IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER: 09/14527

In the matter between:

MAKGATHATSO CHARLOTTE CHANA MAJAKE **Applicant**

and

THE COMMISSION FOR GENDER EQUALITY	**1st Respondent**
NOMBONISA GASA N.O.	**2nd Respondent**
MFANOZELWE SHOZI N.O.	**3rd Respondent**
DR YVETTE ABRAHAMSE N.O.	**4th Respondent**
JANINE HICKS N.O.	**5th Respondent**
REV BAFANA KHUMALO N.O.	**6th Respondent**
BOOGIE KHUTSOANE N.O.	**7th Respondent**
NDILEKA LOYILANE N.O.	**8th Respondent**
DR TEBOHO MAITSE N.O.	**9th Respondent**
KENOSI MERUTI N.O.	**10th Respondent**
ROSIDA SHABODIEN N.O.	**11th Respondent**
DR ANDRE KEET N.O.	**12th Respondent**

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

(1) In this urgent application, the applicant seeks an order to be reinstated to her position with retrospective effect, as the first respondent's Chief Executive Officer on the same terms and conditions applicable to her appointment prior to her dismissal on the 25 March 2009.

(2) The applicant seeks interim relief pending the final determination of an application to be instituted to review and set aside the respondents decision in terminating her appointment.

THE APPLICANT'S CAUSE OF ACTION

(3) The applicant's claim is founded on various causes of action. Firstly, the applicant alleges that the decision made by the second to twelve respondents who constitute the first respondent's "*Plenary",* to terminate her employment as the former's Chief Executive Officer, was unconstitutional, unlawful, and invalid in that such conduct constituted:

(a) unlawful administrative action;

(b) a breach of the principle of legality; and

(c) a breach of her contract of employment.

(4) Secondly, the applicant alleges that when the first respondent's "*Plenary*" purportedly made the decision to terminate her employment:

(a) it was not properly constituted consequently, its decision was invalid as it had no legal authority;

(b) even if it had the legal authority, when it rescinded its prior decision to hold a disciplinary enquiry, it was *functus officio;*

(c) pursuant to the precepts of the *audi alteram partem* principle it was obliged to afford her a hearing before rescinding its prior decision; and

(d) in initially having decided to subject her to a disciplinary enquiry, she had a legitimate expectation it would afford her a pre-dismissal hearing.

(5) Jurisdiction and urgency are contested issues in this application consequently, an analysis of a resumé of the facts is essential in order to determine whether the applicant's causes of action are located within the purview of the ***the Labour Relations Act 66 of***

1995 "The LRA" or section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 "The Constitution," or within the terms of the applicant's contract of employment.

THE SALIENT FACTS

(6) The applicant was appointed as Chief Executive Officer of the first respondent in April 2002 in terms of ***section 7(1)(a) of the Commission on Gender Equality Act 39 of 1996* (*"the CGE Act")***.

(7) On 26 April 2008 following certain allegations, the applicant was suspended from her position by the "*Plenary*" as the first respondent's Chief Executive Officer.

(8) The *"Plenary*" established a Commission of Enquiry ("*The Commission*") consisting of three persons, to investigate the allegations against the applicant.

(9) *"The Commission*" and the "*Plenary*" advised the applicant that the deliberations of the former were not to be construed as and neither were they tantamount to a disciplinary enquiry.

(10) On 12 February 2009 "*The Commission*" issued a confidential report recommending that disciplinary proceedings be instituted against the applicant.

(11) The "*Plenary*" adopted the recommendations and charged the applicant with misconduct. Adv Sesi Baloyi was appointed to preside over the disciplinary enquiry.

(12) At the disciplinary enquiry the first respondent suggested that the evidence adduced at "*The Commission*" be admitted against the applicant, and the format of the disciplinary enquiry be for the presentation of legal argument and submissions.

(13) On 13 March 2009 applicant's legal representative objected to the procedure proposed by the first respondent. The objection was upheld and the disciplinary enquiry was postponed to 18 May 2009 to enable the first respondent to amend the charge sheet.

(14) On 25 April 2009 the "*The Plenary*" consisting of seven Commissioners aborted the disciplinary enquiry and summarily dismissed the applicant from her position as the first respondent's Chief Executive Officer.

