sup>69</sup>

'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a

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cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'<sup>70</sup>

Where legislation is silent, in other words, it is open to a party to seek a contractual remedy in order to enforce the right to fair labour practices or, if no such remedy can be found, to rely directly on the Constitution.<sup>71</sup> This may be done either in the HC or the LC. But there can be no basis for a litigant to 'ignore' legislation such as the LRA by seeking a contractual remedy where a statutory remedy has expressly been created, or for a court to 'bypass' such legislation by reverting to the underlying constitutional right and then 'developing' the common law to 'give effect' to it. Given that parliament has done so already, it is - as Pillay J put it - 'unnecessary' as well as 'impermissible'.

### A Purposive Approach<sup>72</sup>

It should be emphasized that the above position is advocated not simply because it is seen as being in accordance with the principles of constitutionalism. Taking a step back, it can be argued that the two approaches - that manifested in the SCA judgments discussed above as opposed to that adopted in *Chirwa* and *Mohlaka* - emanate from different conceptions of the purpose of labour law. In *Fedlife* the SCA proceeded from the role of labour law in protecting employees against the employer's common-law right to terminate the contract at will.<sup>73</sup> Although the judgment does not spell it out, it appears to be premised on the need to maximize such protection and, hence, the logic of not removing a contractual remedy that is available to certain employees. Broadly speaking, this approach is in line with the traditional explanation of the role of labour law as developed by Kahn-Freund: '[T]he relation between an employer and an isolated employee or worker', as

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it has famously been put, 'is typically a relation between a bearer of power and one who is not a bearer of power.'<sup>74</sup> The 'central purpose' of labour law, thus, is to ensure 'the effective operation of a voluntary system of collective bargaining'<sup>75</sup> while, at the same time, establishing minimum standards of employment primarily for the protection of individual employees. In *Fedlife* and in subsequent judgments, it seems clear, the rationale lies in the 'protective' function of labour law and, to this end, the preservation or extension of contractual remedies in addition to statutory remedies.

While the protective function of labour law will remain incontestable for as long as inequality in bargaining power between employers and individual employees persists, much else has changed during the half-century and more since Kahn-Freund's views were formulated. Without delving into the complex questions that confront us in the era of globalization, suffice it to note that the 'purpose' set out in s 1 of the LRA is considerably broader than the traditional conception of the role of labour law. The central objective of the Act is encapsulated as '[advancing] economic development, social justice, labour peace and the democratisation of the work-place', and the means of doing so is 'by fulfilling the primary objects of this Act'. The 'primary objects', in turn, cover a wide spectrum of socio-economic activities, ranging from regulation of the right to fair labour practices (which applies to employers as well as employees) and giving effect to South Africa's obligations in terms of various conventions of the International Labour Organization to promoting the effective resolution of labour disputes.

This multifaceted purpose is clearly far broader than the single objective of employee protection. It is, however, in line with the contemporary understanding of labour law as an

aspect of labour market regulation in the widest sense. Given the challenges of pursuing socio-economic development in an increasingly integrated world economy, policy-makers are compelled to take a holistic view of the various inter-related processes on which such development depends, including the factors by which labour markets are determined. <sup>76</sup> At the same time, South Africa's constitutional dispensation necessitates a rights based approach in pursuing these objectives; that is to say, the fundamental rights of all people, both as individuals and as social actors, need to be defined vis-à-vis one another and protected in the

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process. In adjudicating issues which impact on socio-economic development, it follows that courts need to be alive to the (often complex) purposes of the laws which they are interpreting.

In the case of the LRA, s 1 requires this expressly. <sup>77</sup> Of all the issues regulated by the LRA, few are more critical in this context than the termination of employment for reasons based on the employer's operational requirements. That was, in essence, the issue at stake in *Fedlife*: the applicant's position had allegedly become redundant and the employer sought to terminate it for this reason. Without considering the broader purpose of the LRA the majority of the SCA ruled, in effect, that termination was impermissible irrespective of whether the applicant had any work to do. <sup>78</sup> Of course, by holding that the matter was justiciable in terms of the common law rather than the LRA, it might appear that the purpose of the LRA was removed from the equation. The common law, however, is also subject to interpretation in terms of the Constitution and, ironically, the SCA in *Gumbi* and later decisions had no hesitation in interpreting rights contained in the LRA as constitutionally mandated terms of the contract of employment. It would seem on this basis that the purposes of the LRA, derived from the Constitution, should also be implicit in the contract of employment.

