CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/13
[2013] ZACC 43

In the matter between:

MPUMELELO OBED MBATHA Applicant

and

UNIVERSITY OF ZULULAND Respondent

Heard on : 5 September 2013

Decided on : 5 December 2013

JUDGMENT

ZONDO J:

Introduction

[1] The applicant, Mr Mpumelelo Obed Mbatha, has brought an application for leave to appeal to this Court against a decision of the Labour Appeal Court dismissing his appeal against a decision of the Labour Court. The Labour Court dismissed the

applicant's application for an order that the respondent, the University of Zululand[1] (Unizul), pay him his salary. The Labour Appeal Court upheld the decision of the Labour Court and dismissed his appeal with costs.

Background

[2] The applicant was employed by Unizul as a researcher in the Zulu Dictionary Project with effect from 1 September 1984. His letter of appointment reflected that it was compulsory for him to be a member of the Associated Institutions Pension Fund, Group Life Insurance Scheme and Bonitas Medical Fund.

[3] The Pan South African Language Board (PanSALB) is a statutory body established by the Pan South African Language Board Act.[2] In terms of that Act, PanSALB is required to establish national lexicography units as companies limited by guarantee. It caused the registration of Isikhungo Sesichazamazwi SesiZulu[3] (ISS) as a section-21 company[4] to be one of the units it would use to promote isiZulu.

[4] It must have made sense to PanSALB that it should work together with Unizul with regard to the project of an isiZulu dictionary because, from as early as 1984 when the applicant was employed by Unizul, Unizul already had an Zulu Dictionary Project.

[1] The University of Zululand was established by the University of Zululand Act 43 of 1969. However, that Act was repealed and replaced by the Higher Education Amendment Act 23 of 2001.

[2] 59 of 1995.

[3] IsiZulu for Zulu Dictionary Unit.

[4] The reference to a section-21 company is a reference to a company that used to be provided for in section 21 of the now repealed Companies Act 61 of 1973. This provision regulates the incorporation of associations not for gain.

On 25 September 2002 PanSALB concluded a tripartite agreement with Unizul and ISS to regulate the parties' relationship on the project of an isiZulu dictionary. At that time the applicant was still in Unizul's employ.

[5] It is necessary to discuss some features of the tripartite agreement. The preamble reflects that each one of the three parties would have a distinct role to play. According to clause 1 of the tripartite agreement the purpose of ISS was—

> "to develop and promote isiZulu language in all spheres of life, by preserving and recording the language. ISS is established to undertake the recording of the language by compiling a user-friendly, comprehensive monolingual dictionary and other lexicographic products."

[6] Unizul's obligations were set out in clause 2. They included that Unizul had to make office space available for ISS on its Umlazi Satellite Campus in accordance with the reasonable needs of ISS. In order to ensure the efficient operation of ISS, Unizul also undertook to provide "necessary services and facilities, including keys, a power supply, a cleaning service in respect of offices used by ISS and ablution facilities".

[7] Unizul's obligations provided for in clauses 2.4-6 are important in this matter. They read as follows:

> "2.4 Unizul undertakes to retain the existing three staffing positions in the Unit for the period from the date of this agreement until 31 December 2005 by which date ISS expressly hereby *agrees to take over the staffing positions and the staff as their own employees*. However, it is expressly agreed that should ISS

be in a position to take over the staff at an earlier date than 31 December 2005 then they shall do so.

2.5 Unizul undertakes, *in respect of remuneration and benefits of staff to be appointed by the Board of Directors of ISS, to channel their monthly salaries to them from the funds made available by PanSALB*.

2.6 Unizul undertakes to allow staff members appointed by the Board of Directors to join the pension scheme and medical aid scheme which the Unizul members of staff subscribe to, provided—

(a) *they elect to do so; and*

(b) *the regulations of the Fund concerned permit this*."

(Emphasis added.)

[8] PanSALB's obligations were limited. Clause 3 set them out as being that, from monies made available to it by Parliament through the Department of Arts, Culture, Science and Technology (Department), PanSALB would make available funding—

"(a) to ISS to enable it to cover day-to-day running costs of ISS;

(b) to Unizul to cover remuneration and benefits of staff employed by ISS; and

(c) to Unizul, which shall be the amount equal to five percent (5%) of the subsidy payable to ISS by PanSALB as from *1 January 2006 or at such earlier date in terms of Clause 2.4 to cover the administrative costs of Unizul*." (Emphasis added.)

It is important to note that in terms of clause 3 there were funds that PanSALB undertook to pay to ISS and Unizul. Payment to ISS was for its day-to-day running costs. Payment to Unizul fell into two categories, namely, to cover remuneration and benefits of staff working at ISS and 5% of the subsidy payable to ISS by PanSALB from 1 January 2006 or at an earlier date in terms of clause 2.4 to cover the administrative costs of Unizul.

[9] ISS's obligations were set out in clause 4 but they are of no moment for the purposes of this matter. According to Unizul, from the time of the conclusion of the tripartite agreement it seconded the applicant to ISS as its Chief Executive Officer (CEO) but he remained its employee. It also seconded to ISS two other members of its staff who had been working in the Zulu Dictionary Project. This means that, although the applicant was not an employee of ISS but was an employee of Unizul, through secondment to ISS he occupied the position of CEO of ISS and performed the duties attached to that position. Although the applicant denied having been seconded to ISS, a secondment would explain how during that period he could occupy the position of CEO of ISS while he remained an employee of Unizul.

[10] It appears that during the period from the conclusion of the tripartite agreement to early in 2005 the parties to the tripartite agreement all honoured their obligations without any problem. In the case of PanSALB, its obligation entailed providing funds for both the operations of ISS and for the salaries and benefits of ISS personnel. It provided certain funds directly to ISS and other funds through Unizul. However, in June 2005 PanSALB withheld the payment of the funds that it had undertaken to provide to Unizul and ISS in terms of the tripartite agreement. It did so because it had not received ISS's audited financial statements for 2004-2005. Unizul provided funds to ISS from its own funds during the period when PanSALB was not prepared to provide funding.

[11] PanSALB's decision to suspend the performance of its obligation to provide funding to ISS took effect six months before 31 December 2005 when, according to clause 2.4 of the tripartite agreement, ISS was going to take the three staffing positions and the three Unizul staff members over as its employees if it had not taken them over earlier. By the time of the suspension of payments by PanSALB, ISS had not yet taken over the three staffing positions and the three Unizul staff members. Unizul continued to make payments to ISS until June 2008 when it stopped. It says that it made these payments from its own funds in the hope that PanSALB would reimburse it in due course because it regarded ISS as its own project.

[12] There is no suggestion that anything of any significance occurred between June and 31 December 2005 except that PanSALB continued to withhold the payment of funds to Unizul and ISS. There is also no suggestion that any of the role players, particularly Unizul, the ISS Board of Directors (ISS Board) and the applicant positively did anything on 31 December 2005 in connection with the takeover contemplated by clause 2.4.

[13] Nothing of any particular significance also occurred in 2006 but PanSALB continued to withhold payment. On 26 April 2007 a meeting was held between Mr GS Maphisa, the Chairperson of the ISS Board (and Registrar of Unizul) and Mr SSE Sambo, then Acting Deputy CEO of PanSALB, to discuss the operations of ISS. On 2 May 2007 Mr Sambo sent a letter to Mr Maphisa in which he recorded what they had discussed. Mr Maphisa confirmed in a letter dated 17 May 2007 that

the contents of Mr Sambo's letter were a correct reflection of the discussion between the two men.

[14] In his letter Mr Sambo had, inter alia, said that—

(a) PanSALB had "suspended the payment of the said grant from June 2005" because "due to some unforeseen circumstances PanSALB [had not received] the 2004-2005 audited financial statement from ISS";

(b) attempts to resolve the impasse between ISS and PanSALB on the 2004-2005 financial statement had proven futile until the meeting of 26 April 2007;

(c) PanSALB undertook to resume making payments on condition that "the [ISS Board] as well as the Management of [Unizul] are committed to rekindling the working relations between all the parties . . . [t]his commitment will be followed by negotiations to resuscitate the [tripartite agreement] . . . with the necessary changes"; and

(d) PanSALB undertook to pay the grants outstanding since the suspension of the payments in June 2005 on condition that it was furnished with the audited financial statements for the whole period of suspension.

[15] Sometime during 2007 PanSALB paid an amount of R1,6 million directly to ISS. When, subsequently, Unizul learnt of this payment, it demanded that ISS pay a certain portion to it as a refund for monies that it had paid to ISS from the time when PanSALB suspended payment of funds to Unizul and ISS. Mr Maphisa supported

Unizul in its claim whereas the applicant maintained that the matter had to be deliberated upon and resolved by the ISS Board.

[16] On 21 November 2007 Mr Maphisa wrote to Mrs NR Nkosi, the CEO of PanSALB, and requested her "to come and assist [Unizul], and [ISS] to resolve [the] financial issue in respect of the relationship between these parties."

[17] On 8 February 2008 a meeting was held at Unizul involving PanSALB, Unizul and ISS. ISS was represented by its Board and the applicant. Unizul attached to its answering affidavit a document purporting to be minutes of that meeting. These reflect the following under item 3.1.1(a) to (d):

> "3.1 **Revision of the [Tripartite Agreement]**
>
> 3.1.1 The Meeting agreed that the [tripartite agreement] be revised, the following recommendations were made:
>
> (a) that clause 1 (one) on the purpose of ISS to be modified to include all aspects of language;
>
> (b) that clause 2 (two) be changed to reflect the change of office ie Umlazi Campus of Unizul to Mangosuthu University of Technology;
>
> (c) *that clause 2.4 be rephrased to accommodate the current position*;
>
> (d) that clause 5.2 be changed to read 'Any movable assets acquired by ISS with funding provided by PanSALB remains property of PanSALB, and shall be registered as such on the inventories kept by [Unizul]'". (Emphasis added.)

[18] Item 4 of the minutes dealt with the outstanding audited financial statements. Under that item the minutes read as follows in part:

"4. **Outstanding Audited Financial Statements**

4.1. The Meeting noted:

(a) that the audited financial statements of 2004/2005, 2005/2006 and 2006/2007 have not as yet been submitted to PANSALB;

(b) that PANSALB have at some point withheld the provision of funds to the ISS;

(c) that PANSALB has since released the funds to the ISS (R1,6 million) and that the release was retrospective with regard to years previously not paid;

(d) that the 2004-2005 audited statements are ready for submission;

(e) (i) that 31 March 2008 is the cut off date for the three years indicated above;

(ii) that this matter is very serious and should not be looked at in a lenient way as the non submission of audited financial statements is a punishable offence;

(f) further that [Unizul] has not been reimbursed in respect of moneys it has paid to ISS in salaries and any other expenses incurred during the period indicated above;

(g) that the ISS is short of resources and would need some assistance from [Unizul];

(h) that ISS should put their needs in writing and that [Unizul] would deal with it internally."

[19] Item 5 of the minutes reflected the following in part:

"5. **The Way Forward**

5.1 The Meeting agreed to the following:

(a) that PanSALB communicate with the office of the Chairperson of the ISS Board (Registrar) with regard to the amendment to be effected to the [tripartite agreement];

(b) that the Audited Financial Statements be submitted to the offices of PanSALB not later than 31 March 2008;

> (c) that the issue of reimbursing [Unizul] be dealt with by the Chairperson of the ISS;
> (d) that [Unizul] will deal with the issue of making resources available to the ISS once the request has been received".

[20] Subsequent to the meeting Mr Maphisa sent the applicant a letter dated 11 February 2008 asking him to effect payment to Unizul and to furnish PanSALB with the outstanding financial statements. He said that these were decisions that had been taken at the meeting of 8 February 2008. It appears that, after Mr Maphisa's letter of 11 February 2008 to the applicant, the applicant tried to arrange a meeting of the ISS Board, probably to discuss the matter. On 14 February 2008 Mr Maphisa wrote to members of the ISS Board and told them that he had not sanctioned the meeting that the applicant was trying to convene. He then wrote: "If [the applicant] insists on this meeting as well as resist to reimburse [Unizul], I will have no option but to recommend the dissolution of the Board to PanSALB and the freezing of ISS funds pending the resolution of the impasse."

[21] In a letter dated 19 March 2008 to Mr Maphisa the applicant disputed the assertion that the meeting of 8 February 2008 had made a decision that ISS should pay any amount to Unizul. He said that in any event the ISS Board should hold a meeting to discuss the matter and reach finality. The applicant pointed out that he had previously tried to convene a meeting of the ISS Board but Mr Maphisa had written him a strongly worded letter opposing the convening of that meeting. He wrote:

> "As far as I can remember Chairperson, the Board of the ISS has never met and deliberated on this matter and *I am still pleading to you to convene a meeting of the*

> *Board of the ISS as a matter of urgency so that this matter can be dealt with and finalised by the correct forum. You will recall Chairperson, that I have made some attempts to convene a meeting of the Board of the ISS in order for us to finalise this matter. My attempt Chairperson, resulted in receiving a strongly worded letter from you dated 14 February 2008 barring me from convening such a meeting*. I will therefore, Chairperson, await for you to convene such an urgent meeting." (Emphasis added.)

[22] As to the financial statements for the 2004-2005 financial year the applicant said that those statements had previously been furnished to PanSALB but he would furnish them again. Subsequently, Mr Maphisa sent the applicant another letter insisting that ISS pay the money to Unizul and furnish PanSALB with the financial statements. Mr Maphisa, inter alia, wrote:

> "I find it illogical for you to expect [Unizul] to continue paying your salary and be prevented from accessing funds from PanSALB. I find it equally unacceptable for you to refuse to furnish PanSALB with the required financials. It was a legally/fully constituted board that met [Unizul] Management as well as PanSALB on 8 February 2008."

[23] Mr Maphisa pointed out to the applicant that the latter's failure to comply with his request was an act of insolence and urged him to comply. He pointed out that the activities of ISS could not continue as before if the issue of the reimbursement of Unizul was not resolved. Mr Maphisa wanted the payment of the amount to Unizul to be made immediately whereas the applicant wanted Mr Maphisa to convene a meeting of the ISS Board to discuss the matter first which Mr Maphisa was not keen on doing. The applicant did not carry out Mr Maphisa's instruction. Mr Maphisa did not convene a meeting of the ISS Board.

[24] Professor RV Gumbi, the Rector and Vice-Chancellor of Unizul, wrote a letter dated 29 May 2008 to the CEO of PanSALB. In that letter Prof Gumbi referred to the meeting of 8 February 2008 and, among other things, pointed out that:

> "Despite repeated attempts through the Chair of the Board, Mr Maphisa, [Unizul] has not been reimbursed the outstanding amount. It would appear that the Editor-in-Chief, [the applicant] is resisting the settlement of the debt. We appeal to you to instruct the Board to immediately settle the debt. [Unizul] will be terminating payments to members of staff employed in the ISS Project if payment is not received by 12 June 2008."

[25] No payment had been made by ISS to Unizul by 12 June 2008. Unizul then stopped all payments to ISS as Mr Maphisa had indicated. This meant that the applicant and the other two staff members were not paid their salaries and benefits.

Labour Court

[26] The applicant instituted an application in the Labour Court to compel Unizul to pay his remuneration.

[27] He averred that he was employed by Unizul. In support of this he put up his letter of appointment of 1984 as well as the payslips for August 2007 to May 2008 which reflected Unizul as his employer. Unizul opposed the application. It denied that the applicant was its employee in June 2008 but admitted that he had been employed by it from 1984 to 31 December 2005. Unizul contended that the applicant was seconded to ISS in September 2002 pursuant to the tripartite agreement and that

his employment was taken over by ISS after December 2005 pursuant to clause 2.4 of the tripartite agreement.

