



REPORTABLE

CASE NO: SA 178/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA WATER CORPORATION LIMITED

Appellant

and

KUIRI FANUEL TJIPANGANDJARA

Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS AJA

Heard: 24 March 2025

Delivered: 24 July 2025

Summary: Mr Tjipangandjara (the respondent) was appointed as General Manager: Operations by Namwater in 1998. He was then transferred to General Manager: Engineering and Scientific Services in 2005, which position he held until 2014.

In July 2014, Namwater implemented a revised structure which did away with the respondent's then position and sought to appoint him to a new position of Chief: Water Supply – Central on the same salary and benefits. The respondent pleaded that this amounted to a unilateral change of his employment terms and conditions in contravention of s 16 and s 28 of the Namibia Water Act 12 of 1997 [and s 50(1)(e) of

the Labour Act 11 of 2007 (the Labour Act) in a dispute he reported to the office of the Labour Commissioner]. He further claimed that this revision of the structure amounted to repudiation of his employment contract which he refused to accept. The respondent pleaded that he and Namwater entered into a settlement agreement on 25 February 2015 to the effect that Namwater's lock-out of the respondent was to end and that its implementation of the revised structure would be suspended pending the finalisation of consultations with the respondent, so that he may be heard and alternatives offered to him.

In the High Court, respondent alleged in his particulars of claim that Namwater failed to adhere to the settlement agreement and continued to lock him out and further failed to pay his salary and claimed damages for loss of income and consequential loss on the basis of a common law breach of contract.

Namwater raised a special plea. Namwater pleaded that the dispute which formed the basis of the respondent's claim was time barred as it had to be instituted within one year as prescribed by s 86(2)(b) of the Labour Act. During its oral argument *a quo*, Namwater abandoned its point that the dispute was time barred, but instead contended that the High Court lacked jurisdiction as the claims were based on contraventions of the Labour Act and that the respondent was therefore limited to the remedies contained in the Labour Act.

The respondent replicated in the High Court that his claims were for 'damages arising from the unlawful repudiation/breach of contract based on common law' and denied that s 86 of the Labour Act found application.

The High Court found that the Labour Act did not exclude the jurisdiction of the High Court in respect of common law claims for damages arising from contracts of employment. The Court concluded that the Labour Act does not provide for the recovery of damages and for that reason dismissed the special plea.

On appeal, this Court in determining whether the High Court had jurisdiction in respect of the respondent's claims –

Held per SMUTS AJA (DAMASEB DCJ concurring):

Held that, the respondent's cause of action arose from contravention of s 50(1)(b) of the Labour Act. It was by virtue of that statutory contravention that the Labour Court declared Namwater's conduct wrongful and unlawful.

Held that, the remedy afforded by the Labour Act to an employee in the position of the respondent when contravention of that provision arises – as found by the Labour Court albeit with a reference to s 34 instead of s 50(1)(b) – is to pursue a dispute in terms of s 86 of that Act.

Held that, as in *Swakop Uranium*, the special plea in its formulation likewise raising the time bars in s 86(2) was bad in law and also where it incorrectly pleaded that the High Court has concurrent jurisdiction to hear disputes under the Labour Act. As in *Swakop Uranium*, it would not however follow that the unsoundness of the formulation of the special plea meant that the High Court had jurisdiction to hear the respondent's claims. The High Court would still need to have the requisite jurisdiction to do so. That would depend upon the nature of the cause of action and right(s) asserted in support of the claims in order to determine whether the High Court had jurisdiction or not.

Held that, repudiation of a contract arises where a party engages in conduct amounting to a fundamental breach which is so serious that it cannot reasonably be expected of the other party to continue with the contract. Repudiation also requires a party to allege and prove both an election to terminate or stand by the contract and claim damages, and secondly a communication of that election.

Held that, although there was a reference to repudiation in the particulars of claim, the claims are instead based upon an infringement of the respondent's rights under s 50 of the Labour Act even though s 34 was incorrectly referred to by the Labour Court and referred to in the respondent's pleadings.

Held that, a fundamental misconception in the dissent is the failure to grasp the true nature of the rights asserted in the respondent's pleadings which include the replication overlooked by the dissent.

Held that, the replication pleads that the respondent's cause of action of repudiation arose at a time when he was long since retired (and the employment relationship had long since come to an end) because of a finding of the Labour Court that his rights under s 50 of the Act had been breached. Having regard to the substance of the claim, and not how it is dressed up, it plainly amounts to the assertion of rights under the Act and not a repudiation as is further demonstrated by the replication.

Held that, the pleadings properly construed with reference to the substance of the rights asserted in support of the cause of action, do not remotely raise a contractual claim of repudiation upon common law principles as against Namwater. As already said, the rights asserted are those created by s 50 of the Labour Act as they amount to unfair labour practices. The dissenting judgment overlooks the fact that this Court in *Swakop Uranium* found that the assertion of rights and obligations created under the Act are confined to the labour forums created by the Act to the exclusion of the High Court and that if an employee has contractual rights under the common law they may be asserted with the applicable common law remedy as occurred in *Nghikofa* which *Swakop Uranium* expressly followed. That decision is binding in accordance with doctrine of precedent unless it is found to be clearly wrong. The only reference to *Swakop Uranium* in the dissent is to criticise the above reliance upon *Makhanya*, where Nugent JA in the SCA unequivocally held that labour forums created by the LRA in South Africa have exclusive power to enforce the LRA rights to the exclusion of the High Court, as being misplaced because the court administration in South Africa is different to that of Namibia. Yet the dissent embraces Nugent AJA's earlier judgment in *Wolfaardt*, also relied upon in *Swakop Uranium*, as strongly persuasive for our purposes.

Held that, the remedy thus to enforce contraventions of the respondent's rights protected in s 50 is in the form of reporting a dispute to the Labour Commissioner who would refer it to arbitration.

Held that, it was apposite to refer to the finding in the dissent that s 115 of the Labour Act 'lacks the legitimacy to elevate the Labour Court to the level of the High Court' and that ss 115, 116 and 117 'when challenged' would be found to be inconsistent with the Constitution, cannot stand up to scrutiny.

Held that, the original jurisdiction referred to in Art 80(2) of the Constitution to hear all civil disputes means, apart from powers specifically conferred by statute, the power of the High Court to 'entertain any claim or give any order which at common law it would be entitled so to entertain or give' Art 80(2) was written and adopted at a time before the rights created in the Labour Act and its predecessor, Act 6 of 1992, existed and thus would not have constituted civil disputes at that time. The labour rights created in both the 1992 and current Labour Act thus could and did not form part of the High Court's original jurisdiction. The High Court possessed no jurisdiction to address the labour rights created in those Acts, except where they also constituted cognizable common law causes of action which the High Court retained, as stressed above. They were enacted subsequent to Art 80(2)'s adoption and the legislature in doing so provided for specialist tribunals and courts with the power exclusively to adjudicate upon and give effect to those rights and remedies so created which did not form part of the High Court's original jurisdiction.

Held that, on account of the incorrect basis of Namwater's special plea in the High Court, it was not entitled to costs in that court.

Consequently, the majority upheld the appeal with costs.

Held per MAINGA JA (dissenting):

Held that, disputes about unfair dismissals and unfair labour practices in the Labour Act and related disputes under the common law may always overlap - a claim instituted in terms of the Labour Act, may well fall properly in the concurrent jurisdiction of the High Court and the Labour Court.

Held that, the characterisation of respondent's claim as solely founded in terms of s 86 of the Labour Act is without doubt fundamentally flawed.

Held that, in *casu* Smuts AJA found that the principle of subsidiarity is not applicable, I agree it is not. That principle is best understood/applicable in the following circumstances. Where a right is protected in the Constitution, take for example, Art 23 on apartheid and affirmative action. When an Act of Parliament is passed entrenching that right, a litigant, pursuing the enforcement of the right when violated, on the

principle of subsidiarity is not required to rely on the Constitution but on the Act. Respondent is not relying on a (labour) right protected in the Constitution entrenched in the Labour Act, he is relying on the common law violation and his claim with all its flaws should have been determined in that context. Likewise, Mr Masule was not pursuing a (labour) right protected in the Constitution, entrenched in the Labour Act. Therefore, reliance on the subsidiarity principle in that case was misplaced as the principle was not applicable in that case too.

Held that, given the relationship of the High Court and the Labour Court to have confined the respondent's claim in the Act, holding that the High Court had no jurisdiction, not only deeply emasculates the constitutional jurisdiction of the High Court, but it is an absurdity of grave injustice.

Held that, on the strength of Art 80 of the Constitution the High Court has concurrent jurisdiction with the Labour Court on the remedies exclusive to the Labour Court.

The minority would accordingly have dismissed the appeal.

APPEAL JUDGMENT

SMUTS AJA (DAMASEB DCJ concurring):

[1] At issue in this appeal is whether the High Court had jurisdiction to hear and determine the respondent's claims instituted against the appellant (Namwater). The claims were for loss of income and damages arising from the employment relationship between the parties. Namwater filed a special plea placing in issue whether the High Court has jurisdiction to hear the matter, albeit in a convoluted manner. This appeal is against the dismissal of that special plea by the High Court.

[2] The question of the High Court's jurisdiction to hear the matter is to be assessed in light of the pleadings.

The particulars of claim

[3] The respondent was appointed as General Manager: Operations by Namwater in 1998. He was subsequently transferred to the position of General Manager: Engineering and Scientific Services in 2005, holding that position until 2014.

