THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 147/08

In the matter between:

TRANSMAN (PTY) LTD **APPELLANT**

v

GRAHAM DICK **1st RESPONDENT**

THE CHAIRPERSON OF THE TRANSMAN (PTY) LIMITED DISCIPLINARY ENQUIRY **2nd RESPONDENT**

Neutral citation: *Transman v Graham Dick* (147/2008) [2008] ZASCA 38 (31 March 2009)

Coram: Mpati P, Jafta, Maya, Mhlantla JJA et Hurt AJA

Heard: 10 March 2009

Delivered: 31 March 2009

Summary: Jurisdiction – the high court has jurisdiction to entertain administrative reviews – dismissals from employment cannot be challenged by means of review – non-compliance with administrative law rules incorporated into employment agreements constitutes a contractual breach giving rise to ordinary remedies.

ORDER

On appeal from: High Court, Witwatersrand Local Division (Van Oosten J)

In the result the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following order:

‘(a) The application is dismissed with costs, including the costs consequent upon the employment of two counsel.’

JUDGMENT

JAFTA JA (Maya and Mhlantla JJA concurring)

[1] This is an appeal against a judgment of the High Court, Witwatersrand Local Division (Van Oosten J) in terms of which the verdict of the employer’s disciplinary body was set aside and replaced with a different verdict by the court. The first respondent (the employee) challenged – by means of a review application – the findings and recommendation of the disciplinary body and the employer’s decision to terminate his employment. The appeal is with the leave of the court below.

THE FACTS

[2] The employee and his wife were both employed by the employer while they were at the same time also its directors. The employee's wife held the position of managing director. The employee was chairman before his removal from the board of directors. He was removed from the board on 10 October 2005.

[3] The employer carries on a labour broking business in terms of which it provides temporary workers to various clients. It places about 11 000 such workers daily with clients who require temporary labour. Its annual turnover is approximately R400 million. The business started in 1983 as a partnership between the employee and his wife. In 1988 they formed a close corporation through which they operated the business. Later they established the employer company as a vehicle through which they ran the business. The employee and his wife held equal shares in the company. Such shares were later transferred to a trust controlled by them.

[4] As from 2001 the employee and his wife experienced marital problems which also affected their relations at work. There were complaints and counter-complaints made by them against each other.
Some of these complaints had to be resolved by the employer's board. During 2005 the employer became aware of certain allegations of misconduct against the employee. On 15 August 2005 it addressed to him a notice of suspension in terms of which he was suspended on specified conditions pending an investigation into the allegations.

[5] The employee was later charged with 13 counts of misconduct and was instructed to appear before a disciplinary enquiry chaired by the

second respondent. After a number of postponements for various reasons, the disciplinary hearing commenced on 13 February 2006. After hearing evidence from the employer's witnesses the second respondent received argument from the parties' legal representatives. She handed down her verdict on 10 March 2006 in terms whereof she found the employee guilty of misconduct in respect of some charges and acquitted him on others. Having considered the mitigating and aggravating factors the second respondent recommended that the employee be dismissed.

[6] The employer's board considered the findings and recommendation before terminating the employee's employment on 27 March 2006. Although the second respondent had recommended dismissal, the board took a softer line against the employee and decided to retire him. In a letter addressed to the employee the board stated:

'As you are aware the chairperson of the disciplinary enquiry recommended that your services with this company be terminated. The Board has considered the recommendation and resolved to accept the recommendation and accordingly terminate your employment.

The Board resolved further that in view of your status as one of the founding members of the company and as a former Chairman of the Board, you would not be summarily dismissed. The Board shall comply with the Chairperson's recommendation by retiring you. Your employment with Transman (Pty) Ltd is accordingly terminated with effect from today, 27th March 2006 at 10h00.'

[7] There is a dispute on the papers about whether the employee was dismissed or retired. For present purposes the dispute is however immaterial. There can be no doubt that the employee's employment was terminated. As stated earlier the employee instituted a review application

challenging the termination and the second respondent's verdict which underpinned it.