[28] In his reply the applicant pointed out that he had not been party to the tripartite agreement, although he had signed as a witness on behalf of ISS. He said that clause 2.4 had not been implemented because PanSALB had stopped making the payments it was required to make in terms of the tripartite agreement. He pointed out that for him or any of the other staff members to be taken over by ISS an agreement with them would have been required and he had not agreed to be taken over by ISS as its employee.

[29] Unizul pointed out in its answering affidavit that the applicant and two other Unizul staff members were seconded to ISS at the time of the conclusion of the tripartite agreement and that "[a]fter December 2005 in terms of clause 2.4 of the agreement ISS took over the employment of the three seconded staff members." Unizul pointed out further that "[i]n terms of clause 2.5 of the agreement the remuneration and employment benefits of the applicant and the other two staff members were to be funded by PanSALB who was obliged to pay the Unizul and Unizul would act as a conduit pipe channelling their monthly salaries to them."

[30] The answering affidavit continues:

> "The reason for this arrangement was to make use of [Unizul's] administrative infrastructure which ISS did not have. In order to fulfil its administrative duties and

> to act as a conduit pipe as aforementioned the salary of the applicant was reflected through [Unizul's] books".

In the next paragraph Mr Govindsamy, who deposed to the answering affidavit, states that the payslips attached by the applicant to his affidavit "simply record an administrative obligation undertaken by the [Unizul] in terms of the agreement and did not in any way whatsoever change the employment regime created by the provisions of clause 2.4 of the agreement."

[31] Unizul pointed out in the answering affidavit that the applicant "is fully aware of the contractual state of affairs between [Unizul], ISS and PanSALB and in this regard attention is drawn to the fact that he signed the agreement as a witness on behalf of ISS."

[32] Unizul also stated that "[t]he applicant furthermore with the formation of ISS . . . was appointed as its [CEO], a position he currently still holds." Unizul also states that the applicant "has the title of being ISS's Editor-in-Chief." It said that it had "no supervisory power or control rights over the applicant who runs the affairs of ISS and reports to its [Board]." It said that the applicant also did not form part of its establishment and his "entitlement to receive remuneration is solely dependent upon the continuation of his employment by ISS as its CEO or Editor-in-Chief."

[33] According to Unizul, its involvement in the affairs of ISS arose purely out of its obligations that exist in terms of the tripartite agreement. It said that its involvement

entailed providing limited administrative support and acting as a conduit pipe in paying certain staff salaries and benefits out of the funds that PanSALB was obliged to channel through itself. Unizul said that during the time when it had the Umlazi Campus, it used to provide office space to ISS. After the closure of its Umlazi Campus, ISS was accommodated by the Mangosuthu University of Technology.

[34] Unizul submits that, given the contents of Annexures "R1" to "R11",[5] the applicant "is fully aware of the relationship that exists between [Unizul], ISS and PanSALB and consequently his relationship with ISS." It says that, "[i]n making the allegations that he does relating to being employed by [Unizul] and that it has failed to pay his salary since [June 2008] he is disingenuous in the extreme." Unizul also stated that, by virtue of PanSALB's breach of the tripartite agreement, it was entitled to decline to continue making payment to ISS.

[35] From the affidavits it is clear that, on the applicant's case, as at June 2008 he was both an employee of Unizul and CEO of ISS as he had been before 31 December 2005 and had not been taken over by ISS as its employee. According to Unizul, while it is true that, between September 2002 and 31 December 2005, the applicant was both an employee of Unizul and CEO of ISS, he was taken over by ISS as an employee after 31 December 2005 and his contract of employment with Unizul had thus come to an end. Unizul's case is that, while the applicant continued as CEO of ISS after 31 December 2005, he was no longer an employee of Unizul but an employee of ISS.

[5] See [136] below for an explanation of the annexures.

The Labour Court was then called upon to determine whether the applicant was still an employee of Unizul in June 2008 although he was CEO of ISS or was an employee of ISS.

Judgment of the Labour Court

[36] The Labour Court gave an *ex tempore* judgment[6] to the effect that the applicant ceased to be an employee of Unizul on 31 December 2005 and became an employee of ISS with effect from 1 January 2006. It seems that the factors which that court found to support those two conclusions were that—

(a) the applicant was the CEO of ISS; the court said nothing about the fact that, on Unizul's own case, the applicant was the CEO of ISS during the period of September 2002 to December 2005 when he was an employee of Unizul; and

(b) as CEO of ISS the applicant was accountable to the ISS Board.

[37] The Labour Court dismissed the application with costs. After the dismissal, the applicant made an application to the Labour Court for leave to appeal to the Labour Appeal Court. The Labour Court dismissed the application but the Labour Appeal Court subsequently granted leave to appeal.

[6] A judgment given at the conclusion of the hearing without the judgment being reserved.

Labour Appeal Court

[38] After setting out the facts and dealing with certain features of the tripartite agreement, the Labour Appeal Court said—

(a) "[S]ection 77(3) on which the appellant relies as his launch pad for his claim is clearly premised on an employment relationship subsisting between the parties";

(b) For the applicant to have succeeded in the Labour Court he "had to satisfy the test whether an employer-employee relationship subsisted between him and [Unizul], in other words whether there was a contract of employment between him and [Unizul] at the time when [Unizul] stopped paying his salary. *Put differently, the [applicant] had to show that, at all material times beyond 31 December 2005, he remained under the control and direction of [Unizul] in the performance of his duties and functions*"; and

(c) The applicant "had to put up a case that showed that in performing his functions regarding the Zulu Dictionary Unit, he remained under the control of [Unizul's] management and the latter retained the prerogative and right to discipline him at all times as an employee." (Emphasis added.)

[39] In the end the Labour Appeal Court concluded that the applicant's employment with Unizul had ceased in December 2005 and, thereafter, he had become an employee of ISS. It said that the Zulu Dictionary Unit was "severed and parcelled out

to ISS" and the applicant effectively assumed the responsibility of managing and directing that project as a business unit. The Labour Appeal Court also pointed out that the applicant had conducted himself as the CEO of ISS "and was in such role not subject to the management and control of [Unizul]." Later on the Labour Appeal Court said: "Clearly the [applicant] cannot be the [CEO] of ISS and still regard himself at the same time as an employee of [Unizul]. His claim was in my view correctly dismissed by the Labour Court."

[40] Towards the end of its judgment the Labour Appeal Court said that it was not necessary to deal with the issue whether there was a transfer of a business in terms of section 197[7] of the Labour Relations Act[8] (LRA) as this was not an issue before it but it did so, nevertheless, as this had been touched upon in argument before it. It then went on to say:

> "This was therefore a classic case of the transfer of a business as a going concern as contemplated by section 197 of the [LRA]. The transaction encompassed in the tripartite agreement has all the hallmarks of a transfer of a business as enunciated in *NEHAWU and Others v University of Cape Town* ie that the transaction must constitute a 'transfer', that a 'business' was 'transferred'. . . as a 'going concern'. In this matter [Unizul] transferred the Zulu Dictionary Project to ISS with the [applicant] and two other employees and that the business unit transferred is clearly a going concern." (Footnotes omitted.)

[7] The gist of section 197 of the Labour Relations Act 66 of 1995 is that it provides that, when a business or undertaking or service is transferred as a going concern, the purchaser becomes the new employer of the employees in the business or undertaking or service.

[8] 66 of 1995.

[41] The Labour Appeal Court said that it had no hesitation in finding that "the picture one sees in the business of ISS consists of the same components of the Zulu Dictionary Project as it was under [Unizul]." It said that the facts showed that the business after the transfer was substantially the same but in different hands. It, therefore, dismissed the appeal with costs.

In this Court

Jurisdiction

[42] The first question is whether or not this Court has jurisdiction to entertain this matter. Until 23 August 2013 this Court's jurisdiction was limited to constitutional matters or issues connected with constitutional matters. With effect from that date this Court acquired general jurisdiction. This matter was argued before this Court after that date. Counsel for both parties were content to have the matter dealt with under the old jurisdiction. Accordingly, I propose to determine whether this Court has jurisdiction on the basis of the position as it was before 23 August 2013. Under that jurisdiction, section 167(3)(b) of the Constitution conferred jurisdiction on this Court to "decide only constitutional matters and issues connected with decisions on constitutional matters." In my view, for reasons that appear below, this matter does raise constitutional issues.

[43] Section 23(1) of the Constitution reads: "Everyone has the right to fair labour practices." Certain provisions of the Basic Conditions of Employment Act[9] (BCEA)

[9] 75 of 1977.

are relevant to the applicant's case even though he might not have referred to them in his affidavits. They are the definitions of the terms "basic conditions of employment" and "employee" and sections 2, 4, 32(1)(b) and 32(3)(a). Section 2 provides that the purpose of the BCEA is—

> "to advance economic development and social justice by fulfilling the primary objects of this Act which are—
>
> (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution—
>
> (i) *by establishing and enforcing basic conditions of employment*; and
>
> (ii) by regulating the variation of basic conditions of employment;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation." (Emphasis added.)

[44] Section 1 defines a "basic condition of employment" as meaning "a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment". Section 1 defines an "employee" as—

> "(a) any person, excluding an independent contractor, who works for another person or for the State and receives, or is entitled to receive, any remuneration; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have a corresponding meaning".

Section 4 provides:

> "A basic condition of employment constitutes a term of any contract of employment except to the extent that—
>
> (a) any other law provides a term that is more favourable to the employee;

(b) the basic condition of employment has been replaced, varied or excluded in accordance with the provisions of this Act; or

(c) a term of the contract of employment is more favourable to the employee than the basic condition of employment."

Section 32(1)(b) reads: "An employer must pay to an employee any remuneration that is paid in money daily, weekly, fortnightly or monthly". Section 32(3)(a) reads: "An employer must pay remuneration not later than seven days after the completion of the period for which the remuneration is payable". The provisions of section 32(1)(b) and (3)(a) are basic conditions of employment within the definition of the term "basic condition of employment" in section 1 of the BCEA.

[45] The applicant's averment that he was an employee of Unizul was essential for two reasons. The one is that the jurisdiction of the Labour Court under section 77 of the BCEA is limited to claims between an employee and an employer. The other is that he could not succeed in his claim for the payment of his remuneration by Unizul if he was not its employee.

[46] Section 4 of the BCEA is of critical importance in the present case. It makes every provision of the BCEA that is a basic condition of employment as defined in section 1 a term of any contract of employment to which the BCEA applies except in any one of the three cases specified therein which do not apply to the present case.

[47] Section 32(1), inter alia, places an obligation on an employer to pay an employee his or her remuneration daily, weekly, fortnightly or monthly, as the case

may be. In the present case the applicant was paid monthly. Section 32(3)(a) places an obligation upon an employer to pay an employee his or her remuneration within seven days after the completion of the period for which the remuneration is payable. In the present case it is common cause that Unizul did not pay the applicant his remuneration within the period prescribed by section 32(3)(a) with regard to June 2008 and every month thereafter. This means that, if Unizul was the applicant's employer as at June 2008, it acted in breach of its obligation in section 32. This would mean that Unizul acted in breach of legislation enacted to give effect to section 23 of the Constitution.

[48] In *NEHAWU v UCT*[10] this Court had this to say about the interpretation and application of legislation enacted to give effect to and regulate the fundamental right conferred by section 23:

> "The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by [section 23] of the Constitution'. In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. *Therefore the proper interpretation and application of the LRA will raise a constitutional issue*. This is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. *In many cases, constitutional rights can be honoured effectively only if legislation is enacted*. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. *Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional*

[10] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU v UCT*).

> *limits, courts must give full effect to the legislative purpose*. *Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter*. In this way, the courts and the Legislature act in partnership to give life to constitutional rights."[11] (Emphasis added.)

[49] As can be seen from the purpose of the BCEA, it is legislation that was enacted to give effect to the Constitution, in particular to the right to fair labour practices conferred by section 23 of the Constitution. The BCEA governs the most basic terms and conditions that every employee is entitled to enjoy.

[50] Section 32(1) and (3) are the only provisions in legislation enacted to give effect to the right to fair labour practices which an employee whose right to fair labour practices has been infringed by way of a non-payment of his or her remuneration may use to enforce the right to fair labour practices. The LRA has no such provision. In his affidavit filed in support of his application for leave to appeal to this Court the applicant, inter alia, pointed out that his application concerns an infringement of his right as an employee to human dignity in terms of section 10 of the Constitution[12] and his right to fair labour practices in terms of section 23 of the Constitution.

[51] One of the most obvious unfair labour practices would be the refusal of an employer to pay an employee his or her remuneration after the employee has performed his or her work or when payment is due. Furthermore, in order to enjoy the

[11] Id at para 14.

[12] Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

benefits of the right to fair labour practices in section 23, one must be an employee or an employer. A determination that a person is not an employee excludes such a person from the category of those who have the right to fair labour practices conferred by section 23.

[52] The applicant's claim for his remuneration has a statutory basis because section 4 of the BCEA renders the provisions of section 32(1) and (3) a term of his contract of employment. Accordingly, in the light of sections 4 and 32(1) and (3) the basis of the applicant's claim for remuneration is not only contractual but also statutory. Since the statute is one that was enacted to give effect to section 23, its application is a constitutional issue.[13] On the approach adopted by my Colleague Jafta J in his concurrence, in seeking to determine whether this Court has jurisdiction the averment made by the applicant that he was employed by Unizul must be assumed to be correct.[14]

[53] One can also view the constitutional issue within the context of the jurisdiction of the Labour Court. The denial by Unizul that the applicant was its employee raised the question whether the Labour Court had jurisdiction to entertain the applicant's matter because the absence of an employment relationship between the applicant and Unizul would have meant that the Labour Court had no jurisdiction to entertain his claim.

[13] *NEHAWU v UCT* above n 10.

[14] See [157] below.

[54] In *Senwes Ltd v Competition Commission of South Africa*[15] the Supreme Court of Appeal found that the Competition Tribunal (Tribunal) had exceeded its powers and thus contravened the principle of legality.[16] In considering whether the Competition Commission should be granted leave to appeal to this Court against the judgment and order of the Supreme Court of Appeal, this Court said: [17]

> "There can be no doubt that this matter raises a constitutional issue. As is apparent from the above, the Supreme Court of Appeal's order is based on the finding that the Tribunal, in adjudicating the margin squeeze abuse, had exceeded its statutory powers and thereby violated the principle of legality which forms part of the rule of law. The question whether the Tribunal had exceeded its statutory power in entertaining the margin squeeze abuse concerns one of the most important principles in the control of public power in our constitutional order, the principle of legality."[18] (Footnote omitted.)

[55] *Senwes* was followed in *Yara*[19] and *Loungefoam*.[20] Although these cases relate to an administrative body and not to a court, I am of the view that the obligation on administrative bodies to perform only those functions or exercise those powers conferred upon them by law applies with equal, if not more, force to courts. Whether or not, in adjudicating the applicant's claim, the Labour Court would have exceeded its jurisdiction goes to the principle of legality. If the applicant was an employee of

[15] *Senwes Ltd v Competition Commission of South Africa* [2011] ZASCA 99.

[16] Id at para 59.

[17] *Competition Commission of SA v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (*Senwes*).

[18] Id at paras 16-7.

[19] *Competition Commission v Yara South Africa (Pty) Ltd and Others* [2012] ZACC 14; 2012 (9) BCLR 923 (CC) (*Yara*) at paras 13 and 47. See also *Pharmaceutical Manufacturers Assocation of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 35.

[20] *Competition Commission v Loungefoam (Pty) Ltd and Others* [2012] ZACC 15; 2012 (9) BCLR 907 (CC) (*Loungefoam*).

