# CIVIL PROCEDURE

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**IN THIS ISSUE:**



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**Cases**

**Legislation**
None

**Literature**
None

## 1. INTRODUCTION

In this Sibergramme the decision in ***Transnet Ltd & others v Chirwa*** **2007 (2) SA 198 (SCA), [2007] 1 All SA 184** is discussed.

All other cases on civil procedure reported in March 2007 were dealt with in **Civil Procedure Sibergramme 7 of 2007** and **Civil Procedure Sibergramme 8 of 2007**.

## 2. JURISDICTION

***Dismissal of public employee***

***Transnet Ltd & others v Chirwa*** **2007 (2) SA 198 (SCA), [2007] 1 All SA 184** raised what the Court considered to be a crisp but complex question**:** whether the High Courts have jurisdiction to determine proceedings instituted by an employee of the state to challenge his or her dismissal, or whether such proceedings may be heard only by the Labour Court. Central to this question were the provisions of s 157(1) and (2) of the Labour Relations Act 66 of 1995, which read as follows**:**

> '(1) Subject to the Constitution and s 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.'

(Subsection (2) quoted immediately above was inserted by s 14 of the Labour Relations Amendment Act 127 of 1998 with effect from 1 February 1999.)

The respondent, a former employee of Transnet, had been dismissed from her employment and challenged the dismissal in the High Court on the ground that Transnet

had, in the circumstances, violated her right to just administrative action in terms of s 33 of the Constitution of the Republic of South Africa, 1996. Two issues were considered in the various judgments delivered in the Supreme Court of Appeal**:** whether the matter was justiciable at all by the High Court, or whether the matter should instead have been resolved through the channels laid down in the Labour Relations Act; and whether the termination of the respondent's contract of employment violated her constitutional right to administrative action that was 'lawful, reasonable and procedurally fair' as contemplated in s 33(1) of the Constitution. The present discussion of *Chirwa's* case will focus on the first of these two questions; a detailed consideration of the second falls beyond the scope of the present publication.

In the High Court, Brassey AJ found that he had jurisdiction to determine the matter and, holding on the basis of common-law principles that there had indeed been a violation of the respondent's right to just administrative action, ordered her reinstatement on conditions no less favourable than those which pertained immediately prior to her dismissal.

On appeal by Transnet against this decision, **the Supreme Court of Appeal, by a majority of three to two, overturned the order made by Brassey AJ and dismissed the respondent's application**. Three judgments were delivered**:** one by Mthiyane JA (Jafta JA concurring) holding that the High Court indeed had jurisdiction but that no violation of s 33 had been established, and accordingly that the appeal had to be upheld and the reinstatement set aside; one by Conradie JA holding that the High Court did not have jurisdiction in the matter, and accordingly that the appeal had to be upheld and the reinstatement set aside; and one by Cameron JA (Mpati DP concurring), holding that the High Court indeed had jurisdiction and that a violation of s 33 had been established, but that Brassey AJ had erred in ordering reinstatement rather than in remitting the matter to the employer for a fresh decision. In what follows, each of the three judgments will be surveyed in so far as it deals with the jurisdictional issue, after which the present writer will give his own view as to what was the correct approach on that question.

Mthiyane JA began by pointing out that the respondent (wrongly identified as the appellant in para 6 at 205A (SA), 189*c* (All SA)) had alleged that the termination of her services constituted a violation of her right to administrative action that was lawful, reasonable and procedurally fair, as enshrined in s 33 of the Constitution. She had thus raised a constitutional issue justiciable in the High Court. The High Court derived its power to deal with such a matter from s 169 of the Constitution. The Labour Court, on the contrary, had 'concurrent jurisdiction' with the High Court in respect of any violation of a constitutional right. It did not have general jurisdiction on labour matters where a constitutional dispute was raised. The respondent could therefore institute proceedings in either the Labour Court or the High Court (para 6 at 205A—C (SA), 189*c—e* (All SA)).

