IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 3445/09

In the matter between

Z HULANE **FIRST APPLICANT**

P MASHOKO **SECOND APPLICANT**

versus

THE MSUNDUZI MUNICIPALITY **RESPONDENT**

JUDGMENT

Delivered on: 7 May 2010

STEYN J

[1] In this matter the applicants seek by way of motion the following order:

> *"(a) Declaring that the contracts of employment entered into between applicants and respondent's mayor and which are dated 13 October 2009* (sic) *are valid and binding and govern the relationship between the parties.*
>
> *b) That the respondents is ordered to pay the costs of this application.*
>
> *(e) Further or alternative relief."*

In essence the applicants seek a declaratory order relating to their employment relationship with the respondent.

[2] Shortly before the matter was to be heard on the 30th October 2009, the Constitutional Court delivered judgment in *Gcaba v Minister of Safety and Security*.[1] Based on the ratio of the aforementioned case, counsel for the Respondent Mr Dickson SC, raised *in limine* the issue of jurisdiction.[2] He contended that a clear reading of the recent decision of the Constitutional Court shows that general employment and labour relations do not amount to administrative action. In light of the decision, he submitted that this Court should distinguish between matters between employer and employee and matters which invoke threatened violations of fundamental rights which arise from employment and labour relations.[3] He has pointed out that the claim relies upon a declaration of a contract which has been concluded and is not dependant upon a violation of any fundamental right or an administrative review, and henceforth the claim falls within the exclusive jurisdiction of the Labour Court.

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1 Unreported judgment delivered on 7 October 2009, case number CCT 64/08 [2009] ZACC 26.
2 Also see *Du Preez v Durban University of Technology* 2010 (1) SA 372 (N).
3 *Gcaba supra* para [69] to [75].

[3] Mr Seggie SC, acting on behalf of the applicants, contended that the submissions made by the Respondent on the issue of jurisdiction are based on an imperfect understanding and interpretation of *Gcaba's* case. He contented that the Court in *Gcaba* did not overrule the decision of *Fedlife Assurance Ltd v Wolfaardt*[4] and in support of his submissions relied on the following paragraphs of *Gcaba*:

> *"[52] In order to evaluate and understand the divergent but arguable approaches to the interpretation of sections 23 and 33 of the Constitution, section 157 of the LRA and the provisions related thereto, it is useful to try to identify a few general principles and policy considerations which informed and have been informed by the interpretations put forward in* Fedlife, Fredricks, Chirwa *and other cases.*
>
> *[53] First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or for a. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the* actio iniuriarum *in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided."*
>
> (Footnotes omitted).

[4] The Court in *Gcaba* in my view broadly followed *Chirwa v Transnet Ltd*.[5] Importantly, however, in relation to the present application is that the Court held that a grievance raised by an

4 2002 (1) SA 49 (SCA).
5 2008 (4) SA 367 (CC).

employee relating to conduct of the employer, has few, if any, implication or consequence for other citizens.

[5] Respondent, avers that the applicants' complaint is employment – related and should be dealt with in terms of section 157(1) of the Labour Relations Act.[6]

Section 157 of the LRA, provides as follows:

> *"(1) Subject to the Constitution and section 173, and except when this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
>
> *(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –*
>
> *(a) employment and from labour relations;*
>
> *(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*
>
> *(c) the application of any law for the administration of which the Minister is responsible …."*

[6] In my view it is necessary to look at the Court's reasoning in *Gcaba* and consider the approach adopted by the

6 No. 66 of 1995, hereinafter referred to as the 'LRA'.

Constitutional Court and against this backdrop measure the submissions that were made by Counsel to this Court on behalf of applicants and respondent. Lastly the principles as re-affirmed in *Gcaba* should then be applied.

[7] The question before the Constitutional Court in *Gcaba* was whether the decision not to appoint Mr *Gcaba* constituted an administrative act (which would be subjected to administrative review in the High Court) or whether the applicant was required to follow the process provided for in the LRA to challenge his non-appointment. Van der Westhuizen J, however, also considered whether the earlier decisions of *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others*[7] and *Chirwa v Transnet Ltd and Others*[8] could be reconciled.

Both decisions are important in relation to the High Court's jurisdiction to deal with labour related matters, even though divergent schools of thought had developed, regarding the interpretation of s 157(1) and (2) of the LRA.

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7 2002 (2) BCLR 113 (CC).

8 2008 (3) BCLR 251 (CC). For the earlier SCA decision see *Transnet Ltd and Others v Chirwa* 2007 (1) BCLR 10 (SCA).

[8] In *Chirwa*, *supra*, it was held that the action to terminate Chirwa's services did not amount to administrative action and henceforth the High Court lacked jurisdiction to decide upon the dispute.

[9] In *Fredericks*, *supra*, however, the dispute turned on an alleged violation of their rights to equality and just administrative action arising from the failure to consider their applications for voluntary retrenchment. There was no complaint about an alleged violation of their right to a fair labour practice or any other right under the LRA.

Importantly, in my view, is that the Constitutional Court decided that these two cases could be distinguished on the basis of the respective pleadings that were filed. Jurisdiction it observed should be determined on the basis of what was pleaded and not on the substantive merits of the case.

