REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 638/06
Reportable

In the matter between:

NOMTHA MAKAMBI **APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
THE DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE **RESPONDENT**

CORAM: FARLAM, NUGENT, MLAMBO, MAYA JJA et MHLANTLA AJA

HEARD: 18 MARCH 2008

DELIVERED: 29 MAY 2008

SUMMARY: Constitutional Law - whether High Court has jurisdiction to review termination of emoluments and benefits of educator in state school.

Neutral citation: This judgment may be referred to as *Makambi v MEC, Education, Eastern Cape* (638/06) [2008] ZASCA 61 (29 May 2008).

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Manjezi AJ sitting in the Bhisho High Court.

[2] The appellant in this matter is an educator. She started her teaching career with the Eastern Cape Department of Education in May 1997 when she took up a temporary contract appointment at the Kubusie State School near Stutterheim in the King William's Town district. Although the period of her initial appointment was from 22 May 1997 to 31 December 1997 she continued to work at that school until early in 2004 when she was advised by the department that she would be transferred to the Tyilekani Primary School.

[3] The letter she received from the department, which was dated 31 March 2004, read as follows:

'RE: TEMPORARY PLACEMENT AS AN ADDITIONAL EDUCATOR:

PERSAL NO 53208862 YOURSELF: Ms NOMTHA MAKAMBI

1. Kindly be informed that you will be placed additional to the establishment of TYILEKANI PRIMARY SCHOOL until further notice.

2. Your co-operation is highly appreciated.'

[4] The appellant thereafter discharged her duties as an educator at the Tyilekani Primary School. In June 2004 she received a further letter from the department dated 15 June 2004. In the heading to this letter she was reflected as being on the staff establishment of the Kubusie State Primary School, the school at which she had taught before being transferred to the Tyilekani Farm School. The letter read as follows:

'DECLARING YOURSELF IN ADDITION OF THE STAFF ESTABLISHMENT OF THE ABOVE SHOOL

The post allocation of schools has been revised with effect from 1 January 2004.

After following the prescribed steps, you have been declared as in addition and must be

redeployed.

If it is known that a vacancy will occur in your school within six months, you will be considered for the post and absorption will depend on the requirements of the post and your experience and qualifications.

If you cannot be absorbed in a vacancy in your school the opportunity will be afforded to you to apply for posts elsewhere in the District through a closed vacancy bulletin.

Meanwhile you are required to continue at your current school and to perform the duties that the Principal requires you to perform, until you receive your placement letter.'

[5] From the commencement of the appellant's employment in 1997 she received her monthly emoluments and other concomitant benefits on the 20th of each month. On 20 August 2004 she did not receive her emoluments and other benefits. This was despite the fact that she had not received the further notice referred to in the department's letter of 31 March 2004 nor the placement letter referred to in the department's letter of 15 June 2004 nor any other notification.

[6] On 20 August 2004, accompanied by Mr Z.H. Mzili, the principal of the Kubusie State School, the appellant had an interview with a Mr Tshabe, a senior official of the department, who stated that the appellant was a temporary educator and that the department was entitled to terminate her employment. On 23 August 2004 the principal, vice-chairperson and secretary of the Kubusie State School wrote to the department requesting that the appellant be employed as a permanent educator.

[7] On 7 October 2004, in a letter signed by the district director for the King William's Town district, the department wrote as follows to the appellant:

'REQUEST FOR AMENDMENT OF NATURE OF APPOINTMENT FROM TEMPORARY TO PERMANENT CS EDUCATOR: YOURSELF

Kindly be advised that the application for the change of your nature of appointment from temporary to permanent CS educator has not been approved.

Your status therefore remains unchanged.'

[8] On 12 November 2004 the appellant brought an application as a matter

of urgency against the respondent, the member of the executive council for the province of the Eastern Cape responsible for education, seeking, *inter alia,* orders:

(a) 'directing that the administrative action of the Respondent, in terminating the payment of the [appellant's] emoluments and the curtailment of her concomitant benefits with effect from 1 August 2004 be judicially reviewed and declared unlawful in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, and reinstating her benefits associated with her employment by the Respondent with effect from 1 August 2002'; and

(b) 'declaring [her] status as an educator to be of a permanent nature'.