On balance, it is respectfully submitted, the approach adopted by the SCA in *Fedlife* was too narrow and the outcome it yielded was at odds with the purpose of the LRA. Transposed onto employment relations in general it places a blanket duty on employers to compensate employees on fixed-term contract whose services are terminated without regard for the circumstances of the dismissal, including the impact on the employer's operations, in an amount that bears no relation to that which is considered appropriate in the case of employees who are not on fixed-term contract. It also bears no relation to the purpose of the LRA. For this reason, in the final analysis, it cannot be good law. The approach adopted in *Bato Star* and *Chirwa*, on the other hand, would place the LRA centre-stage and ensure that disputes of this nature are dealt with in terms of its framework of 'finely tuned'

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rights and duties aimed at promoting its broader socio-economic purpose. For this reason, in the last analysis, this approach deserves to prevail.

The identical arguments do not apply to the decisions in *Gumbi*, *Boxer Superstores* and *Murray*, where the disputes related to disciplinary proceedings rather than the employer's operational requirements. But here, too, the integrity of the system created by the LRA is at stake. The effective resolution of labour disputes cannot be promoted by developing a dual regime of labour law, the common law one apparently becoming a mirror image of the statutory one, but with at least two very important checks and balances - the time-limit placed on the referral of disputes and the capping of compensation - removed. The full implications of this development have yet to be understood. The bottom line, however, is

that common-law judges are being invested with considerably broader discretion than that permitted by the LRA in fashioning precedent-setting remedies in areas of immense socio-economic sensitivity and importance.<sup>79</sup> The process of judicial law-making (for that is effectively what it amounts to) is complicated further by the adversarial nature of the process: disputes are argued by parties who are out to score points and win their case, with little or no thought for longer-term social goals. Judges are left to make critical decisions based on their personal interpretation of open-ended contractual rights and duties, such as 'fair dealing' or 'trust and confidence', much as the Industrial Court was at large to give meaning to the meaning of 'unfair labour practice'. It does not seem right.

## Conclusion

The challenge facing labour law is not to fashion contractual remedies for the protection of a small minority of senior employees who are already protected by statute, who can afford HC litigation and choose to avoid the remedies created by the LRA; certainly, that objective does not justify the 'development' of the common law in defiance of s 8(3)(a) of the Constitution.<sup>80</sup> There are far greater challenges - above all, to serve the developmental purpose outlined in s 1 of the LRA and, specifically, to better regulate the position of the growing numbers of 'non-standard' employees, many of whom fall beyond the de facto enjoyment of labour rights intended for 'standard' employees. The current economic recession, resulting in a rising tide

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of dismissals for operational reasons, makes the challenge all the more urgent.

Meeting these challenges calls for the development of a *coherent* system of labour law that is consistent not only with the Constitution but also with the broader institutional framework of labour market regulation.<sup>81</sup> Specifically, protection for employees on part-time contract should not be limited to ad hoc relief extended to those who succeed in bypassing the statutory system enacted to give effect to s 23(1) of the Constitution. It should be part of a comprehensive policy designed to adapt labour law to the realities of the present-day labour market. This objective, however, is obstructed rather than assisted by the evolution of a parallel regime of judge-made employment law dictated by the vagaries of the cases that happen to come before courts and the views of the judges who happen to preside. The role of the common law in our constitutional dispensation is not to usurp the role of the legislature but to supplement it if and where necessary. Areas such as dismissal, meticulously covered by statutory remedies, are not areas where the development of common law is called for.

