IN THE HIGH COURT OF SOUTH AFRICA

(BHISHO) **Case No. 77/2007**

In the matter between

RUFINUS NARUMO NAKIN **Applicant**

and

THE MEC, DEPT. OF EDUCATION,

EASTERN CAPE PROVINCE **First Respondent**

THE HEAD, DEPT. OF EDUCATION,

EASTERN CAPE PROVINCE **Second Respondent**

JUDGMENT

Froneman J.

[1] In 1995 the applicant lost his post as school principal at the Maluti Senior Secondary School in the Maluti District. That post was a level 4 post. Because the applicant lost the post in circumstances for which he was not to blame he was entitled to be placed in or transferred to another post at the same level. This did not happen. He was transferred to a post which carried a lesser status, post level 3, which resulted in a lower salary and other benefits. This injustice was formally rectified in June 2002 when the Department of Education ('the department') approved a recommendation that the applicant be reinstated to post level 4 and that his salary should be corrected with immediate effect for shortfalls from 1995 onwards. The applicant's complaint in these proceedings is that despite the department's formal approval in 2002 of the

recommendation, full effect has not yet properly been given to the correction of the salary shortfalls and outstanding benefits. The respondents dispute this, but they also contend that the applicant has, in any event, not laid a factual or legal foundation in his papers to support the nature of the relief that he seeks in the application.

[2] The relief sought in the notice of motion is for a declaratory order that the failure by the department to comply with the approval of the recommendations amounts to administrative action under the provisions of the Promotion of Administrative Justice Act ('PAJA')[1]; for an order reviewing that conduct; for further orders directing the department to give effect to the approved salary and benefits adjustments; for payment of interest on the outstanding amounts; and for costs.

[3] Although raised only obliquely in this guise in the respondent's opposing papers, the point was made more directly in argument by Mr.Sishuba, counsel for the respondents, that the applicant's claim that he has not received his salary adjustment and other benefits is one that falls within the ambit of s. 186 (2) of the Labour Relations Act ('the LRA')[2] and that this court thus does not have jurisdiction to hear the matter, a jurisdiction which rests exclusively with the conciliation, arbitration and adjudication bodies established under the LRA.

Jurisdiction since *Fredericks*

[4] Ever since the decisions by, respectively, the Supreme Court of Appeal in *Fedlife Assurance Ltd v Wolfaardt*[3], and the Constitutional Court in *Fredericks and others v*

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[1] Act 3 of 2000.
[2] Act 66 of 1995.
[3] 2002 (1) SA 49 (SCA).

MEC for Education and Training, Eastern Cape and others[4], it has been accepted that the High Court has concurrent jurisdiction with the Labour Court to determine employment matters which arise from the common law contract of employment, as well as from the alleged or threatened violation of fundamental rights under the Constitution arising from employment and labour relations, disputes over the constitutionality of any executive or administrative acts or conduct by the State in its capacity as an employer and disputes about the application of labour laws. Both decisions dealt with the effect of s.157 of the LRA on the jurisdiction of the High Court and Labour Court in relation to these matters.

[5] Section 157 of the LRA provides that:

"157 (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, 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 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.

(3) Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by the commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."

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[4] 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC); (2002) 23 ILJ 81 (CC).

[6] In *Fedlife* Nugent JA found nothing express or implied in the LRA to abrogate an employee's common law entitlement to enforce contractual rights in the High Court[5]. Nor did he consider that chap 8 of the LRA was exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. He stated:

"Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the determination constituted a 'dismissal' as defined in chap 8). In those circumstances it is not a 'matter' that is required to be adjudicated by the Labour Court as contemplated by s 157(1) and the special plea was correctly set aside."[6]

[7] In *Fredericks*[7] O'Regan J, writing for a unanimous Constitutional Court, found that there can be no constitutional objection to the ouster of the High Court's jurisdiction under s.157(1) of the LRA because section 169 of the Constitution makes it plain that a constitutional matter over which the High Court has jurisdiction may be assigned by an Act of Parliament to another Court of a status similar to a High Court and that the Labour Court is such a court by virtue of the provisions of s. 151 of the LRA.[8] Earlier in the judgment the finding was made that the High Court's constitutional jurisdiction could not be so ousted where jurisdiction is conferred upon a tribunal which is not a court of a status similar to a High Court, such as the

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[5] Note 3 above, at para. [17]. The Labour Court has concurrent jurisdiction with the civil courts to hear and determine matters concerning a contract of employment by virtue of s. 77(3) of the Basic Conditions of Employment Act, 75 of 1997.
[6] At para. [22]. See also *United National Public Servants Association of South Africa v Digomo and others* [2005] 12 BLLLR 1169 (SCA); (2005) 26 ILJ 1957 (SCA) at para.[4].
[7] Note 4 above.
[8] At para.[37].