Unizul, the Labour Court would not have exceeded its jurisdiction in entertaining the applicant's claim. If he was not, the Labour Court would have exceeded its jurisdiction if it entertained his claim. Accordingly, the constitutional issue arising out of the need to determine whether the applicant was an employee of Unizul in June 2008 can also be viewed from the perspective of jurisdiction and, therefore, legality.

[56] Furthermore, a finding that a person is not another's employee is a finding that excludes him or her from the category of persons who may enjoy the right to fair labour practices conferred by section 23 of the Constitution. A decision that includes or excludes a person from the category of persons who enjoy a particular right entrenched in the Bill of Rights is a constitutional matter.

[57] When section 23(1) of the Constitution says that "[e]veryone has the right to fair labour practices", it refers to an employee and an employer. A person who is neither an employer nor an employee has no right to fair labour practices as envisaged in section 23(1). In *NEHAWU v UCT* this Court said that "the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both."[21] An issue about whether a person is an employee is an issue about whether or not he or she falls within the ambit of the word "everyone" in section 23(1). Of course, this does mean that such a person may rely directly on section 23. He would have to rely, in a case such as the present, on the definition of "employee" in section 1 of the BCEA. A

[21] *NEHAWU v UCT* above n 10 at para 40.

determination that he or she is an employee confers upon that person a legal status that enables him or her right to claim the right to fair labour practices in section 23(1). A determination that he or she is not an employee denies him or her that status and excludes him or her from the category of persons who have the right to fair labour practices.

[58] An approach to the effect that such an issue is neither a constitutional matter nor an issue connected with a decision on a constitutional matter would mean that courts other than this Court have the final say on which categories of people enjoy certain rights entrenched in the Bill of Rights and that this Court has no say on such an important issue despite the provisions of section 167(3)(b) of the Constitution. I am unable to agree with such an approach. This Court had in mind legislation such as the LRA and the BCEA when it said in the *First Certification Case*:[22]

> "The effect of [section 23 of the Constitution] will be that the right of employers to use economic sanctions against workers will be regulated by legislation within a constitutional framework. The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. *That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in [section 23] are honoured*."[23] (Footnote omitted and emphasis added.)

In *NEHAWU v UCT* this Court took this theme further and said:

[22] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Case*).

[23] Id at para 67.

> "Although these remarks were made in the context of collective bargaining, they apply no less to section 23(1). *This Court also has an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied.*"[24] (Emphasis added.)

[59] I have read the judgment by my Colleague, Cameron J (majority judgment). The majority judgment contends that the question whether the applicant was employed by Unizul in June 2008 is purely factual and, therefore, it does not raise any constitutional issue which means that this Court has no jurisdiction to entertain the matter. In my view the question whether a person is an employee of another is not a purely factual issue. It is an issue that is made up of facts and opinion. It is a value judgment. In determining that question the Court does not look at a single issue but looks at many factors and makes a value judgment on whether the person is or is not an employee. However, even if that question was a factual issue, in the present case it is an issue "connected with a decision on a constitutional matter" within the contemplation of section 167(3)(b) of the Constitution.

[60] The current thinking of this Court on when it can be said that there is a constitutional issue in a matter is reflected in *Grootboom*[25] which was handed down on 21 October 2013. The issue in that case related to section 17(5)(a)(i) of the Public Service Act[26] (PSA). Section 17(5)(a)(i) provided as follows:

[24] *NEHAWU v UCT* above n 10 at para 35.

[25] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37.

[26] 103 of 1994.

> "An officer . . . who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty."[27]

[61] The applicant, Mr Grootboom, had been employed by the National Prosecuting Authority (NPA) as a public prosecutor. Mr Grootboom was suspended from duty. During his suspension he got a scholarship to further his studies in the United Kingdom. He sought permission from the NPA to go to the UK and further his studies and asked that his leave be with full pay. The NPA was prepared to grant him leave but not with pay. He left for the UK without the issue of pay being finalised. While he was in the UK his suspension continued. The NPA invoked section 17(5)(a)(i) against Mr Grootboom while he was on suspension. It said that he was deemed to have been discharged from the public service in terms of section 17(5)(a)(i) on the basis that he had absented himself from his official duties without permission for over a period of one calendar month.[28]

[62] Before this Court the sole question was whether or not Mr Grootboom had absented himself from his official duties for more than a calendar month without permission. If he had, then in terms of section 17(5)(a)(i) he was deemed to have been discharged from the public service and his appeal would have had to be dismissed. If

[27] Section 17(5) of the Act has since been substituted by section 25 of the Public Service Amendment Act 30 of 2007, and is now subsection 17(3)(a) and (b) of the Public Service Act.

[28] *Grootboom* above n 25 at paras 4-11.

he had not, he was not deemed to have been discharged from the public service and his appeal would have had to be upheld.

[63] In his judgment, my Colleague, Madlanga J, suggests that in *Grootboom* the appeal did not depend purely upon a factual issue. With respect, the suggestion is contradicted by a finding that this Court made that was dispositive of the appeal. The Court said:

> "It is so that the applicant was absent from his employment. He was absent because he was suspended. This means that he was absent with the permission of his employer. Therefore, one of the essential requirements of section 17(5)(a)(i) has not been met."[29]

This finding is purely factual. It meant that Mr Grootboom's appeal had to be upheld. Once this factual finding was made, the consequence was that section 17(5)(a)(i) did not apply to the case.

[64] To the extent that the majority judgment and Madlanga J's judgment say that the question in the present case is purely factual and should, therefore, not be entertained by this Court, how much more factual can any issue be than the question in *Grootboom*?

[65] Mr Grootboom did not assert any constitutional right in his affidavit in the Labour Court. He asserted some constitutional rights in his affidavit filed in support

[29] Id at para 42.

of his application for leave to appeal to this Court. However, only one of those constitutional rights was relied upon by this Court to support its conclusion that there was a constitutional issue in that case. That was the right to fair labour practices conferred by section 23 of the Constitution.

[66] In *Grootboom* the question whether or not the matter raised a constitutional issue, thus giving this Court jurisdiction, was dealt with very briefly. This Court said:

> "This matter revolves around the correct interpretation and application of section 17(5)(a)(i) of the Act. Section 39(2) of the Constitution requires legislation to be interpreted to promote the spirit, purport and objects of the Bill of Rights. This Court has held that a constitutional issue is raised where the interpretation of legislation may impact on a fundamental right of a litigant under the Bill of Rights. Section 17(5)(a)(i) effectively countenances the dismissal of a state employee without a hearing. That implicates the right to fair labour practices enshrined in section 23 of the Constitution. The constitutionality of the section is not attacked; hence it must be interpreted in a manner best compatible with the Constitution. A constitutional issue is thus at stake here."[30] (Footnotes omitted.)

[67] Whether or not Mr Grootboom had been given a hearing before section 17(5) was invoked or before he could be deemed to have been discharged from the public service was not one of the issues in the matter. In his affidavit Mr Grootboom also did not refer to section 39(2) of the Constitution upon which this Court relied in its judgment to conclude that there was a constitutional issue in that matter.

[30] Id at para 37.

[68] In the present case I accept that in his oral argument counsel for the applicant confined his argument to the contention that the constitutional issue raised by this matter is a violation of the applicant's right to human dignity. In support of this, counsel submitted that the transfer of the applicant's employment from Unizul to ISS upon which Unizul relied would have occurred without the applicant's consent which meant that he would have been transferred like a chattel. However, that was not the only constitutional issue raised in the applicant's affidavit filed in support of his application for leave to appeal to this Court. He had also raised the issue of his right to fair labour practices entrenched in section 23. Counsel for the applicant did not abandon the other constitutional issues raised in the applicant's affidavit in this Court. Whether there is a constitutional issue in a matter is a question that goes to the jurisdiction of this Court. The jurisdiction of a court is determined objectively on the material before the court. In the present case that is done on common-cause facts. There can be no prejudice to any party.

[69] The view of the majority judgment and Madlanga J's judgment that there is no constitutional issue and that, therefore, this Court has no jurisdiction, is based in part on a failure to give effect to *Grootboom*. In my view, if one agrees that there was a constitutional issue in *Grootboom*, one would have difficulty in justifying the view that there is no constitutional issue in the present matter.

Leave to appeal

[70] This Court grants leave to appeal if it is in the interests of justice to do so. It will have been seen from the above that the determination of whether the applicant was an employee of Unizul must be made within the context of the feature of the secondment of the applicant by Unizul, at some stage, to ISS. This is so because, on Unizul's own case, from September 2002 to 31 December 2005 the applicant was an employee of Unizul but had been seconded to ISS as its CEO and his employment by Unizul came to an end when he was taken over by ISS as its employee after December 2005. The applicant contends that he never at any stage ceased to be an employee of Unizul and never became an employee of ISS even though he was the CEO of ISS. He further argues that he was never taken over by ISS as its employee in terms of clause 2.4 of the tripartite agreement but he was allowed by Unizul to work at ISS as its CEO while remaining its employee.

[71] Bearing in mind what the secondment of an employee entails, if the applicant was not taken over by ISS in terms of clause 2.4, his employment contract with Unizul did not come to an end. If, therefore, beyond 31 December 2005 he was still an employee of Unizul and he was still working as CEO of ISS with Unizul's blessing, then he was still on secondment to ISS as its CEO while remaining an employee of Unizul as had been the case, even on Unizul's case, before 31 December 2005.

[72] The Labour Appeal Court based its conclusion that the applicant was not an employee of Unizul on the finding that the applicant was not subject to the control,

supervision or direction of Unizul but to that of the ISS Board. The Labour Appeal Court stated that the applicant could not be the CEO of ISS and still consider himself to be an employee of Unizul. In this regard the Labour Appeal Court overlooked the fact that, even on Unizul's own case, from September 2002 to 31 December 2005 the applicant was both an employee of Unizul and CEO of ISS. The thrust of the applicant's case in all courts has been that the position that obtained prior to 31 December 2005, namely, when he was both an employee of Unizul and CEO of ISS, never ceased and it was still the position in June 2008 when Unizul stopped paying his remuneration. It is, therefore, critical to understand the role and place of the features of control and supervision in the determination of an employment relationship where an employee has been seconded by his or her employer to another entity. A failure to appreciate the role and place of these features in the determination of the identity of the employer may lead to an incorrect determination of whether a person is or is not an employee of a particular entity.

[73] The employment of many public servants is governed by statutes which provide for their secondment from their departments to other departments or other institutions. These statutes include the PSA, the South African Police Service Act[31] (SAPS Act) and the Intelligence Services Act[32] (ISA). The approach of the Labour Appeal Court, which in effect focuses on which entity exercises control and supervision over the person, may have far-reaching implications where an employee performs duties within the entity to which he or she has been seconded.

[31] 68 of 1995.

[32] 65 of 2002.

[74] On the approach of the Labour Appeal Court an employee who has been seconded by his or her employer to another entity may be declared to be an employee of the other entity and not of his or her true employer just because he or she may be subject to the control and supervision of that entity for the duration of the secondment. The approach adopted by the Labour Appeal Court renders the factors of the control over, direction and supervision of, a seconded employee determinative of who the employer of the seconded employee is. That Court decided in the present case that the applicant was subject to the control or direction of, and, supervision by, ISS and that, because of that, ISS was the applicant's employer.

[75] The Court lost sight of the fact that, if the applicant was an employee of Unizul but was allowed by Unizul and ISS to work at ISS as the latter's CEO while remaining an employee of Unizul, as was the position, even on Unizul's case between September 2002 and 31 December 2005, he would still have been an employee of Unizul on secondment to ISS despite the fact that he was subject to the control of, and, supervision by, ISS. The Court does not appear to have appreciated this.

[76] The question which the Court was called upon to decide, in determining who the applicant's employer was in June 2008, was whether the applicant was taken over by ISS as its employee from Unizul by 31 December 2005. If he was taken over, he then became an employee of ISS. If he was not taken over, he remained an employee of Unizul on secondment to ISS as its CEO. In the latter case the fact that he may

have been subject to the control and supervision of ISS would be no indication or proof that he was not an employee of Unizul but that of ISS. The Labour Appeal Court did not focus on what the takeover contemplated in clause 2.4 of the tripartite agreement would have entailed. It seemed to have regarded that as of no importance as long as it was established who exercised control over, and, supervision of, the applicant because, on its approach, that would determine who the applicant's employer was. In my respectful view the majority judgment falls into the same error as well.

[77] This Court has never had the opportunity to pronounce on the role and place of control and supervision in the determination of the identity of the employer in a case involving an employee who has been seconded. In the light of the fact that secondment is an important feature of public service employment which affects thousands of public servants, it is in the interests of justice that this Court provide the required clarity.

[78] In *Grootboom* the question whether it was in the interests of justice to grant leave to appeal was dealt with very briefly. It was said:

> "Section 17(5) has the potential to affect people employed in the public service. Its reach is extensive. It has the adverse effect of terminating employment for misconduct without notice or hearing, and it is therefore important for this Court to determine the proper scope of its application. The appeal has prospects of success. It would thus be in the interests of justice to grant leave to appeal."[33]

[33] *Grootboom* above n 25 at para 38.

[79] Against the background of what weighed with this Court in granting leave to appeal in *Grootboom* it can be said in the present case that the question of what the role and place of the control over, and, supervision of, a seconded employee when it is sought to determine who his or her employer is has the potential to affect many civil servants because many of them fall under legislation that makes provision for their secondment to other government departments or institutions established by law.

[80] If the position is that the applicant ceased to be an employee of Unizul on 31 December 2005 and became an employee of ISS, he lost employment of more than two decades with an established institution and became an employee of a section-21 company with no money and whose future depended on whether there would be successful co-operation among the three parties to the tripartite agreement. The matter is very important to the applicant. For the reasons arising out of the presence of the feature of secondment as discussed above, it is also very important to many employees whose employment permits secondment. With regard to the prospects of success, for the reasons which appear later in this judgment, I am of the view that the applicant has reasonable prospects of success. It is in the interests of justice to grant leave to appeal.

The appeal

[81] As indicated earlier, the Labour Appeal Court found that there was a transfer of business as a going concern in terms of section 197 of the LRA. The finding should

be set aside because, firstly, it was not part of Unizul's case in the papers and, secondly, no such transfer of business as a going concern occurred. Although I say that it was not part of Unizul's case in the papers that there had been a section-197 transfer of business as a going concern in this matter, in the Labour Appeal Court Unizul did advance the contention that there was a transfer of business as a going concern.

[82] If there were a transfer of business as a going concern, it must have occurred upon the implementation of the tripartite agreement which, in the view of the Labour Appeal Court, provided for a transfer of business as a going concern in terms of section 197. There was no transfer of assets from Unizul to ISS. There was no transfer of the workforce from Unizul to ISS at the time of the implementation of the tripartite agreement in 2002. The agreement was a partnership agreement in terms of which, instead of Unizul running the Zulu Dictionary Project by itself, it now had partners in the form of ISS and PanSALB to co-operate with in the running of the project. ISS could not run anything on its own because it had no funds. PanSALB was to provide funding from monies allocated to it by the Department from funds allocated by Parliament. Unizul had the obligation to provide ISS with accommodation.

