

**Section 77 of the *Basic Conditions of Employment Act 75 of 1997* as a remedy
to enforce contracts of employment**

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List of Abbreviations

AJ	Acting Judge
BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CCMA	Commission for Conciliation, Mediation and Arbitration
CLL	Contemporary Labour Law
Constitution	<i>Constitution of the Republic of South Africa, 1996</i>
ILO	International Labour Organisation
J	Judge
LAC	Labour Advisory Council
LRA	<i>Labour Relations Act 66 of 1995</i>
PAJA	<i>Promotion of Administrative Justice Act 3 of 2000</i>
SADC	Southern African Development Community
SCA	Supreme Court of Appeal
SLR	Stellenbosch Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg

1 Introduction

In Section 77 of the *Basic Conditions of Employment Act 75 of 1997* (hereafter the BCEA) the jurisdiction of the Labour Court is set out with regard to the enforcement of the BCEA, as prescribed by chapter 10 thereof. Section 77(1) of the BCEA states that the Labour Court has, with exception of the offences specified in the BCEA, exclusive jurisdiction regarding all matters set out in the BCEA.¹

The Labour Court has concurrent jurisdiction with the civil courts to adjudicate disputes concerning a contract of employment.² This is the situation regardless of whether a basic condition of employment forms part of the contract of employment or not.³

Section 4 of the BCEA provides that any basic condition of employment in the BCEA automatically forms part of the contract of employment and, as such, the basic condition can be enforced in terms of Section 77(3) of the BCEA. In terms of Section 4 of the BCEA, any basic condition of employment constitutes a term of a contract of employment except in three circumstances. These exceptions are: firstly, if any other law is more favourable to the employee, that particular law must be applied; secondly, if the basic condition of employment has been replaced, varied or excluded in accordance with the provisions provided by the BCEA;⁴ and, thirdly, when a term in a contract is more favourable than the basic condition of employment, effect should be given to that particular term in the contract. Section 4 of the BCEA will be discussed in detail in chapter 2.4 of this paper.

It is important to bear in mind that the *Basic Conditions of Employment Act 3 of 1983* gave sole jurisdiction to the civil courts regarding contracts of employment, while the current act provides for concurrent jurisdiction between the Labour Court and the civil courts.

1 Landman *Practice in the Labour Court* GH9-GH10.

2 Section 77(3) of the BCEA.

3 Landman *Practice in the Labour Court* GH10.

4 For example by means of collective agreement concluded in a Bargaining Council.

There are a number of different approaches and opinions regarding the logic and problems of having concurrent jurisdiction between the Labour Court and civil courts in matters regarding contracts of employment. A large number of these approaches and opinions are found in court cases that will be more fully discussed in chapter 3 of this paper.

Section 77A(e) of the BCEA can be regarded as an extension of Section 77(3) of the BCEA. This section states that when a court considers a matter regarding a contract of employment, the court has the power to make an order for specific performance, damages and/or compensation.⁵ This section bestows the Labour Court with powers and rights equal to those of civil courts where terms or conditions in contracts of employment are in dispute or in the event of a breach of the terms of the contract.

The question regarding the concurrent jurisdiction between the Labour Court and the civil court has resulted in somewhat of a dual stream jurisprudence as stated in *Mogothle v Premier of North West Province & Other*⁶, which will be discussed in chapter 3 of this paper. The various interpretations of Section 77(3) of the BCEA by the courts resulted in legal uncertainty. The High Court made various decisions relating to the subject of considerations of fairness in contracts of employment, as set out in the *Labour Relations Act* 66 of 1995 (hereafter the LRA) and in giving effect to Section 23 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) as these principles are read into the contract of employment. These disputes were based on the contract of employment and therefore the High Court argued and assumed that they had jurisdiction over a matter that could easily have been resolved in the Labour Court.⁷

It is therefore necessary to determine whether Section 77(3) of the BCEA should be interpreted widely or narrowly. This interpretation of Section 77(3)

5 Landman et al *Practice in the Labour Court* GH 11.

6 *Mogothle v Premier of North West Province & Other* 2009 4 BLLR 331 (LC).

7 *Denel (Pty) Ltd v Vorster* 2004 25 ILJ 659 (SCA). *Feinberg v African Bank Ltd & Another* 2004 10 BLLR 1039 (T).

of the BCEA is important for determining jurisdiction where a dispute arises regarding contracts of employment. When clarity has been given regarding the application of Section 77(3) of the BCEA, there will be no more legal uncertainty regarding the issue of concurrent jurisdiction between the Labour Court and civil courts.

The main aim of this study is to attempt to clarify the uncertainty regarding the concurrent jurisdiction as set out in Section 77 of the BCEA. By giving clarity to the above-mentioned situation, fair labour practices will be ensured and labour law in South Africa will be developed.⁸ Effect is also given to Section 34 of the *Constitution* for access to courts, which in turn ensures fair labour practices.⁹ The proposed amendments to the BCEA will be considered to determine the possible impact of creating legal certainty and doing away with the development of a dual jurisprudence in different jurisdictions. These proposed amendments will be discussed in chapter 4 of this paper.

8 Section 23 of the Constitution ensures fair labour practices for everyone. For a further discussion see Currie & de Waal *Bill of Rights* 499.

9 Section 34 of the Constitution ensures that each individual has access to the courts and has a fair public hearing. For a further discussion see Currie & de Waal *Bill of Rights* 703-705.

2 Common Law Remedies for Breach of the Contract of Employment

The contract of employment is central to the employment relationship. When a contract of employment is clear, understandable and in plain language, such a contract will be accessible to both the employer and the employee. Where a contract of employment is not clear, understandable and written in plain language, the relationship between the employer and employee will be compromised.

The basic principles of a contract of employment are derived from the common law. It is therefore necessary to study the different common law principles of a contract of employment for a better understanding of the issues at hand.

2.1 Common Law Principles

The common law contract of work has its origin in and is presently referred to as *locatio conductio operarum*. The word *locatio* refers to the word lease, while the word *conductio* translates to hire or rent.¹⁰ Keeping this in mind, the employer becomes the hirer while the employee or labourer becomes the lessee.¹¹ Employment is thus rendered as a lease while the employer is the hirer thereof.

The earliest *locatio conductio operarum* can be described as a contract where consensus had to be reached regarding two *essentialia*.¹² These *essentialia* included the service to be rendered (*operae*) and the remuneration (*merces*) that would be paid therefore.¹³ The employer could enforce performance of the services that were promised to him by the employee.¹⁴ However, if there was fault on the part of the employee for not rendering services, he or she

10 Van Zyl *Romeinse Privaatreg* 298.

11 Van Zyl *Romeinse Privaatreg* 302.

12 Zimmermann *Law of Obligations* 384-385; Du Plessis *et al Labour Law* 9; see also van Zyl *Romeinse Privaatreg* 301-302 for a more detailed discussion.

13 Zimmermann *Law of Obligations* 384-385.

14 Zimmermann *Law of Obligations* 385.

could not be sued for outstanding wages.¹⁵ Where the fault of not rendering a service lies with the employer, it is far more difficult to determine what could happen. When it is impossible to render a service because of reasons out of the control of the employee or employer, the employer had the risk of still being liable for payment of the *merces* of the employee i.e. as long as the employee tendered his services.¹⁶

The *locatio conductio operis* can be seen as the forerunner for the contract of the independent contractor. The *locatio conductio operis* is defined as follows:¹⁷

One person undertakes to perform or execute a particular piece of work, and he promises to produce a certain specified result.

The person commissioning the enterprise is called the *locator* and the person rendering the service is called the conductor *operis*.¹⁸ The person that renders the service must give a guarantee or safeguard for the fact that the obligations to which he agreed will be fulfilled towards the *locator*.¹⁹ The most well-known obligation of the locator was to fulfil his side of the agreement by paying the *conductor operis*.²⁰

The *locatio conductio operarum* can be seen as the letting and hiring of services in return for monetary compensation, while the *locatio conductio operis* forms the basis for the contract of the independent contractor.

Labour law in South Africa has largely developed from the *locatio conductio operarum*, although both of the mentioned contracts form the basis for labour contracts in South Africa.

15 van Zyl *Romeinse Privaatreg* 302; Zimmermann *Law of Obligations* 385; some of the reasons for not rendering a service could include sickness or incapacity.

16 Zimmermann *Law of Obligations* 385; van Zyl *Romeinse Privaatreg* 302; see also the *Digesta* 19.2.38 pr for the original Roman text.

17 Zimmermann *Law of Obligations* 393; van Zyl *Romeinse Privaatreg* 302-303.

18 Zimmermann *Law of Obligations* 393; du Plessis *et al Labour Law* 9; for a further discussion see van der Merwe *et al Kontraktereg* 384.

19 van Zyl *Romeinse Privaatreg* 303.

20 van Zyl *Romeinse Privaatreg* 303.

2.2 Application of Common Law Principles in South Africa

The common law contract of work is based on two basic principles: firstly, for citizens to regulate their contracts of work between themselves and, secondly, that they are bound to the arrangements that they have created.²¹ The case of *Printing & Numerical Registering Co v Sampson*²² has been cited, with approval, in South African courts.²³ The facts of this case pertain to a dispute regarding a contract by a company for the selling, buying and registering of patents invented by a vendor who agreed to sell all future patents to the company.²⁴ The court discussed the contract between the vendor and the company, and the fairness thereof.²⁵ The court came to the conclusion that where two parties competently and knowingly conclude a contract, such as this, and where such a contract is entered into freely and voluntarily, it results in a sacred and enforceable contract.²⁶ Liberty is therefore the most important underlying principle of the case, while the contract must be sanctified.²⁷ The court concluded that the specific contract was therefore in order and the company could claim from the vendor for patents registered and not handed over.²⁸

It is clear from the discussion above that, irrespective of the type of contract, there are basic principles that exist and these principles should be adhered to at all times. These principles, also apply to a contract of employment and will be discussed throughout this paper.

The basic common law principles of the *locatio conductio operarum* and the *locatio conductio operis* are still applicable in South Africa. A distinction is

21 Brasseley *Employment and Labour Law* C1:7.

22 *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 at 465.

23 Cases where the case has been cited with success include, *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A) at 767A and *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9F-G.

24 *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 at 462.

25 *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 at 462.

26 *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 at 465 - 466.