[4] In July 2014, Namwater implemented a revised structure which did away with the respondent's then position and sought to appoint him to a new position of Chief: Water Supply – Central on the same salary and benefits. The respondent pleads that this amounted to a unilateral change to his employment terms and conditions in contravention of s 16 and s 28 of the Namibia Water Corporation Act 12 of 1997 [and s 50(1)(e) of the Labour Act 11 of 2007 (the Labour Act) in a dispute he reported to the office of the Labour Commissioner].

[5] The respondent also claims that this amounted to a repudiation of his employment contract which he refused to accept. He further pleads that he and Namwater thereafter reached a settlement agreement on 25 February 2015 to the effect that Namwater's lock-out of the respondent was to end and Namwater's implementation of its revised structure would be suspended pending the finalisation of consultations with the respondent, so that he may be heard and alternatives offered to him. This settlement agreement was reached in respect of the respondent's (first) dispute he had referred to the office of the Labour Commissioner, as is evident from its terms attached to the particulars of claim.

[6] The particulars of claim allege that Namwater failed to adhere to this settlement agreement and proceeded to lock the respondent out and failed to pay his salary.

[7] The respondent further alleges that Namwater was on 15 March 2017 informed that he was advised that he no longer needed to tender his services, and had tendered to work from July 2014 until March 2017.

[8] The particulars of claim further states that on 9 November 2018, the Labour Court made a finding that 'the unilateral change of employment terms and conditions by an employer violated the provisions of s 34 of the Labour Act (11 of 2007) and hence the conduct of the defendant in continuing with the lock-out, was wrongful and unlawful' (*sic*).

[9] As a consequence, the respondent in his particulars of claim, claims a loss of income for the period 1 April 2015 to 1 April 2017 in claim 1 in the total sum of N\$2 630 809,47.

[10] A second claim is also advanced in the particulars of claim. It is in respect of damages 'as a result of (Namwater's) wrongful and unlawful repudiation of the employment contract'. The second claim is in respect of alleged interest loss, legal and actuarial fees, cancellation of an investment policy, cattle losses and cattle sales and is in the total sum of N\$3 119 239,10.

Namwater's special plea

[11] In its special plea Namwater refers to the Labour Court's finding that its lock-out of the respondent from 9 April 2015 was unlawful. Namwater further states that the respondent's claim for loss of income was in respect of loss of income and damages in claims 1 and 2 which arose from then (9 April 2015) until his retirement date on 1 May 2017.

[12] Namwater further asserts that the High Court and the Labour Court enjoy 'concurrent jurisdiction to adjudicate and determine disputes as envisaged in s 86 of the Labour Act'.

[13] Namwater however pleaded that the disputes which formed the basis of the respondent's claims must be instituted within one year after they arose in terms of s 86(2)(b) of the Labour Act.

[14] Namwater pleaded that the High Court lacked jurisdiction or power to adjudicate the respondent's claims by reason of the failure to institute the claims within that one year period. When the special plea was argued, Namwater in oral argument no longer pursued the point that the claims were time barred but instead contended that the court lacked jurisdiction because the claims were based upon contraventions of the Labour Act and that the respondent is limited to the remedies contained in that Act for those infractions and that the High Court would not have jurisdiction to determine those claims.

Respondent's replication

[15] The respondent replicated to the special plea, as formulated, that the Labour Court is not a court separate from the High Court and merely a division of the High Court.

[16] The respondent pleaded that his cause of action arose on 9 November 2018 when Namwater's lock-out was determined as unlawful by the Labour Court.

[17] The respondent further pleaded that the provisions relating to the exclusive jurisdiction of the Labour Court in s 117 of the Labour Act did not oust the common law functions of the High Court in labour matters.

[18] The respondent further replicated that his claims were for 'damages arising from the unlawful repudiation/breach of contract based on the common law' and denied that s 86 found any application. The respondent further pleaded that his claims had not prescribed.

Approach of the High Court

[19] The High Court dismissed the special plea of jurisdiction with costs.

[20] The High Court referred to the judgment of this Court in *Nghikofa v Classic Engines CC*¹ which held that the Labour Act did not exclude the jurisdiction of the High Court in respect of common law claims for damages arising from contracts of employment.

[21] In the course of oral argument, the court below was also referred to *Swakop Uranium v Employees of Swakop Uranium*,² which had been argued in this Court shortly before the special plea was argued and the judgment was delivered shortly afterwards. The High Court referred to one of the findings in *Swakop Uranium* to the effect that this Court held that the fact that a breach of an employment contract may also independently of the Labour Act give rise to the enforcement of a common law contractual remedy and may also amount to a dispute, would not mean that the time bars in s 86(2)(b) would apply when those rights are enforced in a contractual claim in the High Court.

¹ *Nghikofa v Classic Engines CC* 2014 (2) NR 314 (SC).

² *Swakop Uranium v Employees of Swakop Uranium* 2022 (4) NR 1195 (SC).

[22] The High Court concluded that it would 'need to determine whether the relief the plaintiff seeks falls within the ambit of the Labour Act'. The court concluded that the Labour Act does not provide for the 'recovery of damages' and for that reason dismissed the special plea.

Submissions on appeal

[23] At the outset, counsel for Namwater correctly conceded that the main basis for the special plea, raising the time bars in s 86, was no longer relied upon but rather a denial of jurisdiction along the lines as determined in *Swakop Uranium*. Counsel for Namwater further contended that the respondent's cause of action, upon which the damages claims are founded, is based upon a contravention by Namwater of the respondent's rights in terms of s 34 of the Labour Act.

[24] Counsel relied upon the approach of this Court in *Swakop Uranium* to the effect that the labour forums established by the Labour Act to provide remedies for breaching that Act have the exclusive power to enforce those statutory rights – to the exclusion of the High Court's jurisdiction.

[25] Counsel pointed out that the remedy for a breach of s 34 is prescribed by s 38 and a party is limited to that remedy in that forum.

[26] It was argued on behalf of Namwater that the High Court accordingly lacked jurisdiction to hear the respondent's claims.

[27] Counsel for Namwater also argued that the appeal should also be upheld on an application of the principle of subsidiarity referred to by this Court in *Masule v Prime Minister of the Republic of Namibia & others*.³ Counsel argued that this principle was alluded to in *Swakop Uranium*. That is however not correct. This Court in *Swakop Uranium*⁴ merely pointed out that the conclusion reached in that matter accorded with the *obiter* remarks contained in para 38 of the main judgment in *Masule* which articulated that challenges in unfair dismissals must in the first instance be ‘ventilated through the conciliation and arbitration machinery created by the Labour Act’.⁵

[28] The respondent’s counsel complained that Namwater’s argument on appeal introduced new points not pleaded in the special plea. It was argued that the jurisdiction point was taken in the special plea with reference to the time periods contained in s 86 and not that the High Court did not have any jurisdiction in respect of contraventions of rights under the Labour Act. Counsel however correctly conceded that the High Court is required to be satisfied that it has jurisdiction and that it is open to this Court to consider and determine that issue.

[29] Respondent’s counsel argued that his client’s case is not based on a contravention of s 34 as contended on behalf of Namwater but rather upon a contractual breach in the form of repudiation. Counsel argued that in terms of the settlement agreement, Namwater agreed to suspend its restructuring pending consultations with the respondent which did not occur. This, counsel contended, together with a lock-out amounted to a repudiation of the employment agreement as the lock-out was found to be unlawful. Whilst the Labour Act concerned issues of

³ *Masule v Prime Minister of the Republic of Namibia & others* 2022 (1) NR 10 (SC) paras 34 – 35.

⁴ Para 50.

⁵ Para 50 read with para 38 of *Masule*.

unfairness, counsel argued that unlawfulness would amount to breach of contract and give rise to damages.

[30] Respondent's counsel further contended that the respondent's claims are for contractual damages arising from the 'unlawful repudiation/breach of employment contract'. Because the Labour Court did not have jurisdiction to award damages, the respondent, so counsel argued, is required to utilise this common law right to sue his employer in the High Court.

[31] Counsel further contended that s 117 did not oust the High Court's 'common law functions in labour matters'.

Issue for determination

[32] The issue raised in the court below was whether the special plea taken against the respondent's claim is a good one. The High Court dismissed that special plea. Although the jurisdiction of the High Court was challenged in the special plea, it was with reference to the time bars contained in s 86, asserting that the claims were time-barred. During oral argument in the High Court, counsel shifted Namwater's stance to arguing that the High Court lacked jurisdiction because the claim raised rights protected in the Labour Act which are to be enforced in the forums created by that Act. The matter was argued on 11 November 2022. This Court's judgment in *Swakop Uranium*, delivered on 22 November 2022, was referred to in the High Court judgment which was in turn delivered on 27 January 2023.

[33] In the application for leave to appeal, Namwater's approach was to rely upon *Swakop Uranium*, arguing that the cause of action and rights asserted arise from the

Labour Act and meant that the respondent was limited to the remedies provided for in that Act in asserting those rights and that the High Court lacked jurisdiction to hear the claim. This approach is also reflected in the notice of appeal and is at the heart of Namwater's written argument filed in advance of the hearing.

Did the High Court have jurisdiction in respect of the respondent's claims?

[34] It is well settled that the jurisdiction of a court is determined on the basis of the pleadings of a matter⁶ and not the substantive merits of a claim. This is because the pleadings contain the legal basis of the claim.

[35] This Court in *Swakop Uranium* held that an almost identically worded special plea (based upon the time bars in s 86) was unsound. The special plea in this matter did however take issue with the High Court's jurisdiction to hear the claims, albeit on that flawed basis. This Court in *Swakop Uranium* held that the issue as to whether the High Court has jurisdiction to hear a matter at all can rightly be raised on appeal. In this instance, it was already raised during oral argument of the special plea in the High Court and thereafter in the application for leave to appeal, the notice of appeal and in written argument filed in advance of the appeal. The respondent is plainly not prejudiced by this and did not persist with the point against jurisdiction being raised on appeal. Its only relevance may be as far as the costs in the court below are concerned.

