

reason, it remained necessary to be satisfied that the High Court enjoyed jurisdiction outside the consent of the parties.

JURISDICTION

[21] All the parties have effectively consented to the jurisdiction of this court. However, the parties cannot clothe the High Court with jurisdiction if it is excluded by statute.

[22] I must therefore consider whether the provisions of section 157(1) of the LRA precludes the High Court from dealing with the matter on the ground that the issues before me can only be determined under the exclusive jurisdiction accorded to the Labour Court. See *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para 113.

[23] Fortunately it is unnecessary in the present case to deal with the tension between section 157(1) on the one hand and the concurrent jurisdiction of the High Court as dealt with in section 157(2) of the LRA and the inherent original jurisdiction of a High Court as entrenched in the Constitution on the other. Accordingly, the case of *Makhanya v University of*



Zululand [2008] 8 BLLR 721 (SCA) which binds me on what portion of the *Chirwa* judgment (which also binds me) constitutes its decision need not be considered in any detail.

- [24] I am satisfied that the way in which the applicant has pleaded his claim (see *Makhanya* at paras [30] and [34]) and the substance of the claim (see *Chirwa* at paras [124] and [125]) falls squarely within the concurrent jurisdiction of the High Court. This is because they both are concerned with a constitutional challenge based on rights of administrative review (see *Chirwa*, para [54]; *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA) at para [16] and *Makhanya* at paras [18] and [26]) and also with the enforcement of common law contractual rights or rights under corporate law in relation to the exercise of delegated powers. (Compare *Kriel v Legal Aid Board* [2009] 9 BLLR 854 (SCA) at para [16] which appears distinguishable because reliance was still placed on the unreasonableness of the dismissal). The question of whether the applicant has embarked on 'forum shopping' and therefore may be precluded as a matter of policy from pursuing his



claim in the High Court does not arise since he has not approached another Court to enforce the claims that arise in this matter. (See *Makhanya at para [61]*)

- [25] Furthermore, the resolution of the issues in this matter are also concerned with the legality of steps taken to initiate disciplinary proceedings against a person whom it is alleged is guilty of maladministration and that Transnet considers itself obliged to pursue the disciplinary proceedings since the investigations allegedly reveal a breach of the Public Finance Management Act, No. 1 of 1999 ("the PFMA"), a concern supported by independent legal advice from two different law firms.
- [26] It is pre-eminently the concern of a High Court exercising original jurisdiction to consider issues of this nature, if the underlying substance of the issues play a role as indicated in *Chirwa*. They involve rights issues, which it is apparent from the stance taken by Transnet, ought not to be the subject matter of conciliation and negotiation by reason of the

obligations they were advised they have to initiate disciplinary proceedings by reason of an alleged transgression of the PFMA.

- [27] It should be sufficient for present purposes to refer to *South African Association of Personal Injury Lawyers v Heath and others 2001 (1) BCLR 77 (CC)* at para [4] where the Court said that:

"... and maladministration are inconsistent with the rule of law and the fundamental values of our the Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

- [28] Although this was said in the context of the Special Investigating Units and Special Tribunals Act, it is clear that the purpose of the PFMA Act is similarly to hold accountable both the Board and officers (such as Executive Management) of State-owned corporations and other government controlled entities. I also refer to sections 195(1) and (2)(b) of the Constitution which requires public administration to be

accountable and to meet high standards of professional ethics. If the application of these constitutional provisions and statutes such as the PFMA are to develop and be applied with reference to public accountability within State-owned corporations then it is pre-eminently the domain of the original jurisdiction exercised by the High Court (with the added advantage of its diverse composition) and ought not to be confined to a specialised court concerned exclusively with labour relations matters.

- [29] Accordingly, I am satisfied that this court enjoys jurisdiction under any of the authorities by which I am bound and which I understand are likely to be considered further in the matter of *Gcaba v Minister of Safety and Security and others* (CCT 64/08) that was argued before the Constitutional Court on 7 May 2009.

STATUS OF TRANSNET

- [30] It is necessary to establish the status of Transnet in order to determine whether its Board and management function

principally within a commercial corporate environment subject to principles application to those areas of law or whether their actions are to be treated as simply the exercise of a state or administrative power.