THE ISSUES

(15) The applicant contends that, "*The* "*Plenary's*" decision in terminating her employment was unlawful and invalid because it was inconsistent with "***The Constitution***" and the principle of legality.

(16) The respondents contend that, the applicant's dismissal was lawful and valid in that, the "*The Plenary's*" decision in aborting the disciplinary enquiry and summarily terminating her employment, was based on "*The Commission's*" finding that:

> *"(a) there had been an irretrievable breakdown in the trust relationship between the applicant and the first respondent; and*
>
> *(b) as a result of such irretrievable breakdown, it would be extremely difficult for the applicant to continue discharging her duties and responsibilities as the Chief Executive Officer of the first respondent."*

(17) Mr Unterhalter on the applicant's behalf, argued that the characterization of the applicant's cause of action was predicated upon the violation of her right to lawful, reasonable and

procedurally fair administrative action entrenched in ***section 33 of "The Constitution,"*** and also on a breach of the terms of her contract of employment. He submitted that the applicant in expressly eschewing any reliance on ***section 23 of "The Constitution"*** or the prescriptions of ***Schedule 8 and 9 of*** "***the LRA****",* places her claim within the ambit of this Court's jurisdiction.

In support of this contention, he relied on the decision in ***Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) SA 693 (CC).***

(18) Mr Brassey on the respondents behalf, argued that the essence of the applicant's claim properly construed, concerned her dismissal from her employment and was therefore a labour dispute located within the rubric of incapacity and justiciable only within the institutions constituted by "***the LRA***".

In support of this contention he relied on the decision in ***Chirwa v Transnet Ltd 2008 (4) SA 367 (SCA).***

JURISDICTION

(19) Despite a veritable Thesaurus on the jurisdictional issue exhaustively ventilated in the Constitutional Court's decisions of ***Fredericks and Chirwa supra,*** the vagaries of litigation have again conspired that this Court should again determine whether it has jurisdiction in matters "*arising from an employment sphere where there has been a violation of a constitutional right and ascertain whether the Legislature in* ***sections 157(1)&(2) of "the LRA"*** *has ousted the jurisdiction of this court."*

(20) In my view since ***Fredericks supra and Fedlife Assurance Limited v Wolfaardt 2002 (1) SA 49 (SCA)*** the question whether this court has jurisdiction to adjudicate claims predicated upon *section* ***33 of "The Constitution"*** or a breach of the terms of an employment contract has been settled. In an attempt to finally lay the jurisdictional ghost to rest I again restate and adumbrate the legal position as enunciated by the Constitutional Court and the Supreme Court of Appeal respectively.

(21) It is trite that the curtailment of a court's jurisdiction *"is, in the absence of an express provision or clear implication to the contrary, not to be presumed."*

See Schermbrucker v Klindt N.O. 1965 (4) 450 (A.D.) at 455.

(22) "***The Constitution***" draws a distinction between employment practices and administrative action and subjects these distinct species of juridical acts to different forms of regulation and enforcement within specified statutory regimes.

(23) A High Court derives its jurisdiction from ***Section 169 of "The Constitution"*** which provides:

"A High Court may decide any constitutional matter, except a matter that is within the exclusive jurisdiction of the Constitutional Court or a matter that is assigned by an Act of Parliament to another court of a status similar to a High Court."

(24) The Labour Court derives its jurisdiction from ***Section 157 of "The LRA"*** which provides:

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

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the

Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer….."

(25) I agree with Skweyiya J's interpretation of ***section 157*** **in** ***Chirwa supra.*** "*It is apparent from the provisions of section 157(1) that it does not confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the words of section 157(1) 'are to be determined by the Labour Court.' This is evident from section 157(2), which contemplates concurrent jurisdiction in constitutional matters arising from employment and labour relations……..*

"*the concurrent jurisdiction provided for in section 157 (2) of*

the L.R.A is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights.(my under underlining)

However, this cannot be seen as derogating from the jurisdiction of the High Court in constitutional matters, assigned to it by section 169 of the Constitution unless it can be shown that a particular matter falls into the exclusive jurisdiction of the Labour Court."