[36] Even though the terms of the special plea in raising jurisdiction were inept and founded upon an incorrect premise, this Court has unequivocally held that it is not only open to the High Court to raise jurisdiction but it is indeed incumbent upon it to do so in order to be satisfied that it has jurisdiction to hear a matter.⁷

⁶ *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) paras 155 and 169 (per Langa CJ); *Gcaba v Minister of Safety and Security & others* 2010 (1) SA 238 (CC) para 75.

⁷ *Swakop Uranium* para 55.

[37] The term 'jurisdiction' has been held to mean 'the power or competence of a Court to hear and determine an issue between the parties'.⁸

[38] Whether the High Court has jurisdiction to hear and determine the respondent's claims depends upon the terms of the pleadings and how they are construed in order to determine whether the cause of action is one to be determined in accordance with the statutory remedies provided for in the Labour Act or is the assertion of a common law breach of contract which can be determined in the High Court.

[39] The statutory scheme of the Labour Act was summarised in *Swakop Uranium* where a strikingly similarly worded special plea was raised in a claim brought in the High Court to claim overtime pay:

[26] According to the long title of the Act, it was enacted to "consolidate . . . the labour law" and "establish a comprehensive labour law for all employers and employees". A further objective set out in the long title is to "regulate basic terms and conditions of employees" and also to "regulate collective labour relations" and to provide for the "systematic prevention and resolution of labour disputes".'

[40] In this appeal, the provisions of Chapters 3 and 5 of the Labour Act, regulating basic terms and conditions of employment and unfair labour practices, as well as Chapter 8, dealing with the prevention and resolution of disputes, are relevant for present purposes. Chapter 3 includes s 34 which concerns dismissal by reason of redundancy. Chapter 5 is entitled 'unfair labour practices' and includes s 50 which concerns employer unfair labour practices. These include a unilateral change to conditions of employment in s 50(1)(e) and bargaining in bad faith in s 50(1)(b).

⁸ *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Gcaba* para 74.

[41] In para 18 of the respondent's particulars of claim, the respondent pleads:

'On the 9th November 2018, the Labour Court (in the case of Tjipangandjara v Namibia Water Corporation Limited & Others (LCA) 16 & 19/2017) [2018] NAHCMD 30 (9 November 2018) made a finding that the unilateral change of employment terms and conditions by an employer violated the provisions of s 34 of the Labour Act and hence the conduct of the second Defendant in continuing with the lock-out was wrongful and unlawful.'

[42] In his replication, the respondent pleads that his cause of action arose on 9 November 2018 when the appellant's lock-out of the respondent was determined as unlawful by the Labour Court.

[43] In para 9 of the particulars of claim, the respondent alleges:

'The aforesaid conduct of the Chief Executive Officer in unilaterally abolishing the previously held employment position of the Plaintiff was wrongful and unlawful in that it amounted to unilateral change of employment terms and conditions.'

[44] Namwater proceeded to lock the respondent out following the settlement agreement. The respondent reported a dispute in terms of s 86 of the Labour Act to the office of the Labour Commissioner, claiming a unilateral change to his terms and conditions and an unfair labour practice. That resulted in the settlement of the dispute as set out in annexure C to the particulars of claim (the settlement agreement). The respondent alleges that Namwater failed to comply with the terms of the settlement agreement and proceeded to lock him out. That gave rise to the referral of a further dispute to an arbitrator, claiming a refusal to bargain in good faith and the refusal to implement the settlement agreement and non-compliance with s 51(4) of the Labour

Act. An arbitrator declined the declaratory order to that effect sought. An appeal to the Labour Court culminated in a finding that there was a unilateral change in the employment contract in violation of the Labour Act and hence the lock-out was wrongful and unlawful, although that court in its judgment and orders merely upheld the appeal without pertinently stating the terms of the declaratory order which should have been granted.

[45] The cause of action relied upon in referring the disputes for the purpose of s 86(2)(b) is a claimed unilateral change in his conditions of employment, being in contravention of s 50(1)(e) of the Labour Act which provides:

‘Section 50(1)

It is an unfair labour practice for an employer or an employers’ organisation –

- (a) . . .
- (b) to bargain in bad faith;
- (c) . . .
- (d) . . .
- (e) to unilaterally alter any term or condition of employment;
- (f) . . .
- (g) . . .’

[46] A contravention of this provision contained in Chapter 5 of the Labour Act constitutes an unfair labour practice. The remedy for this is referring a dispute in writing to the office of the Labour Commissioner to be resolved through arbitration in accordance with Part C of Chapter 8 of the Act. This the respondent did. The adverse outcome of the second dispute was appealed to the Labour Court which upheld that appeal and found that Namwater contravened s 50(1)(e) (and perpetrated an unfair labour practice). In its judgment, the Labour Court also found that Namwater failed to

negotiate in good faith with the respondent in contravention of s 34 of that Act, although the terms of the declaratory order are unfortunately nowhere spelt out in the judgment. Respondent's counsel asserted that the respondent's claim arose from wrongful and unlawful conduct and not unfairness (thus involving the Labour Act) and thus meant that the High Court would have jurisdiction. This assertion however fails to appreciate the nature of the rights asserted by respondent. The Labour Court's finding of unlawfulness stemmed from infringements of the Labour Act which relate to unfair employer conduct in the form of a duty to bargain in good faith and a unilateral change to conditions of employment, which constitute unfair labour practices as defined by s 50 of that Act.

[47] It would appear that the respondent only sought a declaratory order to that or similar effect and did not seek an order from the arbitrator to make an award for compensation under s 86(15)(e). It was plainly open to the respondent to seek compensation from an arbitrator in respect of his salary and benefits if the lock-out was in conflict with the Act and those were denied to him. Sub-section 86(15) empowers an arbitrator to make an appropriate award including:

- '(a) an interdict;
- (b) an order directing the performance of any act that will remedy a wrong;
- (c) a declaratory order;
- (d) an order of reinstatement of an employee;
- (e) an award of compensation; and
- (f) subject to subsection (16), an order for costs.'

[48] The respondent did not seek any form of contractual damages or compensation or an order directing the performance of any act that would remedy a wrong against him by Namwater in his dispute proceedings and subsequently instituted this action in

the High Court claiming loss of income and consequential contractual damages on the ground that Namwater's conduct amounted to a repudiation of his employment contract.

[49] The respondent pleads that his cause of action arose on 9 November 2018 when the Labour Court made a finding 'that the unilateral change of employment terms of conditions . . . violated the provisions of s 34 of the Labour Act and hence (Namwater's) conduct in continuing with the lock-out was wrongful and unlawful'. (That Court in fact found that both s 50(1) and s 34 had been contravened).

[50] It is not clear to me how a contravention of s 34 arises as that provision concerns dismissal arising from a redundancy or reduction of the workforce. It is not alleged that Namwater intended to terminate or did terminate the respondent's service but rather that it sought to transfer him to another position on the same salary and conditions. This however amounted to a change to the respondent's conditions of service and, if done unilaterally, would constitute an unfair labour practice as correctly found by the Labour Court. Bargaining in bad faith would also amount to an unfair labour practice by virtue of s 50(1)(b).

[51] The respondent's cause of action thus arises from contraventions of s 50(1) of the Labour Act. It was by reason of those statutory contraventions (although with reference to s 34 as well) that the Labour Court declared Namwater's conduct wrongful and unlawful. Counsel for the respondent correctly accepted that a contravention of s 34 would not arise and that a contravention of s 50(1)(b) should rather have been the finding. Counsel also correctly accepted that the breaches of that statutory right form the basis of the respondent's cause of action, as

is confirmed in the replication with reference to when the cause of action arose. This is overlooked by the minority judgment in its failure to appreciate the nature of the rights asserted by the respondent being grounded in breaches of the Labour Act, which do not amount to a common law repudiation in any coherent sense. The respondent's claim is furthermore not founded in terms of s 86 of the Labour Act as the dissent would have it. That section provides the remedy for the respondent's claim founded in s 50 of that Act.

[52] The remedy afforded by the Labour Act to an employee in the position of the respondent when contraventions of those provisions arise – as found by the Labour Court albeit with a reference to s 34 instead of s 50(1)(b) – is to pursue a dispute in terms of s 86 of that Act (for referral to an arbitrator and not the Labour Court). That the respondent did twice, firstly culminating in the settlement agreement. In the latter instance he sought a declaratory order from an arbitrator to that effect (declaring statutory contraventions) which he ultimately obtained on appeal to the Labour Court.

[53] The remedy of referral of a dispute is set out in Chapter 8 of the Labour Act dealing with the prevention and resolution of disputes. This chapter includes Part C which establishes arbitration tribunals for the purpose of resolving disputes as defined in that Part.

[54] Section 84 of that Act in turn defines disputes for the purpose of Part C in these terms:

‘For the purposes of this Part, “dispute” means –

- (a) a complaint relating to the breach of a contract of employment or a collective agreement;
- (b) a dispute referred to the Labour Commissioner in terms of section 46 of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998);
- (c) any dispute referred in terms of section 82(16); or
- (d) any dispute that is required to be referred to arbitration in terms of this Act.'

[55] Section 86 sets out the further course which dispute referrals take when proceeding to arbitration and sets time limits within which the two forms of referrals are to be made.