Commission for Conciliation, Mediation and Arbitration ('the CCMA') established in terms of the provisions of the LRA.[9] The judgment continues:

"[38] Section 157(1) therefore has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act provides otherwise. Deciding which matters fall within the exclusive jurisdiction of the Labour Court requires an examination of the Labour Relations Act to see which matters fall 'to be determined' by the Labour Court. It is quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. As Nugent JA held in *Fedlife Assurance Ltd:*
"(S)ection 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees.' "

[8] It was held, further, in *Fredericks* that a matter 'to be determined by the Labour Court' as contemplated by s. 157(1) of the LRA means a matter that in terms of the LRA is to be decided or settled by the Labour Court, and that a review power under s. 158(1)(h) of the LRA does not confer such an exclusive competence on the Labour Court to decide or settle matters where the State acts in its capacity as employer:

"[41] ...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.
[42] It might be argued that s 158(1)(h) of the Act is broad enough to confer such a power. That provision states:
'158 **Powers of the Labour Court**
(1) The Labour Court may –
...
(h) review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law;
...'
[43] Whatever the precise ambit of s 158(1) (h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the State acting in its capacity as employer. Given the express conferral of jurisdiction in such matters 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 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."

[9] The interpretation of s. 157(1) and (2) of the LRA in *Fredericks*, which is consistent with the *Fedlife* decision (albeit that the latter dealt with the High Court's

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[9] At para.[31].

continued jurisdiction to deal with contractual employment disputes), formed the foundation for a number of decisions in the Supreme Court of Appeal where the exclusive jurisdiction of the Labour Court has been carefully circumscribed. In *Boxer Superstores Mthatha v Mbenya*[10] Cameron JA summarised the position thus:

> "....Section 157(1) of the LRA provides that subject to the Constitution and the Labour Appeal Court's jurisdiction, and except where the LRA itself 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'. Despite the seeming breadth of the provision, it is now well established that –
> (i) (as Peko ADJP observed in dismissing the jurisdictional objection) s 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between the employer and employee (*Fedlife Assurance Ltd v Wolfaardt*), and since the LRA affords the Labour Court no general jurisdiction in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations (*Fredericks and others v MEC for Education and Training, Eastern Cape and others*);
> (ii) the LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship – particular conduct may not only constitute an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice (*United National Public Servants association of SA v Digomo NO and others*);
> (iii) an employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract giving rise to a claim for damages (as in *Fedlife*);
> (iv) similarly, an employee may sue in the High Court for damages for a dismissal in breach of the employer's own disciplinary code which forms part of the contract of employment between the parties (*Denel (Edms) Bpk v Vorster*)."[11] (References to footnotes omitted).

[10] The *Boxer Superstores* case took this development even further, as Cameron JA frankly acknowledged,[12] by holding that a claim for a declarator to the effect that the breach of an employee's employment contract by an employer was unlawful could be brought in the High Court. In *Old Mutual Life Assurance Co SA Ltd v Gumbi*[13] the Supreme Court of Appeal also held that the common law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

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[10] 2007 (5) SA 450 (SCA).
[11] At para.[5].
[12] At para.[6].
[13] 2007(5) SA 552 (SCA).

[11] More recently, in a full bench decision of the Eastern Cape High Court, *MEC, Dept of Roads and Transport, Eastern Cape and another v Giyose*,[14] it was held that the common law contract of employment has also developed to include the right to a pre-transfer hearing for a public employee and that the High Court had jurisdiction to deal with a dispute in relation to the transfer on that basis, as well as under PAJA. This finding was reached on an acceptance of the development outlined above:

> "*Gumbi* and *Boxer Superstores* thus appear to be authority for the proposition that the common law contract of employment may be developed to bring it in line with the constitutional right to fair labour practices, but once a right is recognised in this manner the nature of its breach becomes a matter of contractual unlawfulness, not of legislative fairness under the LRA."[15]

[12] On the basis of these authoritative judgments of at least the Constitutional Court and the Supreme Court of Appeal there is little doubt that the High Court has jurisdiction to hear and determine the present matter. The applicant does not refer to any unfair labour practice under the LRA in his papers. The bare bones upon which he relies are that the department approved a recommendation to reinstate him to his previous post level 4 status and that it has failed to give effect to that decision. In his founding papers he characterises that failure as administrative action that falls to be reviewed and set aside under the provisions of PAJA. Under s. 38 of the Constitution the allegation of the infringement of a fundamental right would be sufficient to clothe the High Court with jurisdiction to enquire whether the right to just administrative action has been infringed or not, and to grant appropriate relief depending on its

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[14] EC case no. 1251/06, delivered on 6 September 2007. A declaration of personal interest is called for: I was one of the three judges hearing the matter and responsible for writing the unanimous judgment.

[15] At para.[29].

finding. PAJA gives specific content to this competence in relation to the fundamental right to just administrative action.

The effect of *Chirwa*

[13] Has this generally accepted state of the law as far as the jurisdiction of the High Court to determine alleged fundamental rights disputes in relation to the conduct of the state in its capacity as an employer, and civil law disputes arising from the common law contract of employment, been disturbed or overruled by the recent majority judgment of the Constitutional Court in *Chirwa v Transnet Ltd and others*?[16] The conclusion I reach here is that it may have disturbed a settled state of affairs, but that it did not have the effect of overruling the existing state of the law. It is, however, a conclusion that I arrive at with some, respectful, hesitation.

[14] *Chirwa* is a case about dismissal, which fact in itself might justify the conclusion that the present case – about the implementation of remuneration benefits – falls outside the scope of the majority decision in *Chirwa*.