[9] In her founding affidavit the appellant contended that the department's conduct in terminating her emoluments in the way it did constituted 'an unfair labour practice as contemplated by section 8 of the Constitution'. (It was common cause at the hearing of the appeal that what was meant was s 23 of the Constitution.) She also contended that the department's conduct constituted 'administrative action which is unlawful, unreasonable and procedurally unfair as is contemplated by section 33 of the Constitution'.

[10] The deponent to the answering affidavit filed on behalf of the respondent, Mr Fikile Xasa, the district director of the department stationed in King William's Town, averred that the appellant was at all relevant times a temporary educator in the employ of the department and that the department was entitled to terminate her employment. Before dealing with the merits of her application, however he raised three *in limine* objections to her application, two of which were upheld by the court *a quo.* These were:

(1) that she had not exhausted the internal remedies available to her because she had not made use of the grievance procedure set forth in Chapter H of the Personal Administrative Measures of the Education Labour Relations Council as required by s 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000; and

(2) that the High Court did not have jurisdiction to hear the application as the administrative action of which the appellant complained amounted to an unfair labour practice and should have been dealt with in terms of s 191 of the Labour Relations Act 66 of 1995.

[11] Manjezi AJ, after hearing argument in the matter, made an order on 2 December 2004 dismissing the application with costs. As I have said he upheld the two *in limine* objections summarised above. He added:

'I find it therefore unnecessary to determine the merits of the application.'

[12] This appeal was originally set down for hearing on 13 November last year but was removed from the roll and then set down for hearing on 18 March this year at the request of the parties. The request was based on the fact that it was anticipated that the ground covered by the second point *in limine* would be decided by the Constitutional Court in *Chirwa v Transnet Limited and Others,* the decision in which was expected towards the end of November last year. The Constitutional Court's decision was in fact delivered on 28 November 2007. It has since been reported: see *Chirwa v Transnet Ltd* 2008 (3) BCLR 251 (CC).

[13] Ms *Collett,* who appeared for the appellant, endeavoured to distinguish the present case from *Chirwa* because, as she put it, from the outset the appellant did not base her case on its being a labour dispute as such but relied on an alleged violation of her constitutional right to just administrative action, unlike Ms Chirwa who first took her complaint to the Commission for Conciliation, Mediation and Arbitration and only went to the High Court when conciliation failed. While it is true that in this case, unlike in *Chirwa,* the appellant did not first seek to initiate the process in the Commission for Conciliation, Mediation and Arbitration, I do not think that is a material distinction. *Chirwa* has held that a claimant in the position of the appellant (and Mrs Chirwa) does not have an election, and thus the fact that the appellant did not make an election is immaterial.

[14] Ms *Collett* also submitted, relying on the recent decisions of Revelas J in the South Eastern Cape Local Division in *Mkumatela v Nelson Mandela Metropolitan Municipality,* case no 2314/06, delivered 28 January 2008, and Froneman J in the Bhisho High Court in *Nakin v MEC, Department of Education, Eastern Cape Province,* case no 77/2007, delivered on 22 February 2008 that the Constitutional Court in *Chirwa* did not overrule its earlier decision in *Fredericks v MEC for Education and Training, Eastern Cape,* 2002 (2) SA 693

(CC), and that the appellant was entitled on the strength of that decision to bring her claim in the High Court.

[15] It is true that the majority in *Chirwa* did not overrule *Fredericks* but were content to distinguish it. For the purposes of considering Ms Collett's submission on this point it is necessary to have regard to the basis on which *Fredericks* was distinguished in Skweyiya J's judgment in order to ascertain where he drew the line between the two cases and on which side of that line the present case falls. The matter was dealt with in paras 56 to 61 of Skweyiya J's judgment. Para 58 includes the following:

'Notably, the applicants in *Fredericks* expressly disavowed any reliance on section 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in *Fredericks* rely on the fair labour practice provisions of the LRA [the Labour Relations Act 66 of 1995] or any other provision of the LRA.'