(26) O'Regan J in ***Fredericks supra*** has finally dispelled any contrary construction of *sections 157(1)and(2)* by holding *that* properly construed the sections do not oust the jurisdiction of the High Court:

"…….. section 157(1) had to be interpreted in light of section 169 of the Constitution. That section permits constitutional matters to be assigned to courts other than the High Court, but they must be courts of equal status. The Commission for Conciliation, Mediation and Arbitration (CCMA) is not a court of equal status and the review of CCMA decisions is not a substitute for considering a matter afresh. Section 157(1) of the LRA must, insofar as it concerns constitutional matters, be read to refer only to matters assigned for initial consideration 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 there is no general jurisdiction afforded to the Labour Court in employment matters,

The jurisdiction of a High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations"…….absent a specific provision conferring jurisdiction of a constitutional matter on the Labour Court, the High Court enjoyed concurrent jurisdiction to decide constitutional matters, including administrative action claims."

(27) The Constitutional Court's decision in ***Chirwa supra*** did not overrule its earlier decision in ***Fredericks supra*** that the High Court has concurrent jurisdiction to adjudicate *"constitutional matters, including administrative action claims.*

(28) Mr Brassey argued that it was irrelevant whether the applicant's appointment was effected in terms of ***section 7(1)(a) of*** "***the CGE***" or whether there was an implied term to a pre-dismissal hearing in her contract of employment, what was critical was that the procedural fairness or not of the applicant's dismissal was located

within the institutions created by "***the LRA***" I demur for the following enumerated reasons.

(29) In my view the conclusion that this Court has jurisdiction to entertain a claim arising from a breach of the terms of a contract of employment is settled. An employee's right of entitlement to a pre-dismissal hearing is established in law. The right derives from the common law or statute and may be implied from a contract of employment or parties may for certainty expressly incorporate it in a contract of employment.

(30) The right to a pre-dismissal hearing was developed under the constitutional imperative encapsulated in ***section 39(2) of "The Constitution"*** to harmonize the common law with the Bill of Rights. The right extended the requirement of the *audi alteram partem* principle and engenders justice and fairness in the employment sphere.

(31) In ***Old Mutual Life Assurance Co of SA Ltd v Gumbi 2007 (5) SCA A 552 at 554B-555E*** it was held:

"*The right to a pre-dismissal hearing imposes upon employers nothing more than an obligation to afford employees the*

opportunity of being heard before employment is terminated by means of a dismissal."

(32) A cause of action based on a contractual breach is justiciable in the High Court (***See Fedlife Assurance Limited v Wolfaardt 2002 (1) SA 49 (SCA).*** In ***Transman (Pty) Ltd v Graham Dick case number 147/08*** an unreported judgment of the Supreme Court of Appeal handed down on the 31 March 2009, it was confirmed that every employee has a right to a pre-dismissal hearing.

STATUTORY JURISDICTIONAL FRAMEWORK

(33) ***Section 157(1)of "the LRA"*** *does not prevent any person relying upon* ***the Basic Condition of Employment Act 75 of 1997 "the BCEA"*** *from establishing that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court.*

(34) ***Section 77(1) of*** *"****the BCEA****" provides:*

"subject to the constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in

this Act except on offences specified in sections 43, 44, 46, 48, 90 and 92."

(35) ***Section 77(3) of "the BCEA"*** *provides:*

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract." (my underlining)

(36) The construction ***of sections 77(1) and (3) of "the BCEA"*** *and sections* ***157(1) and (2) of the "LRA"*** is similar in import. In my view it is axiomatic that "***the BCEA***" confers concurrent jurisdiction on any civil court including the High Court to adjudicate matters relating to and concerning contracts of employment.

See University of the North v Franks and Others (2002) 23ILJ 1252 (LAC), Langeveldt v Vryburg Transitional Local Council and Others (2001) 22 ILJ 1116 (LAC).