[83] The Labour Appeal Court's finding that there was a transfer of business as a going concern in terms of section 197 in this case necessarily means that, when the tripartite agreement was implemented in 2002, the applicant's contract of employment

was automatically transferred from Unizul to ISS. That would be in conflict with the other finding of the Labour Appeal Court that the applicant became an employee of ISS on 1 January 2006. If the Labour Appeal Court's finding concerning section 197 is not set aside and the decision of the Labour Appeal Court remains intact after the judgment of this Court and the applicant were to approach Unizul to claim any monies that may have accrued to him before but were not paid out to him, Unizul may well tell him that it is not the right party for him to approach in that regard because there was a section-197 transfer of business and he should look to ISS for the payment of such monies. Of course, ISS will not be able to pay him as it has no funds. The finding that section 197 applied to the tripartite agreement and that there was a transfer of business as a going concern in this matter falls to be set aside.

[84] In considering this appeal, it is critical to remember what each party's case is. The parties are agreed that between September 1984 and 31 December 2005 the applicant was an employee of Unizul. They are also agreed that between September 2002 and 31 December 2005 he was CEO of ISS while he remained an employee of Unizul. They are also agreed that in June 2008 he was still the CEO of ISS but they are in dispute about who his employer was at that time.

[85] Unizul contends that in June 2008 the applicant was no longer its employee but was an employee of ISS because he had been taken over by ISS as its employee after December 2005 in terms of clause 2.4 of the tripartite agreement. The applicant contends that his contract of employment with Unizul did not come to an end on

31 December 2005 because he was not taken over by ISS as its employee in terms of clause 2.4 and the position that had obtained before 31 December 2005 with regard to his relationship with both Unizul and ISS, respectively, continued to obtain beyond 31 December 2005 and was still the position in June 2008. This means that, on the applicant's case, the applicant was still an employee of Unizul in June 2008 but was on secondment to ISS as the latter's CEO.

[86] The concept of the secondment of an employee from one entity to another is an important feature of this matter. It is therefore appropriate to understand what secondment may entail. The Cambridge International Dictionary of English assigns the following meaning to the verb "to second":

> "[T]o send an employee to work somewhere else temporarily, either to increase the number of workers or to replace other workers, or to exchange experience or skills: Eg 'During the dispute, many police officers were seconded from traffic duty to the prison service.'"

With regard to the noun "secondment", the same dictionary gives the following example: "His involvement with the project began when he was on (a) secondment from NASA to the European Space Agency."

[87] Section 1 of the PSA contains, among others, the definition of the term "employment practice". The definition says that the term "employment practice" includes, among others, "transfer and secondment". Although there is no definition of the term "secondment" in the PSA, sections 8A and 15 of that Act give an indication

of what secondment under that Act may entail. Section 8A bears the heading "Mechanisms for obtaining services of persons". It reads:

> "Services of persons may be obtained in terms of this Act by means of—
>
> (a) appointments in terms of section 9, including appointments of heads of department in terms of section 12;
>
> (b) appointments in terms of section 12A on grounds of policy considerations; or
>
> (c) *deployments in the form of*—
>
> (i) *transfers in terms of section 14*, including transfers of heads of department in terms of section 12(3);
>
> (ii) *secondments in terms of section 15*; and
>
> (iii) *assignments in terms of section 32*." (Emphasis added.)

From section 8A(c) it is clear that under the PSA the secondment of an employee is a form of deployment.

[88] Section 15 of the PSA bears the heading "Transfer and secondment of officials." It reads as follows:

> "(1) A person holding a pensionable appointment in a department under any law other than this Act or in any institution or body established by or under any law and which obtains its funds directly in whole or in part from revenue, may be transferred to, and appointed in, a post in the A or B division.
>
> (2) *A person in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a particular service or for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the person concerned and the relevant executing authority and approved by the Treasury*.

(3) (a) *An officer or employee may with his or her consent and on such conditions, in addition to those prescribed by or under any law, as may be determined by the relevant executing authority after consultation with the Treasury, be placed at the disposal of another government, or of any council, institution or body established by or under any law, or of any other body or person, for a particular service or for a stated period*.

(b) Such an officer or employee remains subject to the laws applicable to officers and employees in the public service while so placed at such disposal.

(4) (a) *A person (in this paragraph referred to as the official) in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the official and the relevant executing authority and approved by the Treasury*, and in such a case, on such conditions, in addition to those prescribed by or under any law, as may be determined by the said authority after consultation with the Treasury, an officer or employee may with his or her consent and in terms of such an agreement be placed at the disposal of the employer of the official for the same period on an exchange basis.

(b) Such an officer or employee remains subject to the laws applicable to officers and employees in the public service while so placed at such disposal." (Emphasis added.)

[89] Section 15(1) of the PSA deals with the transfer of a person holding a pensionable appointment in a department to a post in the A or B division to which he or she then gets appointed. Section 15(2) deals with the case where an employee of one department or government or institution gets seconded and also employed by another government or department or institution by agreement with the

first-mentioned government or department or institution but for a specified period. In such a case the employee will hold two concurrent contracts of employment with the consent of all concerned.

[90] Another form of secondment is to be found in section 15(3) where provision is made for a person employed by one department or executing authority to "be placed at the disposal" of another government or council or institution or body "for a particular service or for a stated period." I think that this is the usual form of secondment. The secondment envisaged in section 15(3) seems to be the same as the one with which we are dealing in the present case. Section 15(2) is an example of a case where A is employed by B but gets seconded to C who employs him or her for a certain period while he or she (that is, A) remains an employee of B as well. Section 15(3) is an example of a case where A is employed by B but gets seconded to C for a certain period without being employed by C and he or she performs duties for C while remaining an employee of B.

[91] The Public Service Regulations, 2001,[34] which were promulgated in terms of section 41 of the PSA, provide as follows in regulation B.4[35] about secondments:

> "**Secondments**
>
> B.4.1 An executing authority may, with the consent of the employee concerned, second the employee to another department in the public service for a particular service or for a period of time.

[34] Published in *Government Gazette* 21951 of 5 January 2001.

[35] Id Part VII.

B.4.2 The recipient department shall bear the inclusive costs of secondment, unless both departments agree otherwise.

B.4.3 If an employee is seconded in terms of section 15(3) or (4) of the [PSA], the recipient government, council, institution or body or person shall bear the inclusive costs of the secondment, unless the relevant department, after consultation with the Treasury, and the recipient entity agree otherwise.

B.4.4 If an employee is seconded in terms of section 15(3) or (4) of the [PSA], the relevant executing authority may, subject to the written consent of the employee, bind her or him to continued employment in the relevant department or another department in the public service immediately after the secondment, for a period not exceeding the period of the secondment."

[92] To the extent that as a matter of fact and in terms of the tripartite agreement the costs of the salary and benefits of the applicant may have been borne by ISS through the funds supplied by PanSALB and were not borne by Unizul, that is in line with what would happen in the public service in the case of a secondment as provided for in regulation B.4. The department to which an employee is seconded normally bears the costs connected with the rendering of service by that employee to that department during the secondment.

[93] Section 19(2) of the ISA authorises the Minister of Intelligence, "with the consent of a member and upon such conditions as the Minister may determine", to "second a member, for the performance of a particular service or for a specified period, to the service of any other department, or to any other authority, board, entity, establishment, institution or body, but, while so seconded, the member remains subject to this Act and any other law which applies to him or her."

[94] The SAPS Act also contains a provision about secondment in the South African Police Service. Section 39 of that Act reads:

> "(1) The services of a member may be placed at the disposal of any other department of State or any authority established by or under any law.
>
> (2) *If a member is seconded under subsection (1), such member shall be deemed to be serving in the Service and shall retain all powers and privileges as a member, subject to such conditions as may be agreed upon by the National Commissioner and the department of State or authority concerned.*
>
> (3) A member seconded under subsection (1) shall, in the performance of his or her functions, act in terms of the laws applicable to the department of State or authority to which he or she is seconded, subject to such conditions as may be agreed upon by the National Commissioner and the department of State or authority concerned.
>
> (4) The National Commissioner shall determine uniform standards and procedures regarding the secondment of members." (Emphasis added.)

[95] It is clear that the secondment of employees is provided for in legislation governing employment in the public service. It is also important to appreciate that Unizul, being an institution established by law as contemplated in section 15 of the PSA, is an institution to which public servants may be seconded in terms of section 15 of the PSA. Accordingly, it is likely that the understanding of secondment reflected in the PSA is also the understanding of secondment shared by Unizul. It is, therefore, important that there be a clear understanding as to who exercises control and supervision over a seconded employee. Is it the employer who has seconded the employee to another entity or is it the entity to whom the employee has been seconded?

[96] In my view it is the entity to whom the employee has been seconded which exercises control over or supervision of the seconded employee but that entity is able to exercise such control or supervision only because the employee's employer has agreed to that by virtue of seconding the employee to the entity. However, the fact that the entity to whom an employee has been seconded exercises control or supervision over the seconded employee does not mean that that entity is the employer of the employee. The employer of the seconded employee remains the one who seconded the employee to the other entity. Where the entity to which an employee has been seconded will also be an employer of the employee, the employee will be in a situation such as the one contemplated in section 15(2) of the PSA. In that situation an employee will be employed by both the entity which seconded him or her to another entity as well as by the one to which he or she is seconded. Therefore, to rely on the fact that the applicant was under the control and supervision of ISS for the conclusion that the applicant was an employee of ISS as opposed to being an employee of Unizul is misplaced in the light of the feature of secondment.

[97] In almost every secondment it will be the entity to which the employee has been seconded that will exercise control and supervision over the employee and yet the seconded employee will not be an employee of that entity. Section 39(2) of the SAPS Act makes it clear that the South African Police Service is deemed to remain the employer of a member who is seconded to another department of State or any other authority established by or under any law even though such member performs

his or her functions in terms of the laws applicable to the department of State concerned.[36]

[98] As we have seen from the provisions of section 15(3)(a) of the PSA, a secondment covers the situation where A, an employer, allows B, its employee, to perform duties attached to a certain position in C, another entity, at the latter's request and for the latter's benefit. Indeed, B can even occupy a specific position at C and yet remain an employee of A and not of C. In terms of section 15(2) of the PSA, B could be seconded to C who would employ B for a specified period while B also remains an employee of A. So, for all intents and purposes the matter can be approached on the basis that, when the applicant says that, beyond 31 December 2005 and as at June 2008, although he was the CEO of ISS, he remained an employee of Unizul, he means that he was still on secondment to ISS as an employee of Unizul as had been the case between September 2002 and 31 December 2005.

[99] The issue of whether or not the applicant was an employee of Unizul as at June 2008 in the context of this case requires that we focus on what the relationship between the applicant, Unizul and ISS was before 31 December 2005, what happened on 31 December 2005 or on 1 January 2006, if anything, and what the consequences thereof were beyond 31 December 2005.

[36] See also section 39(3) of the SAPS Act.

[100] Unizul contends that the applicant was taken over by ISS as an employee "after 31 December 2005" and not on or before 31 December 2005. In Unizul's answering affidavit in the Labour Court Mr Govindsamy said: "The secondment remained in place until 31 December 2005. *After December 2005 in terms of clause 2.4 of the agreement ISS took over the employment of the three seconded staff members*." This means that Unizul's case is that the applicant became an employee of ISS after 31 December 2005. Although Unizul's case is that the applicant became an employee of ISS after December 2005, it does not say what was done to make this happen, who did it or how it came about. One would have expected that it would point to an appointment that was made but Unizul does not say any appointment of the applicant as an employee of ISS was made after December 2005. Nor does it say that any offer of employment was made to the applicant by ISS after 31 December 2005.

[101] In our law a person becomes an employee of another when the latter has offered that person employment on certain terms and conditions and that person has accepted that offer. Without an offer being made, there can be no acceptance. Without an offer and acceptance, there can be no contract of employment except in the case of a section-197 transfer. Unizul says that, by his conduct, the applicant consented by implication to being employed by ISS. However, in the papers we do not find anything that tells us what offer was made to the applicant by ISS, when it was made, to what position it related, on what terms and conditions it was made or by whom it was made. Without evidence on this, in our law a court cannot conclude that a contract of employment came about. Since Unizul alleges that a contract of

employment existed between the applicant and ISS, the onus is on Unizul to prove the existence of that contract as well as its terms and conditions.

[102] In Mr Govindsamy's answering affidavit Unizul suggests that clause 2.4 created an employment regime. He says that the administrative obligation undertaken by Unizul in terms of the tripartite agreement "did not in any way whatsoever change the employment regime created by the provisions of clause 2.4 of the agreement." Prior to this point in the answering affidavit Mr Govindsamy had not made any averment that the applicant consented to the "employment regime" created by clause 2.4. This suggests that it is not part of Unizul's case that the so-called employment regime created by clause 2.4 required the applicant's consent, whether express or implied.

[103] Mr Govindsamy then says: "The applicant is fully aware of the contractual state of affairs between [Unizul], ISS and PanSALB and in this regard attention is drawn to the fact that he signed the agreement as a witness on behalf of ISS." This sentence shows that Unizul's case was not that the applicant consented to being taken over by ISS but its case was that clause 2.4 per se caused his takeover by ISS to occur without anything else having to be done and that the applicant was aware of that clause.

[104] It is not averred that the applicant ought to have objected to being taken over by ISS if he was not happy with it. If that had been said in Unizul's answering affidavit, the applicant would probably have dealt with that averment head-on. However, even

without Unizul having made this averment, in his replying affidavit the applicant said that for him and the two other Unizul staff members to have been taken over by ISS as its employees, an agreement with them was required. That contention is in line with the requirement in clause 2.5 of the tripartite agreement for the appointment of the applicant and the other two Unizul staff members by the ISS Board because, for such appointments to occur, the applicant's consent and that of each one of the other two Unizul staff members was required. In other words the applicant's reply could have been: "But the only way I could have become an employee of ISS was by being appointed by the ISS Board as an employee of ISS and the Board never appointed me as an employee of ISS."

[105] In the answering affidavit Mr Govindsamy said in paragraph 8.7: "The applicant furthermore with the formation of ISS . . . was appointed as its [CEO], a position which he currently still holds." This statement must be read consistently with the statement in paragraph 8.3 of Mr Govindsamy's affidavit that "[a]t the time that the [tripartite agreement] was entered into . . . the applicant and two other persons who were members of [Unizul's] staff were in terms of the agreement seconded to ISS. The secondment remained in place until 31 December 2005. After December 2005 in terms of clause 2.4 of the agreement ISS took over the employment of the three seconded staff members."

[106] Reading paragraphs 8.3 and 8.7 of Unizul's answering affidavit together highlights the fact that the appointment of the applicant as CEO of ISS occurred at the

time that the tripartite agreement was entered into which was 25 September 2002 when the applicant, on Unizul's own case, was an employee of Unizul and that between 25 September 2002 and 31 December 2005 he occupied the position of CEO of ISS even though he was not an employee of ISS but that of Unizul. Appreciating this is critical because, if it is not appreciated, one can easily be misled, as the Labour Appeal Court was misled, into thinking that being CEO of ISS and being an employee of Unizul were mutually exclusive, when they are not. It is, therefore, important to appreciate that what was supposed to change on the takeover contemplated by clause 2.4 was that the applicant would cease to be an employee of Unizul and become an employee of ISS.

[107] Clause 2.4 of the tripartite agreement said that the takeover could be by 31 December 2005 or an earlier date. Obviously, it was the ISS Board which would make a decision whether the takeover would be earlier than 31 December 2005 or on that date. Contrary to the submission made by counsel for Unizul, the ISS Board needed to do something positively in order for the takeover to occur in terms of clause 2.4. Clause 2.4 cannot be read in isolation. It must be read in the light of the entire agreement. In particular it must be read with clauses 2.5, 2.6 and 4.2(b). Clause 2.5 contemplated that the ISS Board would appoint the Unizul staff members as ISS employees. That included the applicant. That appointment is the positive act that the ISS Board needed to do in order for the takeover to occur.