It is therefore submitted that the resuscitation of common-law remedies at the expense of the statutory (constitutional) regime in *Fedlife* was uncalled for. The subsequent 'development' of the common law in *Gumbi*, *Boxer Superstores* and *Murray*<sup>82</sup> has compounded the confusion. But this cannot be the end of the story. Hercules, after all, managed to overcome the Lernean hydra in the end. Herculean though the labour may be, it will be necessary for South African labour lawyers to deal with this many-headed accretion of common-law remedies if we are to develop a coherent system of labour law.

<sup>1</sup> The title has been borrowed (with the kind permission of its author) from Clive Thompson's 'A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp' (1989) 10 ILJ 808, dealing with an aberration of a

different kind which has since been laid to rest (or has it?). A draft version was submitted to the 12th Annual Conference of the South African Society for Labour Law, Johannesburg, 23-24 October 2009.

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<sup>2</sup> See, for example, John Grogan 'Which Court When - and Why? Jurisdiction over Employment Disputes' *Employment Law* vol 17 (December 2001). The present author's views are set out more fully in 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law' (2008) 125 *SALJ* 95. For a recent commentary, see Paul Benjamin 'Braamfontein versus Bloemfontein: The SCA and Constitutional Court's Approaches to Labour Law' (2009) 30 *ILJ* 757.

<sup>3</sup> Act 66 of 1995.

<sup>4</sup> (2001) 22 *ILJ* 2407 (SCA); [2001] 12 *BLLR* 1301 (SCA) at paras 15-17; emphasis added. See also *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* 1957 (SCA); [2005] 12 *BLLR* 1169 (SCA).

<sup>5</sup> ie, in terms of s 186(1)(b) of the LRA, which defines 'dismissal' as including the situation where 'an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it'.

<sup>6</sup> This choice of phrase is already an indicator of problems to come. As will be discussed below, the 'intention' of the legislature is no longer the decisive factor in a legal system based on a justiciable Constitution where, rather, a purposive approach is enjoined.

<sup>7</sup> *Fedlife* at para 18.

<sup>8</sup> s 195 of the LRA.

<sup>9</sup> On this reasoning, in addition to the common-law remedy of three years' remuneration claimed in respect of the unexpired portion of his contract, it would also have been possible for Mr Wolfaardt to claim statutory compensation in respect of any procedural unfairness he might have suffered.

<sup>10</sup> at para 18. The full statement reads: 'It is significant that although the legislature dealt specifically with fixed-term contracts in this definition [ie, s 186(1)(b), quoted in fn 5 above] it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair.'

<sup>11</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>12</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 22, with reference to *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

<sup>13</sup> ie, the right to just administrative action laid down in s 34 of the Constitution.

<sup>14</sup> Section 210 of the LRA reads: 'If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.'

<sup>15</sup> A similar point is made in *Mohlaka v Minister of Finance & others* (2009) 30 *ILJ* 622 (LC); [2009] 4 *BLLR* 348 (LC) at para 7.

<sup>16</sup> Unless, that is, the fixed-term contracts in question explicitly make provision for premature termination.

<sup>17</sup> See Explanatory Memorandum to the Draft Labour Relations Bill (1995) 16 *ILJ* 278 at 315-16.

<sup>18</sup> As laid down in s 191 of the LRA in respect of unfair dismissal disputes.

<sup>19</sup> s 11 of the Prescription Act 68 of 1969; see *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344; *LTA Construction Ltd v Minister of Public Works & Land Affairs* 1992 (1) SA 837 (C) at 849.

<sup>20</sup> s 1(d)(iv) of the LRA. The Labour Court has consistently held that 'effective' resolution of a labour dispute means inter alia that it must happen expeditiously: see, eg, *CWIU v Darmag Industries (Pty) Ltd* (1999) 20 *ILJ* 2037 (LC); [1999] 8 *BLLR* 754 (LC) at para 29.

<sup>21</sup> s 185 of the LRA.

<sup>22</sup> s 36(1) of the Constitution.

<sup>23</sup> at para 18.

<sup>24</sup> (2009) 30 *ILJ* 605 (LC) at paras 21-24.