(37) The judgment in ***Fedlife supra*** has since been endorsed and extended by the Supreme Court of Appeal in three recent judgments, ***Old Mutual Life Assurance Co SA Ltd v Gumbi 2007***

(5) SA 552 (SCA) ([2007] 4 All SA 866); Boxer Superstores Mthatha and Another v Mbenya 2007 (5) SA 450 (SCA)*; and *Makhanya v University of Zululand (218/08) [2009] ZASCA 69, (a judgment handed down on the 29 May 2009).

(38) In ***Boxer Super Stores supra*,** the court ruled that all common-law contracts of employment contain an implied provision entitling an employee to a fair pre-dismissal procedure.

(39) The compendium of the above decisions conclusively demonstrate that this court has the requisite jurisdiction to entertain claims arising from ***section 33 of the Constitution*** and from a breach of a contract of employment

See also Nonzamo Cleaning Services Co-Operative v Appie and Others 2009 (3) SA 276, (CKHC) at 290C-D (a full bench decision)

URGENCY

(40) I now turn to consider the question of urgency. Mr Unterhalter argued that the applicant has demonstrated that this application is urgent because she founds urgency on the fact that her unlawful dismissal has infringed her constitutional right to procedurally fair,

reasonable and lawful administrative action with the consequential precipitation of:

(a) reputational harm;

(b) financial prejudice; and

(c) emotional stress.

(41) Mr Brassey argued that urgency has not been proved because applicant's reputation cannot be vindicated by securing an order for interim reinstatement, reputational harm has already occurred. In any event, counsel contended, applicant's suspension will not be reversed, and this, more than the ultimate dismissal, is what creates the potential damage to her reputation.

(42) Counsel argued that the applicant's reputation has not been harmed since the termination of her employment was not predicated on misconduct, but on her incompatibility and a breakdown of the employer/employee trust relationship between her and the first respondent.

(43) Counsel contended that it is impermissible for the applicant to seek remuneration *pendente lite* in this court when she can secure final relief in the appropriate institutions of "***the LRA.***" In any event,

the interim remuneration applicant seeks creates no basis for interim relief in the Labour Court where natural hardship or loss of income is not regarded as a ground for urgency.

(44) Sachs J in ***Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)*** stated: *"The Constitution"…….presupposes that public power will be exercised in a manner that is not arbitrary and not unduly disrespectful of the dignity of those adversely affected by its exercise……..*

"……..Fairness to an incumbent about to be relieved of a high profile position in public life presupposes the display of appropriate concern for the reputational consequences. People live not by bread alone; indeed, in the case of career functionaries, reputation and bread are often inseparable."

(45) In my view the perceived threat to, or the possible violation of the applicant's constitutional right to dignity and to lawful, reasonable and procedurally fair administrative action, and her consequent summary dismissal without being afforded a hearing founds and justifies urgency in this application. The perceived violation of applicant's constitutional right to dignity is a constant and enduring phenomenon until the matter is resolved. The applicant's

constitutional right to human dignity, the right to lawful, reasonable and procedurally fair administrative action renders the application urgent.

WHETHER APPLICANT'S DISMISSAL CONSTITUTES ADMINISTRATIVE ACTION

(46) The applicant's dismissal arises from her employment relationship. The seminal question is whether applicant's dismissal is premised on the exercise of a statutory or contractual power by the first respondent to justify the inference that her dismissal constituted administrative action.

(47) ***Section 1 of the Promotion of Administrative Justice Act 3 of 2000 "PAJA"*** defines administrative action as follows:

"*Any decision taken, or any failure to take a decision, by-*

(a) an organ of State, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect."

(48) The question whether the exercise of public power constitutes administrative action must be determined with reference to ***section 33 of "The Constitution."*** *The application of "****PAJA"*** is triggered once it is determined that the conduct in question constitutes administrative action under the section.

(49) To constitute administrative action under "***PAJA,***" the termination of applicant's contract of employment must have occurred in terms of a statutory authority and not in terms of the contract of employment *per se.* I now turn to consider the source informing the applicant's dismissal.

(50) The applicant was appointed as the first respondent's Chief Executive Officer in terms of ***section 7(1)(a) CGE Act*** by the "*Plenary*" in consultation with the Minister of Finance.