PROCEEDINGS IN THE HIGH COURT

[8] There can be no dispute regarding the nature of the proceedings instituted by the employee in the court below. He sought an order in the following terms:

'1. Reviewing and setting aside and/or correcting the verdict and decision of [the chairperson] and [the employer] in terms of which:

1.1 [The chairperson] found the applicant guilty of certain charges and recommended the dismissal of the applicant.

1.2 [The employer] retired the applicant.

2. Setting aside and/or substituting the verdict and dismissal of [the chairperson] and/or [the employer] with a verdict of not guilty and/or substituting the recommendation of [the chairperson] with a recommendation that no sanction should be imposed on the application or a sanction other than dismissal.

3. Directing [the employer] to re-instate the applicant as an employee of [the employer] with effect from the date of his retirement and on the same terms and conditions as existed at the time of his retirement.'

[9] In challenging the verdict and termination the employee raised a number of review grounds. In his founding affidavit he alleged:

‘GROUNDS FOR REVIEW

43 I respectfully state that [the chairperson], in finding me guilty in her verdict of certain of the charges and certain of the individual counts:

43.1 acted grossly unreasonably, alternatively, unreasonably; and

43.2 could not reasonably or logically have done so on the evidence before her; and

43.3 displayed a biased attitude during my disciplinary enquiry; and

43.4 was well aware of the fact that the disciplinary enquiry was initiated for ulterior motives and unlawful purposes and that her verdict and recommendation justify the conclusion that she failed to apply her mind to the matter in a judicial manner.’

[10] Apart from disputing each ground relied upon by the employee the employer objected to the jurisdiction of the high court in this matter and the competence of the relief sought. It contended that both the chairperson’s verdict and the termination of the employment were not susceptible to review because those decisions did not constitute administrative action and principles of administrative law do not apply to the matter. Regarding jurisdiction the employer argued that in the light of s 157 of the Labour Relations Act 66 of 1995 the high court lacked jurisdiction to hear the matter.

[11] Proceeding from the premise that in our law courts are entitled to review proceedings of domestic tribunals, the court below held that it had jurisdiction to hear the matter and set aside the verdict of guilty and replaced it with the verdict of not guilty. Relying on *Feinsberg v African*

Bank and Another[1] and *Klein v Dainfern College and Another*[2] – to which I shall later return – the court held not only that principles of administrative law applied to this case but also that the impugned decisions could be reviewed and set aside in the same way as administrative actions.

[12] The court below reasoned thus:

'Counsel for Transman did not take issue with this Court's power to review the decision of the chairperson. He in my view correctly, submitted that it must be assumed in favour of the applicant that his contract of employment with Transman is subject to an implied term that he would be afforded a fair hearing before he was dismissed. Authority for the proposition is again to be found in a recent decision of the Supreme Court of Appeal in *Old Mutual Life Assurance Company SA Limited v Gumbi*[3] where Jafta JA, writing for the Court, held as follows:

"An employee's entitlement to a pre-dismissal hearing is well recognized in our law, such right may have as its source the common law or a statute which applies to the employment relationship between the parties (*Modise & Others v Steve Spar Blackheath* 2001 (2) SA 406 (LAC) ((2000) 21 ILJ 519; [200] 5 BLLR 496 in para 21 and the authorities collected there)".

Finally on this aspect, I agree with counsel for Transman that this Court in reviewing her decision, can concern itself only with the relief the applicant would be entitled to at common law. The nature of the relief that the applicant may be entitled to is contractual in nature as opposed to the relief provided for in the Labour Relations Act of 1995.

[1] (2004) ILJ 217(T).
[2] 2006 (3) SA 73 (T).
[3] 2007 (5) SA 552 (SCA).

The grounds of review relied upon by the applicant are, firstly, malice, secondly, bias and thirdly, unreasonableness or gross unreasonableness. In the view I take of the matter only gross unreasonableness requires determination.'

[13] Before considering the issues raised in this appeal it is necessary to remark on the findings and reasoning of the court below. Before the decision of this court in *Gumbi*[4] the right to a pre-dismissal hearing was not implied at common law and this necessitated the development of the common law in terms of s 39(2) of the Constitution. As from the date of delivery of the judgment in *Gumbi* the right of every employee to a pre-dismissal hearing is implied at common law. Since that judgment was delivered after the cause of action had arisen in the present matter reliance on *Gumbi* was misplaced.