It is correct that the appellant did not rely on any of the provisions of the LRA but she did in terms rely on s 23(1) of the Constitution, which entrenches the right to fair labour practices. As Skweyiya J put it (at para 66), 'the LRA seeks to regulate and give effect to' this section of the Constitution.

[16] It is instructive in this regard to examine Ms Chirwa's claim, which it was held she could not bring in the High Court. As appears from para 157 of the dissenting judgment of Langa CJ, with whom Mokgoro and O'Regan JJ concurred, she contended that her dismissal was administrative action as understood by the Promotion of Administrative Justice Act 3 of 2000 (which I shall call in what follows 'PAJA'). The administrative action of which she complained contravened, so she alleged, (i) s 3(2)(b) of PAJA for failing to provide proper notice; (ii) s 6(2)(a)(iii) of PAJA because the administrator who took the decision to dismiss her was biased; (iii) s3(3)(a) of PAJA because she was prevented from obtaining assistance or representation; (iv) s 6(2)(b) of PAJA because a mandatory and material procedure prescribed by an empowering provision was not complied with; and (v) s 6(2)(f)(i) because the action taken against her contravened another law. Ms Chirwa sought in respect of the last two complaints to rely on items 8 and 9 of Schedule 8 to the LRA.

Because of this Skweyiya J held (at para 61) that 'when she approached the High Court she made it clear that her claim was based on a violation of the provisions of the LRA'.

[17] When one compares the complaints set out in the appellant's founding affidavit, which I have summarised in para 9 above, with those on which Ms Chirwa relied it is clear that it is not possible to hold that this case falls on the *Fredericks* side of the line of distinction drawn in the *Chirwa* case. It follows that Ms Collett's submission that *Fredericks* applies cannot be upheld.

[18] Mr *Bloem,* who appeared for the respondent, contended before us that the effect of the *Chirwa* decision is that the appellant may not pursue her claim in the High Court and that the appeal accordingly falls to be dismissed. I think that is correct.

[19] In the circumstances I am of the view that the appeal should fail. In view of the fact that the appellant came to court to assert what she perceived to be her rights under the Constitution I do not think that a costs order should have been made against her in the court *a quo* nor should such an order be made in this court.

[20] The following order is made:

1. Subject to paragraph 2 the appeal is dismissed.

2. The order made in the court *a quo* on 2 December 2004 is amended by the deletion of paragraph 2 thereof.

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IG FARLAM

JUDGE OF APPEAL

CONCUR:

MLAMBO JA)
MAYA JA)
MHLANTLA AJA)

NUGENT JA:

[21] I concur in the order that is proposed by my colleague but I prefer to set out separately the reason for my concurrence lest it be misunderstood. The problem that I have arises from the Constitutional Court's recent decision in *Chirwa v Transnet Limited*,[1] which purported to distinguish, but not overrule, its earlier contrary decision in *Fredericks v MEC for Education and Training, Eastern Cape.*[2] The *Chirwa* decision presents itself for application in this case – which is materially indistinguishable from both *Chirwa* and *Fredericks* on the jurisdictional question. But regrettably I can find no clear legal – as opposed to policy – reason for the outcome in *Chirwa*. Nonetheless, as I explain presently when elaborating upon the reasons for my conclusion, apart from its jurisdictional ruling *Chirwa* indicates that the dismissal of a public-service employee does not constitute administrative action. That finding is equally applicable to this case and it is on that narrow basis that I agree that the appeal should fail.

[22] The appellant was employed in the public service. She claims that her right to just administrative action – having its source in s 33 of the Constitution and elaborated and codified in the Promotion of Administrative Justice Act 3 of 2000[3] (PAJA) – was infringed by her employer. She applied to the high court for an order to remedy the alleged infringement. Her employer (for whom the respondent has been nominally cited) objected to the jurisdiction of that court to consider her claim and the objection succeeded. (The court below also ruled on another preliminary point but that need not be dealt with.)