[15] Ms. Chirwa was dismissed as an employee by Transnet after the initiation of disciplinary steps against her. Following her dismissal, she referred the dispute to the CCMA by alleging an unfair dismissal. The CCMA was unable to resolve the dispute within 30 days and issued a certificate to that effect. It recommended arbitration in accordance with s. 191 of the LRA.[17] Instead of doing so Ms Chirwa approached the High Court seeking an order setting aside the proceedings that resulted in her dismissal and for an order reinstating her to her former position. She succeeded in the

[16] Case CCT 78/06, decided on 28 November 2007.
[17] *Id*, at para [13].

High Court but on appeal to the Supreme Court of Appeal this order was set aside.[18] She applied for leave to appeal to the Constitutional Court, which was granted, but her appeal itself was dismissed unanimously in that court. Skweyiya J wrote a judgment, concurred in by a majority, and Ngcobo J wrote another, concurred in by the same majority. It is these two judgments that may be read as disturbing or overruling what I understand to have been the settled law, described above, of the High Court's jurisdiction to hear employment disputes. Langa CJ wrote a minority judgment (concurred in by O'Regan and Mokgoro JJ) which also dismissed the appeal, but not on jurisdictional grounds. He considered that issue to have been settled, unanimously, in *Fredericks*.

[16] Skweyiya J distinguished the unanimous previous decision of the Constitutional Court in *Fredericks*[19] on the grounds that the claimants in that case placed no reliance on the constitutional right to fair labour practices under the Constitution,[20] nor on any of the fair labour practice or other provisions of the LRA, unlike Ms. Chirwa who, according to his characterisation of her claim, expressly relied on the unfair dismissal provisions of the LRA.[21] He also accepted that the provisions of s.157(1) of the LRA does not confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee,[22] unless it can be shown that a particular matter falls into the exclusive jurisdiction of the Labour Court.[23]

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[18] *Transnet Ltd and others v Chirwa* 2007 (2) SA 198 (SCA); [2007] 1 All SA 184 (SCA); [2007] 1 BLLR 10 (SCA).
[19] Note 4 above.
[20] S 23(1) of the Constitution.
[21] *Chirwa*, note 16 above, at paras.[58] and [61].
[22] At para.[60].
[23] At para.[54].

[17] It is, with respect, not entirely clear to me what the binding reason in Skweyiya J's judgment is for finding exclusive Labour Court jurisdiction in the provisions of the LRA. He refers to the advantages of the 'purpose-built framework' of the LRA,[24] compared to the different purposes of PAJA,[25] and then states in conclusion:

> "[63] Ms Chirwa's claim is that the disciplinary enquiry held to determine her poor work performance was not conducted fairly and therefore her dismissal following such enquiry was not effected in accordance with a fair procedure. This is a dispute envisaged by section 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration and review by the Labour Court. The dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter."

[18] The difficulty with the reasoning in this passage, even on an acceptance of the characterisation of Ms. Chirwa's claim as one grounded in an allegation of an unfair labour practice under the LRA, is that it is in direct contradiction to the binding reasons for the decision in *Fredericks*, namely that exclusive jurisdiction ousting the high court's constitutional jurisdiction cannot legitimately be done by assigning jurisdiction to bodies that are not similar in status to the High Court, and that such jurisdiction is not conferred on the Labour Court by the review provisions in the LRA.[26] The feature relied upon by Skweyiya J for distinguishing *Fredericks*, namely characterisation of the dispute as an unfair labour practice one under the LRA, thus distinguishes *Fredericks* without making a difference to, or challenging, its *ratio decidendi*.[27]

[19] In addition, there is no indication on the facts in *Chirwa* that the director of the CCMA referred the matter to the Labour Court in terms of s 191(6) of the LRA.

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[24] At paras. [41] to[44].
[25] At paras.[46] to [52].
[26] See the quotation from the *Fredericks* judgment in para.[8] above.
[27] Compare the judgment of Langa CJ in *Chirwa*, at para.[170].

Accordingly, in terms of the express provisions of s 157(5) of the LRA the Labour Court had no jurisdiction to adjudicate the matter.[28]

[20] Ngcobo J concurred in Skweyiya's judgment, but wrote a separate concurring judgment dealing with two issues he felt Skweyiya J did not address, namely the scope of the operation of the provisions of s 157(1) and (2) and the characterisation of dismissal as administrative action.[29] He considered[30] that the issues at hand could be disposed of on the simple basis that a party should as a matter of judicial policy be held to its initial election in cases of concurrent jurisdiction, but that the issues were too important to be dismissed on this narrow basis. The judgment then proceeds to examine the scope of the provisions of s 157 of the LRA and comes to the conclusion that the provisions of subsection (1) and (2) of section 157 can be reconciled by having regard to the primary objects of the LRA.[31]

[21] Ngcobo J's discussion of the primary objects of the LRA then proceeds with a look at the history of the 'multiplicity of laws' preceding the enactment of the LRA. The judgment deals extensively with the contents of the Explanatory Memorandum prepared by the Ministerial Legal Task Team and emphasizes the principle underlying the LRA, namely as one Act for all sectors.[32] This part of the judgment ends with the following:

"[102] 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 section 158(1)(h) to review the executive or administrative acts of the State as an employer give effect to the intention to bring public sector employees under one comprehensive framework of

[28] The full text of s. 157 appears in para.[5] above.
[29] *Chirwa*, note 16 above, at para.[80].
[30] At paras [85] and [86].
[31] At para.[97].
[32] At para.[101]

law governing all employees. So too is the repeal of the legislation such as Public Service Labour Relations Act and the Education Labour Relations Act. One of the manifest objects of the LRA is therefore to subject all employees, whether in the public sector or in the private sector, to its provisions except those who are specifically excluded from its operation."