[14] Secondly, in its reasoning the court below conflated the concept of extending the application of administrative law principles to employment contracts with administrative review. It spoke of the employee being entitled to a contractual relief and yet it approached and decided the matter as if it amounted to administrative action. It reviewed and set aside the chairperson's verdict on the basis that it was grossly unreasonable. Taking a step further than just setting aside the verdict, the court substituted such verdict with its own verdict of not guilty. The relief granted is not in keeping with a contractual claim and there was no legal basis for replacing the verdict with one of not guilty. For reasons that are not apparent from the judgment the court below left the termination intact after rescinding its underlying reason – the verdict of guilty.

[4] Above n 3.

THE ISSUES

[15] Three issues were raised in this court. The first issue is whether the high court had jurisdiction to adjudicate the case. The second relates to the competence of the relief claimed in view of the nature of the impugned decisions. The issue is whether the validity of such decisions can be challenged by invoking administrative review procedure. The third issue is whether on the papers – as they presently stand – the employee has made out a case for a pre-dismissal hearing based on the terms of the employment agreement.

JURISDICTION

[16] Counsel for the employer conceded, correctly so in my view, that in so far as the employee's claim for a review is concerned, the high court had jurisdiction to hear the matter. The proposition that administrative action disputes are justiciable in the high court is without controversy. What has been controversial is whether a set of facts supporting a claim of an unfair dismissal could at the same time give rise to a violation of administrative justice rights.[5] As it appears below the controversy has been settled by the Constitutional Court.

[17] In *Chirwa v Transnet Ltd and Others*[6] the Constitutional Court held that public servants can no longer challenge their dismissals by invoking administrative review procedures because they now enjoy the

[5] *Claase v Transnet Bpk en 'n Ander* 1999 (3) SA 1012 (T); *Mgijima v Eastern Cape Appropriate Technology Unit and Another* 2000 (2) SA 291 (Tk) at 309; *Minister of Correctional Services and Another v Ngubo and Others* 2000 (2) SA 668 (N); *Runeli v Minister of Home Affairs and Others* 2000 (2) SA 314 (Tk); *NAPTOSA and Others v Minister of Education, Western Cape* 2001 (2) SA 112 (C).
[6] 2008 (4) SA 367 (CC).

same protection afforded employees in the private sector under the Labour Relations Act. Writing for the majority in that matter Ngcobo J stated:

'Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under s 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and labour relations and administrative action are two different areas of law….

In my judgment labour and employment relations are dealt with comprehensively in s 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution and PAJA.

I conclude that the decision by Transnet to terminate the applicant's contract of employment did not constitute administrative action under s 33 of the Constitution.'

[18] It is important to note that in *Chirwa* the Constitutional Court deprecated the proposition that civil servants have two causes of action, but only in so far as the second cause of action is based on s 33 of the Constitution or the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The decision in *Chirwa* prohibits the use of review process in challenging the validity of a dismissal from employment. What this means is that a cause of action based on a contractual breach is still

permissible.[7] But for purposes of determining jurisdiction the fact that incompetent relief is sought is immaterial. Such enquiry does not entail the outcome of an adjudicative process. The issue that is essential to the enquiry is whether the court has authority to adjudicate a particular dispute. The incompetence of the claim made in the present case, therefore, plays no part in the determination of the high court's jurisdiction. As stated earlier, the employee has instituted review proceedings over which the high court unquestionably has jurisdiction.

WAS THE REVIEW APPLICATION COMPETENT?

[19] The answer to this question lies in whether the chairperson's verdict and the termination of employment constitute decisions which are reviewable in administrative law. On the authority in *Chirwa* we know that such decisions cannot be reviewed either under PAJA or s 33 of the Constitution. Although *Chirwa* dealt with employment in the public sector there is no reason why the same principle should not apply to the private sector employment.