[108] If the ISS Board offered the applicant employment as an ISS employee in a certain position and he accepted it, the ISS Board would appoint him into that position and he would thus be taken over by ISS as its employee in that position in terms of clause 2.4 with effect from 1 January 2006 or with effect from an earlier date agreed upon between him and the ISS Board. If, however, the ISS Board offered the applicant a position as an employee of ISS and he rejected it, he would not be appointed as an ISS employee. In such a case he would not be taken over by ISS as its employee in terms of clause 2.4. He would remain an employee of Unizul until such time as Unizul had validly terminated his contract of employment or until the applicant had resigned or retired. Therefore, there is no room for the proposition advanced by counsel for Unizul that a takeover of the applicant by ISS as its employee in terms of clause 2.4 could occur without his appointment by the ISS Board as an employee of ISS in terms of clause 2.5.

[109] In fact Unizul accepts in its answering affidavit that clause 2.5 of the tripartite agreement applied to the applicant. I say this because in paragraph 8.4 of that affidavit Mr Govindsamy, inter alia, says: "In terms of clause 2.5 of the agreement the remuneration and employment benefits of the applicant and the other two staff members were to be funded by PanSALB who was obliged to pay [Unizul] and [Unizul] would act as a conduit pipe channelling their monthly salaries to them." Clause 2.5 clearly contemplates that there would be an appointment of the Unizul staff by the ISS Board as employees of ISS. Unizul accepts that the staff referred to in clause 2.5 included the applicant. Clause 2.5 reads:

> "*Unizul undertakes, in respect of remuneration and benefits of staff to be appointed by the [ISS Board],* to channel their monthly salaries to them from the funds made available by PanSALB." (Emphasis added.)

This means that the tripartite agreement contemplated that the applicant would be appointed by the ISS Board as its employee. In the absence of such an appointment, there could be no takeover of the applicant by ISS as its employee in terms of clause 2.4.

[110] In terms of the tripartite agreement there was only one way of becoming an employee of ISS, namely, to be appointed by the ISS Board as an ISS employee. Without an appointment by the ISS Board as an employee of ISS, nobody could be an employee of ISS in terms of the tripartite agreement. Therefore, any other way of becoming an employee of ISS was not one in terms of the tripartite agreement. Unizul cannot succeed in showing that the applicant became an employee of ISS if it is not able to show that the way in which he became an ISS employee is one provided for in the tripartite agreement because its defence was that he was taken over by ISS as an employee in terms of the tripartite agreement.

[111] Certainly, as an employee who would be the CEO of ISS, the applicant could only be appointed by the ISS Board. If, therefore, the applicant did become an employee of ISS, there must have been a decision of the ISS Board to appoint him as an employee of ISS. If there had been such a decision, proving it should be very easy. Unizul has neither alleged that the ISS Board appointed the applicant as an employee

nor has it placed any evidence before the Court to prove that there was a contract of employment between the applicant and the ISS Board. Indeed, it has also failed to prove that his contract of employment with it came to an end in any of the lawful ways in which a contract may be brought to an end.

[112] The tripartite agreement does not tell us what position the applicant would occupy in ISS after the takeover nor does it tell us what the applicant's salary and other terms and conditions of employment would be. In this regard it is critical to remember that clause 2.4 does not say that ISS would take over the applicant's contract of employment. It says that it would take over the three positions as well as the applicant and the other two Unizul staff members as employees.

[113] A construction of the tripartite agreement to the effect that the applicant could be taken over by ISS as its employee without the appointment contemplated in clause 2.5 would render clause 2.5 redundant. An agreement must not be interpreted in a manner that renders any of its clauses redundant if there is a construction which can be placed upon it that does not render any of its clauses redundant.

[114] Unizul bore the onus to prove that the ISS Board appointed the applicant as an employee of ISS. Unizul is in partnership with ISS in terms of the tripartite agreement. That should make it easy for it to prove such a fact if such an appointment ever occurred. Furthermore, the Chairman of the ISS Board, Mr Maphisa, is employed by Unizul as its Registrar.

[115] As Chairperson of the ISS Board Mr Maphisa had access to the records of the Board including minutes of meetings which occurred before his time as Chairperson. He could produce the minutes of the meeting of the ISS Board in which the decision to appoint the applicant was taken. He could also produce the letter of appointment sent or given to the applicant by the Board or produce a copy of the contract of employment that the Board concluded with the applicant. He did not do any of this. In fact, he did not even say in his affidavit that the applicant was appointed as an employee of ISS even though he knew that his affidavit was required in connection with a dispute between the applicant and Unizul as to whose employee the applicant was as at June 2008. He did not say or do this despite the fact that he deposed to an affidavit on behalf of Unizul in the Labour Court. If there were any document of which Mr Maphisa was aware which could prove that the applicant was not employed by Unizul or that he was employed by ISS, he would have put it up in support of Unizul's case. He did not do so because there is no such document and there is no such document because the fact that the applicant was employed by Unizul never changed.

[116] The applicant's letter of appointment by Unizul in 1984 reflects that it was compulsory for the applicant to be a member of Bonitas Medical Fund, Group Life Insurance Scheme and Associated Institutions Pension Fund. He must have become a member of these after his employment by Unizul in 1984 as the payslips he has put up for August 2007 to May 2008 reveal that Unizul was still making deductions for these

in 2007 and 2008. There is no suggestion that the applicant's membership of these was ever interrupted.

[117] The applicant could not have continued to be a member of the abovementioned funds and scheme after changing employers without signing any documents. If he had signed documents in connection with this, both Unizul and ISS would have been in possession of copies of those documents. Unizul would have put such documents up. In the case of ISS, Mr Maphisa also would have had access to such documents at ISS and would have put them up. As Registrar of Unizul, Mr Maphisa would also have had access to such documents at Unizul.

[118] From June 2005 right through to beyond 31 December 2005 PanSALB did not pay any funds over to Unizul which the latter would pay over to ISS for salaries and operational costs. This state of affairs may have deterred the ISS Board from making staff appointments which it could not fund in the absence of funding from PanSALB. The applicant specifically states in his replying affidavit that, in the absence of funding from PanSALB, clause 2.4 of the tripartite agreement could not be implemented. Unizul has not disputed this evidence from the applicant even though it had an opportunity to dispute it if it wanted to because it filed a further affidavit disputing another aspect of the applicant's replying affidavit.

[119] The appointment of the applicant as CEO of ISS which endured prior to 31 December 2005 is not the appointment contemplated in clause 2.5. That

appointment was made at the time of the conclusion of the tripartite agreement and was based upon the applicant continuing to be an employee of Unizul whereas what clause 2.5 contemplated was an appointment of the applicant and the other two Unizul staff members by the ISS Board as employees of ISS. The appointment of the applicant as CEO of ISS while remaining an employee of Unizul is common cause and, therefore, no proof thereof is required. However, the allegation by Unizul that after 31 December 2005 the applicant became an employee of ISS is disputed. Accordingly, Unizul needed to prove that but has not done so. It is the absence of that proof that means that the applicant never became an employee of ISS. Instead of Unizul discharging the onus to show that the applicant became an employee of ISS, there are indications that the applicant was not an employee of ISS. I refer to them below.

[120] The minutes of the meeting of 8 February 2008 referred to above reveal that Prof Gumbi explained that "*the ISS Unit does not belong to the Mangosuthu University of Technology. [Unizul] has a verbal agreement with the Mangosuthu University of Technology to house the Unit on behalf of [Unizul]*." (Emphasis added.)

[121] In the same meeting of 8 February 2008 one of the items discussed was a "revision of the [tripartite agreement]". The minutes reveal that one of the decisions that was taken by agreement was that the tripartite agreement be amended. With regard to clause 2.4 of the tripartite agreement it was agreed "that clause 2.4 be rephrased to accommodate the current position." It will be recalled that the essence of

clause 2.4 of the tripartite agreement was that ISS was to take over the three Unizul positions and the three Unizul staff members from Unizul as its employees by 31 December 2005 or earlier.

[122] The decision that clause 2.4 be "rephrased to accommodate the current position" can only mean that what clause 2.4 had contemplated would be the position by February 2008 was still not the position by that date. If what clause 2.4 envisaged would happen by 31 December 2005 had happened, by February 2008 the applicant and the two Unizul staff members would long have been employees of ISS. Accordingly, clause 2.4 would have achieved its purpose and there would have been no need to rephrase it "to accommodate the current position". It stands to reason that what the minutes mean is that the takeover of the Unizul staff members to which reference is made in clause 2.4 had not happened and the applicant and the two staff members remained employees of Unizul. What had to be done to ensure that clause 2.4 reflected "the current position" as at February 2008 was to amend clause 2.4 to reflect that the applicant and the two staff members remained in Unizul's employ. There is no other way of reading item 3.1.1(c) of the minutes of the meeting of 8 February 2008.

[123] Understanding the minutes of the meeting of 8 February 2008 to mean that clause 2.4 had not achieved its purpose and that that is why it had to be rephrased "to accommodate the current position" accords with the applicant's replying affidavit. In that affidavit the applicant said:

> "The [tripartite agreement] was signed in 2002 and at the time ISS was not in a position to take over the staffing positions. The basis of the undertaking was that ISS expected to be in a position to take over staffing positions by 31 December 2005."

The applicant goes on to explain:

> "However in June 2005 PanSALB stopped funding ISS and as a result the [tripartite agreement] could not be implemented. PanSALB again failed dismally to perform in terms of clause 3 of the [tripartite agreement]. By 31 December 2005 ISS had not received funding for six (6) months."

[124] The applicant said further:

> "It is also not correct that clause 2.4 of the agreement resulted [in] the takeover of employment by ISS. The correct position is that ISS undertook to take over the employment. However they did not take over employment."

In his replying affidavit the applicant set out his understanding of the takeover envisaged in clause 2.4. He said:

> "In any event for ISS to take over the staff of Unizul there must be a tripartite agreement signed by Unizul, ISS and by all the employees who are to be taken over by ISS. In this case it is common cause that there was no such tripartite agreement. There was only a conditional undertaking by ISS to take over the staff by a certain date. The conditions were not fulfilled by PanSALB. As a result ISS could not take over the staff."

It must be remembered that the person saying this about ISS is the person who was ISS's CEO at the time when the takeover was supposed to happen. He knows what he is talking about. The Chairperson of the ISS Board who could have contradicted him

decided not to contradict him in his affidavit because he knew that the applicant's evidence on this is true and cannot be contradicted.

[125] After Unizul had received the applicant's replying affidavit, it put up a further affidavit in which a response was provided to an issue that Unizul regarded as a new matter in the applicant's replying affidavit. In the further affidavit Unizul did not challenge the applicant's version and understanding as set out in the two preceding paragraphs.

[126] After he had learnt that the applicant was trying to convene a meeting of the ISS Board to discuss his instruction that the applicant should pay a certain amount over to Unizul, Mr Maphisa, inter alia, wrote in his memorandum of 14 February 2008:

> "If [the applicant] insists on this meeting as well as resist to reimburse [Unizul], I will have no option but to recommend the dissolution of the board to PanSALB and the freezing of ISS funds pending the resolution of the impasse."

The question that immediately arises is this: if the applicant was an employee of ISS and if this was Mr Maphisa's understanding as well, as Chairman of the ISS Board, why did Mr Maphisa not simply discipline the applicant when the applicant was defying his instruction to pay certain funds over to Unizul?

[127] At the time of this memorandum the dispute about whether ISS should pay over part of the amount of R1,6 million it had received directly from PanSALB in 2006 or

2007 had been going on for a long time and throughout this period Mr Maphisa's position was the same as that of Unizul. It was that ISS should pay part of the money over to Unizul as a refund of money that Unizul had paid to ISS while PanSALB was withholding payment. It is difficult to understand why, if the applicant was an employee of ISS, Mr Maphisa did not give him an ultimatum to carry out the instruction or face dismissal. Instead, he threatened to get PanSALB to dissolve the ISS Board. That is a very strange way to deal with your employee's refusal to carry out your instruction.

[128] Mr Maphisa's failure to give the applicant an ultimatum to pay the money over to Unizul or face dismissal must also be viewed against the background that the applicant's attitude was that Mr Maphisa should convene a meeting of the ISS Board to discuss this issue and reach finality but Mr Maphisa was not prepared to convene a meeting of the ISS Board. The applicant had even tried to convene a meeting of the ISS Board but, when Mr Maphisa learnt of this, he had written a strongly worded letter to the applicant. In his letter of 19 March 2008 to Mr Maphisa the applicant had even said:

> "As far as I can remember Chairperson, the [ISS Board] has never met and deliberated on this matter and I am still pleading to you to convene a meeting of the [ISS Board] as a matter of urgency so that this matter can be dealt with and finalised by the correct forum."

It appears that Mr Maphisa never convened a meeting of the ISS Board to deal with the refund by ISS of some money to Unizul.

[129] In the letter dated 29 May 2008 from Prof Gumbi to the CEO of PanSALB, Prof Gumbi also wrote: "[Unizul] will be terminating payments to members of staff employed in the ISS Project if payment is not received by 12 June 2008." That letter was on Unizul's letterhead and was signed by Prof Gumbi. The reference to "members of staff employed in the ISS Project" in that sentence can only be a reference to Unizul's members of staff employed in the ISS Project. If it was intended to refer to people who were employees of ISS, Prof Gumbi would not have referred to them as members of staff. She would simply have referred to ISS employees.

[130] It is also odd that, on Unizul's case, for a period of over two years Unizul would have continued to pay the salaries of someone else's employees when it was under no legal obligation to do so.

[131] With regard to the submission that by his conduct the applicant impliedly consented to being taken over by ISS, there is not a single place in Unizul's answering affidavit in the Labour Court where Unizul says that the applicant consented to his employment being transferred to ISS or to him being so transferred. There is also no place in the answering affidavit where Unizul says that the applicant impliedly gave consent to the termination of his contract of employment with Unizul or to his contract of employment being taken over by ISS. That is not part of Unizul's case on the papers.

[132] There are two paragraphs in Unizul's answering affidavit where something is said about the applicant being aware of the relationship among himself, PanSALB and ISS. These are paragraphs 8.6 and 8.16. Paragraph 8.6 reads as follows:

> "The applicant is fully aware of the contractual state of affairs between [Unizul], ISS and PanSALB and in this regard attention is drawn to the fact that he signed the agreement as a witness on behalf of ISS."

The fact that the applicant was aware of the agreement entered into among Unizul, ISS and PanSALB did not without more translate to the applicant having consented by implication to being taken over by ISS, certainly not without any discussion with him.

[133] Unizul did not say that, once the applicant was aware of the tripartite agreement, he had to object to it or parts of it within a certain period and, because he did not object to it, he was deemed to have consented to it. If this had been said in Unizul's answering affidavit in the Labour Court, the applicant would have had an opportunity to deal with that case.

[134] A logical answer that the applicant could have given if this had been Unizul's case may have been: "I was aware that in terms of clause 2.5 of the tripartite agreement the ISS Board would have to appoint me as its employee for me to be taken over by ISS and I could not just become an employee of ISS without being appointed by the ISS Board. If at that stage the Board made me an acceptable offer, I would have accepted the offer and be appointed by the Board as ISS's employee in which case I would have been taken over by ISS as its employee in terms of clause 2.4. If I

did not like the offer, I would have rejected it, in which case I would not have been taken over by ISS as an employee. That opportunity never arose because the ISS Board never offered to appoint me as its employee."

[135] Our law is that in a civil matter if a court relies upon an inference to make a finding, that inference must be the most plausible one that can be drawn from the facts. In the present case it cannot be said the inference that the applicant agreed to be taken over by ISS is the most plausible inference that can be drawn from the facts. The facts are also consistent with the applicant having been an employee of Unizul on secondment to ISS as the latter's CEO. As the ISS Board never made the applicant an offer of employment, there can be no justification for the inference that the majority judgment seeks to draw.