<sup>25</sup> 'The authors of the latter article acknowledge that the SA Constitution contemplates the development of the common law, but they note that the English courts, for what appear to be policy related reasons, have adopted a rather different course. The authors quote Lord Millet in *Johnson v Unisys Ltd* [2001] 2 All ER 801 (HL) who said: "But the creation of a statutory right [against unfair dismissal] has made any such

development of the common law both unnecessary and undesirable . . . the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost." (At para 80.)' (Footnote 2 in the original.)

- <sup>26</sup> 'There is an obvious overlap here - the jurisprudence developed under the statutory regime will obviously affect the nature and extent of the contractual right of fair dealing.' (Footnote 3 in the original.)
- <sup>27</sup> Interestingly, in *Transman (Pty) Ltd v Dick & another* (2009) 30 ILJ 1565 (SCA); [2009] 7 BLLR 629 (SCA) the SCA restricted the doctrine which it had created in *Gumbi* to matters arising *after* the judgment in *Gumbi*. It reasoned thus: 'Before the decision of this court in *Gumbi* the right to a pre-dismissal hearing was not implied at common law and this necessitated the development of the common law in terms of s 39(2) of the Constitution. As from the date of delivery of the judgment in *Gumbi* the right of every employee to a pre-dismissal hearing is implied at common law' (at para 13). The inference is, in other words, that the constitutional right to fair labour practices (in the view of the SCA) did *not* imply a contractual right to a fair hearing prior to 17 May 2007; despite the notion that courts interpret law but do not make it, the judgment of the SCA in *Gumbi* and not the Constitution is treated as the source of the right.
- <sup>28</sup> For more discussion of the implications, see Paul Pretorius & Anton Myburgh 'A Dual System of Dismissal Law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA)' (2007) 28 ILJ 2172.
- <sup>29</sup> See, for example, *Prinsloo v Harmony Furnishers (Pty) Ltd* (1992) 13 ILJ 1593 (IC) especially at 1599; upheld on appeal in *Harmony Furnishers (Pty) Ltd v Prinsloo* (1993) 14 ILJ 1466 (LAC).
- <sup>30</sup> (1995) 16 ILJ 278 at 281-2.
- <sup>31</sup> (2001) 22 ILJ 889 (C).
- <sup>32</sup> at 897-8.
- <sup>33</sup> (2001) 22 ILJ 1116 (LAC); [2001] 5 BLLR 501 (LAC) at paras 41-42. Subsequently, of course, it was established that the SCA has the power to overrule the LAC.
- <sup>34</sup> *Fourways Mall (Pty) Ltd v SACCAWU* (1999) 20 ILJ 1008 (W), in which a property owner sought relief against striking workers who were not its employees.
- <sup>35</sup> at para 25. *NAPTOSA* was also referred to (at paras 32 and 40), but not the aspect cited above. Neither *Langeveldt* nor *NAPTOSA* was referred to in *Gumbi*, *Boxer Superstores* or *Murray* (above).
- <sup>36</sup> (2002) 23 ILJ 81 (CC); [2002] 2 BLLR 119 (CC).
- <sup>37</sup> Section 157(2) of the LRA provides that '[t]he 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 labour relations; (b) any dispute over the constitutionality of any executive or administrative act or conduct . . . by the State in its capacity as an employer. . . '.
- <sup>38</sup> at para 34.
- <sup>39</sup> (2008) 29 ILJ 73 (CC); [2008] 2 BLLR 97 (CC).
- <sup>40</sup> Because it distinguished the facts before it from those in *Fredericks*, the court made no pronouncement on the judgment handed down in *Fredericks*.
- <sup>41</sup> at paras 63-65; footnotes omitted.
- <sup>42</sup> 2001 (1) SA 1 (CC); (2000) 21 ILJ 2357 (CC).
- <sup>43</sup> at paras 123-124, with reference to *SANDU v Minister of Defence & others* 2007 (5) SA 400 (CC); (2007) 28 ILJ 1909 (CC) at para 51; emphasis added. See also *Denel Informatics Staff Association & another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC); [1998] 10 BLLR 1014 (LC) at paras 18-19, where Basson J found that the concurrent jurisdiction of the LC and the HC relates to fundamental rights other than the labour rights entrenched in s 23. In other words, the court assumed that the LRA gives full effect to s 23 and did not consider, as Ngcobo J did, those rare instances where a party might have to rely on s 23 itself.
- <sup>44</sup> See *Gcaba v Minister of Safety & Security & others* at paras 41-42. In *Makambi v MEC, Department of Education, Eastern Cape* (2008) 29 ILJ 2129 (SCA); [2008] 8 BLLR 711 (SCA) it was held that, when courts are faced with conflicting judgments of higher courts, they are free to choose between them (at para 28). For a fuller analysis of the *Chirwa* judgment, see Halton Cheadle 'Deconstructing *Chirwa v Transnet*' (2009) 30 ILJ 741.
- <sup>45</sup> (2009) 30 ILJ 2623 (LC).
- <sup>46</sup> at para 3.
- <sup>47</sup> at paras 20-39.