27 Brasseley *Employment and Labour Law* C1:7.

28 *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 at 466.

made between the two different contracts and is predetermined in legislation.²⁹ To establish which court would have jurisdiction, various tests have been developed to determine whether a person is an employee or an independent contractor. These tests include the control test, the dominant impression test and the organisation test.³⁰

Both the control test and the organisation tests have been rejected by the South African Courts.³¹ The only other test still recognised by the Labour Appeal Court is the dominant impression test. A much broader approach is followed by the courts. During the application of the dominant impression test, all the facts and the circumstances are taken into account when determining whether a contract of service exists.³² Even with the more flexible approach that the court follows with the dominant impression test, it is still evident that it is difficult to determine exactly when a contract can be classified as a contract of work.³³ The case of *Smith v Workmen's Compensation Commissioner*³⁴ listed six important characteristics of the difference between a contract of work and a contract of service. In the case of *SABC v McKenzie*³⁵, the Labour Appeal Court made similar differentiation to those in the case of *Smith v Workmen's Compensation Commissioner*³⁶. These characteristics include the following:³⁷

29 A distinction between the different contracts is of great importance. Because of the fact that the *Labour Relations Act* 66 of 1995 defines an employee in section 213, only employees will fall within the scope of the Act and independent contractors are excluded.

30 Olivier %Statutory employment relations in South Africa+79-80; du Toit *et al Labour Relations* 75-76; see Grogan *Workplace Law* 19-23 for a detailed discussion.

31 See the case of *S v AMCA Services and Another* 1962 4 SA 537 (A) for the rejection of the organisation test.

32 Olivier %Statutory employment relations in South Africa+80; Grogan *Workplace Law* 20; also see the cases of *Niselow v Liberty Life Association of Africa Ltd* 1998 ILJ 752 (SCA); *SABC v McKenzie* 1999 ILJ 585 (LAC); *Mpungose v Ridge Laundries CC* 1999 ILJ 704 (CCMA).

33 Olivier %Statutory employment relations in South Africa+80.

34 *Smith v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).

35 *SABC v McKenzie* 1999 ILJ 585 (LAC).

36 *Smith v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).

37 Olivier %Statutory employment relations in South Africa+81-82.

- The object of the contract of employment is to render personal services, while the object of the contract of work is the performance of a piece of work and the production of a result.
- With the contract of employment, the employee is at the personal service of the employer, while the independent contractor is not obliged to perform any work personally for the employer.
- A service that must be rendered in terms of the contract of employment is at the disposal of the employer and it is not necessary for it to be rendered, while with the contract of service the independent contractor is bound to perform a specific piece of work that is agreed upon in the contract of work.
- The independent contractor is bound to produce the piece of work agreed upon in the contract of work and can be seen as an employer on his or her own, while the employee is subordinate to the employer and must follow the commands of the employer.
- The death of the employee terminates the employment contract, while the death of the independent contractor does not terminate the contract of work.
- The contract of work is terminated when the work is completed, while the contract of employment is terminated when the specific time period has expired.

From the above it is clear that differences exist between a contract of work and a contract of employment. Despite this, there are still disputes regarding the difference between the two types of contracts. Determining the nature of the contract could be important when establishing the nature of the remedies available to aggrieved parties.

2.3 Common Law Remedies

Both the employer and the employee have remedies at their disposal if the terms of the contract of employment have been breached. The employer and

the employee have certain obligations that they should fulfil or comply with and if these are not met, a breach in the contract of employment occurs.

With the implementation of legislation such as the LRA and the BCEA, the common law remedies for breach of contract have changed considerably.³⁸

The LRA provides specific remedies for certain labour issues such as strikes, lock-outs or unfair dismissals.³⁹

Olivier⁴⁰ lists some of the basic contractual and common law remedies available. Some of these include the claim for damages, specific performance, an interdict and statutory or general remedies. Each of these will be discussed individually.

A claim for damages, in the general sense of the word, refers to a claim made by the employer or by the employee after a breach of the employment contract arises. This remedy is available to both of the parties to the employment contract, depending on the specific situation.⁴¹ If the employer claims damages from the employee he or she should prove that the damages arose from the breach of contract.⁴² This means that the employer would be placed back into the position in which he or she would have been if the breach of contract had not taken place.⁴³ The other side of the spectrum is that of compensation for employees who have been unfairly dismissed. The calculation of the compensation is determined by the reason for the unfairness of the dismissal.⁴⁴ Quantum is thus calculated in terms of the employee's weekly and monthly remuneration.⁴⁵ Compensation is regulated by Section 194 of the LRA, but it is important to bear in mind that

38 Olivier %Statutory employment relations in South Africa+113.

39 Olivier %Statutory employment relations in South Africa+113.

40 Olivier %Statutory employment relations in South Africa+113-115.

41 Olivier %Statutory employment relations in South Africa+113; see also du Plessis, Fouché and van Wyk *Labour Law* 17, 21 and van Jaarsveld 7 van Eck *Arbeidsreg* 74,93.

42 Du Plessis, Fouché and Van Wyk *Labour Law* 17; also see the case of *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 204.

43 Du Plessis, Fouché and Van Wyk *Labour Law* 17; Olivier %Statutory employment relations in South Africa+113.

44 Grogan *Dismissal, Discrimination* 588.

45 Grogan *Dismissal, Discrimination* 598.

compensation is only a *solitium* and therefore a form of compensation because of an infringement on an employee's rights.⁴⁶

When an employee claims damages the same principles would apply to him or her. He or she would thus have to be placed into the position in which he or she would have been if it were not for the breach of contract that took place. Where a breach of contract takes place, an employee may only claim patrimonial damages.⁴⁷

The second type of remedy is specific performance. Some implications arise when specific performance is used as a remedy. The court will not usually grant specific performance against an employee, for reasons that an employee cannot be compelled to return to an employer where he or she has breached a contract of employment.⁴⁸ Although the courts are reluctant to grant an order for specific performance, it would be possible in certain circumstances, but only where substantive and compelling reasons exist.⁴⁹

Reinstatement of employees must be interpreted in the ordinary meaning of the word.⁵⁰ Reinstatement implies that an employee resumes his or her working conditions as they were before the unfair dismissal, or breach of contract.⁵¹ An employee would be entitled to be compensated for the time that he or she was out of work.⁵² Although reinstatement and compensation are kept separate by the LRA, both of these remedies are available to an employee who has been wronged, although only one can be awarded at a time.⁵³

46 Grogan *Dismissal, Discrimination* 598.

47 Patrimonial damages refer to material damages or specifically a loss of income; Olivier %Statutory employment relations in South Africa+113.

48 Du Plessis, Fouché and Van Wyk *Labour Law* 21; Olivier %Statutory employment relations in South Africa+114.

49 Van Jaarsveld & Van Eck *Arbeidsreg* 95; also see *Penrose Holdings (Pty) Ltd v Clark* 1993 ILJ 1558 (NH).

50 Grogan *Dismissal, Discrimination* 586, it can also be described as "restoring the original Contract of employment+see Grogan *Labour Relations Law* 468.

51 Grogan *Dismissal, Discrimination* 584.

52 Grogan *Dismissal, Discrimination* 586.

53 Grogan *Dismissal, Discrimination* 586, also see Du Toit *Labour Relations Law* 477 for a more detailed discussion.

The remedy of an interdict is available to parties to a contract of employment. An interdict is available to a party in instances where the defaulting party is forced to abide by the terms of the contract of employment.⁵⁴ Certain common law requirements should be fulfilled before an interdict may be obtained. The three requirements include, that the applicant must have a *prima facie* right, there is no other remedy available to such an applicant and the applicant will suffer irreparable harm if no relief is granted in his or her favour.⁵⁵

Another remedy discussed by Olivier is the different statutory remedies available to both the employer and the employee. Statutory remedies are contained in legislation such as the LRA and the BCEA, as already mentioned above. Specific remedies are available in circumstances where an employer or an employee fell victim to unreasonable behaviour on the side of the other party.⁵⁶ It is here where the remedies in terms of legislation play a role. Section 193 of the LRA sets out statutory remedies and expressly states what the preferred remedy for unfair dismissals is.⁵⁷ In terms of Section 193, a court may make any other order that the court deems to be appropriate in any other circumstances.⁵⁸

2.4 The South African Contract of Employment

In Grogan's definition of contract work⁵⁹, the following essential elements may be concluded: a voluntary agreement; two parties; agreement on certain specific duties that will be performed; indefinite or specific period; agreement

54 Olivier %Statutory employment relations in South Africa+115; also see Van Jaarsveld & Van Eck *Arbeidsreg* 94.

55 Olivier %Statutory employment relations in South Africa+115.

56 Van Jaarsveld & Van Eck *Arbeidsreg* 74, 96.

57 Grogan *Dismissal, Discrimination* 582.

58 See specifically section 193(3) of the LRA, as well as Grogan *Dismissal, Discrimination* 598 for a more detailed discussion.

59 "A contract of employment is an agreement between two legal personae (parties) in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them" see Grogan *Workplace Law* 31.

on remuneration; and the right of the employer to command the employee regarding the manner in which he or she carries out his or her duties.⁶⁰

The relationship between the contract of employment and the current labour legislation in South Africa is of extreme importance.

The rights and duties of employees in South Africa are regulated by a set of principles derived from international law, the Constitution, the common law contract of employment, delictual law, administrative law and South African labour legislation.⁶¹ For a contract of employment to be applied and interpreted correctly, a thorough knowledge of the relevant sections of the legislation applicable to contracts of employment is necessary. Every contract of employment should comply with a basic set of standards, such as those prescribed in the BCEA. The minimum standards cover all the basic conditions regarding an employee's employment and, in turn, act as a guideline to employers as to what should be included in a contract of employment. However, since legislation cannot provide for every possible scenario, the fall back position remains the common law principles that guide the contract of employment.

The minimum standards set out in the BCEA give effect to the right to fair labour practice, set out in Section 23 of the Constitution, and are referred to as core workers rights by Van Eck.⁶² The question regarding the influence that the Constitution has on the private law contracts between employers and employees, which were previously governed by the common law, is still challenging. As Section 23 of the Constitution extends the right to fair labour practice to everyone, the scope of protection is thus broadened outside the traditional relationship of an employer and employee.⁶³

60 Grogan *Workplace Law* 31 see also Grogan *Employment Law* 17 for a further discussion.

61 Van Eck 2008 *Obiter* 339.

62 Van Eck 2008 *Obiter* 339.

63 Currie & De Waal *Bill of Rights* 499.

The International Labour Organisation (hereafter the ILO) sets out minimum standards to which an employment relationship should adhere, which results in South African labour legislation giving effect to the principles set out by the ILO.⁶⁴ By implementing these minimum requirements, economic development and social justice is being achieved.⁶⁵ These two principles of economic growth and social justice are of uttermost importance for a country with a growing economy like South Africa. Growth of the South African economy can not be achieved if issues regarding labour and employment matters are not kept to a minimum. Strikes and lock-outs can influence production, which in turn influence the growth of the South African economy. Although all rights to employer and employees should be upheld, all must be done to minimise issues at hand. It is thus important that the basic contract of employment should not be a topic of debate, but should rather be a tool in realising these important principles in a country with a growing economy.