[136] Paragraph 8.16 of Unizul's answering affidavit reads as follows:

> "Given the contents of annexures 'R1' to 'R11' it is [Unizul's] respectful submission that the applicant is fully aware of the relationship that exists between [Unizul], ISS and PanSALB and consequently his relationship with ISS. In making the allegations that he does relating to being employed by [Unizul] and that it has failed to pay his salary since [June 2008] is disingenuous in the extreme."

The first part of paragraph 8.16 says nothing different from what was said in paragraph 8.6 quoted above. The passage also says that the applicant is aware of his relationship with ISS. All of this is said on the basis of annexures "R1" to "R11" attached to Unizul's answering affidavit. Annexure "R1" is the tripartite agreement. Annexures "R2", "R3", "R4", "R6", "R8", "R9", "R10", and "R11" are letters and

memos exchanged between the applicant and some of the parties involved in the tripartite agreement and between the parties to that agreement themselves. They bear dates from May 2007 to May 2008. None of these annexures nor annexures "R1", "R5", and "R7" constitute a basis for the suggestion that the applicant became an employee of ISS or that he knew himself to be employed by ISS or that he must be deemed to have consented to being taken over by ISS. On the contrary there are statements in some of those annexures which seem to support the proposition that the applicant was an employee of Unizul even in 2007 or at least was treated as such by Unizul.

[137] If the position was that, with effect from 31 December 2005 or 1 January 2006, the applicant's employment of more than two decades had indeed come to an end, one would have expected Unizul to have written a letter to the applicant marking this important event and even thanking him for his long service. There is no such letter. That is because his employment with Unizul did not come to an end nor was it Unizul's understanding at the time that it had parted ways with the applicant. Indeed, there would have been a letter from Unizul to the applicant advising him of the position with regard to his benefits after such a long period of service. There is no suggestion that the applicant had thus far not served Unizul well during all those years.

[138] There is not even a suggestion that any high ranking official of Unizul held a meeting with the applicant at any time to talk about the practicalities of his exit from

Unizul's service. None of these things happened because Unizul, ISS and the applicant knew that the applicant remained an employee of Unizul on secondment to ISS. What happened here is simply that, after the applicant had instituted proceedings in the Labour Court, Unizul was advised that it could rely on clause 2.4 of the tripartite agreement to contend that the applicant had ceased to be its employee on or after 31 December 2005.

[139] In the light of the above I conclude that, contrary to what was contemplated by the parties to the tripartite agreement in clause 2.4, ISS did not take the applicant over by 31 December 2005 or even subsequent to that date. This means that the applicant never became an employee of ISS.

[140] The next question is: if the applicant was not taken over by ISS as an employee on 31 December 2005 or 1 January 2006, then what happened to the applicant's employment by Unizul at midnight on 31 December 2005? Did it come to an end? Unizul's case was that the applicant's contract of employment came to an end in terms of clause 2.4 of the tripartite agreement. The coming to an end of the applicant's employment envisaged by clause 2.4 was to occur as a seamless process as he was being taken over by ISS as its employee with the result that there was not going to be a time when the applicant was to be unemployed. That is why in clause 2.4 ISS undertook to take him and the other two Unizul staff members over "by that date" (ie by 31 December 2005 or even earlier). What was intended to bring the applicant's contract of employment with Unizul to an end was to be his takeover by ISS by that

date as an employee. If the takeover did not happen, as I have found it did not, then the applicant's contract of employment did not come to an end by virtue of clause 2.4.

[141] In the absence of the takeover, the applicant's contract of employment with Unizul could not have come to an end unless it was brought to an end by any means recognised in law as valid. Those include giving notice of termination, summary termination of the contract where there has been a material breach of the contract, death or agreement. No notice of termination was given nor was there a summary termination of the employment contract. The applicant's contract of employment with Unizul could also have come to an end if there was a section-197 transfer of business as a going concern but there was no such transfer in this matter.

[142] Since the tripartite agreement contemplated that the applicant's consent to his takeover by ISS as an employee would be given or withheld in the context of the ISS Board's appointment of the applicant as its employee in terms of clause 2.5, there is no room for the contention that the applicant gave implied consent to his being taken over by ISS outside of the appointment contemplated by clause 2.5. Implied consent to the takeover outside of the consent to the appointment contemplated in clause 2.5 of the tripartite agreement is necessarily excluded by the fact that the consent required for the appointment in clause 2.5 would serve as the consent to the takeover.

[143] On 31 December 2005 no takeover occurred but Unizul did not recall its staff that had been seconded to ISS. It allowed them to continue performing duties at ISS

and continued to pay them their salaries. In my view that suggests that the secondment continued as a matter of course with Unizul's blessing. If the secondment continued beyond 31 December 2005, then all the reasons upon which the Labour Appeal Court relied for its conclusion that the applicant was an employee of ISS in June 2008, namely, that he was subject to the control, supervision and direction of ISS and not of Unizul, will not support that conclusion. This is because, if an employee has been seconded to another entity, he is subject to the control, supervision and direction of the entity to which he has been seconded but remains an employee of the entity that seconded him and not of the entity to which he is seconded unless he is an employee of both as can happen in a case such as that envisaged in section 15(2) of the PSA. In those circumstances I conclude that the applicant's employment with Unizul continued beyond 31 December 2005 and he was still an employee of Unizul in June 2008 when Unizul stopped paying his salary. His secondment to ISS was still ongoing and would come to an end if Unizul recalled him or brought it to an end in any lawful way or if the applicant ceased to be an employee of Unizul.

[144] On the merits the majority judgment supports its conclusion that the applicant was not an employee of Unizul in June 2008 but that of ISS by saying that there is an "unavoidable inference that [the applicant] agreed to ISS becoming his employer on 31 December 2005." The most remarkable feature of the majority judgment's reasoning is that it does not say anything about anybody having made the applicant an offer of employment on behalf of ISS which he can be said to have accepted. So, in truth the majority judgment suggests that in law there can be an acceptance where

there is no offer. I am not aware of any authority in our law for such a proposition nor is there one relied upon by the majority judgment. I say that the majority judgment suggests that there can be an acceptance without an offer because it says the applicant agreed to be employed by ISS but is silent about when the ISS Board ever made an offer of employment to the applicant. Of course, the reason why the majority judgment is silent on when the ISS Board made an offer of employment to the applicant and on who made the offer on behalf of ISS is that no such offer was ever made. It is difficult to conceive of a contract of employment or any contract for that matter that is based on an acceptance without an offer.

[145] The majority judgment says the most important fact that supports the drawing of the inference that the applicant agreed to ISS becoming his employer on 31 December 2005 is that—

> "[the applicant] was not merely one of ISS's 'staff'. He was not an unskilled factotum. He was the Editor-In-Chief. He was the organisation's animating force. He was its [CEO]. It was he who by his signature witnessed the 2002 agreement on behalf of ISS. This did not make him party to the agreement. But, in the circumstances, it showed his conversance with its terms, as his counsel readily conceded; and all his subsequent conduct bore this out." (Footnote omitted.)

Thereafter the majority judgment mentions various things which the applicant did in the performance of his duties as CEO of ISS and concludes that he did all these things because he was an employee of ISS and he knew it.

[146] With respect, the majority judgment completely misses the point in seeking to draw the inference that it seeks to draw. Except for two "facts" that preceded the date of 31 December 2005, all the facts upon which the majority judgment relies to justify that inference occurred after 31 December 2005 and yet they are relied upon to show that he agreed prior to 31 December 2005 to become an employee of ISS on 31 December 2005. I deal briefly with both sets of facts. The two facts relied upon by the majority judgment which occurred prior to 31 December 2005 are that the applicant was CEO of ISS and, that he signed the tripartite agreement as a witness and, was, therefore, conversant with the terms of the tripartite agreement.

[147] These "facts" cannot possibly justify an inference that the applicant agreed to become an employee of ISS after 31 December 2005 because they are not necessarily inconsistent with being an employee of Unizul on secondment to ISS as the latter's CEO. Furthermore, they cannot justify that inference when the tripartite agreement itself contemplated in clause 2.4 read with clause 2.5 that the Unizul staff, including the applicant, would have to be appointed by the ISS Board as ISS employees. Therefore, whether the applicant was CEO or an ordinary worker, he would have had to go through the same procedure as anyone else in terms of the tripartite agreement to become an employee of ISS, namely, appointment by the ISS Board.

[148] Once it is accepted that Unizul's case as set out in its affidavit in the Labour Court is that the applicant became an employee of ISS in terms of clause 2.4 of the tripartite agreement, it follows that he would only have become an employee of ISS,

on Unizul's case, by 31 December 2005 or at the latest on 1 January 2006. Therefore, his agreement to become an employee of ISS in terms of the tripartite agreement would have had to have occurred prior to 31 December 2005 or at least with effect from 1 January 2006 and not after. Therefore, any facts relied upon by the majority judgment which occurred in 2006, 2007 and 2008 are irrelevant because, by that time, the applicant had either become an employee of ISS or had not become an employee of ISS.

[149] The facts relied upon by the majority judgment which occurred in 2006, 2007 and 2008 are briefly that the applicant attended a meeting with the Premier of KwaZulu-Natal to seek funding for ISS, attended a meeting with ISS, Unizul and PanSALB, did not agree to pay Unizul a certain portion of the amount of R1,6 million received by ISS from PanSALB, that the Premier of KwaZulu-Natal addressed a certain letter to the applicant, and that the applicant bought a vehicle without the approval of the ISS Board. I do not understand how these facts could possibly justify an inference that the applicant was not an employee of Unizul on secondment to ISS as its CEO as was the case before 31 December 2005. In my view there are simply no facts upon which the inference drawn by the majority judgment can justifiably be drawn.

[150] In *Cooper v Merchant Trade Finance*[37] the Supreme Court of Appeal said:

[37] *Cooper and Another NNO v Merchant Trade Finance Ltd* [1999] ZASCA 97; 2000 (3) SA 1009 (SCA) (*Cooper v Merchant Trade Finance*).

> "If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests, he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof."[38]

[151] What is critical is whether there was a takeover of the applicant by ISS as an employee on 31 December 2005 or 1 January 2006 in accordance with clause 2.4 of the tripartite agreement. The majority judgment does not deal with the argument that under the tripartite agreement nobody could become an employee of ISS without being appointed by the ISS Board. In particular, the majority judgment does not deal with the fact that, in its answering affidavit in the Labour Court, Unizul made it clear that the applicant was to be dealt with in terms of clause 2.5 of the tripartite agreement. That statement by Unizul brings the applicant expressly within the category of persons who were to be appointed by the ISS Board. The majority judgment does not explain how the applicant could have become an employee of ISS outside of the terms of the tripartite agreement in circumstances where he was not appointed by the ISS Board as required by clause 2.5 of the tripartite agreement.

[152] In the absence of proof of the applicant's appointment by the ISS Board as its employee, the only logical conclusion is that the applicant never became an employee of ISS in terms of the tripartite agreement. In the circumstances the conclusion reached in the majority judgment on the merits is not supported by any evidence or any provisions of the tripartite agreement. In fact the majority judgment's conclusion is based on a case not foreshadowed in Unizul's papers.

[38] Id at para 7.

[153] An employer is obliged to pay an employee his or her salary or wages if the employee has performed his or her work or has tendered to perform his or her work or has been prevented by the employer from performing his or her work.[39] In this case the applicant performed his work as expected by Unizul but the latter did not pay him. Unizul then denied that he was employed by it. So dedicated was the applicant to his work that, even after Unizul had stopped the payment of his salary, he continued to go to work because there were deadlines he had to meet. The applicant was prevented by Unizul from performing his duties by stopping the payment of his salary and denying that he was its employee. There is no suggestion that the applicant would not have continued to perform his duties in the way expected of him had Unizul not stopped paying his salary and had it not denied that he was employed by it.

Relief

[154] In the light of the above I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and the Labour Court are set aside.
4. The order of the Labour Court is replaced with the following:

   "(a) The applicant's application succeeds.

[39] *National Union of Textile Workers and Others v Jaguar Shoes (Pty) Ltd* 1987 (1) SA 39 (N) at 44J-46D, particularly at 46A-D.

(b) It is declared that as at June 2008 the applicant was an employee of the respondent and his contract of employment with the respondent has not been validly terminated;

(c) The respondent is ordered to pay the applicant all his remuneration and benefits due to him;

(d) The respondent is to pay the applicant's costs."

5. Unizul is to pay the applicants costs in the Labour Appeal Court, Supreme Court of Appeal and in this Court.

JAFTA J (Moseneke DCJ and Nkabinde J concurring):

[155] I have read the judgments prepared by my Colleagues Cameron J, Madlanga J and Zondo J. I agree with Zondo J that the matter raises a constitutional issue and that leave to appeal must be granted. I also agree that the appeal must be upheld and as a result the order issued by the Labour Appeal Court must be set aside. Since my approach to the matter is slightly different from the one adopted by Zondo J, it is necessary to write a separate judgment.

[156] As all of my Colleagues have observed in their judgments, the first issue that arises for determination is the question whether the case raises a constitutional issue. For it is only in that event that this Court would have jurisdiction to adjudicate the case. This means that if we find that no constitutional issue has been raised, it should be the end of the matter. In that event, it is settled that there can be no pronouncement

on the merits of the appeal. A court that lacks jurisdiction may not adjudicate a case. If it does so, its pronouncement amounts to a nullity.[40]

Jurisdiction

[157] Ordinarily the question of jurisdiction is determined with reference to the allegations made in the plaintiff's or applicant's pleadings. The founding papers must contain allegations that show that the court has jurisdiction.[41] In assessing whether this procedural requirement has been met, the proper approach is to take the allegations in the particulars of claim (summons) or the founding affidavit at face value. Usually those allegations are taken to be true for purposes of determining jurisdiction. The question whether a court has jurisdiction does not depend on the substantive merits of the case. The allegations which, if established, would prove jurisdiction are sufficient.

[158] Langa CJ in *Chirwa*[42] proclaimed the correct approach this Court follows in determining jurisdiction. He said:

> "It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it. That much was recognised by this Court in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae*). Van der Westhuizen J, when deciding on what constitutes a constitutional issue, held as follows:

[40] *SOS-Kinderdorf International v Effie Lentin Architects* 1991 (3) SA 574 (NMHC) (*SOS-Kinderdorf*) at 577G-H.

[41] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) 295 (AD) and *SOS-Kinderdorf* above n 40.

[42] *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

> 'An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgment by this Court that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.'

The corollary of the last sentence must be that the mere fact that an argument must eventually fail cannot deprive a court of jurisdiction."[43] (Footnotes omitted.)

[159] Although his was a minority judgment, the approach laid down by Langa CJ was subsequently endorsed by this Court in a unanimous judgment in *Gcaba*. In that case, Van der Westhuizen J said:

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

[43] Id at para 155.

> administrative action that is cognisable by the High Court, should thus approach the Labour Court."[44] (Footnote omitted.)

[160] What emerges from *Gcaba* is that in determining whether this Court, and for that matter any court, has jurisdiction, one must examine the pleadings with a view to finding "the legal basis of the claim under which the applicant has chosen to invoke the court's competence".[45] The caution that applies to this enquiry, as was observed in *Gcaba*, is that one must consider whether the facts pleaded sustain the pleaded cause of action. Whether the facts also support another cause of action, not pleaded, is immaterial. It follows that the facts, as pleaded, play a crucial role in determining jurisdiction.

[161] With this approach in mind, I proceed to the evaluation of what was pleaded by the applicant.