[48](#) at paras 58-62.

[49](#) ie, that the concurrent jurisdiction of the HC and LC in labour matters is confined to claims based *directly* on rights contained in the Bill of Rights, which is possible only to the extent that legislation giving effect to such rights is absent or deficient.

[50](#) at paras 56-57.

[51](#) at para 70; footnote omitted.

[52](#) s 77(3) of the BCEA.

[53](#) at paras 72-73.

[54](#) See ss 185-188 of the LRA.

[55](#) at para 53. Having concluded that '[t]herefore, rigid compartmentalization should be avoided', the court went on to note that 'another principle or policy consideration is that the Constitution recognizes the need for specificity and specialization in a modern and complex society under the rule of law. ... Different kinds of relationships between citizens and the state and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA)' (at para 56). On this basis the court proceeded to uphold the primacy of the labour courts in employment disputes regulated by the LRA, quoted above.

[56](#) Although s 6 of the Employment Equity Act does offer a remedy in circumstances such as these, the egregious and all-pervasive nature of the invasion of the victim's rights makes it clear that not only the right not to suffer unfair discrimination is at issue; other rights, such as the right to dignity (s 10) and to freedom and security of the person (s 12), are equally deserving of protection. Section 6 of the EEA does not purport to provide an adequate or appropriate remedy for violations of rights such as these and, for this reason alone, cannot be seen in the same light as the remedies created for unfair dismissal in terms of the LRA.

[57](#) *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC) at para 66; *Zeuna-Stl'rker Bop (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC); [1998] 11 BLLR 1110 (LAC) at para 6.

[58](#) (2009) 30 ILJ 605 (LC). Similar rulings were arrived at in *Nakin v MEC, Department of Education, Eastern Cape Province & another* (2008) 29 ILJ 1426 (E); [2008] 5 BLLR 489 (Ck) and *Tsika v Buffalo City Municipality* (2009) 30 ILJ 105 (E); [2009] 3 BLLR 272 (E). For criticism of *Nakin*, see Cheadle 'Deconstructing *Chirwa v Transnet*' (2009) 30 ILJ 741.

[59](#) See also *Tsika v Buffalo City Municipality* at para 61, where Grogan AJ observes that 'at no stage in his judgment [in *Chirwa*] did the learned Judge [Ngcobo] expressly state that all the propositions enunciated in *Boxer Superstores* were wrong or that they have been overtaken'.

[60](#) (2009) 30 ILJ 622 (LC); [2009] 4 BLLR 348 (LC).

[61](#) at paras 14 and 29.

[62](#) at paras 34-36.

[63](#) at para 40.

[64](#) (2008) 29 ILJ 2129 (SCA).

[65](#) *Mohlaka* at para 44.

[66](#) See also *Nonzamo Cleaning Services Cooperative v Appie & others* (2008) 29 ILJ 2168 (E); [2008] 9 BLLR 901 (Ck) at paras 33ff.

