CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/06
[2007] ZACC 23

PETRONELLA NELLIE NELISIWE CHIRWA — Applicant

versus

TRANSNET LIMITED — First Respondent

TRANSNET PENSION FUND — Second Respondent

PATRICK IAN SMITH NO — Third Respondent

Heard on : 13 March 2007

Decided on : 28 November 2007

JUDGMENT

SKWEYIYA J:

Introduction

[1] This case comes before us by way of an application for leave to appeal against the decision of the Supreme Court of Appeal.[1] The applicant further seeks condonation for non-compliance with the rules of this Court both in relation to prescribed time frames and the manner in which documents are to be lodged with this Court.

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[1] *Transnet Ltd and others v Chirwa* 2007 (2) SA 198 (SCA); [2007] 1 All SA 184 (SCA); [2007] 1 BLLR 10 (SCA).

[2] The matter concerns the dismissal of the applicant, a public sector employee, by Transnet Pension Fund, a business unit of Transnet Limited. The applicant referred the dispute relating to her dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) as provided for in section 191(1)(a)(ii) of the Labour Relations Act 66 of 1995 (LRA).[2] Conciliation failed to resolve the matter but the applicant did not pursue the matter further under the provisions of the LRA. Instead, she approached the Johannesburg High Court where she sought the review and correction, or setting aside, of the decision of the third respondent to dismiss her from the employ of the first respondent.

Parties to the litigation

[3] The applicant is Ms Petronella Nellie Nelisiwe Chirwa. She joined the staff of Transnet in May 1999 in the capacity of Human Resources Manager. In December 2000 she was promoted to the rank of Human Resources Executive Manager and was transferred to the Transnet Pension Fund Business Unit.

[4] The first respondent is Transnet Limited (Transnet), formed and incorporated under the provisions of the Legal Succession to the South African Transport Services Act 9 of 1989. It is a wholly state-owned public company with a number of business divisions.

[2] Section 191(1)(a)(ii) of the LRA provides:

> "If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to . . . the Commission, if no council has jurisdiction."

[5] The second respondent is the Transnet Pension Fund (the Fund), which was established in terms of the Transnet Pension Fund Act 62 of 1990. The Fund is a business unit of Transnet.

[6] The third respondent, Mr Patrick Ian Smith, is employed as the Chief Executive Officer of the Transnet Pension Fund Business Unit and is also the Principal Officer of the Fund. He is cited as a party to this matter because he took the decision to dismiss Ms Chirwa.

Factual background

[7] A detailed factual background is necessary for the proper perspective of this case. Ms Chirwa assumed her duties as the Human Resources Executive Manager with Mr Smith as her supervisor in January 2001. During October 2002 the relationship between the two soured.

[8] On 23 and 24 October 2002 she was subject to a disciplinary enquiry initiated by Mr Smith and chaired by Mr Barry Jammy, who was appointed by Transnet to investigate the allegation of misconduct lodged against Ms Chirwa. The enquiry specifically concerned allegations that Ms Chirwa failed to exercise her managerial powers and to perform her managerial duties with reasonable care and skill, in that she did not comply with the instruction to fill the vacancy of a management accountant in the Property Asset Management Department. On the recommendation of Mr Jammy,

she was issued with a written warning on 11 November 2002 subsequent to the completion of the disciplinary hearing.

[9] Ms Chirwa sought to appeal against the decision to issue her with a written warning. In a letter dated 14 November 2002, Mr Smith responded to her and explained that at the time there was no functional appellate structure within Transnet, because the proposed disciplinary code for the management of Transnet had not been ratified by the Executive Committee of Transnet. Mr Smith advised Ms Chirwa to challenge the written notice under the provisions of section 186(2)(b) of the LRA.[3] It would appear that Ms Chirwa did not follow that advice but instead lodged a formal written grievance against Mr Smith in which she narrated the acrimonious nature of their relationship.