(51) The first respondent is a public entity created by statute and operates under statutory authority. The first respondent's power to appoint the applicant predicates a correlative power to dismiss. The first respondent's decision to dismiss necessarily involves the exercise of public power. The power to dismiss is sourced in a statutory provision.

See Masetlha supra at paragraph [63]

(52) Because the power to appoint is statutory and is not an *incidentalia* arising from the contract of employment it is implicit that the correlative power to dismiss is also statutory consequently, applicant's dismissal amounts to administrative action as envisaged by ***section 33 of "The Constitution"*** and renders the "*Plenary's*" decision susceptible to administrative review under "***PAJA***".

(53) The first respondent is a *Chapter 9* constitutional organ and in terms of ***section 181 (2) of "The Constitution"*** it is subject only to the Constitution and the law. The first respondent is enjoined to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice.

THE DOCTRINE OF LEGALITY

(54) In order to establish whether there is merit in the respondents contention that the applicant's dismissal was lawful, and whether "*The Commission's*" findings justified her dismissal based on her incapacity or incompatibility and the loss of trust between her and the first respondent, it is apposite to restate the legal principles governing this exigency.

(55) Our constitutional democracy is founded on the *'(s)upremacy of the Constitution and the rule of law'*. "***The Constitution***" declares that the '*Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid.'*

(56) It is a requirement of the rule of law that in order to pass constitutional muster the exercise of public power must not be arbitrary or inconsistent with the rule of law. The rule of law is a source of constraint on the exercise of public power.

(57) The exercise of public power must comply with ***"The Constitution"*** and the doctrine of legality. The doctrine of legality entails that the first respondent as a *Chapter 9* institution *'is*

constrained by the principle that it may exercise no power and perform no function beyond that conferred upon it by law'.

(58) Since the inception of our constitutional democratic order predicted on the rule of law, all courts, quasi-judicial tribunals and tribunals have to conduct their proceedings in a manner consistent with "***The Constitution***" and "*notions of basic justice and fairness"*

(59) The first respondent has a constitutional duty to secure and ensure the enforcement of the applicant's constitutional right to lawful reasonable and procedurally fair administrative action.

THE FIRST RESPONDENT'S DISCIPLINARY CODE AND PROCEDURES

(60) Part 2, Section *9.1 and 9.6* of the *Principle, Policies, Rules and Regulations for the Staff of the Commission on Gender Equality "(PPRR)"promulgated and published in Government Gazette vol. 503 No. 29922 of the 31 May 2007* which regulates and governs internal relationships between "*the Plenary*", Commissioners and staff, decrees that the former shall deal fairly, professionally and equitably with staff members.

(61) *Section 1* of the first respondent's disciplinary code and procedures states that a disciplinary code is necessary for the fair treatment of staff and ensures that members of staff shall have a fair hearing in a formal or informal hearing.

(62) It is patent that the provisions in the first respondent's disciplinary code and procedures form part of the applicant's contract of employment, and entitles her to procedural fairness in a pre-dismissal hearing.

LEGITIMATE EXPECTATION

(63) The applicant contends that she had a legitimate expectation that she would be subjected to a pre-dismissal hearing before the "*Plenary*" could make a decision to terminate her employment as first respondent's Chief Executive Officer.

(64) The principle of legitimate expectation is premised on the duty of an administrative body to act fairly when making an administrative decision which adversely affects an individual, such body must observe the principles of natural justice.

(65) In ***Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A)*** it was held:

"*when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his or her liberty or property or existing rights, the latter has a right to be heard before the decision is taken unless the statute expressly or by implication states the contrary.*"

(66) A public organ which derives its authority from a statute to conclude a contract and a correlative authority to terminate such contract from such public power, has a statutory obligation to afford a contracting party a pre-dismissal hearing in accordance with the precepts of the *audi alteram partem* rule.

(67) The "*Plenary's"* conduct in unilaterally aborting the disciplinary enquiry in order to effect the applicant's summary dismissal is a gross manifestation of arbitrary conduct which negates the first respondent's obligation and duty as a *Chapter 9* institution to act and conduct itself within the purview of *"**The Constitution"*** and the principle of legality. Consequently, the termination of the applicant's employment is inconsistent with "***The Constitution***" and the principle of the rule of law and is therefore invalid.