2.4.1 Interaction between the BCEA and the Law of Contracts

As already mentioned in chapter 1 of this paper, the BCEA can be seen as the cornerstone of the conditions of employment that should be contained in the modern contract of employment. This means that the BCEA sets out all the different aspects necessary for the modern contract of employment to exist. In Section 4 of the BCEA, as mentioned in chapter 1, it states that basic conditions of employment constitutes a term in a contract of employment, unless any other term of law is more favourable.⁶⁶ The basic condition is excluded, varied or replaced in accordance with the BCEA or if the terms in the contract of employment are more favourable than the basic conditions of employment.⁶⁷

The will of the parties must be of utmost importance during the conclusion of a contract of employment.⁶⁸ If a contract of employment was concluded and

64 Todd *Contracts of Employment* 6.

65 Todd *Contracts of Employment* 6.

66 Section 4(a) of the BCEA.

67 Section 4(b) &(c) of the BCEA.

68 Brassey *Employment and Labour Law* C1:7.

specific terms were expressly agreed upon, such terms should be included into the contract of employment and should be given effect.⁶⁹ Such terms and conditions, which are expressly agreed upon, will have to be incorporated into the employment contract. Should such a contract of employment end up before a court, the court should ensure that the wish of the parties be adhered to and not the wish of the court.⁷⁰ In comparison with incorporated terms in a contract of employment, implied terms are on the other side of the scale. Where a court has to decide upon an issue in a contract of employment and no specific terms and conditions are incorporated into the employment contract, such conditions may be determined by the court to identify an appropriate remedy.⁷¹ The intention of the parties to the contract of employment is the most important aspect when determining the implied terms.⁷² It is important that the court determine what the parties intended with such terms when they were put to them.⁷³ Consensus is at the heart of the employment relationship. Without consent, disputes will arise regarding the contract of employment and the terms thereof.⁷⁴ Also, where a court has to decide upon an implied term, it is necessary that it should be sure as to exactly what the parties would have agreed upon. One of the most important court cases where implied terms were given effect is the case of *Old Mutual Life Assurance Co SA Ltd v Gumbi*⁷⁵, which will be discussed in chapter 3 of this paper. The court determined that the right to a pre-dismissal hearing was incorporated into South African law by the enactment of the Constitution and common law principles.⁷⁶ It is hereby understood that the right to a pre-dismissal hearing is implied in every contract of employment where an employer should give an employee the opportunity to be heard.⁷⁷

69 Brasseley *Employment and Labour Law* C1:7.

70 Brasseley *Employment and Labour Law* C1:7.

71 Brasseley *Employment and Labour Law* C1:7.

72 Brasseley *Employment and Labour Law* C1:7.

73 Brasseley *Employment and Labour Law* C1:7.

74 Brasseley *Employment and Labour Law* Ciii.

75 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA).

76 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) 700-701.

77 Van Eck Obiter 343.

In the case of *SA Democratic Teachers Union v Minister of Education & Others*⁷⁸ the Labour Court stated the terms of service include not only an employee's rights and obligation in terms of a contract of employment, but all the circumstances of employment, expressed or implied.⁷⁹ In the case of *Maneche & Others v Commission for Conciliation, Mediation & Arbitration & Others*⁸⁰, it adds to the list as set out in the case of *SA Democratic Teachers Union*. Van Niekerk AJ determined that the BCEA takes precedence over any agreement or practice in the workplace. Only once a variation of the Act is agreed upon or otherwise permitted in terms of the BCEA⁸¹, may it be enforced as such.⁸²

In comparison to the above discussion regarding terms in a contract of employment, it is important to bear in mind that, where terms are decided by the parties to the contract, there cannot necessarily be consensus because of the unequal relationship between the parties. It is because of this that legislation such as the BCEA was incorporated into South African Labour Law to provide basic principles to which a contract of employment should adhere. These basic principles form the basis against which a contract of employment should be measured. The incorporation of legislation, such as the BCEA, levels out the possibility of unevenness between the parties to a contract of employment. Legislation therefore provides a standard to which contracts of employment should be compared. It is clear from this discussion that Section 4 of the BCEA plays a large part in the application of the basic principles set out in the Act. From the case law above, it can be determined that basic principles set out in the BCEA are widely applied in contracts of employment and form the basis to which principles should be compared.

78 *SA Democratic Teachers Union v Minister of Education & Others* 2001 22 ILJ 2325 (LC).

79 *SA Democratic Teachers Union v Minister of Education & Others* 2001 22 ILJ 2325 (LC) 2327.

80 *Maneche & Others v Commission for Conciliation, Mediation & Arbitration & Others* 2007 28 ILJ 2594 (LC).

81 See section 49 of the BCEA for an example of the core rights that cannot be amended.

82 *Maneche & Others v Commission for Conciliation, Mediation & Arbitration & Others* 2007 28 ILJ 2594 (LC) 2597.

From the above it is clear that since the time of Roman-Dutch law, the contract of employment has evolved from a verbal agreement to the current situation in South African law where the contract of employment can be seen as the foundation of the South African employment law.⁸³

2.4.2 Non-compliance of Terms and Conditions of the Contract of Employment

The modern contract of employment consists of basic principles set out mainly in legislation and case law that will be discussed in chapter 3 of this paper. A very basic obligation in terms of the basic conditions of employment is the payment of remuneration. Should an employer not pay an employee the remuneration to which he or she is entitled, the employer is not complying with the basic principles of a contract of employment or basic conditions as set out in the BCEA and therefore a breach of contract is taking place.

In the event of the abscondment of the employee, the employee is repudiating the contract of employment.⁸⁴ The employee absconds from the employment, with the intention never to return.⁸⁵ The employer is then entitled to accept the repudiation and is entitled to cancel such a contract.⁸⁶ The conduct of an employee during such a situation should be seen as fair reason for the dismissal of such an employee, although it must be kept in mind that when such an employee is dismissed, it should still be procedurally fair.⁸⁷ Such an employer may decide to accept the repudiation of the employment contract or hold the employee to the terms of the contract of employment.⁸⁸

83 *Brassey Employment and Labour Law Ciii.*

84 *Du Toit et al Labour Relations Law* 383.

85 Cohen 2006 SLR 95.

86 *Du Toit et al Labour Relations Law* 383, also see the cases of *Provinsiale Administrasie: Wes-Kaap v NEHAWU* 2000 5 BLLR 566 (LAC).

87 *Du Toit et al Labour Relations Law* 383.

88 Cohen 2006 SLR 95, although case law dictates that a matter of reasonableness should be applied to the situation, an employer should hold an enquiry, where possible, before automatically assuming desertion, depending on the circumstances.

Some situations do exist where a contract of employment is ended even before the employee commenced his or her duties or employment. To determine whether a dismissal was fair or not during a situation where a contract of employment was ended even before the employee started with employment, the definition of an employee must be kept in mind. The definition of an employee is as follows.⁸⁹

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;

From the definition above, it is clear that an employee is someone who ~~works~~ for another person, thus an employer, and has been held to include a person who has entered into a contract of employment, but has not yet started to work.⁹⁰ Furthermore, Section 186(1)(a) of the LRA does not specifically state the status of an employee and only refers to ~~termination~~ of a contract of employment.⁹¹ This means that should an employer dismiss an employee even before he or she started performing his or her duties, such termination would constitute a dismissal.⁹²

89 Section 213 of the LRA.

90 Du Toit *et al Labour Relations Law* 382.

91 Du Toit *et al Labour Relations Law* 382.

92 Du Toit *et al Labour Relations Law* 383.

3 Section 77 of the BCEA as an Enforcement Mechanism

The basic principles regarding the jurisdiction set out in Section 77 of the BCEA were mentioned in chapter 1. In this chapter a more in-depth look will be taken into the situation regarding concurrent jurisdiction between the Labour Court and civil courts.⁹³

Section 77(1) of the BCEA states that:

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 terms of this Act, except in respect of an offence specified

For the purpose of this paper, it is important to keep Section 77(1) of the BCEA in mind, although the focus will be on Section 77(3) of the BCEA. Section 77(1) of the BCEA specifically states that all issues relating to the BCEA, thus also basic conditions of employment, are subject to the jurisdiction of the Labour Court.⁹⁴ Relevant case law will be used to explain the application of Section 77(1) of the BCEA.

In the case of *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd & Another*⁹⁵, the issue regarding jurisdiction in terms of the BCEA had to be determined. In this case, the Private Security Provident Fund applied for an order to compel the first Respondent to pay the necessary contributions towards the fund.⁹⁶ The court had to determine whether the High Court had jurisdiction in terms of the *Pension Funds Act* 24 of 1956, which regulations require contributions towards the fund or, in terms of the BCEA⁹⁷, where the Labour Court would have jurisdiction. Section 34A in the BCEA regulates the contributions towards the fund. In this matter the court determined that the

93 Only section 77 of the BCEA will be discussed in this paper, although section 157 of the LRA also permits concurrent jurisdiction between the Labour Court and High Courts.

94 Landman *Practice in the Labour Court* GH9-GH10;

95 *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd v Another* 2008 29 ILJ 289 (B).

96 *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd v Another* 2008 29 ILJ 289 (B) 290-291.

97 Section 51(1) of the BCEA states that the Minister may establish a sectoral determination for basic condition of employment. This was done by *Sectoral Determination 6: Private Security Sector*.

High Court did have jurisdiction because the Applicant's claim was based on a section from the *Pension Funds Act 24 of 1956*⁹⁸ that was similar to Section 34A of the BCEA. Although Section 77(1) states that the Labour Court has exclusive jurisdiction in terms of all matters in the BCEA, in this instance the Labour Court did not have jurisdiction because the application was brought in terms of the *Pension Funds Act 24 of 1956*.⁹⁹ Although the overlapping of the jurisdiction between the High Court and the Labour Court brings about uncertainty, the nature of the Applicant's claim was used as a guideline to determine which court would have jurisdiction.¹⁰⁰

In the case of *Ephraim v Bull Brand Foods*¹⁰¹ the Applicant brought an application based on the grounds of payment of notice pay in terms of Section 77(1) of the BCEA, as prescribed by Section 37 of the BCEA and not on the basis of breach of a contract of employment^{102 103}. Van Niekerk J determined that Section 77(1) of the BCEA, read in conjunction with Section 77A of the BCEA, does not provide the court with the necessary enforcement mechanism to act as an agent of first instance.¹⁰⁴ Section 77(1) does not automatically grant jurisdiction to the Labour Court for matters that should have been dealt with by duly appointed functionaries, such as Labour Inspectors.¹⁰⁵ As with Section 77(1) of the BCEA, Section 77A does not expand the jurisdiction of the Labour Court.¹⁰⁶ Van Niekerk J describes the process that should have been followed, such as approaching the office of the Labour Inspector, who is regarded as a duly appointed functionary, where complaints could be lodged and sufficient assistance would be given.¹⁰⁷ The entire process that should have been followed by the employee in this instance is described by the court. Van Niekerk J states that this process

98 *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd v Another* 2008 29 ILJ 289 (B) 301.