**If an employment dispute raised an alleged violation of a constitutional right, a litigant was not confined to the remedy provided under the Labour Relations Act, and the jurisdiction of the High Court was not ousted**. The position had been dealt with by the Constitutional Court in *Fredericks & others v MEC for Education and Training, Eastern Cape, & others* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 paras 31 and 40 at 710B—C and 713E—G (SA), 126G—H and 130A—B (BCLR), respectively. There O'Regan J had pointed out that as there was no general jurisdiction afforded to the

Labour Court in employment matters, the jurisdiction of the High Court was not ousted by s 157(1) simply because a dispute was one that fell within the overall sphere of employment relations; the High Court's jurisdiction would be ousted only in respect of matters that 'are to be determined' by the Labour Court (para 7 at 205E—H (SA), 189*f—i* (All SA)).

Earlier decisions in the Supreme Court of Appeal, Mthiyane JA pointed out, had held that the Labour Relations Act was not exhaustive of the rights and remedies which accrued to an employee upon the termination of employment. In particular, in *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* 1957 (SCA) para 4 at 1959 Nugent JA had said that a claim by the appellant to enforce the rights of its members to fair administrative action – a right protected by s 33 of the Constitution – was 'clearly cognizable in the ordinary courts'. Likewise, in the High Court, in *Mbayeka & another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk), 2001 (4) BCLR 374 para 17 at 572*j*—573*b* (All SA), 379E (BCLR) Jafta J had held that the Labour Court would never enjoy exclusive constitutional jurisdiction even in matters where the cause of action was confined to an alleged violation of the right to fair labour practices simply because that is a constitutional right in terms of s 23 of the Constitution. The point made in the judgment in *Mbayeka* was 'unanswerable'. **The power enjoyed by the Labour Court to adjudicate on the right under s 33 of the Constitution was merely concurrent with the jurisdiction of the High Courts** (paras 8—9 at 205H—206H (SA), 190*a—i* (All SA)).

The High Court accordingly had jurisdiction in the matter (para 10 at 206H—I (SA), 190*i* (All SA)). The appeal, in the opinion of Mthiyane JA, nevertheless had to be upheld because it had not been shown that the dismissal of the respondent by Transnet was an administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') or that any of the respondent's rights under s 33 of the Constitution had been violated (para 15 at 210D—E (SA), 194*c* (All SA)).

Although agreeing that the appeal should be upheld, **Conradie JA came to the opposite conclusion on the issue of jurisdiction**. Characterizing the question before the Court as being whether Brassey AJ in the High Court had had jurisdiction to review under PAJA an act performed by the state in its capacity as an employer (para 22 at 211I—212A (SA), 195*f—g* (All SA)), Conradie JA held that dismissals in the public domain could not be dealt with as administrative acts by virtue of the structure of the governing legislation. Nothing could be further from the true effect of the legislation than that every dismissal of an employee from the service of an organ of state or the state itself should, at the option of the employee, be litigated in either the High Court or the Labour Court. It did not fit in with the state's desired comprehensive scheme of labour regulation. The legislative intent evident from the Labour Relations Act was beyond doubt**:** it was to subject a dispute about the unfair dismissal of any employee falling within its scope to the dispute-resolution mechanisms of that Act. If there was a way to give effect to that intention, one had to try to find it (para 27 at 213G—214B (SA), 197*c—e* (All SA)).

The Labour Relations Act laid down the elements of procedural fairness that it considered essential for a valid dismissal decision by an employer. PAJA, enacted five years later (not seven years later, as Conradie JA is reported as having said), laid down

the procedural elements for a lawful and fair administrative decision. It applied not only to all decisions of the state but to all decisions of all bodies exercising public power or fulfilling a public function of whatever description. Its scope was broader than that of the Labour Relations Act, which was a special statute regulating a particular type of relationship. **The maxim generalia specialibus non derogant applied, and meant that when the legislature had given attention to a separate subject and made provision for it, the presumption was that a subsequent general enactment was not intended to interfere with the special provision unless it manifested that intention very clearly** (para 28 at 214B—E (SA), 197*e*—198*b* (All SA), with reference to L C Steyn *Die Uitleg van Wette* 5 ed (1981) by S I E van Tonder et al 190, citing *R v Gwantshu* 1931 EDL 29 at 31).