[10] Accordingly the Court held that the High Court was correct in finding that it lacked the requisite jurisdiction to decide *Gcaba's* case.

[11] Van der Westhuizen J, re-affirmed that s 157(1) of the LRA confirms that the Labour Court has exclusive jurisdiction over all the matters that the LRA prescribed as determinative by the Labour Court. The Court, however, added that s 157(2) should not restrict or limit the jurisdiction of a High Court, where a cause of action lies within its jurisdiction. It stated as follows:

> *"[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour – and employment – related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might be in other courts like the High Court and the Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."*[9]

[12] In relying on the pleadings as the legal basis for the claim the Court held that the issue is whether the notice of motion together with the supporting affidavits indicated that the claim should be entertained by the Court. Van der Westhuizen J succinctly stated:

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9 *Op cit* para 73.

"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in time), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleading – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts assented by the applicant would also sustain another claim, cognisable only in another court. If however the proceedings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would take jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should this approach the Labour Court."[10]

[13] Mr Seggie has asked this court to consider the provisions of the Basic Conditions of Employment Act,[11] more specifically s 77 of the Act when it considers the issue of jurisdiction. The section provides as follows:

"Jurisdiction of Labour Court

1) *……..*

2) *……..*

3) *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."*

10 See para 75.
11 No. 75 of 1997.

Much reliance was also placed on the SCA's approach in *Makhanya v University of Zululand*.[12] The problem however in my view, for the applicants is that they are not alleging that any administrative rights had been infringed. It is indeed averred by them that the cause of action is based on contract. In my view, the mere allegation of it being averred that it is based on contract, in general does not mean that it should be dealt with as a contractual dispute, especially in circumstances where the basis for the claim remains a labour dispute.

[14] In my view *Gcaba* should be interpreted as meaning that, generally, employment and labour relationships do not give rise to administrative action as contemplated by PAJA.[13] A grievance raised by an employee relating to conduct of the employer has, few, if ever direct consequences for other citizens. The present application in substance remains one of employee and employer. The factual background to the present application emerges from the applicants' founding affidavit.

In short the applicants were both employed by the respondent

12 [2009] 8 BLLR 721 (SCA).
13 Promotion of Administrative Justice Act, No. 3 of 2000.

as Strategic Executive Managers.[14] Their contracts expired on 31 August 2008.

In May 2008 however the respondent's council resolved to change the structure of the municipality by reducing the number of managers directly accountable to the municipal manager from six to five. The five managers were no longer to be styled as SEM's but deputy municipal managers.[15]

The applicants were then appointed as DMM's in terms of a resolution of the council which was passed on 28 May 2008. The resolution referred to 'the need for certainty among the Strategic Executive Managers, continuity within the municipality, as well as the need to offer packages comparable to similar sized municipalities and it went on to appoint them on a four (4) year contract, with a negotiated package.

After the passing of the resolution they asked for their salary packages to be finalised.

14 Hereinafter referred to as SEM's.
15 Hereinafter referred to as DMM's.

The respondent's process manager: Human Resources Development was tasked with preparing a report on their proposed salary package. She recommended that they should be paid between R945 00 and a maximum of R967 229 per annum.

The applicants expected to be paid new salaries plus backpay from October 2008. When there was no payment as anticipated they wrote to the municipal manager and when the correspondence did not lead to the desired effect, they submitted together with other DMM's a report to the Executive Council of the Municipality. Exco took a resolution, which was later challenged on the basis of certain irregularities. Applicants'salaries were then amended only to the scale that they were paid previously as SEM's. Applicants were aggrieved by the remuneration structure, since they expected to be paid the negotiated remuneration.

It is clear from the contents of the supporting affidavits that applicants seek to bind the respondent (the municipality) to a specific contract with a specific remuneration structure. This is a motion application and not an action, henceforth I need to

consider the supporting affidavits, coupled with the order sought as definitive of what constitute the pleadings. In doing so, I am not persuaded that this application can be considered as something other than a claim for a remuneration benefit that applicants' had negotiated with their employer. When stripped to the bare essentials, the claim remains an issue to be considered by the Labour Court, by virtue of s 157 of the LRA.

[15] In the premises, I conclude that the applicants have failed to establish jurisdiction, through an infringement of a clear or *prima facie* established right, and without establishing such right on the basis of the pleadings, this Court has to uphold the point raised *in limine* that it lacks jurisdiction. Counsel acting for the respondents had abandoned any order for costs should this Court uphold the point *in limine*.

The parties were *ad idem* that no costs order should be made if the point *in limine* is upheld. In my view it is a fair approach that the parties pay their own costs given the fact that this case is based on a recent development in law.

[17] Accordingly the following order is made:

The Application is dismissed.

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Steyn, J

Date of Hearing:	30 October 2009
Date of Judgment:	7 May 2010
Counsel for the applicants:	Adv R J Seggie SC
Instructed by:	Tomlinson Mnguni James
Counsel for the respondents:	Adv A J Dickson SC
Instructed by:	Venn Nemeth & Hart Inc.