Applicant's cause of action

[162] The cause of action pleaded in the founding affidavit filed in the Labour Court was simply this. The applicant and the University of Zululand (Unizul) entered into a contract of employment in 1984, in terms of which the applicant was appointed as a researcher in the isiZulu Dictionary Project. The employment was for an indefinite period and it commenced on 1 September 1984. His appointment letter, which was attached to the founding affidavit, sets out the terms of the employment agreement.

[44] *Gcaba* above n 41 at para 75.

[45] Id.

[163] Unizul paid his salary on a monthly basis until June 2008. He received a telephone call from its Human Resources Manager, informing him that payment of his salary would be terminated on the instruction of the Chief Financial Officer of Unizul. The latter confirmed having issued the instruction but failed to give reasons for the decision. The applicant continued working despite not being paid his salary.

[164] Relying on the provisions of the Basic Conditions of Employment Act,[46] the applicant pleaded:

> "This is an application in terms of section 77(1) and (3) of the [Basic Conditions Act], as amended, for an order directing the Employer Party to comply with the terms of my employment by paying my monthly salary which was unlawfully stopped by the Employer Party."

[165] In determining whether the applicant raises a constitutional issue, the allegations set out above must be regarded as true. On that approach, the issue becomes whether the withholding of the salary by the applicant's employer in the context of the Basic Conditions Act involves a constitutional issue.

[166] In *Fraser*,[47] this Court listed instances when a constitutional issue may arise. In a unanimous judgment, Van der Westhuizen J said:

> "This Court has held that a constitutional matter is presented where a claim involves:

[46] 75 of 1997 (Basic Conditions Act).

[47] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

(a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state;
(b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights;
(c) a statute that conflicts with a requirement or restriction imposed by the Constitution;
(d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so);
(e) the erroneous interpretation or *application of legislation that has been enacted to give effect to a constitutional right* or in compliance with the legislature's constitutional responsibilities; or
(f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution."[48] (Footnotes omitted and emphasis added.)

[167] For present purposes, what is relevant is whether the cause of action pleaded by the applicant involves the interpretation and application of legislation enacted to give effect to a constitutional right. As observed by Zondo J, the Basic Conditions Act is such legislation. It is evident from its long title that this is the position. It reads:

> "To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith."

[168] This is buttressed by section 2 of the Basic Conditions Act which provides that its objects are—

[48] Id at para 38.

"to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution—

(i) by establishing and enforcing basic conditions of employment; and

(ii) by regulating the variation of basic conditions of employment".

[169] It cannot be gainsaid that the Basic Conditions Act applies to the present case. This is apparent from the provisions of section 3. The section extends the scope of the Basic Conditions Act to all employees and employers, excluding only the exceptions listed in it.[49] The applicant and Unizul do not fall within those exceptions. What this means is that the Act applies to all employment relationships except those expressly excluded. As a consequence, employment relationships between employers and employees are not governed by the contractual terms in the employment agreement only, but are also regulated by the provisions of the Basic Conditions Act.

[170] The Basic Conditions Act gives effect to the constitutional right to fair labour practices by laying down conditions of employment, including the employer's obligation to pay remuneration. Withholding wages or a salary amounts to a breach of that right. In section 32, the Basic Conditions Act obliges every employer to pay remuneration within seven days from the end of month, if the employee is paid his or

[49] Section 3 provides:

"(1) This Act applies to all employees and employers except−

(a) members of the National Defence Force, the National Intelligence Agency and the South African Secret Services; and

(b) unpaid volunteers working for an organisation serving a charitable purpose.

(2) This Act applies to persons undergoing vocational training except to the extent that any term or condition of their employment is regulated by the provisions of any other law.

(3) This Act, except section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act 1951 (Act No. 57 of 1951), applies except to the extent provided for in a sectoral determination."

her salary on a monthly basis. The failure to pay the applicant his salary within that period would constitute a violation of the section, unless it can be justified on a legal basis.

[171] This analysis illustrates that employment disputes are no longer determined by reference to the employment contract only. The Basic Conditions Act grants employees additional statutory rights while at the same time it imposes additional obligations on employers. In these circumstances, withholding remuneration not only constitutes a contractual breach, but it also amounts to a violation of the Act.[50] It follows that the cause of action pleaded by the applicant includes the application of the Basic Conditions Act. If proved, it would show a breach of the right to fair labour practices. It will be recalled that in this enquiry the defence raised by Unizul is not taken into account. The correctness of the averment that Unizul is the employer is presumed. At this stage of the enquiry, as this Court held both in *Chirwa*[51] and *Gcaba*,[52] the applicant does not have to show that he would succeed on the merits of the claim.

[172] All he needs to do is to make allegations that, if proved, would show a breach of a constitutional right or legislation passed to give effect to a right in the Bill of Rights. In a long line of cases, this Court has held that the interpretation and

[50] *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA) at para 16.

[51] *Chirwa* above n 42 at para 155.

[52] *Gcaba* above n 41 at para 75.

application of a statute enacted to give effect to a right in the Bill of Rights raises a constitutional issue.[53]

[173] Consistent with the principle of constitutional subsidiarity, where legislation has been passed to give effect to a right in the Bill of Rights, a litigant is not permitted to rely directly on the Constitution for its cause of action.[54] In *South African National Defence Union*,[55] this Court held that a litigant who wishes to assert a constitutional right given effect to by legislation must rely on that legislation, and not directly on the right in the Bill of Rights. In that case, the Court said:

> "[A] litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the

[53] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC); *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC); *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (7) BCLR 675 (CC); *Fuel Retailers Association of Southern Africa v Director-General*: *Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC); *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*); *Dudley v City of Cape Town and Another* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC); *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC); *Ingledew v Financial Services Board: In Re Financial Services Board v Van der Merwe and Another* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC); and *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[54] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73 and *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 40.

[55] *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

> important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights."[56] (Footnote omitted).

[174] As observed by Zondo J in this case, the Basic Conditions Act is the only legislation that gives effect to the right to fair labour practices in the context of payment of salaries of workers. The Act finds application to all disputes relating to non-payment of salaries, regardless of whether an employee has expressly referred to it or not. In *Nichol*,[57] the Supreme Court of Appeal said the following in the context of the Promotion of Administrative Justice Act:[58]

> "The review application (the main application) was brought in terms of Uniform Rule 53, but it is now common cause that, notwithstanding the fact that no mention is made anywhere in the papers filed in the main application of [the Promotion of Administrative Justice Act] or any of its provisions, the review would fall to be decided in terms of [the Promotion of Administrative Justice Act]."[59] (Footnote omitted.)

[175] While it is desirable that an applicant identifies the provision relied on, failure to do so is not fatal to the cause of action.[60] This is so because the application of legislation passed to give effect to a constitutional right does not depend on what the parties plead. If the pleaded facts bring the cause of action within the ambit of such legislation then it applies. Therefore, the applicant's failure to refer specifically to

[56] Id at para 52.

[57] *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) (*Nichol*).

[58] 3 of 2000.

[59] *Nichol* above n 57 at para 8D.

[60] *Bato Star* above n 53 at paras 26-7.

section 32 of the Basic Conditions Act does not lead to the exclusion of its application to the case. It is that application which raises a constitutional issue.

Interests of justice

[176] Establishing that a matter raises a constitutional issue is one of the requirements for leave to appeal. The other requirement is the interests of justice, the determination of which depends on an evaluation of a number of factors. Although the prospects of success are not decisive, they are a significant factor weighing in favour of granting leave. For the purpose of adjudication of cases is to do justice to the parties to particular litigation. As the judgment of Zondo J illustrates, there are good prospects of success here. Therefore, leave to appeal must be granted.

Merits

[177] As outlined earlier, the applicant's claim is a simple one. In 1984 he concluded an employment agreement with Unizul, in terms of which he became its employee and was paid a monthly salary for his labour. In June 2008, payment of his salary was stopped by Unizul. In addition to being a breach of contract, this conduct was unlawful because it contravened section 32 which applied to the employment relationship of the parties.

[178] In resisting the claim, Unizul raised a simple defence, namely, as at the time the cause of action arose, it was no longer the applicant's employer. To substantiate this defence, Unizul invoked an agreement it had concluded with the other parties, to

which the applicant was not a party. Before examining whether the agreement relied on by Unizul gave rise to the legal consequences claimed by it, it is necessary to remind ourselves of basic principles of our law of contract.

[179] The first is where there is an agreement between parties, those parties may be relieved of their obligations under the agreement only if the agreement is terminated. Thus, in this matter, Unizul would be relieved of its obligations, under the employment agreement it concluded with the applicant in 1984, only if that agreement was terminated. This is so because that agreement was for an indefinite period.

[180] Since both parties to the 1984 agreement still exist, it could not be terminated by death and as it was not for a fixed period, it could not be terminated by effluxion of time. Therefore, termination of that agreement could only be brought about by the parties themselves. The termination by the parties could take one of two forms. It could either be effected unilaterally by one of the parties or by mutual agreement of both parties. In our law, a unilateral termination is permissible only if there is a breach of the terms of the agreement and may be effected by the innocent party only. Since there is no evidence of a breach of the 1984 employment agreement, Unizul could not unilaterally terminate it. There is also no evidence on record showing mutual assent to terminate that agreement.

[181] Without cancellation, Unizul was bound to honour its obligations under that agreement. The Labour Court and the Labour Appeal Court erred in defining the

issue as whether the applicant was an employee of Unizul. The real issue was whether the employer-employee relationship between the parties which arose from the 1984 employment agreement had been terminated. Therefore, in this context, the question is whether the applicant is no longer an employee of Unizul. There is no evidence whatsoever on record indicating that the agreement was terminated.

The tripartite agreement

[182] The tripartite agreement, on which Unizul relied for its defence, does not in its terms terminate the 1984 employment agreement. The closest it gets is to renounce Unizul's rights under that agreement and permit Isikhungo Sesichazamazwi SesiZulu (ISS) to recruit its employees. It is clear from clause 2 of the tripartite agreement that the parties to it intended that ISS would, on a date in the future, appoint staff who were employed by Unizul. This cannot be construed as terminating the employment contract of the applicant to Unizul which is the only act in law that could relieve Unizul of its obligations under that contract.

[183] Clause 2.4 of the tripartite agreement grants ISS the option of taking over staff of Unizul, either within the period between September 2002 and 31 December 2005 or on 1 January 2006. We know from the facts that an early takeover did not occur. There is also no proof that after 31 December 2005 ISS entered into employment contracts with former employees of Unizul, including the applicant.

[184] Clauses 2.5 and 2.6 put it beyond doubt that ISS was expected to appoint employees from Unizul's staff. Clause 2.5 provides that Unizul would pay "remuneration and benefits of staff to be appointed by the Board of Directors of ISS". Whereas clause 2.6 provides that "Unizul undertakes to allow staff members appointed by the Board of Directors to join the pension scheme and medical aid scheme which the Unizul members of staff subscribe to". The latter term could not apply to the applicant because he was already a member of those schemes. This compounds the lack of clarity on employees of Unizul which the parties had intended ISS to take over. The relevant clauses are silent on the identity of the employees to be taken over.

[185] In any event, such takeover could not constitute termination of existing employment contracts. Our law allows employees to have more than one employer at any given time. So even if the applicant had concluded an employment contract with ISS, which is not established on the facts on record, that by itself would not have relieved Unizul from its obligations under the 1984 employment contract, unless it was a term of the 1984 employment agreement that entering into employment with a third party would constitute termination. Unizul did not plead and prove such a case.

Reason for withholding salary

[186] It is common cause that Unizul continued to pay the applicant's salary after 31 December 2005. This it did even though PanSALB had breached their agreement since June 2005 by failing to pay to Unizul funds earmarked to cover remuneration

and staff benefits. Unizul furnishes different explanations for continuing to pay salaries of employees at ISS. In the further answering affidavit filed by Unizul in response to the applicant's replying affidavit, Unizul says it continued to pay the salaries because, in a letter furnished to it, the Premier of KwaZulu-Natal had expressed support for the project.

[187] But in an earlier letter of 17 May 2007, addressed to PanSALB, Unizul said:

> "The University of Zululand has always regarded ISS as an important project of the University. It is for this reason that the University has continued funding this project after the suspension of funds by PanSALB. I would like all parties to start negotiations on the memorandum of agreement as soon as possible."

[188] It is apparent from the record that what prompted the decision to withhold the applicant's salary was his failure to pay the sum of R1 219 057.28 to Unizul, following an instruction from the Chairperson of ISS's Board who is also the Registrar of Unizul. The applicant took the view that the payment must be authorised by the Board of ISS and, to this end, he attempted to convene a meeting of the Board. The Chairperson rebuked him and advised members of the Board not to attend the meeting. The applicant then asked the Chairperson to convene the meeting but the latter failed to do so.

[189] It is clear that a dispute relating to the payment of the debt owed to Unizul had arisen between the applicant and the Chairperson. Underlying that dispute was the question of governance.

[190] Regardless of who between them was right, the failure to pay that debt could not constitute justification for withholding the applicant's salary. The obligation to pay his salary did not arise from the tripartite agreement. It arose from his contract of employment and the Basic Conditions Act. Whereas the debt to Unizul arose from the tripartite agreement. For as long as the 1984 employment agreement was not terminated, Unizul remained the applicant's employer and was obliged to pay his salary.

[191] It follows that the Labour Court and Labour Appeal Court were wrong in dismissing the applicant's claim.

CAMERON J (Froneman J, Mhlantla AJ, Skweyiya J and Van der Westhuizen J concurring):

[192] I am indebted to my Colleague Zondo J for his exposition of the facts in the main judgment, but respectfully differ from his approach to the issues and conclusion.

[193] First, there is no jurisdiction. Mr Mbatha does not in my view get past the initial obstacle. His case cannot be entertained because it raises no constitutional issue.[61] He instituted a contractual claim against the respondent University in the Labour Court for reinstatement of his salary. The sole question all along has been

[61] On the date when Mr Mbatha applied to this Court, section 167(3) of the Constitution provided that this Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters". The possible relevance of the Constitution Seventeenth Amendment Act of 2012, which has since come into force, is discussed below.

simply this: Is the University Mr Mbatha's employer? He says Yes. The University says No. It says a non-governmental organisation it houses, ISS, employs Mr Mbatha.

[194] After failing to convince either the Labour Court or the Labour Appeal Court of his case, Mr Mbatha applied unavailingly for leave to appeal to the Supreme Court of Appeal, and then to this Court. To obtain leave, at the date when he sought it, he had to establish not only that his case raised a constitutional issue, but that the interests of justice favoured granting leave.[62] The sticking point was, and remains, his failure to raise a credible constitutional issue. Ordinarily, no appeal lies against mere dissatisfaction with the factual findings of a preceding court's decision, or its application of an accepted legal test.[63]

[195] Throughout the proceedings in this Court, Mr Mbatha's argument has been that his right to dignity[64] would be infringed if the University could treat him like a chattel or serf by transferring his employment contract to ISS without his consent. This was not only far-fetched, but off-point. The University's stance, all along, has been that Mr Mbatha did in fact consent to being transferred. So, the source of the dispute has always been a simple question: Did he agree to work as an employee of ISS? The parties give directly opposing answers. The facts must tell. This involves inquiring

[62] See, for example, *Coetzee v National Commissioner of Police and Another* [2013] ZACC 29 at para 19.

[63] Id at para 27; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12; *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106 (CC); 2007 (3) BCLR 287 (CC) at para 27; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[64] Section 10 of the Bill of Rights provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

into the details of his dealings with the University, ISS and other bodies over a period of years, as they emerge from the evidence.