[20] In this case the employee eschewed any reliance on the Labour Relations Act 66 of 1995, and as stated above, the court below found that that Act did not apply to the matter. It dealt with the case on the basis that the relief claimed was competent at common law. Proceeding from this premise the court below then invoked the common law standard of gross unreasonableness as a basis for setting aside the chairperson's verdict. The question that arises is whether it is permissible to do so in the light of the decision in *Chirwa*. Does the review procedure at common

[7] *Fedlife Assurance Limited v Wolfaardt* 2002 (1) SA 49 (SCA).

law continue to exist side by side with the system entrenched in the Constitution?

[21] In *Container Logistics*[8] this court held the view that judicial review could be claimed either under the Constitution or at common law. In this regard Hefer JA said:

'Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action, but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice.…

No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of *legality* cannot ultimately be reduced to a question of *constitutionality*, it does not follow that the common-law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of s 24 is for the courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact.'

[22] The above proposition was, however, rejected by the Constitutional Court in *Pharmaceutical Manufacturers.*[9] In that case Chaskalson P, writing for the unanimous court, said:

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[8] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd, Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA).
[9] *Pharmaceutical Manufacturers Association of SA and Another : In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

'I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[10]

[23] But even if *Chirwa* did not stand in the way of the relief sought by the employee in this matter, it would be equally incompetent to grant such relief at common law. Barring public sector employment contracts, our common law has always drawn a clear line of distinction between the branches of law which govern employment matters on the one hand, and administrative action on the other. The former is governed by the labour or employment law rules and the latter by administrative law rules. But before the decision in *Chirwa* there was an overlap between the two branches of law when it came to public service contracts.[11] The application of administrative law rules was extended to employment matters for two reasons. First, the employment and dismissal of public servants was regulated by statute. Second, public servants were denied the procedural fairness process that applied to dismissals of employees in the private sector under the Labour Relations Act of 1956.

[24] Since the decision in *Chirwa* public servants can no longer invoke administrative review to challenge the validity of dismissals. However this does not mean that parties cannot incorporate administrative law requirements into their employment agreements. In that event the failure

[10] Id in para 44.
[11] *Administrator Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A).

to comply with such requirements would, however, be a breach of contract and ordinary contractual claims would be available to the aggrieved party.[12] The incorporated requirements cannot convert what is essentially a contractual claim into an entitlement to judicial review on any of the grounds recognised in law. As stated earlier the court below failed to draw this distinction. It was influenced by decisions of the North Gauteng High Court in *Feinberg* and *Klein* referred to in para [10] above.

[25] In *Feinberg*, without referring to any authority, the high court reviewed and set aside a dismissal based on the verdict of guilty reached by a disciplinary body, on the basis that the employee was denied a fair and just hearing. This was done after the court had rejected the argument that it had no jurisdiction to entertain the matter. The issue of whether the relief sought was competent was not considered at all.

[26] In *Klein* the high court, proceeding from the premise that coercive decisions of domestic tribunals in entities such as churches and recreation clubs have always been susceptible to review,[13] held that 'no rational reason exists to exclude individuals from the protection of judicial review in the case of coercive actions by private tribunals not exercising any public power'. Having found that the employment agreement between the parties before it included principles of natural justice, the court held that the employer's decision to dismiss the employee did not constitute administrative action contemplated in PAJA and therefore PAJA did not apply. It proceeded to review and set aside the verdict of guilty and the sanction imposed pursuant to such verdict. That case was concerned with

[12] *Denel (Edms) Bpk v* Vorster 2004 (4) SA 481 (SCA); Nakin *v MEC, Department of Education, Eastern Cape* 2008 (6) SA 320 (Ck) para 11 and the authorities there cited.
[13] *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 and *Taylor v Lurstag NO and Others* 2005 (1) SA 362 (W).

a challenge mounted against the verdict of a disciplinary enquiry in a private sector employment setting.