[22] The judgment then deals with another historical issue addressed in the LRA, namely competing and overlapping jurisdictions of institutions dealing with employment issues. Attention is drawn to the all-embracing dispute resolution scheme of the LRA which "leaves no room for intervention from another court",[33] the specialized skills of the LRA institutions,[34] the avowed object of the LRA to give effect to the constitutional right to fair labour practices,[35] the various provisions in the LRA under which employment disputes are regulated,[36] the historical context for the original enactment of s 157(2) of the LRA, and the present constitutional context.[37] The judgment then continues to point out that the object to establish 'a one-stop court for labour and employment relations' was enhanced by the extension of concurrent constitutional jurisdiction in certain matters to the Labour Court in terms of the provisions of s 157(2) of the LRA,[38] that other provisions in the LRA also make it apparent that the object was to create one court only for labour and employment relations[39], and that in the light of the manifest purpose of the LRA the use of the word "concurrent" in s 157(2) is unfortunate.[40] The conclusion that follows is:

"[123] While section 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the

[33] At para.[104].
[34] At paras.[104] and [105].
[35] At para.[106].
[36] At paras.[107] to [109].
[37] At paras [114] to [117].
[38] At para.[118].
[39] At para.[119].
[40] At paras.[121] and [122].

objective to establish the Labour Court and Labour Appeal Courts as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of section 157(2) and harmonise them with those of section 157(1) and the primary objects of the LRA, is to give section 157(2) a narrow meaning. The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle, that "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

[23] Ngcobo J takes the argument about the comprehensive and all-encompassing nature of the provisions of the LRA, founded on the fundamental right to fair labour practices in section 23 of the Constitution,[41] a step further in his discussion about the possibility of a further cause of action based on the constitutional right to just administrative action in another court being open to Ms. Chirwa. He concludes, as a matter of definitional jurisdiction, that she does not have that alternative:

"[149] In my judgement labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution and PAJA."

Is *Chirwa* distinguishable?

[24] Earlier in this judgment I indicated that *Chirwa* may be distinguished from the present matter on the basis that it deals only with unfair dismissal cases, and that accordingly the jurisdictional issue here may still fall to be decided in accordance with *Fredericks*.[42] The fact that the majority in *Chirwa* explicitly sought to distinguish *Fredericks*, not overrule it, would strengthen and justify such an approach

[41] Para.[106].
[42] Para.[16] above.

even further. It might be argued, however, that the implication of the reasoning of the majority judgments, especially that of Ngcobo J, precludes such a formalistic approach.

[25] Both the *Fredericks* and *Chirwa* matters dealt with situations where the direct dispute resolution procedures in terms of the provisions of the LRA were, firstly, conciliation and, failing that, arbitration.[43] *Fredericks* held that the High Court's constitutional jurisdiction could not be excluded by conferring jurisdiction on conciliation and arbitration bodies (such as the CCMA) that do not hold equivalent High Court status. On the facts in *Chirwa* the majority held that the High Court's constitutional jurisdiction was excluded and that the Labour Court had exclusive jurisdiction, even in the face of the express provision in s 157(5) that the Labour Court does not have jurisdiction where a dispute is to be resolved by arbitration under the Act. Is the implication that follows from that finding one that a conciliation or arbitration institution under the LRA now may have exclusive jurisdiction, ousting the High Court's constitutional jurisdiction? If that is not the proper implication to draw from the majority judgments, is the more plausible reading then that the Labour Court's exclusive jurisdiction in such a case is to be found in the review powers granted to the Labour Court in terms of the LRA? Either way, these implications cannot be squared with the reasoning and explicit findings in *Fredericks*.

[26] In *Fredericks*, the Constitutional Court also accepted that it is sufficient for an applicant to raise the breach of the fundamental right to just administrative action in an employment dispute to establish the Constitutional Court's own jurisdiction to hear

[43] Section 24 of the LRA in *Fredericks*, and s 191(5)(a) of the LRA in *Chirwa*.

the matter. Ngcobo J's treatment of administrative action in an employment context as being definitionally excluded from High Court jurisdiction, suggests otherwise. It is therefore, with respect, difficult to see any space for the concurrent jurisdiction of the High Court in any kind of employment matter, be it in relation to fundamental constitutional rights under the Constitution or under the common law contract of employment, under the reasoning of the majority judgments in *Chirwa*. I may be wrong in my understanding of the reasoning of the majority judgments, and the far-reaching consequences of that reasoning, but they do appear to me to be inevitably in conflict with virtually every aspect of the Constitutional Court's own earlier decision in *Fredericks*.