[23] Jurisdictional objections of the kind that are relevant to this case have shown remarkable resilience. They were taken on similar grounds in four cases

[1] 2008 (3) BCLR 251 (CC).
[2] 2002 (2) SA 693 (CC).
[3] *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 95.

that came before this court – *Fedlife Assurance Ltd v Wolfaardt*,[4] *United National Public Servants Association of SA v Digomo NO*,[5] *Boxer Superstores, Mthatha v Mbenya*[6] and *Transnet Ltd v Chirwa*[7] – and were consistently dismissed. A similar objection was also unanimously dismissed by the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape.*[8]

[24] In *Chirwa* the claim (brought in the high court) was also for the enforcement of the claimant's constitutional right to just administrative action (through the medium of PAJA) as it had been in all the cases to which I have referred (but for *Fedlife*[9]). This court held that the claim fell within the ordinary jurisdiction of the high court, but four members were equally divided on whether the dismissal of the claimant constituted 'administrative action' as contemplated by PAJA. (The conclusion reached by Conradie JA was decisive against the claimant but it went off on other grounds.[10])

[25] On appeal to the Constitutional Court the claimant's appeal was unanimously dismissed. Eight members of that court[11] held that the high court had no jurisdiction to consider the claim. Seven of those members (Skweyiya J excluded) went on to hold that the dismissal did not constitute administrative action. A minority (Langa CJ with the concurrence of Mokgoro and O'Regan J) held that the high court had jurisdiction to consider the claim but that the dismissal did not constitute administrative action.

[26] It is the decision of the majority on the jurisdictional question that raises the difficulty in this case. We are now confronted by two decisions of the Constitutional Court – its unanimous decision in *Fredericks* and its majority decision in *Chirwa* – that seem to oblige us to go in diametrically opposed directions on that issue. That resulted in submissions being made by counsel

[4] 2002 (1) SA 49 (SCA).
[5] [2005] 26 ILJ 1957 (SCA).
[6] 2007 (5) SA 450 (SCA).
[7] [2007] 1 All SA 184 (SCA).
[8] 2002 (2) SA 693 (CC).
[9] The claim in Fedlife was for the enforcement of a contractual right.
[10] For a discussion of the judgment of Conradie JA in this court see D Holness and G Devenish: 'The law in relation to claims relating to dismissal: jurisprudential principle or legal pragmatism?' (2008) 71 THRHR p. 142.
[11] Moseneke DCJ, Madala, Ngcobo, Nkabinde, Sachs, Skweyiya and Van der Westhuizen JJ and Navsa AJ.

that were simple and symmetrical. Counsel for the respondent submitted that the decision of the majority of the Constitutional Court in *Chirwa* obliges us to uphold the jurisdictional objection (and thus dismiss the appeal). Counsel for the appellant submitted that the unanimous decision of the Constitutional Court in *Fredericks* (which was not overruled in *Chirwa*) obliges us to dismiss the jurisdictional objection (and thus uphold the appeal). Counsel for the appellant also submitted that this case is distinguishable from *Chirwa* but for reasons that will become apparent I need not deal with that submission.

[27] Our rules of precedent require a court generally to follow the decisions of a court of higher authority. I do not think that rule is without limitations but it is not necessary to explore those limitations in this case.

[28] What a court is to do when confronted with conflicting decisions of a higher court has naturally received little attention in systems that observe the ordinary rules of precedent. But *Salmond on Jurisprudence* suggests the following solution:[12]

'Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic [higher] court itself. The lower court may refuse to follow the later decision on the ground that it was arrived a *per incuriam*, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be.'

The author describes the freedom that the higher court (and by extension the lower court) has as follows:

'Although the later court is not bound by the decision so given *per incuriam*, this does not mean that it is bound by the *first* case. Perhaps in strict logic the first case should be binding, since it should never have been departed from, and was only departed from *per incuriam*. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later.'

[29] It is in that context that an analysis of the decision in *Chirwa* becomes necessary but some background is helpful to that analysis.