[56] As this Court held in *Swakop Uranium*:

'The fact that the employees' claims constitute disputes for the purpose of s 84 does not however mean that the time bar in s 86(2)(b) results in the High Court not having jurisdiction if the time limit has expired, as the appellant would have it. If the employees' claims also amounted to the assertion of an identifiable cognisable common law contractual claim separate and additional to the right referred to as a dispute, the High Court would have jurisdiction to hear the claim in accordance with the approach of this court in *Nghikofa*, as was correctly found by the High Court. In that event if the employees' claims amount to a separate claim enforceable as a common law contractual claim, then prescription would be determined in accordance with the Prescription Act.'⁹

[57] *Nghikofa*¹⁰ concerned a claim instituted in the High Court for damages arising from an employment contract. The appellant in that matter, who was an employee, had referred a dispute for an unfair dismissal in terms of the Labour Act which was settled. The employer subsequently instituted a damages claim against the employee in the High Court for making 'secret profits', causing the employer to suffer damages arising from that alleged breach of the employment contract. The employee denied the High

⁹ *Swakop Uranium* para 34.

¹⁰ *Nghikofa v Classic Engines CC*.

Court's jurisdiction to hear that damages claim because it related to a dispute under s 86 arising from an employment contract and that it had become time barred by virtue of s 86(2). This Court in *Nghikofa* held:

[16] Section 84 of the Act defines "dispute" to include "a complaint relating to the breach of a contract of employment of a collective agreement." Section 86 then provides that a party to a dispute may refer the dispute in writing to the Labour Commissioner or any labour office, which, in turn, may then be referred to conciliation as happened here.

[17] It appears that at no stage during the proceedings before the Labour Commissioner did the respondent raise the question of the contractual damages it had suffered. The Act does not expressly confer the power to determine contractual damages upon an arbitrator although s 86(15)(d) of the Act empowers an arbitrator to make "an award of compensation" but does not expressly mention damages. The High Court judge, in his judgment in this matter, expressed the view that an arbitration tribunal acting in terms of s 85 of the Act has no power to determine claims based on damages arising from contracts of employment. It is not necessary for this court to determine that question here. It is only necessary for this court to determine the narrower question: assuming that the respondent could have raised its damages claim before the Labour Commissioner, was it compelled to do so?

[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above s 86(2) of the Act provides that a party may refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) in para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation.

...

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.'

[58] In following *Nghikofa*, this Court in *Swakop Uranium* also referred to the position in South Africa as articulated by Nugent AJA in *Fedlife Assurance Ltd v Wolfaardt*¹¹ and concluded:

' [39] Like the position in South Africa, the Act is not exclusive of the rights and remedies that accrue to employees and employers upon termination or upon a breach of an employment contract. *Nghikofa* makes that clear. Recognisable common law contractual remedies of repudiation, interdicts and a damages action may arise under common law which are enforceable in the High Court. A breach of a restraint of trade term in an employment agreement is but one example of the latter. It is not necessary for present purposes to delineate which common law contractual remedies in an employment setting are capable of being heard in the High Court. Some of these may simultaneously also constitute disputes under s 84 because they may arise from issues relating to a breach of contract of employment, as was held in *Nghikofa*.

[40] The fact that a breach of an employment contract would also, independently of the Act, give rise to the enforcement of a common law contractual remedy and may also amount to a dispute would not mean that the time bars contained in s 86(2)(b) would apply when those rights are enforced in that manner in the High Court. The time bars in s 86(2)(b) apply to the remedies invoked in the Act when referring disputes under the Act.'

(Emphasis supplied).

[59] As in *Swakop Uranium*, the special plea in its current formulation likewise raising the time bars in s 86(2) is bad in law and also where it incorrectly pleads that the High Court has concurrent jurisdiction to hear disputes under the Labour Act. As in

¹¹ *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA). As is stated below *Fedlife Assurance* was significantly qualified by the Constitutional Court in *Chirwa* and *Gcaba*, see footnote see para [71] below.

Swakop Uranium, it would not however follow that the unsoundness of the formulation of the special plea means that the High Court has jurisdiction to hear the respondent's claims. The High Court would still need to have the requisite jurisdiction to do so. That would depend upon the nature of the cause of action and right(s) being asserted in support of the claims in order to determine whether the High Court has jurisdiction or not. In this context, this Court in *Swakop Uranium* held:

'If the right asserted solely arises from the Act and the Act provides a remedy for the breach of that statutory right in the form of arbitration, then it would follow that the employee or employer would be limited to asserting that right (breach of the statutory right) and seek the remedy for its breach within the structures provided for by the Act.'¹²

[60] The rights asserted by the respondent which form the basis of his cause of action, concern unfair labour practices perpetrated by Namwater against him. Those unfair labour practices are created by s 50 of the Labour Act. The right to resist and address unfair labour practices thus arises under the Labour Act (s 50) and not by virtue of the common law even where there is an attempt to characterise those unfair labour practices as a repudiation. The incorporation or reference to the Labour Act in a contract of employment, as pleaded in para 7 of the particulars of claim, arises by virtue of s 50 and not under the common law. Contraventions of s 50 give rise to the right under s 51 to refer disputes in respect of those contraventions to the Labour Commissioner to be referred to arbitration. (The remedy for a breach of s 34 is also by virtue of s 38 to refer that dispute to the Labour Commissioner and proceed to arbitration and also to be resolved in accordance with Part C of Chapter 8 of that Act).

[61] Repudiation of a contract on the other hand arises where a party engages in conduct amounting to a fundamental breach which is so serious that it cannot

¹² Para 43.

reasonably be expected of the other party to continue with the contract.¹³ The test for repudiation, as repeatedly approved, is:¹⁴

‘. . . whether conduct amounts to such repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention to no longer be bound.’¹⁵

And as stated in England and approved in *Culverwell*:¹⁶

‘. . . the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract.’¹⁷

[62] The test is objective.¹⁸ Repudiation also requires a party to allege and prove both an election to terminate or stand by the contract and claim damages, and secondly a communication of that election.¹⁹

[63] Although there is reference to repudiation in the particulars of claim, the claims are instead based upon an infringement of the respondent’s rights under s 50 of the Labour Act, even though s 34 was incorrectly referred to by the Labour Court and referred to in the respondent’s pleadings.

[64] A fundamental misconception in the dissent is the failure to grasp the true nature of the rights asserted in the respondent’s pleadings which include the replication overlooked by the dissent.

¹³ *Culverwell & another v Brown* 1990 (1) SA 7 (A) at 14A-B.

¹⁴ *Culverwell* at 14B; *Van Rooyen v Minister of Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-C.

¹⁵ *Street v Dublin* 1961 (2) SA 4 (W) at 10B.

¹⁶ *Ibid* at 14.

¹⁷ *Freeth v Burr* (1874) LR 9 CP at 214 approved by the House of Lords in *Mersey Street Co v Naylor* 9 AC 434.

¹⁸ *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 952-953.

¹⁹ *Ibid* at 952-953.

[65] The replication pleads that the respondent's cause of action of repudiation arose at a time when he was long since retired (and the employment relationship had long since come to an end) on the basis of a finding of the Labour Court that his rights under s 50 of the Act had been breached. Having regard to the substance of the claim, and not how it is dressed up, it plainly amounts to the assertion of rights under the Act and not a repudiation as is further demonstrated by the replication.

[66] This Court will have regard to the substance of the actual rights asserted and not the nomenclature used to describe them. There is no further allegation of an election made by the respondent after the cause of action arose, as pleaded when the Labour Court made its ruling on 9 November 2018. At that stage, the respondent had by then retired from his services with Namwater (as of 1 May 2017), as pleaded. There was no longer an employment agreement subsisting between the parties which had by then terminated by reason of the respondent's retirement. There can thus be no question of repudiation. There is also no allegation to the effect that Namwater's conduct evinced an intention to no longer be bound by the employment agreement. On the contrary, it is alleged that the notice in July 2014 sought to continue the respondent's services in another position on the same salary and benefits and wanted the respondent to accept that position. Respondent's counsel also argued that Namwater's lock-out of the respondent was directed at applying pressure upon the respondent to accept the new position and thus not with the intention of terminating the employment agreement. The pleadings properly construed with reference to the substance of the rights asserted in support of the cause of action, do not remotely raise a contractual claim of repudiation upon common law principles as against Namwater. As already said, the rights asserted are those created by s 50 of the Labour Act as they amount to unfair labour practices.

[67] The remedy thus to enforce contraventions of the respondent's rights protected in s 50 (and s 34 for that matter) is in the form of reporting a dispute to the Labour Commissioner who would refer it to arbitration.

[68] As was held in *Swakop Uranium*:

'[49] The Act, having created the rights and obligations set out in Chapter 3, has in my view confined a party complaining of non-compliance with those rights and obligations to the remedy expressly provided for in s 38. That party would have no further remedy arising from the non-compliance with those statutory rights and obligations. That is clear from the language employed by the legislature in the Act construed as a whole.' (Emphasis supplied)

[69] By parity of reasoning, the same would apply to the rights contained in Chapter 5. The assertion of a right not to be subjected to an employer unfair labour practice created in s 50 is confined to the remedy contained in s 51 of the Labour Act for the contravention of those rights. That is the remedy and forum (dispute referral and arbitration) created by the Labour Act for the assertion of those rights which is to the exclusion of the High Court by virtue of s 117 of that Act.²⁰

[70] In this context, *Swakop Uranium* concluded:

'[52] The labour forums created by the Act to provide remedies for the breach or interpretation of the rights and obligations under the Act have the exclusive power to enforce those statutory rights – to the exclusion of the High Court. This is also the position in South Africa as is spelt out in the incisive analysis of the SCA in

²⁰ *Swakop Uranium* para 53.