[27] If I am wrong in my understanding of the majority's reasoning in *Chirwa* it makes it easier to distinguish the present case from its effect, on the basis that this is not a dismissal case. If my understanding of the majority's reasoning is correct, however, the position becomes somewhat more difficult. Nevertheless, for the reasons that follow, I then still hold that *Fredericks* applies to the present matter.

[28] Firstly, it might simply be considered inappropriate and impermissible for a judge of the High Court to infer that a previous decision of the highest court on constitutional matters might have been overruled by a later decision of that court, especially when that fact is not acknowledged openly by the court making the later decision. Even if it is appropriate and permissible to point out the potential consequences and implications of such a later decision (and I think it is), I consider that lower courts are entitled to expect that when previously authoritative judgments of the higher appellate courts of the country – in this case both the Constitutional

Court and Supreme Court of Appeal – are overruled, the nature and extent of that overruling should be stated in clear and express terms.[44]

[29] I am also, with respect, sympathetic to the broad approach that employment disputes should generally be approached from an employment law perspective, in order to achieve the objective of developing 'a coherent and evolving jurisprudence in labour and employment relations'.[45] As a lone dissenting voice in *Fedlife*[46] I attempted to give voice to some of the concerns and reasoning so much more comprehensively, persuasively and elegantly expressed by Ngcobo J in his judgment in *Chirwa*. But the decision in *Fredericks* came after *Fedlife*, and with apparent approval of the majority judgment in *Fedlife*. So, as a matter of precedent the issues now resurrected in *Chirwa* was laid to rest a number of years ago, on sound jurisprudential grounds. If the developments since then had undermined the emerging coherence of employment law jurisprudence then concerns about their effect might be justified, but I have come round to the view that even though the development of that jurisprudence has taken place in different courts, the fundamental constitutional concern for fairness in employment matters has been advanced, not restricted, by its wider application in courts other than the Labour Court.

[30] The coherence of an emerging labour and employment jurisprudence is not primarily or necessarily determined by its development in one exclusive forum, but

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[44] In *Bloemfontein Topwn Council v Richter* 1938 AD 195 at 232 Stratford JA said this about the highest court in the land overruling its own earlier decisions:
"The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless certainty and confusion. The maxim 'stare decisis' should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."
[45] Ngcobo J's words, in para.[118], *Chirwa*, note 16 above.
[46] Note 3 above.

rather by the degree to which it gives proper expression to the constitutional entitlement of everyone, in terms of section 23(1) of the Constitution, to fair labour practices. Approached from that perspective the question that needs to be asked is whether the coherence of employment law has gained or lost from administrative law insights relating to employment in the public sector, or from the development of the common law contract of employment to incorporate in its fabric some aspects of the constitutional right to fair labour practices. Opinions may differ on this, but my own view is that developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law. If that is the case, does it matter as a matter of substance rather than form where the development takes place, in the civil courts or in the labour court? For example, the incorporation of the right to a pre-dismissal hearing as part of a constitutionally developed common law contract of employment in *Gumbi*[47]and even the further extension of the common law contract of employment to include a right to a pre-transfer hearing for public employees in *Giyose* [48] are in my respectful judgment positive rather than negative developments. The way in which those developments came about and could be channelled in future, might also allay much of the fear about the adverse consequences of forum-shopping and the potential to create two parallel systems of law in the employment field.

[31] Firstly, in relation to the reliance on administrative law and now the fundamental right to just administrative action under the Constitution by the High Courts in public employment disputes, that development has not, I think, impoverished the quest to determine what is fair in those particular employment matters. Fundamental

[47] Note 13 above.
[48] Note 14 above.

constitutional rights do not operate in tightly fitted compartments. In many, perhaps even most, instances they overlap and are interconnected.[49]

[32] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*,[50] Navsa J stated:

"[112] This …. is based on the misconception that the rights in sections 23, 33 and 34 [of the Constitution] are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected." (footnotes omitted).

[34] The judgment of Sachs J in *Sidumo* is even more explicit in this regard:

"[149] The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation.

[150] The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved." (Footnotes omitted).

[35] At the very least the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms[51] underlie the application of the constitutional s 33 right to just administrative action,

[49] For an argument relying on that kind of interrelationship in a different context, see Sandra Liebenberg and Beth Goldblatt, "The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335.
[50] [2007] ZACC 22.
[51] Section 1(a) of the Constitution.

the constitutional s 23 right to fair labour practices, and the possible application of these rights in the direct or indirect development of the common law contract of employment under either ss 8 or 39(2) of the Constitution, in whatever court this might happen. Fairness in public employment may conceivable have a different content to that in the private sector, for reasons relating to constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service.[52] From that perspective, the substantive coherence and development of employment law can only gain from insights derived initially from administrative law concerns.

[36] Secondly, as far as the development of the common law contract of employment in accordance with the Constitution is concerned, the beneficial insights have mostly been flowing to the civil courts from developments in the Labour Court and from the concretisation of fair labour standards in labour legislation and general employment practices, not the other way round. The recognition of a contractual pre-dismissal right in *Gumbi*[53] is again a good example. Development of the common law to bring it in line with the constitutional ethos may often follow legislative advances which pave the way for such new thinking. To insulate the development of the common law contract of employment by compartmentalising and narrowing not only the constitutional right upon which such development might occur, but also to state that any such development may not occur in the general courts of the land in addition to specialised courts, runs counter to the constitutional objective of ensuring that the judiciary in general has a duty to play its part in effecting the constitutional transformation of our society.