99 *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd v Another* 2008 29 ILJ 289 (B) 294.

100 *Private Security Sector Provident Fund v Naphtronics (Pty) Ltd v Another* 2008 29 ILJ 289 (B) 295.

101 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC).

102 With specific reference to section 77(3) of the BCEA.

103 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 952.

104 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 954.

105 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 952.

106 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 953.

107 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 955.

would have no purpose if employees were allowed to bypass this system and approach the Labour Court directly. The Labour Court should have a supervisory function in situations similar to this.¹⁰⁸ Similarly, in the case of *Private Security Sector*, if the Applicant had based his or her claim on the basis of breach of contract, the Labour Court would have heard the case as the provisions of the BCEA are incorporated into the contract of employment. In a similar case, *Indwe Risk Services (Pty) Ltd v Van Zyl: In Re Van Zyl v Indwe Risk Services (Pty) Ltd*¹⁰⁹, Basson J referred to the case of *Ephraim* and stated that, as with the case of *Ephraim*, the case of *Indwe* was also framed in terms of the BCEA and not in contractual terms.¹¹⁰ Also in the case of *Indwe*, Basson J stated that cases based on Section 77 of the BCEA, excluding the claims based on a contract of employment, should be dealt with by the relevant appointed functionaries of the Department of Labour.¹¹¹

As mentioned in chapter 1 of this paper, the Labour Court did not have concurrent jurisdiction with the civil courts in terms of *Basic Conditions of Employment Act* 3 of 1983. This is clear from the case of *Gaylard v Telkom SA Ltd*¹¹² where Revelas J determined that the Labour Court did not have jurisdiction to apply or interpret a claim if it was based on a contract of employment for which the Labour Court did not have jurisdiction at that time.¹¹³ With the current BCEA, the Labour Court and civil courts have concurrent jurisdiction to apply and interpret a contract of employment in terms of Section 77(3) of the BCEA. Section 77(3) of the BCEA must be read in conjunction with Section 4 of the BCEA. Section 4 has been discussed in detail in chapter 2.4.1.

108 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC) 955.

109 *Indwe Risk Services (Pty) Ltd v Van Zyl: In Re Van Zyl v Indwe Risk Services (Pty) Ltd* (2010) 31 ILJ956 (LC).

110 *Indwe Risk Services (Pty) Ltd v Van Zyl: In Re Van Zyl v Indwe Risk Services (Pty) Ltd* (2010) 31 ILJ956 (LC) 968.

111 *Indwe Risk Services (Pty) Ltd v Van Zyl: In Re Van Zyl v Indwe Risk Services (Pty) Ltd* (2010) 31 ILJ956 (LC) 968.

112 *Gaylard v Telkom SA Ltd* 1998 19 ILJ 1624 (LC).

113 *Gaylard v Telkom SA Ltd* 1998 19 ILJ 1624 (LC) 1628-1629.

Section 4, read in conjunction with Section 77(3) of the BCEA, gives clarity to what exactly is meant by the incorporation of a basic condition of employment into a contract of employment and what exactly the exceptions entail.

There are a number of cases where the overlapping jurisdiction between the Labour Court and civil courts regarding a contract of employment is considered. The rest of this chapter will be dedicated to the development of the case law over the past few years.

In the case of *University of the North v Franks & Others*¹¹⁴, Van Dijkhorst AJA determined that the Labour Court did have jurisdiction to determine this matter.¹¹⁵ In short, an offer was made by the University of the North to their employees of 55 years and older to sign a voluntary retrenchment agreement and thereby elect to retire.¹¹⁶ The offer was withdrawn before the time indicated had elapsed. Some of the employees challenged the validity of the University's actions. The Labour Court made an order in favour of the employees and the order was referred to the Labour Appeal Court, where the appeal was dismissed.¹¹⁷ The order made by the Labour Court was in terms of Section 77(3) of the BCEA and the court determined that the Applicants were employed by the Respondent and therefore the dispute concerned a contract of employment and the breach thereof, which grants the Labour Court jurisdiction.¹¹⁸ The Labour Appeal Court finally stated that Section 77(3) of the BCEA went much wider than perviously interpreted as it expressly deals with employment contracts, which have no statutory basic condition and fall outside of the scope of the BCEA.¹¹⁹ Thus the Labour Court should have jurisdiction in all employment contracts and exclusive jurisdiction in respect of some.¹²⁰

114 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC).

115 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1265 -1266.

116 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1254.

117 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1256.

118 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1264-1265.

119 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1266.

120 *University of the North v Franks & Others* 2002 23 ILJ 1252 (LAC) 1266.

In the case of *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All 295 (A) the appeal arose out of a claim that the Respondent instituted against the Appellant in the Witwatersrand Local Division for damages based on a premature termination of the Respondent's fixed-term contract.¹²¹ The appeal was brought after the special plea that was brought by the Appellant, stipulating the High Court's lack of jurisdiction, was set aside on exception by the Respondent.¹²²

It was determined by the majority judgement prepared by Acting Judge Nugent that the premature termination of the fixed-term contract of the employee did not fall within the exclusive jurisdiction of the Labour Court as set out in Section 157 of the LRA.¹²³ The unlawfulness of the contract of employment was relevant and not the fairness of the termination of the fixed-term contract.¹²⁴ During circumstances where the fairness of termination is in question, the LRA would have to apply and the Labour Court would have exclusive jurisdiction in such cases. In the majority judgement, the appeal was dismissed with costs, while in the minority judgement by Acting Judge Froneman, the opposite outcome in this case was reached and Acting Judge Froneman determined that the appeal should be upheld with costs.¹²⁵

In the judgement by Acting Judge Froneman, reference was made to Section 77(3) as well as Section 4 of the BCEA. These two sections, which form the basis of this dissertation, are mentioned by acting Judge Froneman who argues that, in terms of Section 77(3) of the BCEA, the High Court does not need jurisdiction in terms of the BCEA as it already has a residual competence to hear cases regarding a contract of employment. What Section 77(3) of the BCEA does, in the opinion of Acting Judge Froneman, is to give the same residual concurrent competence to the Labour Court.¹²⁶ The Labour

121 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A).

122 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 296, also see Mischke C 2002 *Contemporary Labour Law* 58 for a more detailed discussion of the facts of the case.

123 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 296.

124 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 296.

125 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 296.

126 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 308.

Court does not have such residual concurrent competence+without specific authority in terms of a statute.¹²⁷ In terms of this argument, Acting Judge Froneman found that the exemption to the special plea should have been dismissed by the High Court.¹²⁸ As discussed by Mischke¹²⁹, concurrent jurisdiction does not imply exclusive jurisdiction for the Labour Court and it is therefore implied that an employee may choose which court to approach regarding a contractual issue.

The principles set out in this case can be applied to this paper. The question regarding the jurisdiction in this matter made the application for damages uncertain for the Respondent. Although a claim for damages was brought at the High Court, it could just as easily have been brought in the Labour Court. The unlawfulness of the termination of the Respondent's employment contract was the essence of this case and the Labour Court does not have exclusive jurisdiction where unlawfulness+ is an issue.¹³⁰ This means that a certain degree of uncertainty existed and a whole new+ issue arose out of a simple unlawful termination of a contract of employment+. The issue that arose was that of the correct jurisdiction of the matter and the case had to proceed to the Supreme Court of Appeal to be determined, which wasted unnecessary costs and time for all the parties involved. If more clarity were available during the lodging of the claim for damages by the Respondent, no problems regarding the jurisdiction would have been raised.

One of the major problems arising out of this case is the fact that the overlap between the Labour Court and civil courts is highlighted herein.¹³¹ Although Nugent AJA states that common law remedies are not eliminated, the action could just as easily have followed the path of dispute resolution through the CCMA and/or the Labour Court.

127 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 308.

128 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 308.

129 Mischke C 2002 *Contemporary Labour Law* 58.

130 *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) 296.

131 Van Eck 2008 *Obiter* 341.

A trio of cases decided by the Supreme Court of Appeal will be discussed in detail as they will assist in determining an answer to the question in this paper regarding jurisdiction. In the case of *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹³², the right to a pre-dismissal hearing was to be determined, as mentioned in chapter 2 of this paper. The court had to establish whether the dismissal of the Respondent was procedurally fair after the Appellant dismissed the Respondent when the Respondent withdrew from the disciplinary proceedings because of his health.¹³³ The Respondent only queried the procedure that was followed by the Appellant and not a lack of procedural fairness, for example a fair reason for the dismissal.¹³⁴ The appeal succeeded in the end as the Appellant could not prove that the dismissal of an employee after a hearing that was conducted in the employee's absence could be seen as procedurally fair.¹³⁵ The Supreme Court of Appeal justified their decision in terms of the incorporation of the right to a pre-dismissal hearing into the South African common law contract of employment.¹³⁶ The acceptance of the ILO standards in the South African labour law and the inclusion of Section 23 into the Constitution resulted in the inclusion of the right to a pre-dismissal hearing into the South African common law.¹³⁷ This means that the common law contract of employment has been extended to include the right to a pre-dismissal hearing and the court did not conclude their decision in terms of principles set out in legislation, but purely on common principles included in the contract of employment.

In the case of *Boxer Superstores Mthatha & Another v Mbenya*¹³⁸, the court repeated its observation as in the case of *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹³⁹. This means that an employee insisting on relief by the ordinary courts, when sufficient relief is provided by the LRA, may face a

132 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA).

133 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) 700.

134 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 SCA 52 (RSA) 1.

135 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) 700.

136 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) 700.

137 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) 700.

138 *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA).

139 *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA).

penalty when relief is granted for dismissals that are procedurally and substantively unfair.¹⁴⁰ In this case, Cameron AJ stated that the ordinary courts should be careful when applying the remedial powers of the Labour Court.¹⁴¹ The Labour Court has expertise and skills that should not necessarily be removed from the Court.¹⁴² In the matter of *Boxer*, the employee, yet again, as in the case of *Gumbi*, relied solely on contractual unlawfulness and not on the fairness of the dismissal, which can be determined in terms of legislation such as the LRA. Therefore it was the second case, after *Gumbi*, where a common law contractual claim was brought and not merely a claim based on statutory principles.

From the two cases discussed above, it is clear that the Supreme Court of Appeal acknowledges the expertise and skills of the Labour Court. Although in both cases the matters were heard by the Supreme Court of Appeal, the court applied labour law principles as they should have been applied by the Labour Court in the first place.

The third case in the so called trio of SCA cases is the case of *Murray v Minister of Defence*¹⁴³, which will be discussed later in this chapter. After the cases of *Gumbi* and *Boxer Superstores*, the highly controversial case of *Chirwa* followed.