WAS THE "*PLENARY*" QUORATE

(68) Mr Unterhalter argued that when the "*Plenary*" decided to summarily terminate the applicant's employment it was not quorate consequently, its decision was a nullity. Mr Brassey argued in contradistinction that the "*Plenary*" was quorate and its decisions was valid because the "*Plenary's*" decisions are made by a simple majority.

(69) ***Section 5.3 of the CGE Act*** provides:

"The quorum for any meeting of the Commission shall be a majority of the total number of members appointed in terms of section 3.2.

(70) ***Clause 4.2 of the PPRR*** provides:

"4.2"Plenary" consists of all the Commissioners with two-thirds constituting a quorum;

4.3All decisions taken at a session of "Plenary" that did not have a quorum shall be referred to a quorate session for ratification before they become binding

(71) *Clause 4.2* on which Mr Unterhalter relied for his proposition that the "*Plenary's*" decision was a nullity due to a lack of a quorum is a regulation. It is trite that a regulation cannot trump a statute because it is subordinate legislation. Consequently, a majority of the appointed Commissioners, that is, 51% present at a meeting constitutes a quorum.

See Surmon Fishing (Pty) v Compass Trawling (Pty) Ltd 2009 (2) SA 196 SCA.

(72) It is immaterial whether the decision to terminate applicant's employment was made by 63% of the Commissioners present, it is *de jure* the "*Plenary's*" decision and was validly made.

(73) In any event, even if I am wrong in reaching this conclusion, *"the Plenary's*" decision although unlawful as contended by Mr Unterhalter, is not *per se void ab initio*. The paradox is that this purported invalid administrative action has legal consequences until reviewed and set aside.

See Oudekraal Estate (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) in para [26] at 242A.

(74) The review of the "*Plenary's*" decision as envisaged in ***Oudekraal Estate supra*** would be an exercise in futility, a *brutum fulmen* in view of this Court's conclusion that the "*Plenary's*" decision to abort the disciplinary enquiry and summarily terminate applicant's employment without affording her a pre-dismissal hearing was inconsistent with "***The Constitution***" and was consequently unlawful and invalid.

WAS THE "*PLENARY*" FUNCTUS OFFICIO?

(75) Mr Unterhalter contended that the "*Plenary's"* decision in reneging from its prior decision to subject applicant to a disciplinary enquiry was invalid because the "*Plenary"* did not have the legal authority to make that decision as it was *functus officio.*

(76) The "*Plenary"* in revisiting its prior decision to subject the applicant to a disciplinary enquiry, has not shown that when it exercised its power to make the decision it laboured under a *bona fide* but mistaken belief that such prior decision was permissible in law and that it has subsequently transpired that such prior decision was in fact erroneously based upon an error of law or fact.

See Baxter Administrative Law 1st Edition page 373.

(77) The doctrine of *functus officio* is predicated on the principle of administrative certainty consequently, the applicant was entitled to be heard pursuant the dictates of the *audi alterem partem* principle before the "*Plenary"* abrogated its prior decision to subject her to a disciplinary enquiry and instead unilaterally and summarily dismiss her. Consequently, the "*Plenary's"* subsequent decision is a nullity due to lack of engagement with the applicant before making such decision.

WHETHER IT IS COMPETENT FOR THE APPPLICANT TO SEEK A MANDATORY INTERDICT

(78) Mr Brassey contended that it was impermissible for the applicant to seek mandatory relief by way of an interim interdict to reinstate her in her former employment in the form of specific performance.

(79) Counsel argued, that it was impermissible for the applicant to seek an interim interdict for mandatory positive relief *pendite lite* because she was effectively requesting this court to anticipate a final finding, alternatively the effect of the mandatory interdict order in the context was the same as a specific performance for the payment of a debt.

(80) Mr Brassey urged me to exercise the court's discretion in favour of the respondents having regard to:

(a) the extent of the breakdown of trust;

(b) the nature of the contract;

(c) the constant danger of contractual disputes; and

(d) the court's inability to supervise and prevent disputes.