[52] Compare s 195 of the Constitution.
[53] Above, note 13.

[37] Substantive coherence in employment law may thus be achieved and developed in different courts, provided that these courts give a broadly similar effect to the underlying constitutional right to fair labour practices. The content given to that right can also be enriched by recognising and giving appropriate expression to the inter-connectedness between that right and other fundamental rights, such as the right to just administrative action.

[38] Institutional control of the process can be achieved by various means. One of them would be for the High Courts to give recognition to the fact that in many cases the dispute resolution mechanisms and institutions provided for in the LRA may be more appropriate to deal with a specific matter brought before it. In such a case 'appropriate relief' under s. 38 of the Constitution may justify a refusal to deal with the matter until those processes have been complied with,[54] or appropriate costs orders may be made where a quicker or cheaper resolution of the issues could have been effected by using the LRA route. But that would have to be done on a case-by-case basis, and not as a general principle. Easy access to the dispute resolution institutions created under the LRA must be a reality in a particular case and the actual prejudice to the opposing party in not following that route must be apparent from the facts of the case before that route must necessarily be followed. I will return to this when dealing with the circumstances of the case before me at present.

[39] Final institutional control lies, of course, with the Constitutional Court. If the coherence of employment law is disturbed in any way, either in the High Courts or in

[54] Compare this kind of order with the Labour Court's power under s 158(2) of the LRA.

the Labour Courts, the Constitutional Court can rectify it by giving proper direction on the substantive content of employment law in accordance with the Constitution. It has always had that competence, as its decision in *Fredericks* illustrated.

Jurisdiction in the present matter

[40] The applicant seeks relief in the present matter on the basis that the failure by the department to implement his properly approved reinstatement to post level 4 status amounts to unlawful administrative action and that he is entitled to certain relief in that regard. He does not rely on any allegation of unfairness under the LRA as the cause of his application. On the authority of *Fredericks* the High Court has jurisdiction to determine whether, on the merits, he does have a claim based on alleged unlawful administrative action.

Merits of the claim

[41] The applicant is an educator and his employment is thus governed by the provisions of the Employment of Educators Act ('the EEA').[55] To the extent that the provisions of the Public Service Act ('the PSA')[56] are not excluded in respect of his employment, they apply only in so far as they are not contrary to the EEA. But he is nevertheless part of the public service,[57] which means that, generally, his employment is subject to the democratic values and principles enshrined in the Constitution.[58]

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[55] Act 76 of 1998.
[56] Proclamation 103 of 1994.
[57] Section 8(1)(a)(iv) of the PSA.
[58] See s 11(1) of the PSA and ss 1(c), 195 and 197 of the Constitution.

[42] The applicant was employed as a school principal at a post level 4 before he was transferred. The transfer was to a lower post level 3. It is common cause that this effective demotion was unjustified. A lawful decision was made by the department to reinstate him to post level 4. This entailed that the remuneration benefits lost from 1995 onwards, whilst he was on post level 3, had to be repaid to him. His complaint is that this has not been done.

[43] The applicant has chosen to characterise the failure by the respondent to pay the outstanding benefits as unlawful administrative action actionable under PAJA. He chose not to formulate his claim in contract or under any provision of the LRA or the common law contract of employment. The first issue on the merits of the claim as formulated is thus whether the failure by the department to pay him the outstanding remuneration benefits amounts to administrative action under PAJA.

Administrative action

[44] Decisions on what does and what does not constitute administrative action under s 33 of the Constitution and PAJA abound in the law reports, but instead of embarking on a detailed examination of these it may be useful to take a step back, in order to gain a clear perspective at what level the enquiry into that question should proceed.

[45] A foundational value of our new constitutional order is the rule of law.[59] The rule of law is an evolving concept in our jurisprudence and its full implications still need to be explored and elucidated.[60] At its broadest level, however, it means that all

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[59] Section 1(c) of the Constitution.
[60] See Cora Hoexter, "The Principle of Legality in South African Administrative Law" (2004) 4 *Macquarie Law Journal* 165; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311

legal actors, be they public or private, are bound by the law. This includes all the arms of government; executive, legislative and judicial.[61] It also includes all private legal persons, natural or juristic. Thus the conduct of all public officials, from the highest to lowest, as well as the conduct of private persons or juristic persons, is subject to judicial scrutiny. Put in other words, the exercise of all power, public or private, is in the end subject to judicial scrutiny and adjudication. The nature of judicial adjudication (or 'judicial review') remains the same no matter who is involved, but the degree or intensity of judicial scrutiny or review may vary, depending on the kind of power exercised and the interests affected by the exercise of that power.