[10] By letter dated 15 November 2002, Mr Smith, in his official capacity, invited Ms Chirwa to an enquiry on 22 November 2002 to respond to allegations of inadequate performance, incompetence and poor employee relations; the outcome of which would be a decision regarding her future at the Fund. The letter catalogues in detail instances of poor performance, incompetence and poor employee relations spanning a fairly lengthy period. The letter also contains a record of meetings that were held to plan the improvement of Ms Chirwa's performance.

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[3] Section 186(2)(b) of the LRA provides:

> "'Unfair labour practice' means an unfair act or omission that arises between an employer and an employee involving . . . the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee".

[11] Ms Chirwa refused to participate in the 22 November 2002 enquiry on the grounds that she objected to Mr Smith being "the complainant, witness and presiding officer at the same time." Mr Smith proceeded with the enquiry and concluded that Ms Chirwa should be dismissed.

[12] In the letter of her dismissal dated 22 November 2002, Ms Chirwa was advised that in the event of her disputing her dismissal she was entitled to exercise her rights as provided for by the LRA. The letter was signed by Mr Smith in his capacity as the Chief Executive Officer of the Fund.

[13] Following her dismissal, she referred the dispute to the CCMA by alleging an unfair dismissal.[4] The CCMA was unable to resolve the dispute within 30 days. Accordingly, it issued a certificate to that effect and recommended arbitration in accordance with section 191 of the LRA. Instead of proceeding to arbitration, Ms Chirwa approached the High Court where she sought an order to (a) set aside the disciplinary proceedings that resulted in her dismissal and (b) reinstate her in her former position.

[14] Her complaint in the High Court was that the disciplinary proceedings were fundamentally flawed on two grounds. The first was that Mr Smith, her main accuser, who was also her supervisor, acted as a complainant, witness and a presiding officer during the disciplinary enquiry. It is not disputed that some 11 days prior to the

[4] This is provided for by section 191(1) of the LRA.

disciplinary enquiry, the applicant had received a written warning in disciplinary proceedings initiated by Mr Smith, her accuser. Eight days before the disciplinary enquiry, which is the subject matter of these proceedings, the applicant had lodged a formal grievance against Mr Smith.

[15] The second ground was that she had not been afforded the opportunity to obtain legal representation. She alleged that the process of dismissing an employee for poor work performance is by its very nature complex. In support of this contention, Ms Chirwa relied upon the provisions of item 9 of the Code of Good Practice: Dismissal (the Code) contained in Schedule 8 to the LRA, alleging that:

> "It involves, firstly, the setting of the requisite performance standard and, secondly, a determination of whether the employee concerned did meet the required performance standard. If the employee concerned did not meet the required performance standard consideration must be given to whether or not—
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> (a) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
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> (b) the employee was given a fair opportunity to meet the required performance standard; and
>
> (c) dismissal was an appropriate sanction for not meeting the required performance standard."

[16] It is worth noting here that the passage cited above repeats almost verbatim the requirements set out in item 9 of the Code which provides that:

> "Any person determining whether a dismissal for poor work performance is unfair should consider—
>
> (a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not—

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard."

[17] After setting out the relevant facts, Ms Chirwa crucially concluded that:

> "The aforegoing facts amply demonstrate that the 3rd respondent failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the Labour Relations Act, 1995 (Act 66 of 1995) (the LRA). That being so, the decision at issue is reviewable in terms of sections 6(2)(b) and 6(2)(f)(i) of the PAJA."[5]

[18] It is therefore clear that Ms Chirwa's claim is based on the provisions of section 188 of the LRA read with items 8 and 9 of the Code. Section 188 of the LRA provides:

"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—

(a) that the reason for dismissal is a fair reason—

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair

[5] Item 8 of the Code deals with the appointment and dismissal of an employee who is on probation. The reliance on item 8 is misplaced as Ms Chirwa had assumed her duties as the Human Resources Executive Manager in January 2001. This indicates that she was working in that position for a period of approximately two years before her dismissal, a period abnormally long for probation. In fact, Ms Chirwa points out in the founding affidavit lodged with the High Court that she was expecting a particular standard of treatment as she was "no longer on probation".