[196] That is precisely what the Labour Court and the Labour Appeal Court did. They examined the facts, and found ringingly against Mr Mbatha. That should have been the end of the matter. Mr Mbatha's attempt to conjure up a constitutional issue so as to gain a further examination by this Court of his factual dispute with the University should fail. There is no discernible constitutional issue.

[197] No constitutional point can be located in the fact that Mr Mbatha claims he is an "employee" of the University under legislation that protects employment. His dispute with the University raises no issue of interpretation or disputed application of the statutory definitions, or any contested claim about the courts' jurisdiction over employees and employment disputes. It is a simple factual dispute about who his employer was. If it were otherwise, every dispute about an employee's true employer could reach this Court. That cannot be.

[198] Mr Mbatha cannot gain constitutional access on the basis that his case involves the interpretation or application of section 197 of the Labour Relations Act.[65] The Labour Appeal Court mentioned this provision in its judgment, and expressed the opinion that this was a "classic case" of its application.[66] But its reference was incidental, and immaterial to the basis of its decision. Though expressing its view, the

[65] 66 of 1995.

[66] *Mbatha v University of Zululand* [2012] ZALAC 47 at para 17.

Court did so only after saying clearly that this is "not an issue before us" and that it was therefore "not necessary to deal with the issue whether there was a transfer of a business".[67] A court's expression of view on a matter immaterial to its reasoning cannot confer jurisdiction on an appellate court. The University abandoned reliance on section 197 in argument before us. In any event, even if section 197 were in play, the sole issue, again, is its application to the facts. The possible peripheral relevance of the provision, where it has not been given any weight by the lower courts, cannot strengthen Mr Mbatha's claim to jurisdiction.

[199] What is more, the parties' dispute has already been determined by two specialised courts, the Labour Court and Labour Appeal Court. In the absence of important wider issues, that should be the end of it. This Court has made clear that it will "be slow to hear appeals from the [Labour Appeal Court] unless they raise important issues of principle."[68] There is none here.

[200] I agree with the further reasons Madlanga J gives for finding that this Court lacks jurisdiction to entertain Mr Mbatha's appeal and concur in his judgment. And for the same reasons, I consider that, even if this Court's jurisdiction as expanded by the Constitution Seventeenth Amendment Act applies, it does not afford Mr Mbatha

[67] Id.

[68] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 31.

any basis for a further appeal. As his counsel conceded, his case presents no arguable point of law of general public importance which this Court ought to consider.[69]

[201] But even if Mr Mbatha can find a constitutional toehold, his application for leave to appeal must in my view fail. His claim has no prospects of success. In view of the main judgment's comprehensive exposition of the facts, it is necessary for me to set out my reasons only briefly, since those facts lead to the unavoidable inference that Mr Mbatha agreed to ISS becoming his employer on 31 December 2005.

[202] In August 1984, the University appointed Mr Mbatha to a permanent position as a researcher. In June 2000, ISS was incorporated as a non-profit entity.[70] In September 2002, the University, ISS and PanSALB[71] concluded a Memorandum of Agreement. Under this agreement, the University temporarily, until 31 December 2005 at the latest, seconded Mr Mbatha and other staff to ISS. And ISS undertook to take over the staff as its own employees by no later than 31 December 2005. The University would meanwhile pay the ISS staff with funds provided by PanSALB.

[203] The question is whether that agreement took effect and Mr Mbatha thereby became an employee of ISS. Here, the most important fact is that Mr Mbatha was not merely one of ISS's "staff". He was not an unskilled factotum. He was the

[69] The Constitution Seventeenth Amendment Act of 2012, which came into force on 23 August 2013, amends section 167(3) of the Constitution. This section now provides that this Court may decide a non-constitutional matter if it grants leave to appeal "on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered" by it.

[70] ISS was incorporated as a company not for profit in terms of section 21 of the Companies Act 61 of 1973.

[71] PanSALB is established in terms of the Pan South African Language Board Act 59 of 1995, in accordance with section 6(5) of the Constitution.

editor-in-chief. He was the organisation's animating force. He was its chief executive officer (CEO). It was he who by his signature witnessed the 2002 agreement on behalf of ISS. This did not make him party to the agreement. But, in the circumstances, it showed his conversance with its terms,[72] as his counsel readily conceded; and all his subsequent conduct bore this out.

[204] When PanSALB withheld payments to ISS in mid-2005 because ISS failed to file financial statements, it was Mr Mbatha who on behalf of ISS attended a meeting with the Premier of KwaZulu-Natal to discuss solutions. And it was to him, as editor-in-chief, that the Office of the Premier in January 2006 addressed a letter undertaking "to embrace all efforts" to preserve the isiZulu language, "such as the work performed by the ISS". It was on the strength of this hopeful prospect, procured by Mr Mbatha, that the University on behalf of PanSALB resumed payment of ISS salaries.

[205] It was Mr Mbatha who in February 2008 attended a meeting with PanSALB and the University to discuss revising the 2002 agreement. That meeting noted that "ISS is short of resources and would need some assistance from the University". It resolved that "ISS should put their needs in writing and that the University would deal with [the issue] internally." This was more than two years after the transfer of Mr Mbatha's contract of employment to ISS. All of it is consistent only with the fact that ISS was an independent entity, funded outside the University, which employed its

[72] That is not to say that a witness to a will or agreement is always presumed to know its contents. See Wigmore *On Evidence* Chadbourn revised ed (Little, Brown and Co, Boston 1972) vol 4 at §1292-3.

own staff, including Mr Mbatha as CEO and editor-in-chief. None of it is compatible with the notion that Mr Mbatha either was, or still regarded himself as, an employee of the University.

[206] Subsequent events bring the point home sharply. When PanSALB paid an amount of some R1.6 million to ISS instead of the University, it was to Mr Mbatha that the University addressed repeated demands that the money be paid to it, for it had paid Mr Mbatha and other ISS staff their salaries in the expectation that PanSALB would reimburse it. And it was Mr Mbatha who repeatedly refused these demands. Indeed, it was Mr Mbatha who, in March 2008, on ISS letterhead signed by him on behalf of ISS, at length and with vigour disputed the University's position on the funds, complaining that he, as ISS's CEO, had not been informed of certain dealings with the chair of the ISS Board. He wrote: "You will also agree with me Chairperson that Corporate governance does not allow such a practice i.e. corresponding with the Chairperson of the organisation only and not informing the CEO".

[207] Instead, during this very period, according to undisputed correspondence, it was Mr Mbatha who, without the approval of the Board, authorised the purchase of equipment. Even though he had the opportunity, Mr Mbatha gave no account of the allegations in the correspondence. And it was he who authorised the purchase of a vehicle – despite the repeated injunctions of the chairperson of the ISS Board to repay the funds he was using.

[208] In all this, Mr Mbatha was running his own show. He was exercising plenary authority as the CEO of ISS, exerting its organisational and institutional autonomy from the University, and his command of its resources and capacities. If his actions had any tittle of justification, it was only because he completely understood and accepted, from the date he formally witnessed the Memorandum of Agreement in 2002, that at the end of 2005 ISS became fully autonomous from the University and employed its own staff – including himself.

[209] The complaint that Mr Mbatha's assent to the transfer of his employment to ISS is nowhere expressly recorded surely misses the point, which is that his assent was incontrovertibly and abundantly manifested in everything he did for and on behalf of ISS, as its CEO, its editor-in-chief, and most importantly as the one who controlled its purse strings. What is more, our law applies an objective test for the existence of a contract.[73] The University inferred from Mr Mbatha's conduct that he had consented to ISS becoming his employer. And that inference was abundantly reasonable.

[210] Mr Mbatha's conduct of his case is telling. He carried the burden of showing that the University was his employer. His founding affidavit was disquietingly sparse. The sole attachments to it were his August 1984 letter of appointment and his salary slips. And despite the extended history of the parties' dealings, he purported to express puzzlement that the University had stopped paying his salary. He said that he

[73] This is a consequence, in particular, of the doctrine of quasi-mutual assent. See, for example, *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) at para 9 and *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239F-240B, citing the classic dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607.

had "not been given reasons" why. He had then "tried to contact [his] Union about this matter but they could not assist [him] as it baffled them as the kind of problem [he] had was sort of peculiar." Peculiar indeed. Just how peculiar emerged only from the University's evidence. The University readily owned that it had employed him in 1984, but put up a mass of evidence – correspondence, agreements, minutes and a factual account – establishing that his employment with it ended, with his agreement, on 31 December 2005.

[211] With the details of that evidence Mr Mbatha's reply did not engage at all. All he offered in response to the most crucial details of the University's evidence were bald denials. He did not explain why, while running ISS, he failed to repay the University the money PanSALB had paid for his salary. He did not explain the purchase of the vehicle under his authority. He did not explain why, if the transfer of the employment contracts was not to go ahead as agreed in 2002, he, as the one calling all the shots at ISS, never raised a peep about it, then or later.

[212] The Labour Appeal Court found that "the hallmarks of an employment relationship" between Mr Mbatha and the University "had ceased to exist beyond December 2005".[74] It concluded that the University had established "a clear and unambiguous contractual arrangement that the employment relationship" with Mr Mbatha would end on 31 December 2005, and that Mr Mbatha's unit was on that

[74] Labour Appeal Court judgment above n 66 at para 14.

date "severed and parcelled out to ISS".[75] It also found that there was "uncontroverted evidence on record" establishing that Mr Mbatha "was clearly alive to the true nature of his employment situation and had at all times acted in consonance therewith".[76]

[213] All these findings are in my view unimpeachable.[77] The Labour Appeal Court also observed that it was "disingenuous in the extreme" for Mr Mbatha to deny his employment by ISS and yet conduct himself as its CEO in dealings with the public.[78] That finding, too, is unimpeachable.

Order

[214] I therefore make the following order:

The application for leave to appeal is dismissed with costs.

MADLANGA J:

[215] I have read the judgments by my Colleagues Cameron J, Jafta J and Zondo J. I do not agree with Jafta J and Zondo J that this matter raises a constitutional issue. Instead I agree with Cameron J that it does not and that, as a consequence, the application for leave to appeal falls to be dismissed with costs. I thought it necessary

[75] Id.

[76] Id at para 19.

[77] For that reason, Mr Mbatha's case is very different from *National Union of Metalworkers of SA and Others v Spinmet (Pty) Ltd* (1992) 13 ILJ 1459 (LAC), where the Labour Appeal Court found that there was no evidence that the applicant employee ever knew about or consented to his transfer to another employer.

[78] Labour Appeal Court judgment above n 66 at para 15.

to write separately from Cameron J because to me there is not a scintilla of a constitutional issue necessitating even paragraphs [201] to [213] of his judgment, which enter the debate on the facts. Also, I want to address some of the propositions made by Jafta J and Zondo J.

[216] The contest between the parties is on the facts, nothing more. And that is what the decisions of the Labour Court and Labour Appeal Court turned on. There is no contest between the parties about the interpretation of the provisions of the Basic Conditions of Employment Act.[79] Whether or not an employer/employee relationship existed between Unizul and the applicant is a question of fact. An interpretation of the provisions is not in issue. The application of the provisions is axiomatic, if the applicant was an employee of Unizul. Thus the antecedent factual question is, was he?

[217] It is exactly contests of this nature that *Boesak*[80] has decreed do not raise a constitutional issue. Writing for a unanimous Court in *Boesak*, Langa DP says that there is no constitutional issue if all there is, is a challenge to a decision on the sole basis that it is wrong on the facts.[81]

[79] 75 of 1997.

[80] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[81] Id at para 15.

[218] Does *Grootboom*[82] assist the applicant? I think not. As I see it, the issue in *Grootboom* was not only about the fact whether Mr Grootboom had absented himself from his official duties without permission. In that case at one point this Court says that "[t]his matter revolves around the correct interpretation and application of section 17(5)(a)(i) of the [Public Service] Act".[83] On a conspectus, there was not even a dispute on the facts on which the judgment ultimately turned. The question was more whether, as a matter of interpretation (*not fact*), one who goes on study leave whilst on suspension can be said to have absented oneself from official duties without permission as contemplated in section 17(5)(a)(i). At the risk of being repetitive, in the application now before us the issue is purely factual: was the applicant still employed by Unizul at the time payment of his remuneration stopped?

[219] *Boesak* is important for another reason. There the applicant had contended that "the decision of the Supreme Court of Appeal constitute[d] an infringement of [his] constitutional rights as enshrined in sections 12(1)(a) and 35(3)(h) of the Constitution, namely, the right not to be deprived of freedom and security without just cause and the right to a fair trial".[84] This Court did not, without more, proceed to find that there was a constitutional issue purely because the applicant said there was one. What it did instead was to look at the substance of the issues that he was raising and, seeing them for what they were, came to the conclusion that no constitutional issue had been raised.

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[82] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37.

[83] Id at para 37. See also para 3.

[84] *Boesak* above n 80 at para 3. (Footnotes omitted.)

[220] This Court's approach was similar in *Phoebus*.[85] In its application for leave to appeal the appellant in that case claimed that the case involved an infringement of its property right which "might well involve developing the common law relating to the vicarious liability of the State for delicts committed by police officers."[86] The appellant there also placed reliance on the obligations imposed on the South African Police Service by section 205(3) of the Constitution.[87] What this Court then held is instructive:

> "Upon closer examination, however, it is clear that none of these contentions advanced on behalf of the appellant is valid. The appellant's property rights under the Constitution are not engaged; the duties imposed on the police by the Constitution carry the matter no further; and the reliance on the judgment in *Carmichele* . . . is misplaced. The appellant's constitutional right to be protected in the enjoyment of its property was not in issue. The constitutional foundation for this property claim advanced by counsel for the appellant, must be sought in the provisions of section 25(1) of the Constitution. It is clear, however, that these provisions are inappropriate here. They are aimed at protecting private property rights against governmental action and are quite irrelevant here where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by the three thieves."[88] (Footnote omitted.)

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[85] *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) (*Phoebus*).

[86] Id at para 3.

[87] Section 205 reads:

> "(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
>
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
>
> (3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[88] *Phoebus* above n 7 at para 4. To explain the reference to three thieves, in that case the appellant corporation was robbed of a large sum of money when an armed gang gained access to the home of the appellant's

[221] Based on this and *Boesak*, in a scenario where it is clear that the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does.[89] Otherwise, that would be the simplest stratagem by means of which the unscrupulous would have their issues ventilated in this Court under the guise that they raise constitutional issues.

[222] This approach is not at odds with the proposition in *Fraser*[90] quoted in [166] of Jafta J's judgment. There, all that Van der Westhuizen J is saying is that a constitutional issue remains one even if it may turn out to be unmeritorious. That is not the same as saying that what in essence is a factual issue may somehow morph into a constitutional issue through the simple facility of clothing it in constitutional garb.

[223] This Court, of course, will grapple with hotly contested factual issues as long as they are connected with a well-grounded constitutional issue.[91]

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controlling member. The investigating officer traced part of the spoils to the home of the father of two of the robbers. Accompanied by an informer the investigating officer went there, only to discover that the money was gone. He had been forestalled by three dishonest police officers who had taken the money the previous day. On the pretext of being about police business they induced the father to hand over his sons' cache.

[89] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

[90] Id.

[91] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52.

[224] I thus conclude that there is no constitutional issue: not on the basis pleaded by the applicant,[92] nor on the bases that my Colleagues Jafta J and Zondo J rely on.

[92] The applicant pleaded an infringement of the right to dignity in section 10 of the Constitution.

For the Applicant:	Advocate M Pillemer SC instructed by Jafta Inc.
For the Respondent:	Advocate S Budlender and Advocate L Kutumela instructed by Garlicke & Bousefield Inc.