[30] Whether a court has jurisdiction (in the sense that is now relevant) to

[12] 12 ed by PJ Fitzgerald p. 152-53.

consider a particular claim depends upon the nature of the rights that the claimant seeks to enforce. (Whether the claim is good or bad in law is immaterial to the jurisdictional enquiry.[13]) I think it can be taken to be trite that a claim for the enforcement of the constitutional right to just administrative action (through the medium of PAJA) falls within the ordinary jurisdiction of the high courts. Section 157(2) of the Labour Relations Act (LRA) confers concurrent jurisdiction on the Labour Court in respect of such claims in certain circumstances.[14] It follows that a claim that falls within the terms of that section is capable of being pursued either in the high court or in the Labour Court. Any suggestion that the effect of that section is to oust the ordinary jurisdiction of the high courts in respect of such claims was firmly put to rest in *Fredericks* in the following terms:[15]

'Whatever else its import, s 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.'

There are also various rights that are accorded to employees by the LRA that are not enforceable in the high courts but only through the mechanisms that are provided for in the LRA.

[31] The jurisprudential objections that were taken in the cases I have referred to – and that was taken in this case – were all taken on the same basis. In each case it was contended by the objector that the claim was not what it purported to be (a claim for enforcement of the right to just administrative action that fell within the jurisdiction of the high courts[16]) but was instead a claim for enforcement of rights conferred upon the claimant by the LRA (which falls outside the jurisdiction of the high courts). In effect the objectors purported to substitute the claim that had been made with the claim that had not been made by calling it the latter.

[32] But things cannot be made to be what they are not merely by calling

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[13] Cf Langa CJ in *Chirwa* para 155.

[14] Section 157(2): 'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;
(b) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
(c) the application of any law for the administration of which the *Minister* is responsible.'

[15] Para 41.

[16] But for *Fedlife*, in which the claim was for the enforcement of a contractual right.

them something else and that applies as much to legal claims as to other things. Where the lower courts construed the claim to be other than the claim that it purported to be[17] the objections were consistently upheld. Where courts dealt with the objection on the basis that the claims were indeed what they purported to be the objections were consistently dismissed.[18] In both cases the outcome was inevitable, depending upon whether the claim was dealt with for what it was, or whether it was substituted in effect with a claim that it was not.

[33] That problem did not arise in *Chirwa* – although there are passages in the two majority judgments that might at face value suggest the contrary.[19] One thing is clear beyond a shadow of doubt – notwithstanding other difficulties I have had interpreting those judgments – which is that the court construed the claim as being one for the enforcement of the claimant's constitutional right to just administrative action (which is what the claim purported to be). For had the claim been construed to be anything else the court would not have been capable of finding (as both the majority and the minority found) that the dismissal of the appellant did not constitute administrative action – the question whether the dismissal constituted administrative action could simply not have arisen.

[34] That the claim in that case was a claim for the enforcement of the constitutional right to just administrative action must necessarily be the starting point for the enquiry as to whether the high court had jurisdiction. Notwithstanding close and repeated study of the majority judgments over a considerable period of time I regret that I have not been able to discover a legal basis for the finding that the high court has no jurisdiction over a claim of that kind. I have already pointed out that it is trite that a claim for the enforcement of the constitutional right to just administrative action falls within the ordinary jurisdiction of the high courts. The fact that the claim arises from an employment relationship does not place it within the exclusive jurisdiction reserved to the Labour Court by s 157(1) of the LRA (as pointed out by Skweyiya J,[20] citing with

[17] Sometimes purporting to 'characterise' the claim but in truth substituting one claim for the other.

[18] This court in *Fedlife*, *Digomo*, *Boxer Superstores* and *Chirwa*, and a unanimous Constitutional Court in *Fredericks*.

[19] See Skweyiya J at para 63 in which the word 'claim' is incorrectly used. What was said in that paragraph to be the claim was instead the allegations and submissions made by the claimant in support of her claim. Also Ngcobo J at para 125, which refers to what the 'dispute concerns' whereas the proper enquiry is what rights the claim seeks to enforce.

[20] Skweyiya J at para 25.

approval the decision in *Fredericks* on that point.[21]) And if the claim falls within the ambit of s 157(2) then the ordinary jurisdiction of the high courts is expressly preserved (as pointed out in *Fredericks* and not overruled by *Chirwa*).