[67](#) Discussed above.

[68](#) 2007 (5) SA 400 (CC); (2007) 28 ILJ 1909 (CC).

[69](#) 2006 (2) SA 311 (CC) at para 437 (the remainder of the court did not disagree with this proposition). See also *Institute for Democracy in SA & others v African National Congress* 2005 (5) SA 39 (C); 2005 (10) BCLR 995 (C) at para 17.

[70](#) Consistently with this principle, it follows that fundamental rights are enforced primarily by the HC (in terms of s 169 of the Constitution) or, in labour matters, also by the LC (in terms of s □157(2) of the LRA) that direct access to the Constitutional Court is allowed in 'only the most exceptional cases': *S v Zuma & others* 1995 (4) BCLR 401 (CC) at para 11. See also *S v Mbatha*; *S v Prinsloo* 1996 (3) BCLR 293 (CC) at para 29; *Satchwell v President of the Republic of SA & another* 2004 (1) BCLR 1 (CC) at para 6; *Van der Westhuizen v S* 2004 (2) BCLR 117 (CC) at para 3; and see rule 18 of the Rules of the Constitutional Court (GN R1675 of 31 October 2003).

[71](#) See, for example, *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* (2007) 28 ILJ 897 (LC).

- <sup>72</sup> I Am Indebted to Professor Richard Mitchell of Monash University, Melbourne, for Encouraging Me to See this Question in a Broader Light - an Exercise Which is Very Much 'Work in Progress'.
- <sup>73</sup> at paras 13ff.
- <sup>74</sup> Davies & Freedland *Kahn-Freund's Labour and the Law* (2 ed 1983) at 18.
- <sup>75</sup> at 2.
- <sup>76</sup> For example, regulatory institutions, dispute-resolution systems, the promotion of equality, skills development and the provision of social security: see Paul Benjamin *A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives* (Human Sciences Research Council 2005); Halton Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 ILJ 663. See also Working Party on the Social Dimensions of Globalisation *Organisation, Bargaining and Dialogue for Development in a Globalizing World* (International Labour Organization Geneva November 2000) table 3, listing 29 market regulatory agreements entered into in 14 European countries between 1982 and 2000.
- <sup>77</sup> On purposive interpretation, see *Business South Africa v Congress of SA Trade Unions & another* (1997) 18 ILJ 474 (LAC); [1997] 5 BLLR 511 (LAC); *Ceramic Industries Ltd t/a Betta Sanitaryware & another v National Construction Building & Allied Workers Union & others* (1997) 18 ILJ 550 (LC); [1997] 6 BLLR 697 (LAC); *Mohlaka v Minister of Finance & others* (2009) 30 ILJ 622 (LC); [2009] 4 BLLR 348 (LC).
- <sup>78</sup> The rationale for the similar decision by the LAC in *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC); [2005] 2 BLLR 115 (LAC) was as follows: 'If [the employer] chooses to enter into a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes' (at para 11). It is submitted, with respect, that this is singularly unconvincing. Dismissals for operational reasons are almost always a result of unforeseen setbacks, whether employees are employed on fixed-term or indefinite contracts. In any event, the 'risk' can be averted by inserting a clause in the contract providing for the possibility of premature termination.
- <sup>79</sup> For example, in giving content to the open-ended duty of 'trust and confidence': see *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A); [1996] 6 BLLR 685 (A) (decided prior to the promulgation of the current LRA); cf Craig Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 ILJ 28.
- <sup>80</sup> Which provides that a court, 'in order to give effect to a right in the Bill [of Rights], must apply, or if necessary develop, the common law *to the extent that legislation does not give effect to that right*' (emphasis added).
- <sup>81</sup> As eloquently argued by Judge Dennis Davis in his presentation 'Has Our Labour Law Broken from Its Designated Moorings?' South African Society for Labour Law (SASLAW) seminar, Cape Town, 23 June 2009 (unpublished).
- <sup>82</sup> Where, it will be recalled, the applicant was not an 'employee' and the application of the LRA was expressly excluded.