(81) Counsel submitted that it was impermissible to grant an interdict or declaratory order having the effect of enforcing an employment contract because normally, the only remedy open to an employee was damages under the common law, alternatively, compensation under "***the LRA***". In support of this proposition he referred to the case of ***Theron v Minister of Correctional Services and Another (2008) 29 ILJ 1275 (LC)***.

(82) ***R.H.Christie, The law of Contract in South Africa 4th Edition at page 613*** *states:*

"*An order for specific performance of a contract of employment, will, in the exercise of a court's discretion, not normally be*

granted. The tendency to regard it as a rule of law that specific performance of such contract would never be granted was corrected in National Union of Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151 (T) but the reasons why the courts have not granted such an order remain as valid as ever, provided it is remembered that in every case the court has a discretion."

(83) Although the first respondent alleges that there has been a breakdown in trust, and consequently incompatibility, that alone does not constitute sufficient ground to justify a unilateral termination of the applicant's contract of employment because the applicant on the first respondent's version was not counseled before the termination of her employment as required by law.

(84) It must however be said that an irretrievable breach of trust will be relevant for purposes of a remedy where a litigant seeks specific performance. The ordinary remedies for breach of contract are either reinstatement, damages or payment of benefits for the remaining period of the contract of employment.

(85) The manner in which the applicant's employment was summarily terminated is not characterized by hall marks infused with "*notions*

of basic justice and fairness" and indeed if one may opine, the "*Plenary's*" conduct offends the notion of ones sense of justice and fairness. The termination of the applicant's employment is inconsistent with "***The Constitution***" and the principle of legality.

(86) Bereft of any embellishment, the relief sought by the applicant is to be reinstated as the Chief Executive Officer of the first respondent. Given the underlying contract of employment, it is open to the applicant to claim specific performance in the form of reinstatement, payment of her salary, and the benefits that attach to her post.

(87) The contract of employment was terminated unlawfully, the applicant is entitled to reinstatement as a matter of contract. Although reinstatement is a discretionary remedy in employment law it is awarded here because of the infringement of the applicants *section 10* constitutional right to dignity and *section 33* right to lawful, reasonable and procedurally fair administrative action.

(88) In exercising my discretion and because of the reasons I have advanced, in my view this is an appropriate case to order reinstatement.

THE REQUIREMENTS OF AN INTERIM INTERDICT

***PRIMA FACIE* RIGHT**

(89) The applicant's *prima facie* right upon which the applicant relies is founded on the failure to afford the applicant a pre-dismissal disciplinary hearing, the infringement of her constitutional right to procedurally fair, reasonable and lawful administrative action and the unlawfulness of the "*Plenary's"* conduct in having failed to comply with the terms of her contract of employment.

Irreparable Harm

(90) The applicant has demonstrated that her constitutional right to her dignity has been violated, and has suffered irreparable reputational and financial harm.

Alternative remedy

(91) The applicant has no alternative remedy. The *CCMA* cannot be the proper forum to challenge the violation of her *section 33* constitutional right to fair, reasonable and lawful administrative

action.

Balance of Convenience

(92) The prejudice the applicant has suffered and continues to suffer because of the violation of her *section 33* constitutional right outweighs any prejudice, if any, that the respondents would suffer. The applicant's dismissal is unlawful consequently if interim relief is not granted she would incur severe reputational impairment to her credibility in the public domain.

IS IT COMPETENT TO GRANT FINAL RELIEF

(93) In view of the urgency of the matter and time constraints, subsequent to hearing full argument and after considering same, I issued an order reinstating the applicant. I reserved the reasons underpinning such order with the caveat that counsel should furnish Supplementary Heads Of Argument addressing the issue, whether, it was competent for the court to grant a final order in this matter since the applicant sought interim interdictory relief.

(94) The rationale predicating the Court's view was that the applicant could only be reinstated as first respondent's Chief Executive Officer if it was determined that the termination of her

employment was unlawful. If such determination is made it renders the applicant's prayer to be given leave to institute review proceedings to set aside or declare her dismissal invalid superfluous and academic.

THE REQUIREMENTS OF A FINAL ORDER

(95) Although the applicant seeks interim relief, she is entitled to final relief if she can establish a clear right as opposed to a *prima facie* right. If the applicant is to be granted a final order she has to establish not only a clear right, but also an injury actually committed, and the absence of an alternative remedy.