PAJA, continued Conradie JA, was enacted against the background of a provision (s 157(1)) in the Labour Relations Act conferring exclusive jurisdiction on the Labour Court 'in respect of all matters that elsewhere or in terms of this Act or in terms of any other law are to be determined by the Labour Court'. That provision applied also to public-sector employees unless the 'rather special circumstances' set out in s 157(2) conferred concurrent jurisdiction on the Labour Court and the High Courts. By extending the benefits of the Labour Relations Act to, and imposing restrictions on, employees of the state and its organs, the legislature took dismissals out of the realm of administrative law. It would thus seem perverse that PAJA should, in respect of those matters specially assigned to the Labour Court, and without expressly saying so, effectively have repealed the exclusive-jurisdiction provision of the Labour Relations Act in respect of public-sector employees (para 29 at 214F—215B (SA), 198*d—f* (All SA)). This applied only to matters such as a dismissal based on conduct, capacity or operational requirements that were to be determined by the Labour Court. Not all issues arising from an employment relationship were governed by the Labour Relations Act. The jurisdiction of the Labour Court was limited to the four corners of the Labour Relations Act. A cause of action falling outside that for which the legislature had prescribed recourse to the Labour Court as the only remedy was not taken away by the Labour Relations Act. The point was merely that, for a complaint arising from a procedurally unfair dismissal for poor work performance, a quintessential Labour Relations Act matter, relief under PAJA was not intended to be available (para 30 at 215B—F (SA), 198*f*—199*b* (All SA)).

The Bill of Rights, added Conradie JA, created two distinct sources of power. The one, in s 23 of the Constitution, fed the procedures of labour law and the other, in s 33 of the Constitution, those of administrative law. Administrative-law power over the subject had one source, an employer's power over its employees another. The statutes enacted to give effect to each of the constitutional provisions, PAJA and the Labour Relations Act, differed fundamentally in the substantive remedies they provided. If an application for the review of administrative action succeeded, the applicant was usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness was an issue, the reviewing court did not concern itself with the substance of the applicant's case and only in rare cases substituted its decision for that of the decision-maker. Under the Labour Relations Act, on the other hand, the procedure to have a dismissal overturned or adjusted involved a rehearing with evidence by the parties and the substitution of a correct decision for an

incorrect one. The scope for relief consequent upon such an order was extensive. It was quite unlike that afforded by an administrative-law review (para 31 at 215F—216B (SA), 199*b—f* (All SA)).

One might say that an employee who was content with the lesser remedy afforded by PAJA should be free to pursue it, but that opinion did not take adequate account of the fact that **the legislature had firmly set its face against matters governed by the Labour Relations Act being litigated in another court**, regardless of whether the employee was employed in the public or the private sector (para 32 at 216B—C (SA), 199*f—g* (All SA)).

Having held that PAJA could not be utilized by a litigant in an administrative-law review in the High Court aimed at challenging the legality of a dismissal from public-sector employment, Conradie JA then added that even if he was wrong in thinking that no action was available under PAJA, the respondent in *Chirwa* was nevertheless not entitled to pursue that remedy in the High Court (para 33 at 216D—E (SA), 199*g*—200*a* (All SA)). This was because the jurisdiction provision in s 157(1) of the Labour Relations Act conferred on the Labour Court exclusive jurisdiction in respect of all matters that 'elsewhere in terms of this Act' were to be determined by the Labour Court. The phrase 'elsewhere in terms of this Act' meant in a section other than s 157. And in the very next section, s 158(1)*(h)*, there was a provision extending the jurisdiction of the Labour Court. Under that paragraph, the Labour Court was empowered to 'review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law' (para 34 at 216E—G (SA), 200*a—d* (All SA)). **The fact that it was thought necessary to make special provision for a review of state decisions in the employment sphere on any grounds permissible in law suggested an extension of jurisdiction to bring the kind of employment-related decision that might be considered to fall outside the scope of the Labour Relations Act – such as an administrative decision under PAJA – under the exclusive jurisdiction of the Labour Court** (para 35 at 216G—217B (SA), 200*d—e* (All SA)). If this was correct, then the Labour Court had exclusive jurisdiction to review the decision to dismiss the respondent so that, even if she had a cause of action under PAJA, the High Court was not the forum for it (para 36 at 217C—D (SA), 200*g—h* (All SA)).