The facts in the case of *Chirwa v Transnet Limited & Others*¹⁴⁴ were that Mrs *Chirwa* was dismissed as a public sector employee while working at Transnet Pension Fund, a business unit for Transnet Limited. The dispute was referred to the CCMA but could not be resolved. The Applicant later referred the matter to the Johannesburg High Court instead of pursuing the matter under the provisions of the *Labour Relations Act* 66 of 1995.¹⁴⁵

140 *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA) 2210.

141 *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA) 2210.

142 *Boxer Superstores Mthatha & Another v Mbenya* 2007 28 ILJ 2209 (SCA) 2210.

143 *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA).

144 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC).

145 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 2.

The legal question in this matter, therefore, is whether the High Court or Labour Court has exclusive jurisdiction or whether the Labour Court has concurrent jurisdiction to hear this matter.¹⁴⁶

The Constitutional Court stated in their majority decision that the Applicant (Mrs Chirwa) was not without a remedy. She should have pursued the route set out by the *Labour Relations Act* 66 of 1995, which prescribes that the CCMA or another relevant bargaining council should be approached, and if she was not satisfied with the arbitration award, only then could she approach the Labour Court.¹⁴⁷ The Applicant brought the application in the High Court instead of the Labour Court, basing her claim on the principles set out in the *Labour Relations Act* 66 of 1995, instead of bringing an application on the principles as set out in the *Promotion of Administrative Justice Act* 3 of 2000. The Constitutional Court stated that employees of the state should not be treated in a different manner to any other employee in South Africa.¹⁴⁸ This means that public sector employees should not have a preferential position above any other employee in South Africa.¹⁴⁹ Under the Constitution, all employees are equal and neither state employees nor employees in the private sector have preference with regard to remedies available to them.

In the case of *Chirwa*, the Constitutional Court stated that she was not without a remedy.¹⁵⁰ As already explained above, the Applicant should have first pursued the specialised framework as set-out in the *Labour Relations Act* 66 of 1995 and should therefore have first pursued the route of arbitration before proceeding with the action in the Labour Court.¹⁵¹

The decision in the Supreme Court of Appeal, as referred to in the judgement of *Chirwa*, concluded that the existence of purpose-built legislation, such as the BCEA and the LRA, infers that certain forums should take precedence

146 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 20, 37, 59.

147 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 77.

148 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 66.

149 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 66.

150 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 77.

151 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 77.

over others with regard to employment-related matters.¹⁵² It is here where the issue of *forum-shopping* comes to the fore. The term *forum-shopping* refers to the possibility of pursuing a matter in more than one forum or court. The multiplicity of possibilities of forums to approach creates inconsistency and jurisdictional problems. Where an inconsistency exists, it creates uncertainty and the relevant legislation therefore does not provide an appropriate remedy.

From the above-mentioned case law it is clear that no clear definition exists for the concurrent jurisdiction between the Labour Court and the civil courts. Since the case of *Chirwa*, a number of cases were heard by civil courts and by the Labour Court and different conclusions were reached in each of these *new* cases.

In the past few years, cases have surfaced regarding the jurisdictional issue between the Labour Court and the civil courts. Three recent cases adjudicated by the Labour Court and the civil courts respectively will be discussed. The first of the three cases is the matter of *Mohlaka v Minister of Finance & Others*¹⁵³ where the Second Respondent, namely SARS, employed the Applicant for whom training was provided. The Applicant objected to some of the training as it did not have anything specifically to do with his job description. The Applicant resigned and referred a dispute to the CCMA, claiming constructive dismissal. The dispute was filed late and a condonation application did not accompany the application.¹⁵⁴ The application for condonation was subsequently unsuccessful.¹⁵⁵ Two years later the Applicant launched an application at the Labour Court for damages in terms of Section 77 of the BCEA.¹⁵⁶ However, the claim by the Applicant in the Labour Court was dismissed with costs, the reasons therefore being that condonation was not allowed, the statement of case was filed a month after the claim prescribed and the condonation application was filed after the application was

152 *Chirwa v Transnet Limited & Others* 2008 29 ILJ 73 (CC) 41.

153 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC).

154 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 349.

155 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 349.

156 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 349.

brought. The Labour Court did not allow the order in which the applications were brought.¹⁵⁷

The Second Respondent, namely SARS, accepted the jurisdiction of the Labour Court.¹⁵⁸ The Labour Court took a number of cases into consideration when they commented on this aspect, the most important case being the case of *Chirwa*¹⁵⁹, which was discussed earlier in this chapter. The case of *Chirwa* was applied because of the fact that the reasoning in *Chirwa* was that the primary objectives of the LRA should be upheld.¹⁶⁰ This means that a purpose-built employment framework must get preference above non-purpose-built processes. Acts such as the LRA and BCEA should be used for the purpose for which they were established. Therefore, the fundamental constitutional right to fair labour practice, as set out in Section 23 of the Constitution, is applied.

Although the Constitutional Court in *Chirwa* discussed the ~~contest~~ of jurisdiction between the Labour Court and High Court and the relationship between the LRA, BCEA and the common law, but mainly the relationship between the overlap between administrative law and the LRA.¹⁶¹ The Labour Court in *Chirwa* stated that when issues regarding the jurisdiction interfere with the policies set out by the LRA, the ~~path~~ should be followed so that full effect will be given to the policies set out by the LRA, as well as to the primary object of the LRA.¹⁶² The court stated that purpose-built specialised tribunals and forums, as established by the LRA¹⁶³, should be preferred by parties to a dispute.¹⁶⁴ This means that problems regarding the jurisdiction between the High Court and the Labour Court interfere with the policies and objectives of

157 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 350.

158 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352.

159 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352.

160 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352, although the *Chirwa* decision was applied by the court, it found that the *Chirwa* decision overturned the previous decisions by the SCA. The court further found that common law principles should not be developed to include a duty of fair dealing and provide protection against unfair treatment of employees, see Le Roux PAK 2009 *Contemporary Labour Law* 57 for a more detailed discussion.

161 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352.

162 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352 .

163 Section 151 of the LRA prescribes the establishment of the Labour Court.

164 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352.

the LRA. When a decision regarding jurisdiction has to be made, it must be made with the relevant legislation in mind.¹⁶⁵ When keeping the legislation, such as the LRA in mind, the correct decision regarding jurisdiction will be made and the correct court will hear the matter and thus uphold the primary objectives of legislation, such as the LRA. Skweyiya J applied the Explanatory Memorandum to the Labour Relations Bill (1995) where it stated that the inconsistency created by the number of legislation that can be applied in labour law matters and is repaired by the implementation of the LRA through the fact that it creates an integrated legislative framework.¹⁶⁶ The court applied the Explanatory Memorandum to the Labour Relations Bill (1995) and therefore came to the above conclusion that the legislative framework, as prescribed, must get preference above any other.

The Labour Court further stated that although the legislature designed both the LRA and the BCEA for different purposes, certain aspects of the labour law do still overlap, although this was never the intention.¹⁶⁷ The LRA was written by the legislature to include the regulations of collective bargaining, unfair labour practices and dismissals, while the BCEA was written to establish, enforce and regulate the Basic Conditions of Employment.¹⁶⁸ The Labour Court submits that, if the dismissal law were located in the BCEA, it would prevent the litigant from shopping for a forum between the BCEA and the LRA.¹⁶⁹ With this statement the court indicates that should dismissal law be moved from the LRA to the BCEA, jurisdiction between the two labour acts would not necessarily need to be determined, as the LRA would only then regulate collective bargaining. Therefore, all disputes regarding individual labour law would be regulated by the BCEA and uncertainty between the two acts would be cleared.

165 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352.

166 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 352, the court came to this conclusion on the basis that principles of fair treatment should rather be developed to avoid competing legal regimes and the duplications of forums.

167 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 354.

168 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 354.

169 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 354.

All contracts of employment should therefore include the right to fair labour practices (as set out in the LRA). This means that an unfair dismissal is also an unlawful dismissal.¹⁷⁰ A certainty was created by the codification of dismissal laws and the inclusion thereof in contracts of employment.¹⁷¹

The Labour Court finally stated that it could thus never have been the intention of the legislature for Section 77(3) of the BCEA to be interpreted so widely that it could include any matter concerning a contract of employment.¹⁷² These ~~wide~~ interpretations were also seen in the cases of *Indwe*¹⁷³ and *Ephraim*¹⁷⁴, which were discussed in the beginning of this chapter. It is here that the Constitution starts to play a role. Section 23(1) states that ~~everyone~~ is entitled to fair labour practices, which means that the Labour Court should apply a common law contract of employment that is consistent with the LRA and the Constitution, without any recourse to the development of the common law contract of employment.¹⁷⁵ This means that the LRA, BCEA and the Constitution should be applied to correct any structural inequality in employment relationships in South Africa. This could also mean that, should a contract of employment include more favourable terms than those set out in legislation, the terms in the contract would be applied, therefore protecting the employee and applying the most favourable terms.¹⁷⁶ Enforcement of contracts of employment would thus be more difficult as the contracts would be based on ~~more favourable terms~~ included in the contract of employment and not terms and regulations included in legislation. Terms and conditions included in the legislation, such as the Basic Conditions of Employment concluded in the BCEA, regulate these principles. Should a dispute with regard thereto arise, the BCEA would be the proper guide as to how the dispute should be resolved. Although inequality between the employer and employee should be eradicated by legislation,

170 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 354.

171 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 354 355.

172 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 355.

173 *Indwe Risk Services (Pty) Ltd v Van Zyl: In Re Van Zyl v Indwe Risk Services (Pty) Ltd* (2010) 31 ILJ956 (LC).

174 *Ephraim v Bull Brand Foods (Pty) Ltd* 2010 31 ILJ 951 (LC).

175 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 356.

176 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 357.

such as the *Constitution* and labour legislation, the most favourable terms and conditions must be applied. From this case it is clear that the BCEA and the LRA should be applied consistently and complementary to each other, otherwise these two acts will be in conflict with one another and remedies would be duplicated, which is exactly what the legislature should avoid.

In the case of *Tsika v Buffalo City Municipality*¹⁷⁷, the Plaintiff was a municipal manager for the Defendant until his contract was terminated for alleged misconduct. The Plaintiff claimed an amount for damages from the Defendant on the grounds that he was entitled to *ex gratia* payment in terms of a clause in his employment contract, as well as an amount deducted from his preservation fund.¹⁷⁸

A special plea was filed challenging the jurisdiction of the Court. The Court therefore had to determine the jurisdictional point before proceeding with the matter.