Makhanya,²¹ where the court found that a right under LRA is enforceable only in the forums created by the LRA:

“[18] Thus to summarise:

- The labour forums have exclusive power to enforce LRA rights (to the exclusion of the High Courts).
- The High Court and the Labour Court both have the power to enforce common law contractual rights.
- The High Court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.”

And concluding

“[26] In the present context exclusive jurisdiction to enforce LRA rights has been assigned to the labour forums. But in respect of the enforcement of both contractual and constitutional rights the High Courts retain their original jurisdiction assigned to them by the Constitution.”

[71] The dissenting judgment overlooks the fact that this Court in *Swakop Uranium* found that the assertion of rights and obligations created under the Act are confined to the labour forums created by the Act to the exclusion of the High Court and that if an employee has contractual rights under the common law they may be asserted with the applicable common law remedy as occurred in *Nghikofa* which *Swakop Uranium* expressly followed.²² That decision is binding in accordance with the doctrine of precedent unless it is found to be clearly wrong. The doctrine of precedent is after all an incident of the rule of law and advances justice by ensuring certainty of law.²³ The only reference to *Swakop Uranium* in the dissent is to criticise the above reliance upon *Makhanya*, where Nugent JA in the SCA unequivocally held that labour forums created

²¹ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras 18 and 25.

²² *Nghikofa v Classic Engines* CC 2014 (2) NR 314 (SC).

²³ *Gcaba* paras 59-61.

by the LRA in South Africa have exclusive power to enforce the LRA rights to the exclusion of the High Court, as being misplaced because the court administration in South Africa is different to that of Namibia. Yet the dissent embraces Nugent AJA's earlier judgment in *Fedlife Assurance*, also referred to in *Swakop Uranium*, as strongly persuasive for our purposes yet fails to appreciate that *Fedlife Assurance* was implicitly overruled by the Constitutional Court in *Chirwa*²⁴ or at the very least was significantly qualified by *Gcaba*. In *Gcaba* the court held that if the pleadings properly interpreted establish that a party is asserting a right under the LRA, and one which is exclusively to be determined by the Labour Court, the High Court would lack jurisdiction.²⁵

[72] The minority judgment fails to appreciate that the approach in *Swakop Uranium* (followed in this judgment) and *Makhanya* are logical corollaries to and the other side of the coin to and are clearly consistent with *Nghikofa* and in any event with *Fedlife Assurance* respectively. In fact, in *Makhanya* Nugent JA expressly refers to his earlier judgment in *Fedlife Assurance* which he states was implicitly overruled in *Chirwa*, before setting out the cogent summary as to the overall position cited with approval in *Swakop Uranium*.

[73] This Court in *Swakop Uranium* in fact expressly follows *Nghikofa* which in turn refers to *Fedlife Assurance* as confirming that common law remedies are retained by parties to an employment contract and are to be pursued in the High Court, notwithstanding the exclusive jurisdiction of the forums to hear and determine disputes concerning rights created under the Labour Act. At the risk of repetition, where certain of those rights set out in the Act overlap with common law rights and may also properly

²⁴ *Makhanya* para 8.

²⁵ *Gcaba* para 75.

be asserted as cognizable common law remedies, the High Court continues to have jurisdiction. The subsequent qualification of *Fedlife Assurance* by the Constitutional Court does not affect this position save in the context of bringing reviews in the context of public sector employment which does not arise in this matter. (The approach in *Swakop Uranium* and in this judgment is in any event entirely consistent with the conclusions reached in *Chirwa* and *Gcaba*). But in this case, the substance of the rights asserted do not arise at all under the common law, despite the nomenclature employed, and only under the Labour Act. Thus only the forums created in the Act to address those rights would enjoy jurisdiction as is expressly provided for in s 117.

[74] The High Court thus does not have jurisdiction to hear and determine the respondent's damages claims. It follows that the High Court erred in finding that it had jurisdiction to do so. Even though referring to *Swakop Uranium*, the court incorrectly considered that the relief sought, being a damages claim, which is not directly provided for in the Labour Act, meant that the High Court would have jurisdiction. That basic premise (that the Labour Court and arbitrators would not have jurisdiction to hear damages actions because arbitrators are confined to awarding compensation), may have some basis (although it is not necessary for present purposes to delineate the ambit and extent of awarding compensation) and the extent to which that may overlap with an award in damages. The approach of the High Court however overlooked the further key question as to the nature of the rights and the cause of action asserted by the respondent which can only be asserted by means of the remedies created by that Act and to those forums created in that Act to the exclusion of the High Court.

[75] Because of the conclusion reached, it is not necessary to consider Namwater's contentions concerning the principle of subsidiarity.

[76] It is however apposite to state that the finding in the dissent that s 115 of the Labour Act 'lacks the legitimacy to elevate the Labour Court to the level of the High Court' and that ss 115, 116 and 117 'when challenged' would be found to be inconsistent with the Constitution, cannot stand up to scrutiny.

[77] In the first instance, neither party even remotely raised this question in this appeal. Nor was it put to them at any stage during or before argument. Nor were submissions invited on the question after oral argument. Nor was the Attorney-General joined and submissions sought from that office on such a far-reaching finding in accordance with the longstanding practice of this Court. It would thus be wholly inappropriate for a court to make such a far-reaching finding of this nature in those circumstances and I decline to be drawn on the subject, except to express my strong reservations as to its correctness for the reason set out below and in the absence of it being properly ventilated. It should not be followed at all for this reason alone.

[78] I would further merely endorse the conclusion reached by the majority in *Masule*. I may also add that the dissent's approach on the constitutionality of those provisions rests upon a fallacious premise. The original jurisdiction referred to in Art 80(2) of the Constitution to hear all civil disputes means, apart from powers specifically conferred by statute, the power of the High Court to 'entertain any claim or give any order which at common law it would be entitled so to entertain or give'.²⁶ Article 80(2) was written and adopted at a time before the rights created in the Labour Act and its predecessor, Act 6 of 1992, existed and thus would not have constituted civil disputes at that time. The labour rights created in both the 1992 and current Labour Act thus

²⁶ *Ex Parte Millsite Investment Co (Pty) Ltd* 1965 (2) 582 (T) at 585G following *Steytler v Fitzgerald* 1911 AD 295 at 311. See generally *D Pistorius 'Pollak on Jurisdiction'* 2nd (1993) at 28-30.

could and did not form part of the High Court's original jurisdiction. The High Court possessed no jurisdiction to address the labour rights created in those Acts, except where they also constituted cognizable common law causes of action which the High Court retained, as stressed above. They were enacted subsequent to Art 80(2)'s adoption and the legislature in doing so provided for specialist tribunals and courts with the power exclusively to adjudicate upon and give effect to those specially crafted rights and remedies so created which did not form part of the High Court's original jurisdiction.

[79] The argument mounted on the lack of constitutionality of those provisions collapses and fails upon the very first premise upon which it is built.

Costs

[80] The special plea to the respondent's claims was unsound in its formulation. It did however assert a lack of jurisdiction and the High Court was obliged to be satisfied that it had jurisdiction to hear the claims. The High Court, to its credit, considered the relevance of the *Swakop Uranium* judgment, delivered shortly after hearing oral argument but misapplied it. It may have been advisable for that court to have sought the parties' views on its impact on the matter by way of further submissions, either written or both written and oral.

[81] Namwater should not be entitled to costs in the court below by reason of the incorrect basis to its special plea. But it is entitled to the costs of appeal by raising the basis for the lack of jurisdiction of the High Court at all stages of this appeal. It would accordingly be equitable for no order as to the costs being made in the High Court, as is reflected in this Court's order.

Order

[82] The following order is made:

1. The appeal succeeds.
2. The order of the High Court is set aside and replaced with the following order:
 - ‘(a) The plaintiff’s claims are dismissed for lack of jurisdiction of this Court to hear and determine those claims.
 - (b) There is no order as to costs.’
3. The respondent is to pay the appellant’s costs of appeal, to include the costs of one instructing legal practitioner and two instructed legal practitioners.

SMUTS AJA

DAMASEB DCJ (concurring):

[83] I had the benefit of reading in draft the judgment by Smuts AJA (the main judgment) and that by Mainga JA (the dissent). I concur in the main judgment. I wish to add a few words in support of the main judgment and to record concerns I have about some observations and conclusions in the dissent.

[84] The first concern I have with the dissent is the reopening of the debate on the ‘Labour Court’ and ‘High Court’ dichotomy which was authoritatively settled by this Court by majority in *Masule*.²⁷ Mainga JA wrote the lead judgment in *Masule*. Although I supported the order he proposed in that matter, I was unable to support the reasoning he adopted. Hoff JA concurred in the reasoning I adopted and that therefore became the *ratio decidendi* of *Masule*.

[85] In *Masule*, a judge of the High Court declined jurisdiction on the basis that the case before her fell within the ‘exclusive jurisdiction’ of the ‘Labour Court’.²⁸ Mainga JA and I were satisfied that the learned judge was wrong to decline jurisdiction on the basis that she did – that is that the matter was, on account of s 117 of the Labour Act, within the exclusive jurisdiction of the Labour Court created by s 115 of the Labour Act. I referred to²⁹ and overruled³⁰ previous cases which established the wrong principle that the ‘Labour Court’ was separate from the High Court.