Nor could the respondent avoid the conclusion that the Labour Court had exclusive jurisdiction by relying directly on s 33 of the Constitution rather than on PAJA, for (as was held by Chaskalson CJ in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 para 96 at 364H—I (SA), 38A—B (BCLR) and by Ngcobo J (not Chaskalson CJ, as wrongly indicated by Conradie JA in *Chirwa*) in para 437 of the same case at 446D—447A (SA), 118D—119A (BCLR)) **a litigant may not avoid the provisions of PAJA by seeking to rely on s 33 of the Constitution or on the common law**, since that would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation (para 38 at 217G—218B (SA), 201*b—e* (All SA); see also paras 39—40 at 218B—E (SA), 201*e—h* (All SA)). A claimant could not escape the provisions of the Labour Relations Act by alleging that the case involved a constitutional issue. Every labour dispute could be said to have a constitutional dimension. That did not mean that the constitutional right to fair

labour practices of someone who had been unfairly dismissed had been violated. It meant that the dismissal was unlawful in terms of the Labour Relations Act. The Labour Court retained its exclusive jurisdiction (para 43 at 219E—F (SA), 202*g—h* (All SA)).

Conradie JA accordingly concluded that the respondent's reliance on PAJA had been misplaced. In so far as she might have had a claim under PAJA, she had chosen the wrong forum to enforce it. Her attempt to found a cause of action directly on s 33 of the Bill of Rights was also misplaced. It followed that the appeal had to succeed and the application be dismissed (para 44 at 219F—H (SA), 202*h*—203*b* (All SA)).

In his dissenting judgment, Cameron JA began by remarking that after hesitation, he had found himself driven to a different conclusion from that reached by Mthiyane and Conradie JJA. The respondent had been entitled to 'at least' declaratory relief, and the appeal by Transnet could succeed only partially (para 46 at 220C and E (SA), 203*d—e* and *f—g* (All SA)). The essence of the difference in thinking was that **the Constitution, in the view of Cameron JA, permitted an employee of a public body to seek relief in the ordinary courts for dismissal-related process injustices that constituted administrative action**. Conceptual, doctrinal and interpretative difficulties obstructed the path to the conclusion that the employee was not entitled to any relief in the ordinary courts, and compelled the contrary conclusion. The ordinary courts should, however, be careful in employment-related matters not to usurp the remedial role and special aptitudes of the Labour Courts**:** public employees might properly be discouraged from having recourse to the ordinary courts in such matters by limiting the remedy granted (para 47 at 220E—H (SA), 203*g*—204*b* (All SA); see also para 67 at 227C—D (SA), 210*a* (All SA)).

The starting-point, said Cameron JA, was the Constitution, which regulated the exercise of all power and entitled all persons not only to fair labour practices (as enacted in the Labour Relations Act) but also to just administrative action (the right to which was now embodied in PAJA). If there were no Labour Relations Act, the respondent would have been able to bring her claim under PAJA (contrary to what Mthiyane JA found) and the Labour Relations Act did not obstruct that conclusion (contrary to what Conradie JA held) (para 49 at 221D—F (SA), 204*e—g* (All SA)). After remarking that it was hard to see why the decision of a state organ to dismiss an employee did not constitute administrative action (para 51 at 222A (SA), 205*a* (All SA); see also para 53 at 223B—C (SA), 206*b—c* (All SA)), Cameron JA concluded that whatever the position might be in relation to purely commercial contracts, the public dimension of employment service with a public body rendered it subject to administrative-law oversight, and PAJA was accordingly applicable (para 56 at 224D (SA), 207*c—d* (All SA)).

Turning to the question of jurisdiction, Cameron JA remarked that when Transnet had dismissed the respondent, its conduct had trenched on two constitutional rights**:** her right to fair labour practices and her right to just administrative action. The legislature had augmented the right to fair labour practices by affording employees an elaborate set of remedies in the Labour Relations Act. When conciliation under the Labour Relations Act had failed, the respondent could have subjected her unfair-dismissal claim to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), but had chosen instead to launch an application for relief in the High Court in express reliance on PAJA, asserting that two causes of action arose from her dismissal –

one under the Labour Relations Act and the other under the Constitution and PAJA. That assertion, said Cameron JA, was correct (para 57 at 224E—G (SA), 207*d—f* (All SA)).

**The fact that the employee had remedies under the Labour Relations Act did not preclude her from asking the ordinary courts to vindicate her rights under PAJA**. Both existing authority and principle compelled the conclusion that she was entitled to bring her claim for relief in the ordinary courts (para 58 at 224G—H (SA), 207*f—g* (All SA)). The Labour Relations Act did not confer exclusive jurisdiction on the Labour Courts in matters arising from the employer/employee relationship; it was intended to supplement the employee's common-law rights, and not to exhaust the rights and remedies accruing to an employee on termination of employment. And since the Labour Relations Act afforded the Labour Courts no general jurisdiction in employment matters, the jurisdiction of the ordinary courts was not ousted simply because a dispute fell within the sphere of employment relations. The ordinary courts retained their competence in relation to disputes arising from the alleged infringement of constitutional rights (para 59 at 225A—C (SA), 207*g*—208*b* (All SA), with reference to *Fredericks & others v MEC for Education and Training, Eastern Cape, & others* 2002 (2) SA, 2002 (2) BCLR paras 36—43 at 711G—714G (SA), 128C—131A (BCLR)). Referring (like Mthiyane JA) in para 60 at 225C—G (SA), 208*b—f* (All SA) to *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* para 4 at 1959, Cameron JA held that the claim in *Chirwa* was no different from the claim in *Digomo*. The employee was entitled to formulate her complaint against her public employer in terms cognizable in the ordinary courts. By invoking PAJA, she did so. The view of Conradie JA could not be accepted, for it suggested that the Labour Relations Act, a statute which preceded PAJA, had to be read to have deprived the employee of her administrative-justice rights of action. The Labour Relations Act did not do so expressly, and could not be held to have done so by implication either**:** 'so large a conclusion' could not be drawn 'from such obliquely inferred grounds' (para 61 at 225G—226B (SA), 208*f—h* (All SA)).

Behind this debate loomed the broader question whether, when the legislature provided an express statutory vehicle for the realization of one constitutional right, it thereby occluded reliance on other rights whose breach might be involved. To do so might indeed lie within its power, but far clearer, more precise and more robust language would have to be used to achieve that object than was found in the Labour Relations Act, for the evaporation of a constitutional cause of action should be inferred only with great hesitation (para 62 at 226B—C (SA), 208*h*—209*a* (All SA)). **No doctrine of constitutional law confined a beneficiary of more than one right to only one remedy**, and if the legislature sought to deprive dismissed public employees of their administrative-justice cause of action in the ordinary courts because they enjoyed rights under the Labour Relations Act, it could have said so when it enacted PAJA. Far from doing so, PAJA's extensive list of exclusions from the definition of administrative action refrained from any such mention. It followed that **the cause of action under PAJA survived unscathed** (para 63 at 226C—E (SA), 209*a—c* (All SA); see also para 65 at 226F—G (SA), 209*d—e* (All SA), where Cameron JA found that the Constitution likewise gave no indication of an intention to confine the beneficiary of more than one constitutional right to any single legislatively created scheme of rights).

**Nor**, concluded Cameron JA, **could s 158(1)*(h)* of the Labour Relations Act be read as conferring exclusive jurisdiction on the Labour Courts to review decisions taken or acts performed by the state in its capacity as employer**. The provision merely gave the Labour Courts the power to review the state's conduct as employer, without the intention to confer exclusivity (para 64 at 226E—F (SA), 209*c—d* (All SA)). The respondent had accordingly been free to frame her cause of action under PAJA, as she had done (para 65 at 226G (SA), 209*e* (All SA)).

In the view of the present writer, the correct approach was that adopted by Cameron JA. Since the Constitution is now the authoritative and definitive source of the power of the High Court to determine matters, the Constitution (and not either PAJA or the Labour Relations Act, as Conradie JA would have it) must be the starting-point of any enquiry into the jurisdiction of the High Court. The governing provision, as Mthiyane JA indicated, is s 169 of the Constitution, which provides as follows**:**

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

By virtue of the fact that the right to fair labour practices (entrenched by s 23(1) of the Constitution) and the right to just administrative action (entrenched by s 33(1) of the Constitution) were alleged to have been violated, the matter was manifestly a constitutional matter falling within the ambit of item *(a)* of s 169. Since the dispute in *Chirwa* did not fall within any of the categories of matter which only the Constitutional Court may, in terms of s 167(4) of the Constitution, decide, a High Court would have jurisdiction to determine the dispute, whether the constitutional right in issue was the right to fair labour practices, the right to just administrative action or both, unless the matter was 'assigned by an Act of Parliament' to another court of a status similar to that of a High Court. And as the Constitutional Court (per O'Regan J) held in *Fredericks*, 'assigned' means taking jurisdiction away from the High Court and conferring it on another court of similar status (para 31 in 2002 (2) SA at 710C—D, 2002 (2) BCLR at 126H). Manifestly, however, **the only other relevant statutory provision dealing expressly with jurisdiction, s 157(2) of the Labour Relations Act, did not deprive the High Court of jurisdiction: it did precisely the opposite, declaring the Labour Court to have 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** (which includes both s 23 and s 33 of the Constitution), where the alleged or threatened violation arises from any one of the three categories referred to in s 157(2). (It should be noted that the word 'and' appearing at the end of category *(b)* and immediately prior to category *(c)* in s 157(2) must be interpreted disjunctively, not conjunctively (sc must be interpreted to mean 'or'), for category *(b)* is much narrower than category *(a)*, and category *(a)* would be altogether tautologous if the word 'and' appearing after category *(b)* were to be construed conjunctively. For in that event, the

requirements of both *(a)* and *(b)* would have to be satisfied in every case, yet every instance falling within *(b)* will also fall within *(a)*, although not vice versa.) The claim in *Chirwa* fell within the ambit of both category *(a)* and category *(b)* mentioned in s 157(2), and therefore the High Court indisputably had jurisdiction by virtue of both s 169 of the Constitution and s 157(2) of the Labour Relations Act.

This conclusion is bolstered by dicta of O'Regan J (writing on behalf of the Constitutional Court) in the *Fredericks* case. Dispositive of the question is para 41 of the judgment in *Fredericks* 2002 (2) SA at 714B—C, 2002 (2) BCLR at 130E—F, where the following was said**:**

> 'There is no express provision of the [Labour Relations] Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the State acting in its capacity as employer, other than s 157(2). That section provides that challenges based on constitutional rights arising from the State's conduct in its capacity as employer is a matter that may be determined by the Labour Court concurrently with the High Court. Whatever else its import, s 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.'

Nor, added O'Regan J, could s 158(1)*(h)* of the Labour Relations Act alter this conclusion**:**

> 'Given the express conferral of jurisdiction . . . by s 157(2), it would be a strange reading of the Act to interpret s 158(1)*(h)* read with s 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by s 157(2). Section 158(1)*(h)* cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient, when read with s 157(1), to exclude the jurisdiction of the High Court'

(para 43 at 714E—G (SA), 130H—131A (BCLR)).

In the face of the abovementioned legislative provisions and judicial dicta, **the approach adopted, and the conclusion reached, by Conradie JA cannot possibly be supported**. Nowhere in the judgment of Conradie JA are these clearly relevant dicta in *Fredericks* even mentioned, despite the case being referred to as authority (in n17 at 215I (SA), n44 at 198*j* (All SA)) on a different point. Nor is there any reference in the judgment of Conradie JA to s 169 of the Constitution, which was obviously the correct springboard from which the enquiry into jurisdiction had to be launched. The central problem with the judgment of Conradie JA, however, is that it took as its starting-point the Labour Relations Act and treated that Act, by virtue of its status as an enactment dealing with the specific issue of employment relations, as one which had to override more general legislation such as PAJA, on an application of the maxim generalia specialibus non derogant. The trouble with this line of reasoning is that the Labour Relations Act could not be regarded as overriding PAJA without also overriding the Constitution, which was manifestly a more general statutory enactment (albeit one with elevated status) than the Labour Relations Act. And the Labour Relations Act could not be regarded as overriding the Constitution without violating the principle of supremacy of

the Constitution expressly laid down in s 2 thereof. (Section 2 states, inter alia, that the Constitution is the supreme law of the Republic, and that law or conduct inconsistent with it is invalid.) The Labour Relations Act could not legitimately be read so as to imply a result (sc the exclusive jurisdiction of the Labour Court to determine matters pertaining to employment and labour relations in which fundamental rights entrenched in Chapter 2 of the Constitution are alleged to have been violated or threatened) which was contrary to the express terms of s 169 of the Constitution and s 157(2) of the Labour Relations Act. The view expressed by Conradie JA that s 157(2) was restricted in its application to 'rather special circumstances' (para 29 at 214G (SA), 198*d—e* (All SA)) was unduly restrictive, and it was quite wrong to say, in the teeth of s 169 of the Constitution and s 157(2) of the Labour Relations Act, that the true effect of the legislation was to deprive a dismissed employee who alleged that his or her constitutionally entrenched rights (whether in terms of s 23 or s 33 of the Constitution) had been violated of the option of litigating the matter in the High Court. **The state's desired comprehensive scheme of labour regulation was not to send all labour matters to the Labour Court, even where a violation of a constitutionally entrenched right was alleged to have occurred**, and the assertions in para 27 of the judgment of Conradie JA to the contrary cannot be accepted. Nor can the view that 'the Legislature has firmly set its face against matters governed by the [Labour Relations Act] being litigated in another court' (para 32 at 216C (SA), 199*f—g* (All SA)) be supported. The exposition of s 157(1) in para 34 at 216E (SA), 200*a—b* (All SA) of the judgment of Conradie JA simply perpetuates the judge's erroneous line of reasoning, by disregarding the crucial opening words of that provision**:** 'Subject to the Constitution'. And the conclusion in para 36 at 217C—D (SA), 200*g—h* (All SA) that 'the Labour Court has exclusive jurisdiction to review the decision to dismiss the respondent so that, although she has a cause of action under PAJA, the High Court is not the forum for it' is contradicted by the express and unequivocal wording of s 157(2) of the Labour Relations Act, and cannot therefore be maintained either.

In the result, **four of the five judges who presided in *Chirwa*** (Mthiyane and Cameron JJA, and Jafta JA and Mpati DP who, respectively, concurred with them) **held that the High Court did indeed have jurisdiction to determine a challenge to a dismissal of a public-sector employee on the ground that the employee's constitutional rights were violated. This view must now be regarded as settled law, a development that is to be welcomed**. When it comes, however, to a choice between the view adopted by Mthiyane JA and that of Cameron JA on whether the appeal had to succeed or be (in the main) dismissed – a matter that turns on the proper meaning of the expression 'exercising a public power or performing a public function in terms of any legislation' in the definition of 'administrative action' in s 1 of PAJA, and one that it falls beyond the ambit of the present publication to consider in any detail – the present writer supports the approach of Cameron JA for the reasons which were given by him. The conclusion, regrettably, must be that the appeal in *Chirwa* was wrongly upheld by the majority.

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