[46] As far as the exercise of public power is concerned the Constitution provides for the threefold separation of state authority into legislative, executive and judicial authority.[62] It is important to realise that, on an institutional level, the exercise of proper constitutional legislative, executive and judicial authority (or power) does not involve administrative action under s 33 of the Constitution or under the provisions of PAJA. When the national, provincial or municipal legislatures *legislate* in accordance with the Constitution, or where the respective national, provincial or municipal executive authorities act within their constitutional *executive* capacity, or where the courts *adjudicate* in terms of their constitutional judicial authority, their conduct cannot be assailed under s 33 of the Constitution or under PAJA. That does not mean that these legislatures, executive authorities and courts always act as legislatures, in their executive capacities, or as proper courts. They also sometimes perform tasks that

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(CC), para.[614]; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), paras.[85]-[86].

[61] S 2 of the Constitution.; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Councel* 1991 (1) SA 374 (CC), para.[59]; *Kaunda and others v President of the Republic of South Africa* 2005 (4) SA 235 (CC), paras. [218] – [219]; *S v Mabena* [2006] SCA 132 (SCA).

[62] Better known as the 'separation of powers', as constituted in ss 43, 85, 104, 125, 151, 156 and 165 of the Constitution.

fall outside their exclusive constitutional capacities, and when they do so they might be involved in administrative action under s 33 of the Constitution and PAJA. It is only when the issue is whether or not constitutional legislatures, executive authorities or courts acted outside their respective constitutional competencies that the "what matters is not so much the functionary as the function" dictum in *SARFU* [63] becomes applicable. Thus, where a constitutional executive authority does not make policy, but implements policy,[64] or where a legislature does not implement policy by legislating but by exercising a statutory discretionary power,[65] or where a court of law does not properly adjudicate,[66] all these constitutional holders of, respectively, executive, legislative and judicial authority may be exercising a function that constitutes administrative action under s 33 of the Constitution or the provisions of PAJA. However, once it is determined that the function exercised by a legislature, an executive authority, or a court, was administrative action or not, the 'function not functionary' test loses its relevance. Its purpose is to assist in determining whether the legislative, executive and judicial bodies established in terms of the Constitution acted within their exclusive constitutional competencies.[67] If they did, they are not subject to judicial review under just administrative action principles, but only under the rule of law or principle of legality.[68] If they did not act within their respective exclusive constitutional competencies, they are subject to the principles of just administrative action under 33 of the Constitution, as expressed and regulated under the provisions of PAJA.[69] What matters then is whether the administrative action was

[63] *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC), ('*SARFU*') para.[141].
[64] *Id.*
[65] *Permanent Secretary, Dept of Education and Welfare, Eastern Cape v Ed-U-College (PE)(Section 21) Inc 2001 (2) SA 1 (CC)*, paras.[12],[14] and [16].
[66] *Nel v Le Roux NO* 1996 (3) SA 562 (CC); *Bernstein v Bester NO* 1996 (2) SA 751)CC).
[67] *Sidumo*, note 50 above, paras.[80] to [93] (per Navsa J) and paras.[126] to [139] (per O'Regan J).
[68] As in *SARFU*, note 63 above.
[69] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC).

constitutionally just. Whether such administrative action had legislative, executive or judicial features becomes irrelevant, at least from a jurisdictional perspective.

[47] The present matter is clearly not one where the respondents purported to exercise any constitutional legislative, executive or judicial authority. In order to qualify as administrative action in terms of the provisions of PAJA, however, the alleged failure of the department to implement the reinstatement of the applicant to post level 4 salary and other remuneration benefits since 1995, must meet seven requirements:[70] the failure must be (i) a decision, (ii) by an organ of state, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which have a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA.

[48] The department implements education policy in terms of applicable legislation. It employed the applicant as an educator at a public school as part of that implementation of education policy. It is an organ of state that functions only in terms of empowering legislation. That legislation, the EEA,[71] provides fairly comprehensively for the appointment, remuneration, promotion, transfer, discipline and termination of services of an educator. Any decision relating to these aspects of the employment relationship undoubtedly depends on that statutory foundation for its legitimacy. It is thus difficult to see how the approval of the applicant's reinstatement could have been anything other than the exercise of a public power in terms of the provisions of the EEA to (re)determine the applicant's remuneration entitlements. But what does one make of the alleged failure, within the department, to implement that

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[70] *Chirwa*, note 3 above, para.[181]; *Grey's Marine Hout Bat (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para.[21].
[71] Note 55 above.

undoubted exercise of public power? In terms of the definition section of PAJA, inaction may also meet the requirement of being a 'decision' under PAJA.[72] The inaction at stake here is that of an organ of state, it has adversely affected the applicant's rights, which at the same time appears to meet the requirement of 'a direct external legal effect' (although I must confess to bafflement as to what that requirement really means),[73] and it does not fall within any of the PAJA exclusions. What remains is to ask whether this establishment of a legal relationship by virtue of enabling legislation (in my judgment clearly the exercise of a public power) also necessarily implies that the exercise of rights and obligations flowing from the established legal relationship retains its public nature. PAJA may be read as forcing one to make a conceptual choice in this regard (and perhaps the majority in *Chirwa* tried to tell us that the conceptual choice should be made in terms of the LRA and not PAJA), but conceptual choices can be manipulated in order to avoid voicing the real substantive reasons why one choice is made in preference to another.[74]