[86] In *Masule*, the majority made it clear that a division of the High Court (such as the Labour Court) does not have subject-matter jurisdiction to the exclusion of the High Court: The Labour Court is synonymous with the High Court. That having been said, *Masule* is also authority for the principle that where an Act of Parliament (such as the Labour Act) has provided specific remedies for the disputes identified in that Act, an aggrieved person is required to take advantage of those remedies so as to avoid the creation of parallel systems of law. It is in that context that the majority in *Masule* discussed the principle of subsidiarity.

²⁷ Reported as *Masule v Prime Minister of the Republic of Namibia & others* 2022 (1) NR 10 (SC).

²⁸ *Masule* paras 24, 25 and 30.

²⁹ *Masule* para 26.

³⁰ *Masule* paras 42 - 50.

[87] Inspired by the wrong premise that the Labour Court is separate from the High Court, Mr Masule had advanced the argument that he was entitled to approach the High Court instead of the Labour Court and to pursue remedies other than those provided under the Labour Act.³¹ He relied for that proposition on the argument that the High Court enjoys unlimited original jurisdiction which had not been ousted by Parliament and that he had a choice as between the remedies under the Labour Act and those possessed by the High Court in furtherance of its unlimited original jurisdiction.

[88] Mr Masule had therefore anchored his argument as a constitutional right. It is therefore surprising that in para [118] of the dissent Mainga JA states that 'Mr Masule was not pursuing a labour right protected in the Constitution. . . '. Of course he was! On the dissent's own reasoning, therefore, subsidiarity applied.

[89] The majority in *Masule* explained that the doctrine of subsidiarity is an obstacle to a litigant (such as Mr Masule was) who, instead of calling in aid remedies provided under the Labour Act, relied on the Constitution. According to the majority in *Masule*:

'[47] The Labour Court, just like the other divisions, is a division of the High Court established by art 78(1)(b), read with art 80 of the Constitution. It is not a court separate or independent from the High Court created by the Constitution. The procedures that the division uses and the scope of remedies that it can grant, are determined by the legislation that creates the division. Those procedures and remedies are the litigants' first point of call and make them subject to the limits they impose. That is the constitutional principle of subsidiarity.

[48] A judge of the High Court faced with a dispute which is governed by the Labour Act is required by the principle of subsidiarity to apply the procedures set out under the Labour Act and the rules made by the Judge President on its authority; and to grant the

³¹ *Masule* paras 16 - 20.

remedies chosen by the legislature for such disputes. Such a judge does so as a judge of the High Court.'

[90] The only basis on which a judge of the High Court can non-suit a litigant pursuing a labour-related grievance is if the party locates the relief under a legal framework not designed for that purpose or by not using the procedural rules intended for such disputes. That is the context in which subsidiarity was discussed by the majority in *Masule*. Simply put: if the legislature provides for a particular procedure and remedy for ventilating a grievance you have a duty to follow it. We cannot have parallel systems of law.

[91] For all the reasons that he gives, I wish to echo Smuts AJA's concern about the suggestion in the dissent that the establishment of the Labour Court does not pass constitutional muster. Since, as the majority made clear in *Masule*, the Labour Court is not a separate court from the High Court, it cannot be correct, as implied by the dissent, that the Labour Court is a 'Lower Court' as that concept is used in the Namibian Constitution.³²

[92] As a division of the High Court, the Labour Court is a convenient mechanism for the Judge-President, under more propitious budgetary conditions, to create a specialist pool of judges to adjudicate disputes arising under the Labour Act.

[93] The dissent's reasoning on the issue of subsidiarity and divisions of the High Court, I am afraid, misses the point. It is best countered by giving an obvious example. The High Court is also a court of admiralty and in that role administers our nation's admiralty laws which a party must call in aid in matters of admiralty. I have yet

³² Article 78(1)(c) of the Constitution although the dissent refers to 'divisions'.

to hear an argument that in matters of admiralty, rather than rely on the special admiralty legislation, a litigant is entitled to approach the High Court as a court of unlimited original jurisdiction to seek common law remedies such as interdicts and declarators on the strength of Arts 18 and 25 of the Constitution.

[94] Returning to the case before us, the issue is whether the respondent is entitled to pursue what are referred to as common law damages against the former employer when the legislature had provided specific remedies for his grievances. The dissent makes the case that the respondent had made an election to 'pursue his claims outside the labour statute' and that 'Disputes about unfair dismissals and unfair labour practices in the Labour Act and related disputes under the common law may always overlap – a claim instituted in terms of the Labour Act, may well fall properly in the concurrent jurisdiction of the High Court and the Labour Act'.

[95] Although the statement of law is correct - based on *Swakop Uranium, Nghifoka* and the *ratio* enunciated in the main judgment in the present case (that a cause of action under the Labour Act may also overlap with common law remedies) – the present is not such a case. Smuts AJA has so comprehensively and persuasively set out the reasons why that is so, and I fully associate myself with his reasoning for arriving at that result.

[96] It is for these reasons that I fully and unreservedly endorse the reasoning by Smuts AJA in the present case and in *Swakop Uranium*.

[97] The appeal must therefore succeed. I support the order proposed by Smuts AJA.

DAMASEB DCJ

MAINGA JA (Dissenting)

[98] I have had the benefit of reading the judgment of Smuts AJA (majority judgment). I agree that the jurisdiction of a court is determined on the basis of the pleadings of a matter and not the substantive merits of a claim.

[99] My disagreement lies in the characterisation of respondent's claim and the fact that the judgment, although it relies on *Nghikofa* for its reasoning and conclusion, fails to appreciate the true purport of, particularly para 18 of that judgment, which paragraph, the majority judgment refers to with approval. My further disagreement is also founded in the unending debate that 'the High Court . . . does not have jurisdiction to hear and determine the respondent's damages claim' and thus 'erred in finding that it had jurisdiction to do so'.

[100] In *Nghikofa* this Court in para 18 said:

'[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above s 86(2) of the Act provides that a party may refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant's cause of action. (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a

different dispute, the court will rarely conclude that such a rule is implicit in legislation.’
(The underlining is mine)

[101] The respondent’s claim or the right he asserts has been characterised to solely arise from the Act and that the Act provides a remedy for the breach of that statutory right in the form of arbitration and that the employee or employer would be limited to asserting that right and seek the remedy for its breach within the structures provided for by the Act.

[102] In justification of the finding above, the judgment in paras [52], [60] and [66] reads thus:

‘[52] The remedy afforded by the Labour Act to an employee in the position of the respondent when contraventions of those provisions arise – as found by the Labour Court albeit with a reference to s 34 instead of s 50(1)(b) – is to pursue a dispute in terms of s 86 of that Act. That the respondent did twice, firstly culminating in the settlement agreement. In the latter instance he sought a declaratory order from an arbitrator to that effect (declaring statutory contraventions) which he ultimately obtained on appeal to the Labour Court.

[60] The rights asserted by the respondent which form the basis of his cause of action, concern unfair labour practices perpetrated by Namwater against him. Those unfair labour practices are created by s 50 of the Labour Act. The right to resist and address unfair labour practices thus arises under the Act (s 50) and not by virtue of the common law even where there is an attempt to characterise those unfair labour practices as a repudiation. The incorporation or reference to the Act in a contract of employment, as pleaded in para 7 of the particulars of claim, arises by virtue of s 50 and not under the common law. Contraventions of s 50 give rise to the right under s 51 to refer disputes in respect of those contraventions to the Labour Commissioner to be referred to arbitration. (The remedy for a breach of s 34 is also by virtue of s 38 to refer that dispute to the Labour Commissioner and proceed to arbitration and also to be resolved in accordance with part C of ch 8 of the Act).

...

[66] This Court will have regard to the substance of the actual rights asserted and not the nomenclature used to describe them. There is no further allegation of an election made by the respondent after the cause of action arose, as pleaded when the Labour Court made its ruling on 9 November 2018. At that stage, the respondent had by then retired from his services with Namwater (as of 1 May 2017), as pleaded. There was no longer an employment agreement subsisting between the parties which had by then terminated by reason of the respondent's retirement. There is also no allegation to the effect that Namwater's conduct evinced an intention to no longer be bound by the employment agreement. On the contrary, it is alleged that the notice in July 2014 sought to continue the respondent's services in another position on the same salary and benefits and wanted the respondent to accept that position. Respondent's counsel also argued that Namwater's lock-out of the respondent was directed at applying pressure upon the respondent to accept the new position and thus not with the intention of terminating the employment agreement. The pleadings properly construed with reference to the substance of the rights in support of the cause of action do not remotely raise a contractual claim of repudiation upon common law principles as against Namwater. As already said, the rights asserted are those created by s 50 of the Labour Act as they amount to unfair labour practices.' (The underlining is mine)

[103] Smuts AJA continues to say the respondent failed to seek any form of contractual damages or compensation or an order directing the performance of any act that would remedy a wrong against him by Namwater in his dispute proceedings, when it was plainly open to him to seek compensation from an arbitrator in respect of his salary and benefits if the lock-out was in conflict with the Act as s 86(15) empowers an arbitrator to make various appropriate awards, compensation included. But, that instead, he subsequently instituted his action in the High Court claiming loss of income and consequential contractual damages on the ground that Namwater's conduct amounted to a repudiation of his employment contract.

[104] It is the grounding of the respondent's claims within the Act without considering that respondent elected not to pursue his claim under the Act that I disagree with. Did the respondent have an election to pursue his claims outside the labour statute? In my

opinion he did. Disputes about unfair dismissals and unfair labour practices in the Labour Act and related disputes under the common law may always overlap – a claim instituted in terms of the Labour Act, may well fall properly in the concurrent jurisdiction of the High Court and the Labour Court. It is for this very reason that this Court in *Nghikofa* stated what it said in paras 17 (second sentence) and 18. In *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd & others*³³ Nienaber JA noted that it is difficult to conceive of circumstances where unlawful dismissal would not also be unfair.