(96) In this matter there is no dispute on the papers that the applicant has been dismissed from her employment, and has suffered harm, or that she has no alternative remedy. The only dispute relates to the legal issues pertaining to such dismissal. In my view, having proved that her dismissal was unlawful, the applicant has established a clear right to secure a final order.

(97) ***In National Gambling Board v Premier, KwaZulu-Natal 2002 (2) SA 715 (CC) at para 52,*** it was held:

"[52] Ordinarily, an interim interdict is appropriate when the facts which establish a right to a final order are in dispute. It has been held in some cases that an interim interdict is not appropriate when the facts relating to a final order are not in dispute. In such a case the court will proceed to decide the legal issue pertaining to the main dispute. It will then issue or refuse a final order. In other cases it has been held that there may be circumstances in which the court will issue an interim interdict even if the facts pertaining to the main dispute are not in dispute."

(98) In ***Fourie v Olivier en Ander 1971 (3) SA 274 (T)*** it was held:

"where a legal issue is dispositive of a matter, the court seized with the application for interim relief should finally decide the matter and should not leave same for a trial court or the court hearing the application for final relief to determine same."

(99) In this matter all questions of law requiring detailed argument were raised and fully ventilated. Although the court was approached on urgency this court has had ample time for mature reflection and the consideration of legal argument by two eminent senior counsel.

(100) I am of the firm considered view that on the common cause facts the applicant can only be reinstated to her position as Chief Executive Officer of the first respondent only if it is established that her dismissal was unlawful.

(101) I completely agree with Southwood J who was confronted with an analogous situation ***in Mzilikazi and Another v The South African Reserve Bank an unreported case of the North Gauteng High Court*** case number 50711/08 handed down on 19 February 2008 that:

"*Notwithstanding the formulation of the relief in the Notice of Motion and the formulation of the causa in the founding affidavit the parties agreed that the relevant facts are before this court, that there are no real disputes of fact and that if the court were to uphold the applicants contentions regarding ultra vires and/or the Regulation 22D review, the court should simply grant a final order declaring the notice invalid. That is obviously the real relief which the applicants seek in this application. In my view that is the appropriate course for this court to follow. If the court were to find*

that the notice is invalid on either ground it would serve no useful purpose to grant interim relief – ***See Fourie v Olivier 1971 (3) 274 (T) at 284G-285H."*** *The parties accept that this court "can issue a final order as a matter of jurisdictional competence even though a final order was not sought in the application. However that such final order can only be made provided that court is satisfied that a clear right has been demonstrated for such relief."*

(102) I am of the firm view that the applicant request in seeking leave to institute an application for an order reviewing and setting aside or declaring invalid the decision of the first respondent's "Plenary" in terminating her appointment as Chief Executive Officer, would be inconsistent with the principles of *res judicata,* and would be superfluous, academic and an unnecessary waste of costs.

(103) The right of the respondents to appeal such final order are and remain unfettered, consequently no prejudice or potential prejudice would be suffered by the respondents as a result of such final order.

THE ORDER

(104)In the premises the following order is made:

(a) The applicant is reinstated with retrospective effect to her position as Chief Executive Officer of the first respondent on the terms and conditions applicable to her appointment prior to 25 March 2009;

(b) The first respondent is ordered to pay the costs of the applicant's costs and the costs consequent upon the employment of two counsel.

Signed at Johannesburg on the 12 June 2009.

_____

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 APRIL 2009

DATE OF JUDGMENT: 12 JUNE 2009

COUNSEL FOR THE APPLICANT: D UNTERHALTER SC

ASSISTED BY: A G GOTZ

INSTRUCTED BY: IRENE ROME ATTORNEYS c/o H MILLER ACKERMANN & BRONSTEIN

TELEPHONE NUMBER: (011) 483-0144

COUNSEL FOR THE RESPONDENTS: M BRASSEY SC

ASSISTED BY: M.VAN AS

INSTRUCTED BY: LEPPAN BEECH INC

TELEPHONE NUMBER: (011) 250-5190