Grogan AJ discussed a number of different situations where the jurisdiction of the Labour Court and civil courts came into question. The most important part of the judgement is where Grogan AJ, discusses the effect of *Chirwa* on the interpretation of the BCEA and whether Section 77(3) of the BCEA should be read in a similar manner to the way in which the Constitutional Court interpreted Section 157 of the LRA.¹⁷⁹ This part of the judgement is of utmost importance to this paper. The resemblance between Section 157 of the LRA and Section 77 of the BCEA is determined and questions arise as to the interpretation of the two sections and whether these two sections should be interpreted similarly.¹⁸⁰ After considering the majority judgement of the Constitutional Court in *Chirwa* and the wording of Section 77 of the BCEA, Grogan concluded that the interpretation of Section 157 of the LRA in the case of *Chirwa* leaves a questionable guideline for the court to effectively

177 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E).

178 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 273.

179 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 274.

180 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 287.

redraft Section 77(3) of the BCEA.¹⁸¹ The only way the possibility exists is to substitute the word *concurrent* with the word *exclusive* by legislative amendment and not by the courts.¹⁸² Grogan further states that if the Legislature wished to give the Labour Court exclusive jurisdiction in matters concerning contracts of employment, the word *exclusive* would have been included in the wording of the section and the wording *with the civil courts* would have been omitted.¹⁸³ This opinion of Grogan was made long before the Amendment Bill to the Basic Conditions of Employment Act was published in 2010. This amendment bill is similar *almost to the word* to the opinion given by Grogan in the case of *Tsika*. The Amendment Bill will be discussed in detail in chapter 4 of this paper.

The three cases of *Fedlife Life Assurance Ltd v Wolfaard*¹⁸⁴, *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹⁸⁵ and *Boxer Superstores Mthatha & Another v Mbenya*¹⁸⁶ were also considered by this court in *Tsika*. The court stated that the principles set down in *Fedlife* had been extended and endorsed by the other two cases of *Gumbi* and *Boxer Superstores*.¹⁸⁷ Both of these cases were heard after the implementation of the BCEA and they were also both appeals from the High Court.¹⁸⁸ The court determined that the common law contract of employment contains an implied provision, which determines that all employees are entitled to pre-dismissal procedures as in the case of *Gumbi*.¹⁸⁹ The court in *Boxer Superstores* stated, and was quoted in *Tsika*, that every employee now has a common law contractual claim in terms of the inclusion of implied provisions and therefore the High Court would have jurisdiction in situations where a contract of employment is in question.¹⁹⁰ Even before the case of *Boxer Superstores*, Skweyiya J also stated in *Fedlife* that Section 157 of the LRA, which is similar to Section 77 of the BCEA, does

181 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 290.

182 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 290.

183 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 290.

184 *Fedlife Life Assurance Ltd v Wolfaard* 2001 22 ILJ 2407 (SCA).

185 *Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA).

186 *Boxer Superstores Mthatha & Another v Mbenya* 2007 5 SCA 450 (SCA).

187 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 291-292.

188 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 292.

189 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 292.

190 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 292.

not give exclusive jurisdiction to the Labour Court. Hence, even if a matter falls squarely within the labour ambit, the High Court is not simply ousted.¹⁹¹

The most important part derived from the judgement of *Tsika* is the summary of the current state of the law after the case of *Chirwa*. Grogan AJ summarised four different points with regard to the current state of the jurisdiction of the High Court regarding employment matters.¹⁹² Grogan AJ firstly determined that all matters where the cause of action falls within the scope of the LRA, and where the LRA provides a remedy, fall within the exclusive jurisdiction of the Labour Courts;¹⁹³ secondly, employees employed at statutory institutions may not bring application in terms of PAJA in the civil courts where the LRA provides a suitable remedy for their problem;¹⁹⁴ thirdly, employees may not bypass the remedies provided by the LRA and approach the civil courts with claims based on the constitutional right to fair labour practice; and, finally, the Labour Court and civil courts have concurrent jurisdiction regarding claims for damages arising out of breach or omissions in terms of employment contracts.¹⁹⁵

In the case of *Tsika*, the court does not clarify the application of Section 77(3) of the BCEA any more than it was before the case was heard. The jurisdiction regarding a common law contract of employment is still concurrent between the Labour and civil courts and both still have the right to determine such cases. Le Roux¹⁹⁶ concluded the following points regarding the jurisdiction that the court had in the case of *Tsika*, where the claim was based on payment of money arising from a breach of contract by the employer, namely that Section 77 of the BCEA made it clear that the High Court had jurisdiction to hear such cases as this, therefore the Labour Court did not have exclusive jurisdiction and the SCA decisions referred to by the court were not overturned by *Chirwa*.¹⁹⁷

191 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 292.

192 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 296.

193 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 296.

194 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 296.

195 *Tsika v Buffalo City Municipality* 2009 3 BLLR 272 (E) 296.

196 Le Roux PAK 2009 *Contemporary Labour Law* 56.

197 Le Roux PAK 2009 *Contemporary Labour Law* 56 - 57.

In the case of *Mogothle v Premier of North West Province & Other*¹⁹⁸, the Applicant brought an application to set aside his suspension by his employer, the Respondent.¹⁹⁹ The Applicant stated three reasons for this application: firstly, that the decision was taken by the Respondent under the direction of the North West Legislature and not at his own discretion; secondly, that certain preconditions for the jurisdiction were not met; and, lastly, that the Applicant was not given a chance to state his side of the situation before a decision was taken.²⁰⁰

The court discussed a number of cases regarding the matter of jurisdiction. Emphasis was placed on a trio of decisions by the Supreme Court of Appeal where the relationship of trust and confidence on the part of both parties to a common law contract of employment was stressed.

Firstly, the Court discussed the case of *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699, where the court determined that the common law contract of employment should include the right to a pre-dismissal hearing.²⁰¹ This underlines the development of the contract of employment in terms of the Constitution and means that harmonisation is achieved between the common law and the Constitution.

The second case in the trio of judgements referred to by the court is the case of *Boxer Superstores Mthatha & Another v Mbenya* 2007 8 BLLR 693 (SCA), also previously discussed in this chapter where the case of *Gumbi* was confirmed.²⁰² Both of the above-mentioned cases place the emphasis on the fact that the common law contract of employment should be developed in accordance with the Constitution in order to uphold and reflect the right to fair labour practices.²⁰³

198 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC).

199 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 333.

200 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 333.

201 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 338.

202 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 339.

203 Le Roux PAK 2009 *Contemporary Labour Law* 52.

The third and final case in the trio is the case of *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA) where the court went even further than in the matters of *Gumbi* and *Boxer Superstores* and determined that an employee has the right not to be constructively dismissed. A duty exists where the employer has an obligation of fairness when making decisions regarding employees.

The court stated that the development of the common law contract of employment by the Supreme Court of Appeal was not uncontroversial.²⁰⁴ The development was criticised for the fact that a possible ~~qual~~ jurisprudence was developing where the common law principles were competing with principles of unfair labour practice, already set out in legislation such as the LRA.²⁰⁵

In the matter of *Mogothle* it was further argued that in the case of *Chirwa* the court mentioned that a ~~complex and controversial~~ debate developed regarding the decision made in the case.²⁰⁶ This ~~complex and controversial~~ debate refers to the judgements made by the minority and majority of the Constitutional Court regarding the issue of jurisdiction. Judge van Niekerk interpreted the case of *Chirwa* by stating that, in his view, nowhere in the judgement did the court clearly state that an employee was deprived or clearly excluded from a common law contractual right to pursue his or her claim in terms of Section 77(3) of the BCEA or any other civil court.²⁰⁷ This means that although specific statutory remedies were developed after reform in 1994, the common law principles of a contract of employment still exist and legislation, such as Section 77(3) of the BCEA, provides for a possible remedy in either the Labour Court or civil courts.

Van Niekerk J came to the conclusion that the approach adopted in the case of *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) remains ~~in~~ ~~tact~~ ~~+~~ post-*Chirwa*.²⁰⁸ This means that van Niekerk agrees with the decision of

204 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 339.

205 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 339.

206 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 340.

207 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 340.

208 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 341.

Fedlife and acknowledges the fact that even legislation, such as the BCEA and LRA, does not repeal the common law entitlement to enforce contractual rights.²⁰⁹ Van Niekerk states that although the cases of *Gumbi*, *Boxer Superstores* and *Murray* might be controversial, they acknowledge the common law contractual obligations an employer has towards an employee. This implies that should a dual stream jurisprudence develop, such consequence must be resolved by the Legislature and it is not for the courts to decide. Furthermore, should an employee be affected by breach of contractual obligations, such an employee may seek to enforce a contractual remedy in terms of Section 77(3) of the BCEA and a remedy may be sought in the Labour Court.²¹⁰

Van Niekerk J furthermore states that the BCEA carries just as much weight as the *Labour Relations Act* 66 of 1995.²¹¹ The court stated that when parties agree to use Section 77(3) of the BCEA, they are aware of the fact that the Labour Court has concurrent jurisdiction with the civil courts.²¹² The court also stated that it must be guided by unfair labour practice and unfair dismissals. Where dual stream jurisprudence develops, it must be resolved by the legislature and not by the courts, as already mentioned above.²¹³ The Applicant chose to pursue her claim in the Labour Court to enforce a contractual remedy. In this case the court set aside the Respondent's decision to suspend the Applicant.²¹⁴ The suspension of the Applicant was not upheld because the Court stated that the Applicant had a right to work and a right to dignity and no alternative remedy was available to her. The court further determined that the presence of the Applicant at the work place would not jeopardise the investigation and, as no hearing was afforded to the Applicant before her suspension, her suspension was unfair and amounted to a breach of her contractual rights.²¹⁵ With this the court indicated that it had jurisdiction to entertain the Applicant's application.

209 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 341.

210 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 341.

211 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 341.

212 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 29.

213 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 30.

214 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 347.

215 *Mogothle v Premier of North West Province & Another* 2009 4 BLLR 331 (LC) 334.

The case of *Mogothle* can be seen as a building block for common law contract principles. The cases of *Gumbi*, *Boxer Superstores* and *Murray* made a clear indication that common law contract principles should be developed to provide protection for employees in situations where the LRA or BCEA do not provide any protection.²¹⁶ The development of the common law through the SCA leads to the development of the common law contract principles in case law. This has been criticised on the grounds that legislation provides for the protection of employees. The case of *Chirwa* followed thereafter and has advanced to an argument regarding the possibility that *Chirwa* overrules the above-mentioned case law.²¹⁷ However, Le Roux describes certain propositions why the case of *Mogothle* must be considered as authority for the development of the common law.²¹⁸ These include: the development of the common law contract principles, which ensure that an employee need not only rely on rights set out in the LRA, but also on his or her common law rights; the development of the common law principles that give effect to the right to fair labour practice and impose a duty of fair dealing on an employer; the fact that both the ordinary and the Labour Court have jurisdiction to consider such contractual claims; and, finally, the fair dealing with procedural and substantive fairness where an employer suspends an employee.²¹⁹

In conclusion, with regard to the above cases, it can be observed that development of the common law contract of employment took place, the application of jurisdiction between the Labour Court and the civil courts has become somewhat of a problem and the dilemma of forum shopping has reared its head. When determining jurisdiction, a person should be able to do so without complications. When jurisdiction is not clearly indicated, it creates a problem for the party referring the dispute. Although jurisdiction should be the first tool for directing the party referring a dispute to the correct forum, uncertainty regarding jurisdiction complicates the matter.