[105] In *Fedlife Assurance Ltd v Wolfaardt*³⁴ referenced in *Nghikofa* above, the South African Supreme Court of Appeal stated the following:

[13] The clear purpose of the Legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common-law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice of summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

[14] That position was perhaps ameliorated with the adoption of the interim Constitution in 1994 (the Constitution of the Republic of South Africa Act 200 of 1993), which guaranteed to every person the right to fair labour practices in s 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). Thus it might be that an implied right not to be unfairly dismissed was imported into the common-law employment relationship by s 27(1) of the interim Constitution (and now by s 23(1) of the present Constitution, the Constitution of the Republic of South Africa Act 108 of 1996) even before the 1995 Act was enacted.

[15] However, there can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term

³³ *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd & others* 1996 (4) SA 577(A) at 592F-H, para 3.

³⁴ *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had their source in the interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for 'unlawful dismissal' as provided for in the 1995 Act.

[16] In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the Legislature did not intend to interfere with existing law and *a fortiori*, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication (*Staadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784D-H)

[18] The clearest indication that it had no such intention is s 186(b), which extends the meaning of 'dismissal' to include the following circumstances:

“(A)n employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.”

. . .

[19] Moreover, s 195 makes it clear that an order or award of compensation in consequence of an unfair dismissal is 'in addition to and not a substitute for any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment'. It was submitted on behalf of the appellant that the 'other amounts' referred to in that section are those amounts that might have accrued to an employee at the time of the dismissal, such as accrued wages, leave pay and the like, and do not include damages for breach. I can see no reason to restrict the plain words of the section in that manner.'

[106] While the extracts above pertain to South Africa, I have no doubt, they are strongly persuasive for our purposes. In Namibia, regarding the award of compensation, it is left in the discretion of the Arbitrator as long as it is reasonable, fair and equitable, regard being had to all circumstances of the case.³⁵

³⁵ *Novanam Ltd v Rinquest* 2015 (2) NR 447 (LC) at 456l - 457A, para 23.

[107] Therefore, in my opinion respondent's claim should not have been characterised the way it has been, this Court should have approached the claim the way it was pleaded. The words 'to unilaterally alter any term or condition of employment' are not peculiar to the Labour Act, they existed long before the passage of the Act. An employer can end or vary a contract by repudiation, which is what the respondent alleges. The main judgment states that respondent makes no allegation that Namwater's conduct evinced an intention to no longer be bound by the employment contract and that on the contrary he alleges that Namwater wanted him to continue in another position on the same salary and benefits and that respondent's counsel also argued that Namwater's lock-out of the respondent was directed at putting pressure upon respondent to accept the new position/demotion. The judgment then concludes that the pleadings properly construed with reference to the substance of rights [s 50 of the Labour Act] in support of the cause of action do not remotely raise a contractual claim of repudiation upon common law principles as against Namwater.

[108] This is an interpretation of the Labour Act which *Nghikofa and Fedlife Assurance Ltd* warns against. It destroys respondent's cause of action. In para 9 of his particulars of claim he alleges that the Chief Executive Officer (CEO) unilaterally abolished his previously held position which is wrongful, it was a unilateral change of his employment terms and conditions. In para 10 he states that the CEO's conduct was not supported by the Board of Directors, in contravention of ss 16 and 28 of the Namibia Water Corporation Act 12 of 1997 (as amended). In para 11 he states that, that conduct was unlawful repudiation of the agreement and was unlawfully locked-out from the work-place. In para 12 he states that he refused and continued to refuse to accept such repudiation. In para 13 are allegations of voluntary agreement between the parties with the terms that the CEO must implement the terms of the agreement,

end the lock-out and allow the respondent to return to work to facilitate proper consultations, in good faith. In para 14, it is alleged that the decision altering respondent's condition(s) of employment was suspended and in para 15 he alleges that appellant opted not to comply with the voluntary agreement, perpetuated the lock-out of respondent and refused to pay him a salary. In para 16, respondent alleges that on 15 March 2017, appellant's legal representative conveyed an instruction to him that he need not tender his services until further notice to the contrary from the (CEO). In para 17 he alleges that since July 2014 he had tendered to work for appellant in his previous position but appellant continued to deny him access to the work-place until he reached retirement age on 1 May 2017. In para 18, on which the main judgment also relies, he states that the High Court found the lock-out to be wrongful and unlawful.

[109] From the allegations above, it is very clear that appellant, except for offering respondent the demotional post, had no intention to retain or resurrect respondent's previous position. From a general manager to a chief is a big fall in ranks and one can assume appellant knew very well that respondent would decline the offer. When he refused the offer he was locked-out of the work-place for almost three years, forcing him to accept the demotional position.

[110] His claim might be muddled or might lack averments of a common law claim or failed to make an election to end the contract there and then and inform the appellant of his election, regard had especially to the second claim and his heads of argument, (which are wholly arguments and submissions on damages) he had no intention to pursue his claim in terms of the Act. In *Nghifoka* (para 18) this Court made it clear that while s 86(2) of the Act provides that a party may refer a dispute to the Labour Commissioner, it is not compelled to do so. This is in line with the reasoning in *Fedlife*

Assurance Ltd that the Labour Act supplements the employee right exercised under the common law. The argument in that case that the common law rights were abolished by the Labour Act was refused.

[111] Therefore, the characterisation of respondent's claim as solely founded in terms of s 86 of the Labour Act is without doubt fundamentally flawed.

[112] This brings me to the unending debate on the jurisdiction of the High Court and the Labour Court. I reiterate what I said in *Masule* above on the authority of Art 80(2) of the Constitution of the Republic of Namibia, ie, 'the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes' and all labour disputes are civil in nature and all labour disputes with no exception are covered in Art 80(2). Article 78 of the Constitution vests judicial power in the courts of Namibia, 'which shall consist of (a) a Supreme Court of Namibia (b) a High Court of Namibia and (c) Lower Courts of Namibia. While Art 83 provides for the establishment of Lower Courts by Act of Parliament, there is no such a provision regarding the High Court. (The underlining is mine)

[113] Compare ss 166 and 169 of the Constitution of the Republic of South Africa which provides as follows:

'Judicial system

166. The courts are –

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;

- (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

[sub-s (c) substituted by s 2 of the Constitution Seventeenth Amendment Act of 2012.]³⁶

'Amendment of section 166 of Constitution

'2. Section 166 of the Constitution is hereby amended –

- (a) by the substitution for paragraph (c) of the following paragraph:
 - “(c) the **[High Courts, including]** High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from [High Courts] any court of a status similar to the High Court of South Africa;”; and
- (b) by the substitution for paragraph (e) of the following paragraph:
 - “(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the **[High Courts]** High Court of South Africa or the Magistrates' Courts.”³⁷

'High Court of South Africa

169. (1) The High Court of South Africa may decide –

- (a) any constitutional matter except a matter that –
 - (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
- (b) any other matter not assigned to another court by an Act of Parliament.

³⁶ Constitution Seventeenth Amendment Act, 2012 which was enacted as Act 72 of 2013.

³⁷ Ibid.

- (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for–
 - (a) the establishing of Divisions, with one or two more seats in a Division; and
 - (b) the assigning of jurisdiction to a Division or a seat with a Division.

- (3) Each Division of the High Court of South Africa –
 - (a) has a Judge President;
 - (b) may have one or more Deputy Judges President; and
 - (c) has the number of other judges determined in terms of national legislation.

[s. 169 substituted by s. 5 of the Constitution Seventeenth Amendment

Act of 2012.]³⁸

'Substitution of section 169 of Constitution

'5. The following section is hereby substituted for section 169 of the Constitution:

"High [Courts] Court of South Africa

- 169.** (1) **[A]** The High Court of South Africa may decide–
- (a) any constitutional matter except a matter that–
 - (i) **[only]** the Constitutional Court **[may decide]** has agreed to hear directly in terms of section 160(6) (a); or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to **[a]** the High Court of South Africa; and
 - (b) any other matter not assigned to another court by an Act of Parliament.

³⁸ The Constitution of the Republic of South Africa as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

- (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for –
 - (a) the establishing of Divisions, with one or more seats in a Division; and
 - (b) the assigning of jurisdiction to a Division or a seat within a Division.
- (3) Each Division of the High Court of South Africa –
 - (a) has a Judge President;
 - (b) may have one or more Deputy Judges President; and
 - (c) has the number of other Judges determined in terms of national legislation.”³⁹

[114] On the point under discussion in this country a valid argument can be made that judicial power vests in the High Court of Namibia. In *Masule*⁴⁰ the majority said ‘the creation of a division of the High Court is not inconsistent with the Constitution and that divisions have in fact been created under some statutes: the Northern Local Division (NLD) and the Electoral Court and they went on to say that the Labour Court was established under similar circumstances, as is a division of the High Court established by Art 78(1)(b) read with Art 80 of the Constitution. They further went on to say, ‘it is not a court separate or independent from the High Court . . .’ and that ‘the procedures that the division uses and the scope of the remedies that it can grant, are determined by the legislation that creates the division’ and that ‘those procedures and remedies are the litigant’s first point of call and make them subject to the limits they impose’ and that ‘that is the constitutional principle of subsidiarity’.

[115] On a proper construction (literal interpretation) of Art 78 the assertion of the creation of divisions would be inconsistent with that Article. As already stated Art 83 provides for the establishment of the Lower Courts by Act of Parliament but the

³⁹ The Constitution of the Republic of South Africa as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

⁴⁰ *Masule* at 20G-I, paras 44 and 48.