[35] But if *Chirwa* and *Fredericks* were at one on the nature of the claim that was in issue in each case, and on the proper construction of the applicable law, one is left with the question why the outcome in each case differed.

[36] In attempting to resolve that question I have not found it helpful to scrutinise sentences, or even paragraphs, of the majority judgments in isolation, because on the face of it there seem to me to be inconsistencies. I think that the import of *Chirwa* more easily becomes apparent from viewing the judgments more broadly and as a whole. From that perspective it seems to me that the distinction between that case and *Fredericks* does not lie in opposing views held by the respective courts on the law but lies rather in the premise upon which each was decided.

[37] I think a fair reading of the two judgments makes it clear that the majority was of the view that the objective of the Act was both to encompass employees in the public service and also to be exhaustive of their rights arising from their employment, notwithstanding that the legislature had expressed itself to the contrary in s 157(2).[22] With that as its starting point the majority considered it to be desirable as a matter of policy that such employees should pursue complaints arising from their employment only through the mechanisms of the Labour Relations Act and to attain that objective it decided that the high courts must not exercise their ordinary jurisdiction in such cases.

[38] That construction of the judgments seems to me to be consistent with the various references to what *should* or *should not* be permitted (expressed in various ways)[23] in contradistinction to what *is* or *is not* permitted by the statute. It also explains why *Fredericks* was not overruled as a matter of law (the majority distinguished it on its facts but I am unable to see how the factual

[21] *Fredericks* para 40.

[22] Ngcobo J observed that the word 'concurrent' in that section was 'unfortunate' for the achievement of the supposed objective of the Act.

[23] See Skweyiya J at paras 65, 66, 67 and 68 and Ngcobo J at paras 125 and 126.

distinction that was relied upon could be material). It is also the only construction that would be consistent with the appeal by the majority to the legislature to revisit s 157(2) of the LRA,[24] for if the outcome that it considered to be desirable had been one that the law dictated there would be no cause for legislative intervention. Moreover, that construction of the majority judgments seems to me to be expressly acknowledged by the observation of Skweyiya J that

'although one should be 'loathe [to deprive] a litigant of existing rights where she or he is accorded more than one right by the Constitution or any other enabling legislation, it is unsatisfactory that the High Court should be approached to decide review applications in terms of PAJA where the LRA already regulates the same issue to be reviewed.'[25]

[39] While the outcome in *Chirwa* might indeed be desirable I am not at all sure that this court is bound – or even permitted – to adopt and apply a supposed policy if the legislature has not embodied that policy in law. I share the following reservation that was expressed by the Chief Justice:[26]

'We must be careful, as a court, not to substitute our preferred policy choices for those of the Legislature. The Legislature is the democratically elected body entrusted with legislative powers and this Court must respect the legislation it enacts, as long as the legislation does not offend the Constitution.'

[40] Fortunately I have not found it necessary to confront that question in this case. Applying the decision in *Fredericks* – which seems to me to be good law until it is overruled or superseded by amending legislation – I think the appeal must in any event be dismissed.

[41] Ten members of the Constitutional Court held in *Chirwa* that the dismissal that was there in issue did not constitute administrative action as contemplated by PAJA and on that ground alone the appeal in that case fell to be dismissed. (If the high court did not have jurisdiction to pronounce upon the merits of the claim then it seems to me that the Constitutional Court similarly had no jurisdiction and its finding on that issue would not be authoritative but on the approach that I take to the matter that difficulty does not arise.) On that

[24] See Skweyiya J at para 71.
[25] Para 40. Although the judgment of Conradie JA in this court is also difficult to deconstruct it seems to reflect a similar approach.
[26] Para 174.

issue I think I am bound to follow the decision of the Constitutional Court[27] whatever my own view might be on the matter. I do not think the conduct that is complained of in this case is materially distinguishable from the conduct that

[27] By which I mean the ten members (excluding Skweyiya J) who decided that issue.

was in issue in *Chirwa*. It is on that ground that I agree that the appeal should be dismissed and concur in the order proposed by my colleague.

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R.W. NUGENT

JUDGE OF APPEAL