- [31] Transnet Limited was incorporated as a public company pursuant to the provisions of the Legal Succession to the South African Transport Services Act, Act 9 of 1989 (the Legal Succession Act).
- [32] In terms of this Act, Transnet became the successor to the South African Transport Services and took transfer of all its assets (save those relating to certain rail commuter services). See section 3.
- [33] In terms of the Legal Succession Act, and despite the provisions of section 32 of the Companies Act, 1973 the Registrar of Companies incorporated Transnet Limited as a public company with the State as its only member and shareholder. Moreover, the provisions of section 2(6) of the Legal Succession Act excluded only sections 66, 190 and 344(d)

of the Companies Act from applying and then only while the State remains the sole beneficial member and shareholder.

- [34] Accordingly, Transnet is essentially subject to all the provisions of the Companies Act.
- [35] It is clear that Transnet is intended to operate as a commercial enterprise under the ordinary provisions of the Companies Act and is subject to the common law principles governing corporations including those relating to corporate governance which render its Board and management subject to fiduciary obligations. Its formation as a public company was directed at transforming it from a government agency (see section 3 of the Legal Succession Act) and at allowing it to operate on profitable commercial lines with the potential of attracting investor shareholders (see the wording in section 2(6) and 20 of the Legal Succession Act). This is apparent from the following further considerations.
- [36] The State's interest in Transnet is exercised through the Minister of Public Enterprise. The Minister may direct

Transnet to discontinue any activity that is contrary to the strategic or economic interests of the country (see section 17). In principle this is no different from the actions of a majority shareholder who dictates the course a company is to take. It does not affect the Board's or management duties to have regard to the best interests of the company and to comply with all the common law rules relating to corporate governance.

[37] Transnet was not burdened with an unprofitable operating division. Hence the separation of those rail commuter operations which required subsidisation. These were hived off to a separate entity, namely the SA Rail Commuter Corporation Limited under the responsibility of a different Minister. (See Chapter V of the Legal Succession Act)

[38] The composition of the Transnet Board was not circumscribed by the Legal Succession Act. This was not an oversight since the same Act carefully structured (in section 24) the makeup of the SA Rail Commuter Corporation Board, uniquely termed a Board of Control. Transnet is incorporated with a

Memorandum and Articles of Association under the Companies Act. Hence the Transnet Board and its executive officers are clearly intended to be subject to the provisions of the Companies Act and the common law, such as that relating to corporate governance, that has developed in relation to corporations. (See Coetzee DJP's explanation in the Full Bench decision of *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T))

[39] The fact that the Transnet Board and its officers are subject to the express provisions of sections 50 and 51 of the PFMA in regard to their fiduciary duties and their accountability does not denigrate from their actions remaining subject to corporate laws. The PFMA amplifies these duties and obligations, which are of special application to all State-owned entities, whatever from they take.

[40] Although initially an employee of Transnet was deemed to be an employee of the State, there was a specific sunset clause that terminated the situation three years after the Legal Succession Act became operative (see Section 9(3) read with section 9(2)).



[41] In short, whilst Transnet is a State-owned enterprise its structure and objectives are those of a public listed company and its board and officers execute their functions within the laws relating to corporations with, where applicable, the heightened duties and responsibilities imposed by the PFMA.

WHETHER THE DECISIONS TO INSTITUTE DISCIPLINARY PROCEEDINGS OR TO SUSPEND THE APPLICANT CONSTITUTED ADMINISTRATIVE ACTION SUBJECT TO THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000 ("PAJA")

[42] Transnet is specifically identified as a major public entity under Schedule 2 of the Legal Succession Act. It is also a statutory body, fulfilling a public function and is obliged to act in a manner consistent with the strategic and economic interests of the country. See Section 17 of the Legal Succession Act.

[43] Nonetheless, this alone does not render every action taken by Transnet, whether through its Board or executive management, subject to the provisions of PAJA. (See Chirwa per Ngcobo J at para 139-150 and the minority decision of Langa CJ at para 181-194.)



[44] *Chirwa, Transman and Makhanya* have confirmed that a Transnet employee or a person in a similar position, even though a public servant of an organ of State, is precluded from challenging his dismissal by relying on the rights of review provided for under PAJA. This is because the decision does not constitute "administrative action" for the purposes of triggering the application of that Act but is based on the exercise of a contractual power (*Chirwa* at paras 142, 143 and 148; *Kriel v Legal Aid Board* [2009] 9 BLR 854 (SCA) at paras 13 and 14 and the cases cited at para 15).

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[45] It is therefore evident that the decision to delegate the authority to decide whether or not to discipline Mr Gama is not justiciable under PAJA. In any event, the decision in my view is similar to a decision taken to prosecute which does not necessitate administrative action and is not subject to review (see *Zuma v National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290, para [35]).

[46] I am also satisfied on balance that the decision to suspend Mr Gama similarly does not constitute "administrative action".