Constitution is silent on the establishment of High Courts or divisions of the High Court of Namibia. I however agree with the fact that the Labour Court is not a court separate or independent from the High Court, and in my opinion, for that reason alone the debate of jurisdiction between the two courts should never arise in this jurisdiction, and for a further reason that, policy considerations which point in favour of a finding that the Labour Court must enjoy exclusive jurisdiction, namely, (i) specialised tribunals should address specialised issues, (ii) avoid forum-shopping and (iii) the danger of legal incoherence, uncertainty or possible unfairness to individual litigants flowing from allowing two different sets of courts to decide substantially the same sets of facts on different legal grounds, do not arise in this jurisdiction given the relationship of the High Court and the Labour Court as eloquently explained in *Masule* by the Deputy-Chief Justice who wrote for the majority, who also is the Head of the High Court.

[116] In fact, a literal interpretation of Art 78 read with Art 80, the Labour Court established by an Act of Parliament is no different to lower courts established in terms of Act of Parliament. Section 115 of the Labour Act lacks the legitimacy to elevate the Labour Court to the level of the High Court and ss 115, 116 and 117 when challenged would be found inconsistent with the Constitution.

[117] In *Masule* the majority leaped on the principle of subsidiarity as a justification for the exclusive jurisdiction of the Labour Court on the procedures and remedies created by the Labour Act and that those procedures and remedies are the litigant's first point of call and make them subject to the limits they impose.

[118] In *casu* Smuts AJA found that the principle of subsidiarity is not applicable, I agree it is not. That principle is best understood/applicable in the following

circumstances.⁴¹ Where a right is protected in the Constitution, take for example, Art 23 on apartheid and affirmative action. When an Act of Parliament is passed entrenching that right, a litigant, pursuing the enforcement of the right when violated, on the principle of subsidiarity is not required to rely on the Constitution but on the Act. Respondent is not relying on a (labour) right protected in the Constitution entrenched in the Labour Act, he is relying on the common law violation and his claim with all its flaws should have been determined in that context. Likewise, Mr Masule was not pursuing a (labour) right protected in the Constitution, entrenched in the Labour Act. Therefore, reliance on the subsidiarity principle in that case was misplaced as the principle was not applicable in that case too.

[119] In South Africa, s 23 of the Constitution provides for labour relations and protected as fundamental rights which are entrenched in the Labour Relations Act 66 of 1995. Section 23 in its entirety reads as follows:

'Labour relations

- 23 (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right–
- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union;
- and
- (c) to strike.
- (3) Every employer has the right–
- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right–
- (a) to determine its own administration, programmes and activities;

⁴¹ *My Vote Counts NPC v Speaker of the National Assembly & others* 2016 (1) SA 132 (CC) from paras 44 (particularly) to 50 and 161.

- (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

[120] The closest the Namibia Constitution comes in protecting labour rights under Chapter 3 is the freedom to form and join trade unions in Art 21(e) and Chapter 11, headed Principles of State Policy, particularly, Art 95 (b), (c) and (d) which have nothing to do with fair labour practices. In South Africa, the Constitution further in s 166 above provides for courts other than the High Court, with jurisdiction to hear matters referred to such courts. The prime purpose of the Labour Relations Act in South Africa is to give effect to s 23 of the Constitution. Under those circumstances and the court system in South Africa, the principle of subsidiarity and exclusivity of the Labour Court in labour disputes finds application in some instances with ease. But as we all know, notwithstanding the face value clarity of the jurisdictions of the High Courts and Labour Court in that country, the debate of the jurisdiction between those courts still rambles on *ad neuseum*. The cause of that debate centres mainly around whether a labour dispute is unfair (falling under the Labour Court's jurisdiction) or unlawful (falling under the High Court's jurisdiction).

[121] Therefore, given the relationship of the High Court and the Labour Court to have confined the respondent's claim in the Act, holding that the High Court had no

jurisdiction, not only deeply emasculates the constitutional jurisdiction of the High Court, but it is an absurdity of grave injustice.

[122] In sum, I would have dismissed the appeal. The High Court has concurrent jurisdiction with the Labour Court on the remedies exclusive to the Labour Court.

[123] In that regard, I associate myself with the sentiments of Maritz J in *Onesmus v Minister of Labour & another*⁴² where he eloquently said:

[15] Moreover, it [High Court] does not draw on any statute for those powers; it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament

[16] All courts in Namibia, other than the Supreme and High Courts, are lower courts. Article 78(1), which vests the judicial power of State in the courts of Namibia, provides that the courts of Namibia shall consist of:

- “(a) a Supreme Court of Namibia;
- (b) a High Court of Namibia
- (c) Lower Courts of Namibia.”

Unlike the superior courts, which have been established by the Constitution, lower courts are established by Acts of Parliament. Their jurisdiction, their procedures and the appointment of their judicial officers are all prescribed by Acts of Parliament and regulations made thereunder. The use of the indefinite article ‘a’ before ‘High Court’ and ‘Supreme Court’ in art 78(1)(a) and (b) also precludes the possibility that other parallel superior courts may be established by Parliament. All courts established by Acts of Parliament are therefore, by constitutional design, categorised as lower courts.

[17] This proposition includes the Labour Court. It was established by s 15(1) of the Labour Act. Although the president of the court is ‘a judge or acting judge of the High Court of Namibia designated by the Judge President for such purpose’, it does not,

⁴² *Onesmus v Minister of Labour & another* 2010 (1) NR 187 (HC) at 195D-196A-E, 197D-J-198A.

from a constitutional perspective, elevate the status of the Labour Court beyond that of a lower court. . . .

. . .

[19] It stands to reason that, to the extent an enactment purports to reserve exclusively for a lower court jurisdiction that would otherwise have fallen within the ambit of the High Court's jurisdiction, the notional effect of the enactment would be to amend the Constitution at least to the extent that the High Court would no longer have jurisdiction in matter it previously had under the Constitution. The entrenchment of fundamental rights and freedoms by art 131 aside, art 132 prescribes that –

“Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeal and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals of amendments.”

Furthermore, it provides that such will have to be passed with two-thirds majorities in both houses of Parliament. The Labour Act does not resemble or even aspire to be such an Act. It cannot indirectly achieve what is reserved for Acts specifically intended and designed to bring about an amendment to the Constitution.

[20] By conferring ‘original jurisdiction’ on the High Court in matters involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder, the founders precluded a statutory erosion of the court's powers. . . .

[21] . . . Parliament cannot diminish or defy that right by the establishment of a lower court with exclusive jurisdiction to adjudicate cases of that nature. If it nevertheless purports to do so, the statutory enactment will remain subordinate to the Supreme Law of Namibia. In such instances, the Constitution must prevail and the constitutional powers vested in the High Court will remain unaffected. It is on this basis that the first respondent's objection to the jurisdiction of the court has been dismissed.’ (The underlining is mine)

[124] Lord Wilberforce said, ‘a constitution is a legal instrument respect must be paid to the language which has been used’.⁴³ In *S v Zuma and others*⁴⁴ Kentridge AJ implores to heed Lord Wilberforce’s reminder and went on to say, ‘if the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination . . .’. It is not for this Court or any other court for that matter to adopt an interpretation of s 117 at odds with the language of Art 78 read together with Art 80. Parliament like the other arms of government is bound by the Constitution and could not have purported to promulgate s 117 in the face of Arts 78 and 80. In my considered opinion, Art 78 requires amendment along the lines of the Republic of South Africa’s Constitution. I disagree therefore with Smuts AJA’s conclusion that the High Court did not have jurisdiction to hear this matter. The reference/comparison to *Makhanya v University of Zululand*⁴⁵ in *Swakop Uranium*⁴⁶ and in this case where that court found that a right under the Labour Relations Act 66 of 1995 (LRA) is enforceable only in the forums created by the LRA is misplaced as the court administration in South Africa is different from that of Namibia as I demonstrated above.

[125] The conclusion the majority arrive at is applicable in the circumstances of the court administration in South Africa. In the face of Art 80 I hold the view that the conclusion the majority arrives at in this case and this Court’s conclusion in *Swakop Uranium* are patently wrong and refuse to be drawn in the argument made in para 78 of the majority.

⁴³ *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) at 328-9.

⁴⁴ *S v Zuma and others* 1995 (2) SA 642 (CC) at 653, para 18.

⁴⁵ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

⁴⁶ *Swakop Uranium v Employees of Swakop Uranium* 2022 (4) NR 1195 (SC).

[126] I may add that even if I had joined in the reasoning of Smuts AJA, I would have disagreed with the order made, especially the substituted order. In *Masule* the majority held that the learned High Court judge in *Masule* could not have held that she had no jurisdiction and that it was a misdirection, she should have determined whether the matter was covered by the Labour Act. In *casu* the judge heard the matter and found that she had jurisdiction and indeed she had. This Court cannot toss out respondent's claim; more especially that the court below besides dismissing the special plea *albeit* with reference to have found that the lock-out was unlawful and wrongful, and that such lock-out violated s 34 instead of s 50(1)(b) of the Labour Act. That finding ought to be fully protected by this Court. I would have referred the matter to be placed before the right forum.

[127] It is for the reasons above that I respectfully dissent.

MAINGA JA

APPEARANCES

APPELLANT:

G Narib (with him T Muhongo)

Instructed by ENS | NAMIBIA
(Incorporated as Lorentz Angula Inc)

RESPONDENT:

K Kamuhanga

Of Kamuhanga Hoveka & Samuel Inc