[27] Although the *Klein* judgment was delivered before the decision in *Chirwa*, the high court lost sight of the fact that none of the domestic tribunal decisions that it relied on dealt with employment contracts. As it appears above, in concluding that parties to an employment agreement can incorporate administrative law rules, the high court was correct. But it was wrong to assume that once this happens a dismissal of the employee may be reviewed as if it were administrative action. There can be no doubt that the object of administrative law rules such as the rules of natural justice is to afford procedural fairness to the party against whom the decision is taken. It is also true that judicial review is not the only mode through which such procedural fairness can be achieved in an employment setting. The Labour Relations Act imposes a duty on employers to act in a fair manner when effecting dismissals.[14] As does the common law since its development in *Gumbi*. In addition, where the parties have agreed to incorporate rules of natural justice into their employment agreement, the employee can insist on compliance with such rules by means of a contractual claim. I conclude therefore that there is no need to permit a challenge based on judicial review in employment dismissals. It follows that in this regard the employee has misconceived his cause of action.

[14] Section 188 of the Labour Relations Act 66 of 1995.

HAS THE EMPLOYEE MADE OUT A CASE FOR A CONTRACTUAL PRE-DISMISSAL HEARING?

[28] Counsel for the employee argued that the employee was entitled to a second hearing before the board terminated his employment. He submitted that this entitlement arose from an implied term of the employment agreement. As mentioned earlier the parties to an employment contract may set a standard of procedural fairness applicable to their employment relationship by incorporating principles of natural justice into their agreement. Such incorporation may either be express or tacit.[15]

[29] Where – as in the present matter – the incorporation is claimed to have been tacit, the test ordinarily applicable to a determination of a tacit term applies.[16] That test was restated in a recent decision of this court in *City of Cape Town (CMC Administration) v Bourbon – Leftleyh and Another* NNO.[17] In that case Brand JA said:

'(A) tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so….

It follows that a term cannot be inferred because it would, on the application of the well-known "officious bystander" test, have been unreasonable of one of the parties

[15] *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 668.
[16] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H-648B.
[17] 2006 (3) SA 488 (SCA).

not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such term if it had been suggested to them at the time…. If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.'[18]

[30] In the present case the duty was on the employee not only to plead a contractual claim but also to prove facts from which the contended tacit term could be inferred. This the employee has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment. In fact he has failed to plead the terms of the employment agreement between himself and the employer. Therefore he has not satisfied the requirements of the test for importing terms into a contract. Accordingly the court below erred in assuming that his employment contract was 'subject to an implied term that he would be afforded a fair hearing before he was dismissed'. It follows that the appeal must succeed. This finding is reached without adjudicating the merits of the complaint by the employee.

[31] In the result the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court below is set aside and replaced with the following order:

[18] Id in para 19.

‘(a) The application is dismissed with costs, including the costs consequent upon the employment of two counsel.’

C N JAFTA
JUDGE OF APPEAL

HURT AJA (Mpati P concurring):

[32] I have read the judgment of my brother Jafta and agree with the order which he proposes. I consider, though, that justification for the order can be found on a more simple basis. I will refer to the parties by the designations used in the judgment of Van Oosten J in the high court, viz to the appellant as 'Transman' and to the first respondent as 'the applicant'.

[33] The background facts material to the decision of the matter are set out in the judgment of Jafta JA and need not be repeated here. The essence of the approach adopted by van Oosten J is set out thus in the early part of his judgment:

‘Counsel for Transman did not take issue with this Court's power to review the decision of the chairperson. He in my view correctly, submitted that it must be assumed in favour of the applicant that his contract of employment with Transman is subject to an implied term that he would be afforded a fair hearing before he was dismissed.[19] . . . . Finally on this aspect, I agree with counsel for Transman that this Court in reviewing her decision, can concern itself only with the relief the applicant

[19] The learned Judge referred, in this regard, to *Old Mutual Life Assurance Co of SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).

would be entitled to at common law. The nature of the relief that the applicant may be entitled to is contractual in nature as opposed to the relief provided for in the Labour Relations Act, 66 of 1995.[20] The grounds of review relied upon by the applicant are, firstly, malice secondly, bias and, thirdly, unreasonableness or gross unreasonableness. In the view I take of the matter only gross unreasonableness requires determination.'[21]

[34] Having thus stated his approach, the learned Judge proceeded to consider the evidence in the record of the disciplinary enquiry and the evidence and submissions in the review application. He concluded that the chairperson's decisions to find the applicant guilty on what may be referred to the 'main charge' as well as on various other charges of a less serious nature were either grossly unreasonable (the main charge) or not based fairly upon the evidence adduced by the employer.[22] The learned Judge also found that a decision to suspend the applicant pending the resolution of the disciplinary proceedings and a decision by the Board of Directors to retire the applicant from service as an employee were irregular and unlawful because the *audi alteram partem* rule had not been followed before these decisions were taken.

[35] Based on these findings, the following order was made:

'1. The verdict of [the chairperson] in terms of which the applicant was found guilty on certain charges as well as the decision to retire the applicant, are set aside;

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[20] In this regard the learned judge cited *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA)

[21] That the applicant's claim was, indeed, based on contract is quite clear from paragraph 12 of the applicant's founding affidavit in the application, where he explicitly asserted that the high court had jurisdiction to deal with the application and the Labour Court did not.

[22] On certain of the charges she had made 'no finding' and these were not considered further, save for a comment by the Judge that the applicant was actually entitled to a formal acquittal on these.

2. The verdict of [the chairperson] referred to in para 1 above is substituted with a verdict of not guilty.'

[36] There are two features of the situation in which an employee challenges disciplinary proceedings and/or dismissal on a contractual basis as opposed to the 'unfair labour practice' with which the Labour Relations Act 66 of 1995 and proceedings in the Labour Tribunals are concerned. The first is that, having based his claim on contract, it is incumbent on the employee to prove the terms of the contract on which he relies and the breach which entitles him to relief. The second is that the relief which he seeks must be relief in terms of the common law of contract. This much is clearly established in the judgments of this court in *Lamprecht v McNeillie* 1994 (3) SA 665 (AD), *Fedlife* (above, footnote 2) and *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 488.

[37] There is no evidence in the founding papers which establishes the terms of the applicant's contract of employment with Transman. In paragraph 8.2.2 of her answering affidavit, the deponent for Transman specifically pointed out that:
'. . . the relief sought by the applicant (*sc* the review of the disciplinary proceedings) is, in any event, not based on any right identified in the founding papers.'

[38] In this situation, the simple question may be asked of the applicant: 'In what respects did the disciplinary hearing constitute a breach of Transman's contractual obligations toward you?' The question could certainly not be answered by reference to anything in the applicant's papers. It is not enough for him to contend for a general implied term that he would be 'afforded a fair hearing' because what constituted a fair

hearing in this particular situation would plainly depend on the contractual provisions read as a whole. There is clearly an infinite variety of ways in which steps can be taken to ensure that an employee is given a fair hearing in matters which may affect his interests, particularly in the cases of disciplinary action or dismissal. Where the contract contains express provisions in this regard, these must be followed.[23] Where such provisions must be implied, their nature and extent must be gauged by reference to the contract as a whole so that a 'clear and exact formulation' can be arrived at.[24] It follows that the applicant cannot establish his case as a breach of contract without taking the primary, elementary step of proving the contract on which he relies. As was decided in *Lamprecht*, the applicant's case must fail at its threshold for want of proper proof of his contract.

[39] I think I should add, in this connection and as further support for the view that I take, that the very relief granted by Van Oosten J was plainly not contractual. If he could establish a breach of contract, the applicant was entitled to an order that Transman perform its obligations under the employment contract and such damages as the applicant may have suffered by virtue of the breach, or an order declaring the contract cancelled and appropriate compensation to the applicant pursuant to such cancellation.

[40] I agree fully with what my brother Jafta has said in paras 28 to 30 of his judgment, in relation to the applicant's contention that the decision to retire him without first affording him the right of making representations to Transman's Board was a breach of contract. My view is

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[23] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA), particularly at 488.
[24] *Desai & Others v Greyridge Investments (Pty) Ltd.* 1974 (1) SA 509 (A) at 522.

simply that the same approach should be adopted to the issues arising out of the applicant's attempt to review the disciplinary proceedings.

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N V HURT
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	P J van Blerk SC A C Botha Instructed by Bowman Gilfillan Inc, Sandton, Johannesburg McIntyre & Van der Post Bloemfontein
FOR RESPONDENT:	J L C J van Vuuren SC (1st Respondent) M Smit Instructed by Feldman Nance-Kivell, Parktown, Johannesburg Lovius-Block Attorneys Bloemfontein