> procedure must take into account any relevant code of good practice issued in terms of this Act."

[19] The explanation offered by Ms Chirwa for approaching the High Court instead of the Labour Court was that she had two causes of action available to her; one under the LRA and the other flowing from the Bill of Rights read with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). She further explained that in the light of these options she had decided "for practical considerations" to approach the High Court in the exercise of her constitutional right of access to court. Consistent with this attitude, in this Court as in the court below, it was contended on her behalf that the High Court had concurrent jurisdiction with the Labour Court in respect of her claim.

The questions presented

[20] The central question in this matter is whether Parliament conferred the jurisdiction to determine the applicant's case upon the Labour Court and the other mechanisms established by the LRA, in such a manner that it either expressly or by necessary implication excluded the jurisdiction of the High Court.

The decision of the High Court

[21] The High Court[6] assumed that it had jurisdiction in the matter, but did not reach this conclusion based on the alleged violation of the provisions of PAJA as pleaded by the applicant. Instead, the High Court decided the matter on the basis of common law

[6] Case No 1052/03.

rules of natural justice, and concluded that the rules of natural justice had been breached. This is based on the decision of *Administrator, Transvaal, and Others v Zenzile and Others*,[7] in which it was held that dismissal of a public sector employee was not simply the termination of a contractual relationship but the exercise of a public power which required the employer to apply the rules of natural justice.

[22] The court therefore declared the applicant's dismissal a nullity and made an order of reinstatement on terms and conditions no less favourable than those that operated at the time of her dismissal on 22 November 2002. However, it directed that its order should operate retrospectively for a period of nine months from the date of its order on 25 February 2004.

[23] To the extent that the High Court did not consider Ms Chirwa's claim in the context of PAJA, it erred. The cause of action of what is claimed to be an administrative act now arises from PAJA, and not from the common law as it would have in the past.[8]

[24] With the leave of the High Court, Transnet appealed to the Supreme Court of Appeal where it raised the following two issues for consideration by that Court:

[7] 1991 (1) SA 21 (A).

[8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2000 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

(a) Whether Ms Chirwa's dismissal was a matter which fell within the exclusive jurisdiction of the Labour Court in terms of section 157(1) of the LRA.[9]

(b) Whether the dismissal constituted administrative action as defined in PAJA.

The decision of the Supreme Court of Appeal

[25] Mthiyane JA, with Jafta JA concurring, held that the High Court had concurrent jurisdiction with the Labour Court in relation to the applicant's claim. He reasoned that if an employment dispute raises an alleged violation of a constitutional right, a litigant is not confined to the remedy provided under the LRA and that the jurisdiction of the High Court is therefore not ousted. In support of this reasoning, he relied upon the decision of this Court in *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others*.[10] In that decision, this Court held that the Labour Courts are not afforded general jurisdiction in employment matters and that the High Court's jurisdiction is not ousted by the provisions of section 157(1) simply because "a dispute is one that falls within the overall sphere of employment relations."[11]

[26] Apart from *Fredericks*, Mthiyane JA relied upon certain decisions of the Supreme Court of Appeal, notably *Fedlife Assurance Ltd v Wolfaardt*[12] and *United*

[9] Section 157(1) of the LRA provides:

> "Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

[10] 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC).

[11] Id at para 40.

[12] 2002 (1) SA 49 (SCA).

National Public Servants Association of South Africa v Digomo NO & others.[13] In *Fedlife*, the majority of the Supreme Court of Appeal held that Chapter 8 of the LRA was not exhaustive of the rights and remedies that accrue to an employee upon the termination of employment.[14] