THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 218/08

EDWARD MBUYISELO MAKHANYA — Appellant

and

THE UNIVERSITY OF ZULULAND — Respondent

Neutral citation: *Makhanya v University of Zululand* (218/08) [2009] ZASCA 69 (29 May 2009)

Coram: NUGENT, LEWIS & SNYDERS JJA

Heard: 5 MAY 2009

Delivered: 29 MAY 2009

Summary: Employment – claim to enforce contract – alternative remedies available under Labour Relations Act 1995 – whether high court had jurisdiction to consider claim.

ORDER

On appeal from: High Court Durban (Hugo J sitting as court of first instance)

1 The appeal is upheld with costs. The order of the court below is set aside and the following orders are substituted:

'(a) Both special pleas are dismissed with costs.

(b) The action is postponed sine die for disposal of the remaining issues'.

2 The matter is remitted to the high court.

JUDGMENT

NUGENT JA (LEWIS and SNYDERS JJA CONCURRING)

[1] Professor Makhanya instituted an action against the University of Zululand in the High Court at Durban. The particulars of claim were straightforward. Makhanya said that he had been employed by the University under a contract of employment. He said that the University had purported to terminate the contract in breach of its terms. That notwithstanding, said Makhanya, he had continued to render his services, or at least he had tendered to do so. But the University had not paid him his remuneration and other moneys to which the contract entitled him, and he claimed orders compelling it to do so. (Two separate claims were made but

they were in truth a single claim and I will refer to them together in the singular. An additional claim was made that does not feature in this appeal.)

THE JURISDICTIONAL CHALLENGE

[2] In a special plea the University challenged the jurisdiction of the high court to consider the claim. The jurisdictional challenge is curious because claims for the enforcement of contracts are commonplace in the high courts. Some eight years ago it was argued before this court – in *Fedlife Assurance Ltd v Wolfaardt*[1] – that claims for the enforcement of contracts of employment had been excluded from the jurisdiction of the high courts by the Labour Relations Act 66 of 1995 (LRA) but that argument was rejected,[2] and is not sought in this case to be revived. And if there is any residual doubt as to whether a high court has the power to consider such a claim it is put to rest by s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), which was enacted after the LRA, and which makes it perfectly clear that the high courts have not been divested of their ordinary jurisdiction to enforce contracts of employment (the section confers equivalent jurisdiction on the Labour Court also to consider such claims).

[3] One asks in those circumstances on what basis the jurisdictional objection could possibly have been taken? Because the objection was upheld by the court below, and it dismissed the claim on that ground. This appeal is against that order and it is before us with the leave of that court.

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[1] 2002 (1) SA 49 (SCA).
[2] The argument was dealt with in paras 23-27.

[4] Whatever explanation is given invariably leads one back to the decision of the Constitutional Court in *Chirwa v Transnet Ltd*,[3] in which the majority expressed the view that the high court had no jurisdiction to consider the claim in that case. I will return to that decision in some detail later in this judgment.

[5] This case is not materially different to *Chirwa* – I will expand upon that later in this judgment – and any attempt to distinguish them on their facts would be no more than a makeweight. That is the difficulty that now confronts us. On the one hand *Fedlife* (which seems to have had the approval of that court) and the BCEA make it clear that the high court has jurisdiction in this case. On the other hand if we are bound to apply the view expressed by the majority in *Chirwa* then we must reach the opposite conclusion.

[6] The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts, as Cameron JA said in this court in *True Motives 84 (Pty) Ltd v Mahdi*,[4] is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. He went on to say:

> 'Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.'

[7] He pointed out that 'at this tender stage of our legal development, the doctrine of precedent has special importance' and warned that 'this court

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[3] 2008 (4) SA 367 (CC); [2007] ZACC 23.
[4] [2009] ZASCA 4 para 100.

should not lay itself open to the … complaint that it is violating the rule of law by illegitimately disregarding or evading [Constitutional Court] precedents'.[5] But he also observed that:

'it is well established that precedent is limited to the binding basis (or *ratio decidendi*) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (*obiter dictum*), and is not binding on subsequent courts.'[6]

[8] The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings, that is for convenience of academic study and treatment, and should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields. If the ratio of *Chirwa* is as I have stated it, as the court below considered it to be, then the majority must be taken to have implicitly overruled the decision in *Fedlife.* And the express reservation in the BCEA of the ordinary power of a high court to consider contractual claims would need in some way to be explained. And the question would arise as to what further limitations it might impose on the ordinary power of the high courts in other cases. And so it could go on, because a domino that falls usually sets off a cascade.

[9] Apart from its jurisdictional finding the majority in *Chirwa* also found that the claim was bad in law. What is most striking about that case is that the two findings are mutually destructive and cannot both have provided the

[5] Para 102.
[6] Para 101.

ratio for the order that was made. I deal with that more fully later but for the moment I need only say that if the high court (and by extension the court on appeal) had no jurisdiction in the matter then that ought to have been an end of the matter: by its own decision it would have had no power to dismiss the claim on its merits. Conversely, if the ratio for the order was that the claim was bad in law, it follows that it must have had the power to make that finding. The ratio may be one or the other but it cannot be both.

[10] For those reasons I think that we must be most circumspect before accepting without question that that was indeed the ratio of *Chirwa,* thereby taking this court along a path that it has not taken before, and for the proper disposal of this appeal we cannot avoid enquiring into that question. That enquiry seems to me to be best undertaken by starting with first principles, which I do before turning to the decision in that case.

HOW THE PROBLEM ARISES

[11] The LRA creates certain rights for employees that include 'the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices'.[7] I will refer to those rights interchangeably as 'LRA rights'. Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract. Another is the right that everyone has (a right emanating from the Constitution and elaborated upon in the Promotion of Administrative Justice Act) to just administrative action.[8]

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[7] Section 185.

[8] Section 33(1) of the Bill of Rights: 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.' The Interim Constitution provided a right in comparable terms in s 24.

[12] Thus there is the potential (I emphasise that I refer only to the potential) for three separate claims to arise when an employee's contract is terminated. One is for infringement of his or her LRA right. Another is for infringement of his or her common law right. And where it occurs in the public sector, a third is for infringement of his or her constitutional right.

[13] An LRA right is enforceable only in the Commission for Conciliation, Mediation and Arbitration (CCMA)[9] or in the Labour Court.[10] (I will refer to them interchangeably as the 'Labour Forums' except where it becomes necessary to distinguish them). The common law right is enforceable in the high courts[11] and in the Labour Court.[12] And the constitutional right is enforceable in the high courts[13] and in the Labour Court.[14]

[14] It is convenient to pause for a moment to make an observation with regard to the enforceability in the high court of that constitutional right. There is some suggestion in the judgment of Ngcobo J in *Chirwa* that s 157(2) of the LRA might somehow have divested the high courts of their

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[9] Created by s 112 of the LRA.

[10] So far as disputes fall within the jurisdiction of the CCMA the exclusivity of its powers is implicit in the procedures for resolution of such disputes. As for the Labour Court, s 157(1) of the LRA provides: '… [T]he Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act … are to be determined by the Labour Court.' (see *Fedlife*, above, on the meaning of that subsection, approved in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC)).

[11] Section 169(b) of the Constitution. The section assigns judicial authority to the high courts in the following terms:

'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.

[12] Section 77(3) of the Basic Conditions of Employment Act: 'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment …'

[13] Section 169(a)(ii) quoted above.

[14] Section 157(2) of the LRA: '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] and arising from … employment and from labour relations.'

ordinary power to consider claims to enforce a constitutional right arising from employment (the claim that was made in *Chirwa*)[15] and in that context it was suggested that the use of the word 'concurrent' in s 157(2) might have been unfortunate.[16] That suggestion might be founded upon a misconception and I do not think it can be correct.

[15] The section so far as it is now relevant reads as follows:

'157 Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations…'

[16] It is important to bear in mind that s 157(2) does not purport to confer jurisdiction on the high courts. The power to consider claims for the alleged violation of constitutional rights, whether in the employment sphere or otherwise, is assigned to them by the Constitution. Section 157(2) does no more than to confer equivalent jurisdiction upon the Labour Court.

[17] A statute that confers power on a special court might often say expressly that it is to be exercised 'concurrently' so as to remove ambiguity. But in s 157, in which the conferring of exclusive and concurrent jurisdiction is dealt with in separate subsections, there is no room for ambiguity, and the word 'concurrent' is superfluous. A construction of subsection (2) that

[15] Paras 122-123.

[16] Paras 121 and 122.

divests the high courts of their ordinary power in such matters, and assigns it to the Labour Court exclusively, would require a major rewriting of the section as a whole, and not merely the deletion of the word 'concurrent'.[17] It would mean that subsection (2) as a whole is superfluous, and would also call for subsection (1) to be rewritten so as to assign that power exclusively to the Labour Court. The section simply does not open itself, by any form of interpretation, to being reconstructed in that way. The section clearly recognises the existence of the high court's original jurisdiction in such matters and merely extends it to the Labour Court as well.

[18] Thus to summarise:

- The Labour Forums have exclusive power to enforce LRA rights (to the exclusion of the high courts).
- The high court and the Labour Court both have the power to enforce common law contractual rights.
- The high court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.

[19] I turn to what happened in this case. In consequence of the termination of his employment Makhanya at first pursued a claim for infringement of his LRA right in the CCMA where it ultimately failed (I elaborate upon that later). The University now alleges that because Makhanya pursued a claim for enforcement of his LRA right (in the CCMA) the high court has no power to consider his claim for enforcement of his contractual right.

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[17] Even the deletion of the words 'concurrent … with the High Court' would not alter the meaning of subsection (2) when properly construed in the context of the section as a whole.

[20] Much the same happened to Ms Chirwa, who was employed in the public sector. When Transnet terminated her employment Ms Chirwa at first pursued a claim for infringement of her LRA right in the CCMA (she did not take it to conclusion but that is not material). She then instituted a claim in the high court for infringement of her constitutional right. It was because Ms Chirwa had pursued a claim for enforcement of her LRA right (in the CCMA) that the majority concluded, as I understand it, that the high court had no power to consider her claim for enforcement of her constitutional right.

[21] But for the fact that the right that was asserted in each case was different – which is not material to the jurisdictional issue – the two cases are materially indistinguishable. It seems to me that what has confused matters in both cases is that a claim for enforcement of an LRA right has become muddled with a separate claim for the enforcement of a right arising outside the LRA (in this case a claim for the enforcement of a contractual right and in *Chirwa* a claim for enforcement of a constitutional right).

JURISDICTION GENERALLY

[22] The power of a court to entertain a claim derives from the power that all organised states assume to themselves to bring to an end disputes amongst their inhabitants that are capable of being resolved by resort to law. Disputes of that kind are brought to an end either by upholding a claim that is brought before it by a claimant or by dismissing the claim. By so doing

the order either permits or denies to the claimant the right to call into play the apparatus of the state to enforce the claim.

[23] The original power of the state to bring disputes to an end (its judicial authority) is assigned in this country to the high courts by the Constitution.[18] (I speak in general terms and do not deal with limitations that are not relevant to this case.) Judicial power is the power both to uphold and to dismiss a claim. It is sometimes overlooked that the dismissal of a claim is as much an exercise of judicial power as is the upholding of claim. A court that has no power to consider a claim has no power to do either (other than to dismiss the claim for want of jurisdiction).

[24] In general the high courts thus exercise the original authority of the state to resolve all disputes, of any kind, that are capable of being resolved by a resort to law, unless that authority has been assigned to another court. When a high court resolves a contractual claim it exercises that original jurisdiction. When it considers a claim for enforcement of a constitutional right it exercises that original jurisdiction. So too when it enforces a statutory right.

[25] But the state might also create special courts to resolve disputes of a particular kind. Generally those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by (a) conferring power on the special court and simultaneously (b)

[18] Section 169 of the Constitution quoted above. Other courts have such powers as may be assigned to them by legislation.

excluding the ordinary power of the high court in such cases (it does that when 'exclusive jurisdiction' is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the high court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the high courts). In the latter case the claim might be brought before either court.

[26] In the present context exclusive jurisdiction to enforce LRA rights has been assigned to the Labour Forums. But in respect of the enforcement of both contractual and constitutional rights the high courts retain their original jurisdiction assigned to them by the Constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the high courts.

[27] Naturally a claim that falls within the concurrent jurisdiction of both the high court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of lis pendens (the claim is pending in another court) or by a plea of res judicata (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court. But where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts.

PLEADING JURISDICTIONAL CHALLENGES

[28] When cases come before a court on appeal or on application the issues are presented to the court simultaneously and that might at times obscure the various issues if they logically arise sequentially. I think it is useful, for proper analysis in such cases, to envisage how they would have arisen in an action, where the issues are often pleaded and disposed of sequentially.

[29] Jurisdictional challenges will be raised either by an exception or by a special plea, depending on the grounds upon which the challenge arises. There will be some cases in which the jurisdiction of a court is dependent upon the existence of a particular fact (often called a 'jurisdictional fact'). Where the existence of that fact is challenged it will usually be in a special plea, and the matter will proceed to a factual enquiry confined to that issue. In other cases the existence or otherwise of jurisdiction to consider the case will appear from the particulars of claim and in those cases the challenge will be raised by an exception. In such cases a court that considers the challenge might not even be aware of whether or not the plaintiff intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first, because upon it depends the power of the court to make any further orders.

[30] The case before us is one in which the challenge is not dependent upon the existence of a jurisdictional fact but instead upon the nature of the claim. Because the nature of the claim will be apparent from the particulars of claim a jurisdictional challenge will conventionally be raised in an exception to the particulars of claim.

[31] The disposal of a jurisdictional challenge on exception ought to be elementary, because it entails no more than a factual enquiry, with reference to the particulars of claim, to establish the nature of the right that is being asserted in support of the claim. Sometimes the right that is asserted might be identified expressly. At other times it might be discoverable by inference from the facts that are alleged and the relief that is claimed. And if there is any doubt a court might simply ask the litigant to commit himself or herself to what the claim is before the court embarks upon the case.

[32] Applying those principles of pleading it is worthwhile considering what would have happened had Ms Chirwa brought her claim in an action, on particulars of claim that alleged the material facts, and went on to allege that the conduct complained of infringed her constitutional right to just administrative action, and to claim appropriate relief.

[33] An exception to the particulars of claim, on the basis that the high court lacked jurisdiction to consider the claim, would have been taken and disposed of first, with reference only to the particulars of claim. Indeed, had the matter been pleaded conventionally, the court hearing the jurisdictional exception would not even have been aware that a further exception (on the basis that the claim was bad in law) was waiting in the wings. It would have been called upon to consider the jurisdictional issue with reference to the particulars of claim, on the assumption that the claim was good in law. Clearly the exception could not have been sustained, because it is manifest from the Constitution that the high court has jurisdiction to consider such a claim. But if the court had (unaccountably) upheld the exception, then the

matter would have ended there, and the challenge to the validity of the claim would not even have arisen.

[34] Some surprise was expressed in *Chirwa* at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced.[19] A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.

COMMON FEATURES OF THE CASES

[35] The first case that came before this court that purported to raise a jurisdictional challenge of this nature was *Fedlife.*[20] Other cases followed that also purported to raise such jurisdictional challenges, which include *United National Public Servants Association of SA v Digomo NO*,[21] *Boxer Superstores, Mthatha v Mbenya,*[22] *Fredericks v MEC for Education and*

[19] See Ngcobo J in *Chirwa* paras 92 and 95.

[20] A true jurisdictional challenge was raised, but almost as an afterthought. The real issue in that case was whether there was a good cause of action. Thus there were two distinct issues in that case (dealt with in the judgment in the reverse order of their logical sequence). The first was whether the high court had the power to consider a claim for breach of contract (which was the claim that was before it). For that stage of the enquiry the question whether the claim was good in law was irrelevant. The court held that the high court did have jurisdiction to consider such a claim (paras 23-27). Once that had been decided it was open to the court to consider the next question (which would ordinarily have been raised on exception to the particulars of claim had the case been properly pleaded), which was whether the claim was good in law. It found that the claim was indeed good in law (paras 8-22).

[21] [2005] 26 ILJ 1957 (SCA).

[22] 2007 (5) SA 450 (SCA), [2007] ZASCA 79.

Training, Eastern Cape,[23] and they continue with a regularity that is becoming alarming. Upon proper analysis none of those cases was about jurisdiction at all.[24] They were about whether the claimant had a good claim in law.

[36] All those cases, as well as this case and *Chirwa*, have three features in common. The first is that the claimant was an employee. From that arises the second common feature, which is that the claimant had an LRA right. The third is that the claimant asserted that he or she also had a right that arose outside the terms of the LRA. (I do not say that the claimant necessarily had the right that was asserted. I say only that he or she asserted that right.) That right in each case was either the right at common law to exact performance of a contract, or it was the constitutional right to just administrative action.

[37] The claim in each case arose from the termination of the contract of employment. That fact had the potential to found a claim for relief for infringement of the LRA right. But it also had the potential to found, in addition, a claim for relief for infringement of the other right that was asserted. Thus in every case the claimant had a potential claim for enforcement of an LRA right (which was enforceable only in a Labour Forum). In every case the claimant also had a potential claim for enforcement of a right that fell outside the LRA (enforceable either in the high court or in the Labour Court).

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[23] 2002 (2) SA 693 (CC).

[24] I pointed out above that one of the matters dealt with in *Fedlife* was a true jurisdictional challenge but that was raised almost as an afterthought and was peripheral to the principal issue in that case.

[38] It follows from this that the claimant in each case was capable of pursuing both claims in the Labour Court,[25] either simultaneously or in succession (because they were different claims). In one claim the Labour Court (as one of the Labour Forums) would be asked to enforce an LRA right (falling within the exclusive power of the Labour Forums). And in the other claim it would be asked to enforce a right falling outside the LRA (but within the concurrent jurisdiction of the Labour Court). Similarly the claimant would have been capable of bringing one claim (the claim to enforce an LRA right) in a Labour Forum and to bring the other claim (for enforcement of the right arising outside the LRA) simultaneously, or sequentially, in the high court.

[39] None of that should evoke surprise. It is the natural consequence of a claimant asserting two claims, each of which is capable of being brought in a different forum. That two claims arising from common facts might be asserted, whether separately or in the alternative, is not unusual. Whether the assertion will succeed is another matter, but that is irrelevant to the jurisdictional question.

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[25] LRA rights are enforceable sometimes in the CCMA, and sometimes in the Labour Court. For convenience I have assumed that the particular claim is one that falls under the jurisdiction of the Labour Court and not the CCMA.

TWO CLAIMS ARISING FROM COMMON FACTS

[40] It is not unusual for two rights to be asserted arising from the same facts. That is what occurred in a leading case that came before this court, which I find to be most instructive in the present context.

[41] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd*[26] the plaintiff said that it had two distinct claims arising from precisely the same facts. The facts were briefly these. A company (the plaintiff) contracted with a firm of professional engineers (the defendant) to provide professional services. The company was not satisfied with the way in which the engineers performed their services. The facts were capable of founding a claim for breach of contract. But the company chose instead to sue the engineers in delict for negligence. That was a novel claim, because a delictual right arising in those circumstances had not been recognised in law before. The defendant opposed the claim on the basis that the claim was bad in law because the right that was asserted did not exist.

[42] The facts that were relied upon in support of the delictual claim corresponded with the facts that would have supported a claim in contract. What the court was being asked to do was to recognise that the company had two separate claims arising from the same set of facts. This is how the court expressed the question that was before it:[27]

'The only infringement of which the [company] complains is the infringement of the [engineers'] contractual duty to perform specific professional work with due diligence; and the damages which the [company] claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In

[26] 1985 (1) SA 475 (A).
[27] At 499D-E.

determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability.'

[43] As it turns out the court declined to recognise the right that was asserted (the delictual right) and the claim was thus dismissed as being bad in law, but that is not important for present purposes. What is important is that the plaintiff was entitled to ask a court to exercise its power to consider and rule upon the claim notwithstanding that the company might equally have founded a claim on another right.

[44] I think it is useful for present purposes to consider what might have happened in that case had there been a special court with exclusive jurisdiction to deal with claims for the enforcement of contracts. Would it have made any difference to whether the high court had the power to consider the claim that was before it?

[45] I think it is patent that the high court would not have declined to consider the claim (a claim that asserted a right in delict) only because the company had an alternative claim arising from the same facts (a claim that asserted a right in contract) enforceable in another court. The claim that was before it was a claim in delict and it fell within the power (and the duty) of the high court to consider that claim (if only to dismiss it). That there was another claim enforceable in another court was irrelevant. That can be tested by asking what would have happened had the two claims been brought simultaneously (one in either court). Clearly neither could have been met by a plea of lis pendens. Nor, if one was dismissed in one court (which is what

occurred), could a plea of res judicata have succeeded in relation to the other.

[46] The existence of a right might nonetheless be relevant to a claim asserting another right arising from the same facts but in an altogether different context. The fact that the plaintiff already enjoys a right arising from those facts (for example, a contractual right) might be thought by the court to be sufficient to protect his or her interests, and thus persuade it that another right (a delictual right) should not be recognised. That is what occurred in *Lillicrap*. The court found that the company was capable of protecting itself adequately by its contract, and thus it was not necessary for the law to recognise a delictual right in addition.[28] But that has nothing to do with jurisdiction. It has to do with whether the claim is a good claim.

EXPLANATIONS THAT HAVE BEEN ADVANCED FOR JURISDICTIONAL CHALLENGES

[47] With all that in mind it is difficult to see how a jurisdictional challenge could be maintained in this case, or in any of the cases I have mentioned. The claim in each case falls clearly within the ordinary power of the high court, and the fact that the claimant had another claim (to enforce LRA rights) is irrelevant (on the jurisdictional issue).

[48] Explanations that have been advanced, both in this and other cases, have always resolved themselves, in one way or another, into one or other of three unacceptable propositions. I propose in this case to deal with each explanation separately. Two of those explanations presented themselves in this case. I will deal with each under a heading that summarises the

[28] See 500F-501H.

proposition that the explanation comes down to upon analysis. But first I need to elaborate upon how the issue arose in this case.

[49] Two special pleas were filed. One special plea raised the jurisdictional challenge. The other raised a defence to the claim. In both cases the relevant plea was founded upon substantially the same allegations. In the special plea relating to jurisdiction it was alleged that Makhanya had 'pursued [the claim] through the CCMA', that an arbitration had been held and an award had been made, that Makhanya had at first applied to the Labour Court to review the award but had abandoned the application, and that 'by virtue of … [Makhanya's] election to proceed with the aforesaid [claim] in the CCMA and the Labour Court' the high court had no jurisdiction to consider the claim.

[50] In the other special plea it was alleged that the disposal of the claim by the arbitrator of the CCMA gave rise to a good defence of res judicata (the allegation being that the claim in the high court was the same claim that had been disposed of by the arbitrator).

The First Unsound Proposition: *The court has no jurisdiction because the claim is a bad claim.*

[51] The submissions that were made before us by counsel for the University, when examined, came down to asserting that proposition. That submission was founded upon the allegation in the special plea that the two claims (the claim in the CCMA and the claim in the high court) were the same claim. In truth that is not correct, but I will assume its correctness for

present purposes. Upon that supposition counsel submitted that because the claim had been disposed of finally by the CCMA the high court had no jurisdiction in the matter. Her submission, in short, was that the court had no power in the matter because the University had a good defence to the claim.

[52] I have pointed out that the term 'jurisdiction', as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.

[53] The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer – because there is none.

[54] There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*, expressed it as follows:[29]

'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it'.

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[29] Para 155.

[55] I make no apology for repeating that rule of logic in various ways throughout this judgment. It has often been ignored in cases purporting to raise jurisdictional objections of the kind that is now before us.

[56] Even if the University indeed has a good defence to the claim along the lines that I have indicated that is irrelevant to the question whether the high court had the power to consider the claim, if only to dismiss it. The submission by counsel that the court had no jurisdiction in the matter because there is a good defence is not capable of being sustained, merely as a matter of logic. Once more it becomes apparent, on that submission, that this case is not about jurisdiction. It is about whether the University has a good defence to the claim.

[57] I might add that if courts were precluded from considering claims that are bad in law there would be no scope for the recognition of new rights and the development of the law. The very progress of the law is dependent upon courts having the power to consider claims that have not been encountered before. A court cannot shy away from exercising its power to consider a claim on account of the fact that it considers that the recognition of the claim might have undesirable consequences. Its proper course in a case like that is to exercise its power to consider the claim but to decline to recognise the rights that are asserted and to dismiss the claim as being bad in law. That is what occurred in *Lillicrap*.

The Second Unsound Proposition: *A high court that has jurisdiction to consider a claim for the enforcement of a right may thwart the assertion of that right by declining to exercise its jurisdiction.*

[58] This was the basis upon which the court below upheld the objection in this case. It is clear from the particulars of claim, when compared with the factual allegations made in the special plea, and even more so when those allegations are read in conjunction with the award of the arbitrator (which was attached to the plea), that the claim that was before the high court, and the claim that was pursued before the CCMA, are not the same claims (contrary to what is alleged in the special plea). Indeed, that was freely acknowledged by counsel (which in itself undermined the argument that she initially presented as I outlined it above). The claim that is now before us was not even capable of being pursued and ruled upon by an arbitrator of the CCMA, because it is not for the enforcement of an LRA right.

[59] The claim that was pursued before the CCMA was a claim to enforce the right of an employee not to be dismissed unfairly (what I have called an LRA right) which is enforceable only in a Labour Forum. The claim in this case asserts for enforcement a right emanating from the common law to exact performance of a contract. It is plain that the high courts have the power to consider claims for the enforcement of employment contracts (as does the Labour Court).

[60] The court below quoted a passage from the judgment of Ngcobo J, writing for the majority in *Chirwa*,[30] which it construed to mean that Makhanya was put to an election as to which claim to enforce, and that his election to pursue one claim (the claim in the CCMA) meant that as a matter of 'judicial policy' the court could stop him from pursuing the other claim by simply declining to exercise its jurisdiction to consider the claim. Taken to its logical conclusion the approach that the court below adopted would mean that the claim would not be capable of being adjudicated upon at all by any court, not even to be dismissed on its merits. It is to be left wandering, unresolved, in some sort of limbo, for want of a court to at least consider it, if only thereafter to dismiss it.

[61] As I pointed out earlier, it is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for 'forum shopping' by allowing the litigant that choice. But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.[31]

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[30] Para 85: 'Ordinarily and as a matter of judicial policy, even if the High Court had concurrent jurisdiction with the Labour Court in this matter, it should be impermissible for a party to initiate the process in the CCMA alleging one cause of action, namely unfair labour practice, and halfway through that process allege another cause of action and initiate proceedings in the High Court. It seems to me that where two courts have concurrent jurisdiction, and a party initiates proceedings in one system alleging a particular cause of action, the party is bound to complete the process initiated under the system that she or he has elected. Concurrent jurisdiction means that a party must make an election before initiating proceedings. A party should not be allowed to change his or her cause of action mid-stream and then switch from one court system to another. In effect the applicant is inviting us to countenance such a practice. It is an invitation which should in my view be firmly rejected.'

[31] The passage I have referred to fails to distinguish those two distinct situations and treats them, incorrectly, as if they are interchangeable.

[62] The approach taken by the court below has the effect of denying to Makhanya, as a matter of 'judicial policy', the ability to pursue the present claim at all, thereby thwarting the assertion of the right upon which the claim is founded. That cannot be correct, because 'judicial policy' to that effect would be unconstitutional.

[63] It is not unknown in history for authorities to attempt to subvert the assertion of rights by the expedient of denying the holder a forum in which to assert them. For a right without a forum in which to enforce it might just as well not exist at all. The drafters of the Constitution were clearly alive to the stratagem of surreptitiously negating rights in that way, which it outlawed by guaranteeing to every person a forum in which to prosecute any legal claim and not only some of them.[32] That guarantee is fundamental to the preservation of rights.

[64] Even if the court below meant only that the claim could not be asserted in the high court but may be pursued in the Labour Court under its concurrent jurisdiction (which is not what the court had in mind) that would also be unconstitutional. The law has designated the high court as a forum for pursuit of the claim, and a litigant may not be denied access to a court that the law allows.

[65] Clearly a court may not thwart the assertion of a right by denying access to a court in which to do so. It would be no answer to say that it really will not matter because the claimant has another right that is just as

[32] Section 34 accords to every person the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

good. If the claimant asserts two rights – and it is not in issue in this case that he does – then both must have a forum in which to be asserted. That is what the Constitution guarantees. To the extent that the objection was upheld on that basis the order cannot stand.

The Third Unsound Proposition: *The claim that is before the court is not what it purports to be, but is instead a claim for enforcement of an LRA right.*

[66] That proposition was not advanced in this case, but it is the foundation for a defence that has been mounted, academically, in support of the decision in *Chirwa*. It is convenient to deal with it now, before turning to *Chirwa.* The defence has been mounted by Halton Cheadle in an article that is shortly to appear in the Industrial Law Journal.[33]

[67] Cheadle points out that the majority in *Chirwa* did two things, one of which was to 'decide as a matter of constitutional interpretation to limit the scope of the right to administrative action so as to exclude labour practices' (its finding that the conduct of Transnet was not 'administrative action').

[68] I am aware that that finding has evoked some controversy but that finding is not my present concern. Cheadle advances persuasive grounds for concluding that it was correct. In that respect the author lays heavy store on what he considers to be a policy encapsulated in the LRA that grievances that an employee in the public sector might have arising from dismissal

[33] Halton Cheadle 'Deconstructing Chirwa v Transnet' [2009] 30 *ILJ* 741. I am grateful to the author for providing me with a proof of the article.

should be the subject only of claims under the LRA. That is also the constant theme of the majority in *Chirwa* and the following is an example of what was said in that regard:[34]

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

[69] If that is indeed the purpose of the legislation it would justify a construction of the legislation such as to deny to public sector employees any rights other than those provided for in the LRA, which is the construction that the majority placed upon it. That construction, with its consequence that a claim arising outside the LRA is bad in law, will give full effect to that legislative purpose. On that finding alone any further claim that might yet be made along similar lines (whether in the high court or in the Labour Court) will be doomed to failure on that ground and the claimant will be confined to pursuing his or her LRA rights only. But it begs the question why the legislature should have denied a claimant his or her ordinary right to approach a high court to consider such a claim, if only to have it dismissed because the claim is bad. It would be most odd if the legislature, having resolved to deny employees rights arising outside the LRA, should also bar the courts from declaring that an employee has no such rights.

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[34] Para 102.

[70] The explanation advanced by Cheadle for the jurisdictional finding arises from what he says the majority did in that regard. He says that the majority 'characterised the decision to terminate Ms Chirwa's employment as a labour practice rather than as administrative action.' What he says, as I understand it, is that the majority regarded the claim that was before it as a claim for the enforcement of LRA rights (enforceable only in a Labour Forum) and not as a claim to enforce a constitutional right.

[71] Before turning to that explanation there are two observations that I need to make. The first is that the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.

[72] The second observation is that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called 'characterising' the claim. Where that word is used to mean 'describing the distinctive character of' the claim that is before the court,[35] as a fact, then its use is unexceptionable. But when it is used to describe an alchemical process that purports to convert the claim into a claim of another

[35] *Concise Oxford Dictionary*.

kind then the word is abused. What then occurs, in truth, is not that the claim is converted, but only that the claimant is denied the right to assert it.

[73] I understand Cheadle to say that that was what the court purported to do in *Chirwa*. If it had indeed done so then that would not have been permissible, because that would have denied Ms Chirwa the right to assert the claim that she had brought. But I think it is clear that the statement that the majority did so is factually not correct.

[74] I had occasion in *Makambi v MEC for Education, Eastern Cape*[36] to consider the possibility that the majority might have done that (there are statements in the judgment of Skweyiya J that appear to bear that out but they seem to me to be inconsistent with other statements in the judgment[37]) and in that regard I said the following:[38]

'One thing is clear beyond a shadow of doubt … which is that the court construed the claim as being one for the enforcement of the claimant's constitutional right to just administrative action (which is what the claim purported to be). For had the claim been construed to be anything else the court would not have been capable of finding (as both the majority and the minority found) that the dismissal of the appellant did not constitute administrative action – the question whether the dismissal constituted administrative action could simply not have arisen.'

[75] On numerous occasions in both majority judgments it is stated that Ms Chirwa's claim was for enforcement of her constitutional right. That is how this court understood the claim. There could also have been no doubt in the mind of the majority that that was the claim. And the fact alone that the

[36] 2008 (5) SA 449 (SCA), [2008] ZASCA 61.
[37] For example, compare para 18 with paras 19, 24 , 46 and 55.
[38] Para 33.

court found itself able to find that the conduct in question was not 'administrative action' demonstrates ineluctably that the court did not consider the claim that was before it to be a claim for the enforcement of LRA rights. The contrary would suggest that the majority regarded the claim as being one for the enforcement of LRA rights when assessing the jurisdictional issue, but to be a constitutional claim when assessing the merits, which would be absurd.

THE DECISION IN *CHIRWA*

[76] In *Makambi* I commented on the difficulty I had deconstructing the language of the majority in *Chirwa* so as to discover why the high court was said to have had no jurisdiction. I do not intend pursuing that line of enquiry. It is sufficient to say that there are hints in the judgments of the majority of all the three propositions that I dealt with above but none ever quite blossomed.

[77] If the ratio of its decision to dismiss the claim was that the high court lacked jurisdiction to consider it then it applies as much in this case, because on that issue the two are indistinguishable notwithstanding the differences in their facts.

[78] In this case the employment of Makhanya terminated, as in *Chirwa*. As in *Chirwa* that gave rise to a potential claim to enforce LRA rights (a claim for the enforcement of that right was in fact pursued to its conclusion in this case but that distinction is not relevant). And as in *Chirwa* the claim that is now before us is a claim that asserts a separate right that is said to have been infringed. The right that is asserted in this case is an established

right, unlike the right that was asserted in *Chirwa*, but that is immaterial, because as I have said, jurisdiction is not dependent upon whether the claim is good or bad.

[79] Both in *Chirwa* and in this case the right that was (and is now) asserted, is not an LRA right, but is one that falls within the ordinary power of the high court to enforce. In this case it falls within the ordinary power that the high courts have to enforce contractual rights (expressly preserved by the BCEA). And in *Chirwa* it fell within the ordinary power that the high courts have to enforce constitutional rights (expressly conferred by the Constitution and preserved in s 157(2) of the LRA).

[80] Thus in all material respects the present claim corresponds with the claim in *Chirwa* notwithstanding the factual distinctions. If the finding on the jurisdictional issue in *Chirwa* was the ratio for the order that was made then we are bound to apply it in this case and to dismiss the claim on that ground as the court below did. (That question did not arise in *Makambi* because the claim in that case fell to be dismissed in any event.)

[81] But what needs to be borne in mind, as Cameron JA reminds us in *True Motives*,[39] is that what binds a lower court is only the ratio of the decision of a higher court and not what might have been said en passant (though views of a higher court that are expressed in that way are always instructive). My colleague dealt comprehensively in that case with the explanation that Schreiner JA gave in *Pretoria City Council v Levinson*[40] of

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[39] See para 7 above.
[40] 1949 (3) SA 305 (A).

what constitutes the ratio of a case. Schreiner JA subsequently repeated that, perhaps more succinctly, in *Fellner v Minister of the Interior*,[41] when he said the following:

'The decision or judgment, in the sense of the Court's order, by itself only operates of course, between the parties themselves: it can only state law in so far as it discloses a rule'.

[82] I mentioned earlier that the most striking feature of *Chirwa* is that its two findings, in so far as they purport to express the rule upon which the order was founded, are mutually destructive. For the court was sitting on appeal in that case from a decision of the high court and its power on appeal necessarily replicated that of the high court. There is nothing in *Chirwa* to suggest that the court invoked anything but its powers on appeal in reaching its conclusions.

[83] The high court, once having found that it had no jurisdiction, as the majority found, would not have been capable, by its own decision, of making any further orders in the matter. The only course open to it would have been to dismiss the claim, on the ground that it lacked the power to make any further orders. It would not have been capable of deciding authoritatively that Ms Chirwa had no cause of action and dismissing her claim on that ground. Yet the majority (excluding Skweyiya J) went on to make a finding on that issue, which purported to have been at least one of the grounds on which the claim was dismissed.

[41] 1954 (4) SA 523 (A) at 542D-E.

[84] It follows that the ratio for its decision to dismiss the claim is to be found in one or other of those findings but it cannot be found in both. The difficulty with which we are confronted is to discover which of them it was. Because we are bound by whichever one provides the ratio of the decision, and bearing in mind that this case is not materially distinguishable on the jurisdictional issue, it would be a pity to dispose of it on the wrong ground.

[85] Ordinarily the ratio of a decision will appear from the express language of the judgment. In this case there is a difficulty.

[86] Certainly as far as Skweyiya J was concerned, the ratio for his decision to dismiss the claim was that the high court lacked jurisdiction, because having found that, he left the matter there. But the remainder of the majority went on to make the further finding I have referred to. Its reasons for doing so are reflected in the judgment of Ngcobo J (with whom the remainder of the majority concurred). That judgment supplemented the reasons that had been given by Skweyiya J for his jurisdictional finding, and in addition set out the reasons for the conclusion on the merits.

[87] The learned judge ended by stating the conclusions that he reached on each of those issues,[42] but failed to say which of them constituted the reason for dismissing the claim. As I have already pointed out, it might have been either one or the other, but it could not have been both. Thus we are left with no express statement by the majority of which of those was the ratio for its order dismissing the claim.

[42] Paras 150 and 151.

[88] While the ratio of a decision is a rule of law, the rule itself exists as a fact, and is thus capable of being discovered in either of two ways. It might be found in what a court says it is expressly. But where that does not occur then, as with all facts, it is capable of being discovered circumstantially by inference. As Schreiner JA explained it in *Fellner*:[43]

'Where, however, even when reasons [for the order] are given, it is not possible to discover a ratio decidendi from them, it becomes necessary to resort to the facts found to be material and to the order, as if no reasons had been given, so as to find what must have been treated by the Court as the law, if the order was to be justified.'

[89] I find myself compelled to approach the matter in that way and to determine, as if no reasons had been given, with reference only to the material facts and the order that was made, what must have been treated by the court as the law if the order was to be justified. Fortunately in this case I need confine myself to only two possibilities.

[90] I have already said that all arguments in support of jurisdictional objections of the present kind, when properly analysed, ultimately come down to one or other of the three unsound propositions I have mentioned. I have also pointed out that each of them is fatally defective. One because it offends an immutable rule of logic. Another because it is in conflict with the Constitution. And I need not concern myself with the third because if only one thing is clear it is that that was not the basis of its finding.

[91] I can think of no other possible explanation for why the high court might not have had jurisdiction in *Chirwa.* Moreover, as I have pointed out, this case is not materially distinguishable. Thus if a high court has jurisdiction in this case then it must equally have had jurisdiction in *Chirwa*

[43] At 542F-G.

(and vice versa) and it is perfectly clear that the high court has jurisdiction in this case. That was held in *Fedlife* and the high courts' ordinary powers in such cases are also expressly preserved by the BCEA.

[92] It seems to me in those circumstances that that could not have been the ratio of the majority (but for Skweyiya J) in *Chirwa* because on the material before the court its order cannot be justified on that ground. There being only one other possibility that presents itself I must conclude that the claim was dismissed because the termination of Mrs Chirwa's employment was found not to have been administrative action with the consequence that the claim was bad in law.

[93] Once more, so it seems to me, *Chirwa,* like all the cases that preceded it, was not about jurisdiction at all. It was about whether there was a good cause of action. In my view the least said about jurisdiction in such cases the better because, once that red-herring is out of the way, courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA.

CONCLUSIONS

[94] To summarise, I am driven to conclude that the ratio for the order that was made in *Chirwa* (both of the minority and the majority, but for Skweyiya J) was that the termination of an employment contract in the circumstances in which it occurred in that case, does not constitute 'administrative action', and for that reason the claim was bad in law and it was dismissed on that ground. The further views of the majority that the high court had no jurisdiction to consider the claim was not the ratio for the order that it made and what was said by various members of the court in that regard is thus not binding upon us. In those circumstances we are free to dispose of this appeal on conventional principles.

[95] In this case the claim is for the enforcement of the common law right of a contracting party to exact performance of the contract. We know this because that is what it says in the particulars of claim. Whether the claim is a good one or a bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law. A claim of that kind clearly falls within the ordinary power of the high court that is derived from the Constitution and the jurisdictional objection should have failed. The appeal must accordingly succeed.

THE SPECIAL DEFENCE TO THE CLAIM IN THIS CASE

[96] Counsel for Makhanya submitted that if that were to be our finding we should remit the matter to the high court to decide the remaining issues, including the defence raised in the other special plea, because only the jurisdictional issue is before us.

[97] While the special defence might indeed not strictly be before us I think it would be fruitless to remit the matter for a decision on that point. The court below has already expressed itself, albeit tentatively, on that issue (which was against Makhanya) and if it were to confirm that view the matter is destined to return because I think that view is not correct. Moreover, the issues that are raised by that defence were interwoven in the submissions that were advanced before us and I think it would be wasteful for them to be argued again.

[98] I think it is clear that the defence of res judicata, in the full sense of that term,[44] cannot succeed for at least one reason. It is clear that the claim that is now before us, and the claim that was pursued in the CCMA, were not the same claims, as I observed earlier in this judgment.

[99] For that reason counsel for the University confined herself instead to a narrower meaning in which the term has also been used – at times also called 'issue estoppel'.[45] She submitted that the question whether Makhanya had an employment contract – an essential element of the present claim and also the claim that was pursued in the CCMA – had been finally pronounced upon by the arbitrator and could not be pursued a second time.

[100] I have considerable doubt that a finding by an arbitrator of the CCMA can prevent a litigant from raising the issue once more in the high court but I need not decide that question. It is apparent from the award of the arbitrator that no definitive finding was made on that issue. It was found only that the

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[44] Lawsa ed WA Joubert 2ed Vol 9 paras 623-646 for a discussion of that defence.
[45] Lawsa, above, paras 647-650.

agreement had not been established and not that there was no such agreement. On that ground alone Makhanya cannot be prevented from submitting the question to the high court for decision. No doubt the findings of the arbitrator will be given serious consideration when deciding whether to persist in the action but that is another matter.

[101] The following orders are made:

1 The appeal is upheld with costs. The order of the court below is set aside and the following orders are substituted:

'(a) Both special pleas are dismissed with costs.

(b) The action is postponed sine die for disposal of the remaining issues'.

2 The matter is remitted to the high court for disposal of the remaining issues in the action.

R W NUGENT
JUDGE OF APPEAL

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