216 Le Roux PAK 2009 *Contemporary Labour Law* 52.

217 Le Roux PAK 2009 *Contemporary Labour Law* 52.

218 Le Roux PAK 2009 *Contemporary Labour Law* 55.

219 Le Roux PAK 2009 *Contemporary Labour Law* 55 - 56.

From the most recent cases of *Mogothle* and *Tsika* it can be determined that the court is open for development of the common law contract of employment and the rights contained in the contract are available to an employee. A party to a contract of employment should not be limited to only relying on legislation such as the LRA and the BCEA, but must also be able to rely on common law contractual principles. In both of these cases, the court stated that the majority of cases by the SCA, *Gumbi*, *Boxer Superstores* and *Murray*, is not overturned by the decision in the case of *Chirwa*. This means that the development of the common law contract of employment clearly includes the right not to be unfairly dismissed or, as was determined in *Murray*, not to be constructively dismissed. *Chirwa*, on the other hand, concludes that all matters covered by the LRA should fall within the exclusive jurisdiction of the Labour Court and may not bypass the LRA dispute resolution process and approach the High Court with a contractual claim.

In comparison with the two cases of *Mogothle* and *Tsika*, in the case of *Mohlaka* the court determined that the majority of cases by the SCA was overturned by the decision in *Chirwa*. The court determined that Section 77(3) of the BCEA should not be interpreted in a way to include all matters such as this where the employee's claim was based on common law contractual principles. The court stated that the Labour Court did not have jurisdiction in matters such as this because the claim for unfair dismissal and discrimination was founded in labour law and should, therefore, be based on the appropriate legislation and not on contractual claims. The judges in *Mohlaka* relied on the case of *Chirwa*, where the context of the dispute was different and the legal question was whether administrative law principles should also be applicable to employment relationships of public sector employees. Therefore, if the court had to determine which court should have had jurisdiction, the development of the common law contract of employment would have played a role and the court would probably have chosen the Labour Court. On the other hand, in the cases of *Mogothle* and *Tsika*, both of the courts indicated that the Labour Court and civil courts had jurisdiction to determine such matters.

The cases of *Mogothle* and *Mohlaka* were both decided by the Labour Court, although the outcomes in these two cases differ. In her article, Smit²²⁰ compares these two cases. Her argument is that in the case of *Mohlaka* the Labour Court found that it is not bound by the judgements of the SCA as the judgement of *Chirwa* overruled the trio of case law, while in the case of *Mogothle* the ratio of *Chirwa* were followed.²²¹

Although the fairness of a contract of employment was considered of uttermost importance by the court in the case of *Mogothle*, the court determined that it was bound to the so called ratio of judgements by the SCA.²²² The court established a contractual right to fair dealing and therefore binds all employers to the application of rights, independent of any statutory protection by legislation.²²³ Smith further states that, although all these cases have been heard since *Chirwa*, the question still remains regarding concurrent jurisdiction between the Labour Court and civil courts.²²⁴ The precise meaning of Section 77 is still unclear and writers such as Grogan do not agree with the sentiments of the court in the case of *Mohlaka*. Here Grogan argues that the SCA's judgements have set in motion the development of the common law contract of employment to which the drafters of legislation would not have objected.²²⁵ Grogan's opinion regarding the decision in the case of *Mohlaka* is most probably based on the narrow approach the court had with the judgement. The court stated that it does not have jurisdiction to hear matters concerning contracts of employment in terms of Section 77(3) as this would, in the court's opinion, resuscitate problems between the LRA and the BCEA.²²⁶ Furthermore, Grogan states that there is no clear difference between the jurisprudence in the Labour Court and the

220 Smith N 2010 TSAR 324 . 326.

221 Smith N 2010 TSAR 324, see also le Roux PAK 2009 *Contemporary Labour Law* 52 .
56 for another comparison between these two cases.

222 Smith N 2010 TSAR 324 . 326.

223 Smith N 2010 TSAR 325.

224 Smith N 2010 TSAR 325.

225 Smith N 2010 TSAR 325 - 326.

226 *Mohlaka, A.K v Minister of Finance & Others* 2009 4 BLLR 348 (LC) 357.

civil courts and that both these courts help continue the ~~cross-fertilisation~~ of the different areas of the law.²²⁷

In the current state, there is no crystal clear answer as to which court should be approached in the different possible scenarios set out in the discussion in this chapter. Both the Labour Court and civil courts have been approached with all the questions at hand and different outcomes were received from both courts.

Therefore, uncertainty does still exist when determining which court should be approached when a question arises regarding a contract of employment as both the Labour Court and High Court can be approached with such matters. However, Section 77 of the BCEA could provide a remedy to an individual regarding a dispute concerning a contract of employment.

227 Smith N 2010 TSAR 325 - 326.

4 Amendments to the *Basic Conditions of Employment Act*

During 2010, the *Basic Conditions of Employment Amendment Bill* was published in the Government Gazette²²⁸. Possible amendments were proposed to Section 77 of the BCEA. Section 77(3), which plays the most prominent part in this paper, is to be amended from:

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.

to exclude the wording ~~concurrent jurisdiction~~ and to replace it to read ~~exclusive jurisdiction in respect of all matters in terms of this Act~~. If this amendment is approved and comes into practice, it will end the issue of uncertainty regarding the jurisdiction of the Labour Court regarding matters in terms of the BCEA, such as contracts of employment. This means the end of uncertainty regarding jurisdiction of the Labour Court and clarity and surety regarding the application of Section 77 as a remedy to enforce contracts of employment.

228 GN 1112 in GG 33873 of 17 December 2010.

5 Namibian Labour Legislation and the Application thereof as a Remedy to Enforce Contracts of Employment

Since the independence of Namibia in 1990, referred to by Fenwick as 'democratization', change has come to Namibia. Namibia's labour legislation and legislation on the whole has changed considerably. Namibia adopted a constitution²²⁹ that entrenched some collective and individual labour rights.²³⁰ In comparison to the South African Constitution, which dedicates the whole of Section 23 to the protection of labour rights, the Constitution of the Republic of Namibia (hereafter the Namibian Constitution) protects their labour rights in general throughout. No specific mention is made of labour rights in the Namibian Constitution, Chapter 3, which regulates the Protection of Fundamental Human Rights and Freedoms can be seen as the most eminent part of the Namibian Constitution protecting labour rights.

The changes in labour legislation, and therefore labour law reform, have brought about rights to workers, who were unprotected under earlier labour regimes.²³¹ Some of the major changes that have taken place in the SADC (Southern African Development Community) region, thus including Namibia²³², were the setting of minimum standards in legislation.²³³ These minimum standards, or basic conditions, as they are known in South African legislation, set out the minimum rights regarding an employee's wages, health and safety, working hours and leave.²³⁴ Secondly, a system for labour dispute resolution was created in legislation, wherein it is determined how dispute resolution should take place.²³⁵ Lastly, the tripartite²³⁶ principle is applied and a country such as Namibia applies these principles by means of

229 *The Constitution of the Republic of Namibia*, 1990.

230 Fenwick *Labour Law* 5, The Constitution of the Republic of Namibia includes Chapter 3, which provides for the protection of Fundamental Human Rights and Freedoms, protects Namibian Labour Rights in general.

231 Fenwick *Labour Law* 6.

232 Namibia is a member state to SADC.

233 Fenwick *Labour Law* 6.

234 Fenwick *Labour Law* 6.

235 Fenwick *Labour Law* 6.

236 With a tripartite government, the government or state divides its powers between three different spheres, judicial, legislative and executive.

the Labour Advisory Council (LAC)²³⁷, which mainly fulfils a consultative role.²³⁸

The most recent²³⁹ changes in labour legislation in Namibia were brought about by the promulgation of the *Labour Act* 11 of 2007 (hereafter the *Labour Act* 2007). In the *Labour Act*, 2007, unlike labour legislation in South Africa, all aspects of labour law are consolidated in one single act. More specifically, in Chapter 3 of the *Labour Act*, 2007, the Basic Conditions of Employment and the application thereof are set out.²⁴⁰ The Labour Act applies to all employees in Namibia, with the exclusion of the Defence Force, Police Force, Central Intelligence Service and the Prison Service.²⁴¹

Part F of Chapter 3 of the *Labour Act*, 2007 describes what must happen during termination of employment. In short, termination in the *Labour Act*, 2007, is divided into termination of employment on notice²⁴², payment instead of notice²⁴³, automatic termination of contracts of employment²⁴⁴, unfair dismissal²⁴⁵, dismissal arising from collective termination or redundancy²⁴⁶, severance pay²⁴⁷, transportation on termination of employment²⁴⁸ and payment on termination and certificate of employment²⁴⁹. Part F of the *Labour Act*, 2007 sets out how termination of employment should be approached and correctly executed.

237 Fenwich *Labour Law* 6.

238 Fenwich *Labour Law* 6.

239 The *Labour Act* in Namibia has been amended since the initial promulgation of the *Labour Act*, 1992.

240 Other labour legislation includes the *Apprenticeship Ordinance No. 12* of 1938 and the *Merchant Shipping Act No. 57*, as amended in 1991, see Muller 2007 <http://www.ilo.org>.

241 Muller 2007 <http://www.ilo.org>, public servants are covered by the *Public Service Act* 2 of 1980.

242 Section 30 of the *Labour Act*, 2007, the period of notice is prescribed herein.

243 Section 31 of the *Labour Act*, 2007, in certain situations a notice period can be substituted with payment of remuneration.

244 Section 32 of the *Labour Act*, 2007, prescribes the situations where automatic termination is eminent.

245 Section 33 of the *Labour Act*, 2007, dismissal may not be without a valid or fair reason and following the proper procedures prescribed in section 34 of this act.