[49] What is the nature of the legal relationship established by the department's approval to reinstate the applicant to a post level 4 status? There are three plausible possibilities. The first is the one that the applicant has couched his claim in, namely a public law administrative relationship between the state and one of its subjects. The second is that the applicant's (private law) common law contract of employment with the department has been amended to the extent that he has a contractual claim to payment of his past salary and other remuneration benefits. The third is that he has a

[72] S 1 of PAJA.
[73] Compare Cora Hoexter, *Administrative Law in South Africa*, Juta, 2007, at 204 -209.
[74] Cora Hoexter, “Contracts in Administrative Law: Life after Formalism?”, *(2004) 121 SALJ 595* at 616-618.

statutory right under the provisions of the LRA that protects him from unfair labour practices, one of which consists of withholding employment benefits.[75] If one views these three different possibilities as conceptually exclusive, both in relation to the kind of rights that may be established under each, as well as in the manner of its enforcement, then a stark choice awaits one. But it seems to me that, in truth, all three possibilities rely on similar underlying constitutional rights and values, and that their enforcement in different courts should have the same broad purpose, namely to give practical affect to these constitutional rights and values.

[50] The nature of the legal employment relationship between the applicant, a public employee, and the department, an organ of state, is a complex one that is not in my view capable of exclusionary compartmentalisation into only one of the three possibilities mentioned above. The common law contract of public employment is 'framed' by administrative law principles[76] and should include, as a constitutionally mandated implied legal term, the right to fair labour practices. Fairness is required in administrative justice, in labour legislation and, yes, in contract too.[77] And fairness has much to do with equality, dignity and freedom; founding values of our Constitution. To view these interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole and complete picture of such a relationship. And in the process one might forget to ask and assess the real substantive issue at stake in a particular case.

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[75] Section 186 (2)(a) of the LRA.

[76] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA), at para.[8].

[77] In employment contracts, by the need to develop the common law by direct or indirect application under s 8 and 39(2) of the Constitution to give content to the right to fair labour practices (section 23 (1) of the Constitution), and in contracts generally, to do the same to ensure that the public policy underlying contract law accords with constitutional values (*Barkhuizen v Napier* 2007 (5) SA 323 (CC)).

[51] And so, finally, we get to the real question in this case: should the applicant be entitled to legal relief if his complaint that he has not been properly been paid after being re-instated to post level 4 status is factually correct? The answer is: of course he should, the department should pay him the money he is entitled to. But that answer also reveals some of the problems the applicant has created by bringing legal proceedings under the guise of administrative review. The important part of the relief he seeks is the payment of a sum of money he alleges the department owes him, not the declaratory order and administrative review he seeks. It is true that payment of that sum of money can only be effected by department officials performing the necessary administrative tasks within the department to ensure that the money is available, but here the applicant has not himself quantified the amount he says is owing to him; he is in a sense asking the officials in the department to do it for him. Therein lies another practical problem: the department says that his personal file has been lost but that computer records show that he has been fully paid. It should have been a relatively simple procedure for the applicant to determine what exact amounts he is entitled to at a post level 4 status and to have claimed that from the department. The extent of any factual dispute would then have been clear. That kind of claim for the payment of money does not fit easily, or perhaps not at all, into review proceedings. Perhaps it would also have been better if the parties had first attempted to conciliate and arbitrate their dispute under the provisions of the LRA, but of that I am not too sure in the present matter - the respondents have not placed any information before court to indicate that those processes would have been quicker, cheaper and more effective in resolving what is a dispute about money first and fairness second, although the latter obviously underlies the former.

[52] On the papers the factual dispute about what is owed to the applicant cannot be resolved on affidavit. Under rule 6 (5) (g) I may make 'such order as [I] deem meet with a view to ensuring a just and expeditious decision'. I intend to make an order referring the matter to oral evidence on specific terms, but I consider that the applicant should have foreseen the potential difficulties in bringing the matter to court in the manner he did. The respondent should not bear his costs for that mistake.

[53] The following order is made:

1. The matter is referred to oral evidence to determine whether the respondents have complied with the recommendations, approved by the department, which are set out in paragraph 3.2 of annexure 'A', at pages 25 and 26 of the papers, subject to paragraphs 2 to 5 below.
2. The applicant is to file a statement of claim, setting out the exact amounts he alleges are outstanding under paragraph 3.2 of annexure 'A', together with the basis upon which these amounts are arrived at, within 14 court days after the delivery of this judgment.
3. The respondent is to file a responding statement of defence, setting out (i) the exact amounts they allege were owing to the applicant under paragraph 3.2 of annexure 'A', together with the basis upon which these amounts were arrived at, as well as (ii) the exact amounts already paid to the applicant under the said paragraph 3.2, with particulars of where and when the payments were made, within 28 court days after the delivery of this judgment.

4. The respective statements referred to in paragraphs 2 and 3 above must also contain all the documentary evidence the respective parties rely on in order to substantiate the particulars set out in those statements.

5. Within 10 days after delivery of the said statements the parties and their legal representatives must meet to debate the said statements and only if no agreement is reached after debatement of the statements may the matter be set down for hearing of evidence in terms of paragraph 1 above.

6. No order is made in respect of the costs of the application to date.

J.C.Froneman

Judge of the High Court.