246 Section 34 of the *Labour Act*, 2007.

247 Section 35 of the *Labour Act*, 2007.

248 Section 36 of the *Labour Act*, 2007.

249 Section 37 of the *Labour Act*, 2007.

As in South African labour legislation, remedies must be available to Namibian employees should they have trouble with termination of their employment. Where disputes arise²⁵⁰ out of Chapter 3 of the *Labour Act*, 2007, it is indicated in Section 38 that such a party may refer a dispute to the Labour Commissioner²⁵¹ in writing, or refer the matter to private arbitration.²⁵² The Labour Commissioners must attempt to conciliate disputes, give advice where necessary or arbitrate a matter if not resolved through conciliation.²⁵³ The South African dispute resolution system, where the Commission for Conciliation, Mediation and Arbitration also performs the duty of conciliating or arbitrating labour disputes, is similar to that of its Namibian counterpart. If no agreement or solution is reached between the parties in dispute, the matter must be arbitrated.²⁵⁴ Should a party to the dispute not agree to the arbitration award, he or she may refer it to the Labour Court to be reviewed or appeal against the arbitration award in terms of the *Labour Act*, 2007.²⁵⁵

Jurisdiction to enforce the *Labour Act*, 2007 is granted from the Labour Inspectors, right through to the Labour Court and Supreme Court.²⁵⁶ It can be stated that the Labour Court in Namibia, although a division of the High Court²⁵⁷, is a superior court with sufficient standing and powers and is equal to the High Court.²⁵⁸ The jurisdiction of the Labour Court is comprehensively described in Section 117 of the *Labour Act*, 2007. The High Court of Namibia also has jurisdiction in terms of employment matters.²⁵⁹ Section 20(3) of the High Court Act, 1990 states that the Labour Court, in performance of its duties, has all the powers and functions of the High Court of Namibia. This means that two different superior courts can be approached regarding labour

250 Disputes are described in section 38 as non-compliance, contravention, interpretation or the application of chapter 3, Basic Conditions of Employment.

251 A Labour Commissioner is appointed in terms of section 120 . 122 of the *Labour Act*, 2007 and fulfils the function of a conciliator and arbitrator.

252 Section 38 of the *Labour Act*, 2007.

253 Section 121 of the *Labour Act*, 2007 describes the different powers and functions of the Labour Commissioner, while section 91 stipulates Private Arbitrations.

254 In terms of section 86 of the *Labour Act*, 2007.

255 Section 89 of the *Labour Act*, 2007 prescribes the procedures which should be followed with regard to appeals and review application.

256 Musukubili *Namibian Labour Dispute Resolution System* 37-47.

257 Section 115 of the *Labour Act*, 2007.

258 Musukubili *Namibian Labour Dispute Resolution System* 41.

259 In section 20(1)(e) of the High Court Act, 1990, the High Court was given jurisdiction for matters concerning contracts of employment.

disputes and that almost equal jurisdiction between the Labour Court and High Court exists. The following case law will assist in indicating the situation regarding jurisdiction between the Labour Court and the High Court of Namibia, and thus also the Namibian dispute resolution system. This case demonstrates the fact that both the High Court and the Labour Court can be approached with regard to Labour matters and especially matters concerning contracts of employment.

In the case of *Overberg Fishing (Pty) Ltd v Villar Decampo*²⁶⁰, there was an appeal and a cross-appeal. The appeal by the Appellant (Overberg Fishing) was against a decision made by the district Labour Court, Walvis Bay. The court determined that the Respondent in this matter, Decampo, was not unfairly dismissed, as claimed. Decampo concluded a fixed-term contract with the Appellant and the time frame lapsed. The Appellant informed Decampo timeously that the fixed-term contract would not be renewed and therefore complied with the Labour Act.²⁶¹ In the similar case of *Van Ouerkerk v Hangana Sea Food (Pty) Ltd*²⁶² the court determined that there were no merits for grounds on an appeal brought by Van Ouerkerk on a decision made by the Windhoek District Labour Court. When a fixed-term contract by Van Ouerkerk ended after the specified time period had lapsed, the Respondent kept the Appellant on as an employee on a month to month basis. Sufficient notice was given by the Respondent and the court determined that no unfair dismissal existed, but made an order that the Appellant was entitled to leave pay, as prescribed in terms of his contract of employment.²⁶³ From the two cases above it can be concluded that the Labour Court in Namibia definitely approaches issues in terms of contracts of employment with simplicity and the proper application of the Labour Act. The *Labour Act* is applied throughout and basic conditions of employment should

260 *Overberg Fishing (Pty) Ltd v Villar Decampo* 2011 NALC 17 LCA 51/2010 (15 July 2011).

261 *Overberg Fishing (Pty) Ltd v Villar Decampo* 2011 NALC 17 LCA 51/2010 (15 July 2011).

262 *Van Ouerkerk v Hangana Sea Food (Pty) Ltd*²⁶² (LCA 41/2008)[2009]NAHC 103 (8 July 2009).

263 *Van Ouerkerk v Hangana Sea Food (Pty) Ltd*²⁶³ (LCA 41/2008)[2009]NAHC 103 (8 July 2009).

be adhered to consistently and correctly through the employment relationship. Remuneration, such as in the case of Van Ouerkerk, is allowed should the case lean itself thereto and can therefore be seen as a sufficient remedy in a relevant situation.

In the case of *Peace Trust v Beukes*²⁶⁴, an appeal was brought in terms of a judgement by the District Labour Court. The Respondent was awarded damages after the court determined that she was unfairly dismissed. The Labour Court, however, found that the appeal should not succeed and that the Respondent had been fairly dismissed. After hearing verbal evidence regarding the employment relationship between the board of the Trust and the Respondent, the court determined that a contract of employment contains implied terms that employees will not conduct themselves in a way that could break down the employment relationship. Grogan's test for incompatibility was discussed and the court finally determined that the Respondent was responsible for the incompatibility between herself and the Appellant and therefore the dismissal was fair.²⁶⁵

Furthermore, in the case of *Municipal Council for the City of Windhoek v Swarts*²⁶⁶, the Labour Court heard an appeal by the Appellant for determining that the Respondent's accumulated leave days were in accordance with the basic conditions of employment, in terms of the Labour Act, 1992 and were enforceable. Although the Respondent retired with 265 accumulated leave days, the Appellant only agreed to pay 130 thereof and 135 leave days were therefore unpaid.

The Labour Court found that the Rules of the Municipality prescribe a maximum of 130 days of paid accumulated leave. Furthermore the Labour Court found that as long as the Rules of the Municipality were within the prescribed Basic Conditions of Employment²⁶⁷ as set out in the *Labour Act*,

264 *Peace Trust v Beukes* (LCA 41/2002) [2010] NALC 1 (22 February 2010).

265 *Peace Trust v Beukes* (LCA 41/2002) [2010] NALC 1 (22 February 2010).

266 *Municipal Council for the City of Windhoek v Swarts* (LC1/04)[2005] NALC 3 (14 October 2005).

267 See section 39 of the *Labour Act*, 1992.

1992, and were not in conflict, the Rules of the Municipality should be applied. The Labour Court found in favour of the Municipality and therefore determined that the Rules of the Municipality fall within the Basic Conditions of Employment.²⁶⁸

From the above it is clear that the legislation in Namibia is definitely moving towards extending and developing protection for workers and employees in the formal sector. The contracts of employment of employees are protected by legislation such as the *Namibian Constitution* and the *Labour Act, 2007*. The steps that should be taken where a dispute arises regarding contracts of employment, terminations of employment²⁶⁹ and any other Basic Conditions of Employment are clear. Both the Labour Court and High Court, as well as their subsidiaries, have enough power at their disposal to apply and enforce the *Labour Act* and therefore provide sufficient solutions to the disputes referred by the Namibian public, as well as sufficient remedies, such as payment of outstanding monies, reinstatement, specific performance, interdicts²⁷⁰ and the statutory and general remedies.

268 *Municipal Council for the City of Windhoek v Swarts* (LC1/04)[2005] NALC 3 (14 October 2005).

269 See the case of *Reilly v Namibia Ports Authority* [2011] NALC 20 LCA 96/2009 (22 July 2011) for a case where the court applied the rules and regulations for resolving dispute regarding retrenchment.

270 See the case of *Van Wyk v Gowases and Another* (LC 40/2008) [2008] NALC 3 (18 December 2008) for details regarding interdicts.

6 Conclusion

The main intention of this paper was to determine the accessibility of Section 77 of the BCEA as a remedy for the enforcement of contracts of employment and the possible impact of the provision of concurrent jurisdictions in disputes regarding contracts of employment.

From the above court cases and discussions regarding Section 77 of the BCEA, it can be concluded that there is more to labour law in South Africa than to the different provisions in legislation and case law. By this is meant that it is not only legislation, but also the common law contract principles, as well as case law, that provide guidelines for the labour law in South Africa regarding which path should be followed if a dispute arises.

As mentioned throughout this paper, sufficient remedies are available for disputes regarding contracts of employment. It can be concluded from the discussion above that Section 77 of the BCEA has been applied by the Labour Court on more than one occasion and has brought answers to possible jurisdictional issues. Section 77 of the BCEA brought sufficient assistance where it was needed and can be seen as a remedy to enforce contracts of employment. In the current situation it is not always crystal clear which court should be approached, but case law discussed throughout this paper can be used as a possible guideline to determine the correct forum.

The current approach to jurisdiction in terms of contracts of employment and Section 77 of the BCEA as a remedy thereto is indicated in the three cases of *Mohlaka*, *Tsika* and *Mogothle*, which were discussed in chapter 3 of this paper. In the most recent case of the three, that of *Mogothle*, the court determined that the development of the common law contract of employment was controversial because it included a duty of fair dealing, but found in favour thereof, especially to strengthen the SCA ratio²⁷¹ of cases. The court further determined that the case of *Chirwa* did not overturn the decisions by

271 The trio of cases are the cases of *Gumbi*, *Boxer Superstores* and *Murray*, which were discussed in chapter 3.

the basis of case law and that both the Labour Court and civil court have jurisdiction to develop the common law. In my opinion, this approach by the Labour Court is correct, although the case of *Mogothle* still does not provide a clear indication of which court should be approached with regard to employment contracts. Although the court determined that both the Labour Court and the civil courts have jurisdiction, uncertainty still exists. It is here where the amendments to the BCEA come in. The possible amendments to the BCEA would indicate that specifically the Labour Court will have jurisdiction to determine matters where a contract of employment is in question. This will mean that Section 77 of the BCEA would be a remedy to determine contracts of employment.

With regard to remedies available to parties in need thereof, the *Labour Act* of Namibia can be seen as a more simplistic application of Basic Principles of Employment than that of South African Labour Law and therefore makes remedies more easily available to the parties in dispute. The non-complicated way in which the Namibian courts approach disputes regarding contracts of employment should be acknowledged by South African courts and a more straightforward approach should be adopted to apply remedies to disputes.

The problem of forum-shopping in South Africa does exist and the development of the dual system jurisprudence should be ended as soon as possible. The possible amendments to Section 77 of the BCEA, as discussed in Chapter 4, will bring clarity and surety regarding which court should be approached during the breach of a contract of employment and Section 77 of the BCEA would, therefore, definitely be a perfect remedy to enforce contracts of employment should these amendments be accepted into South African labour legislation.

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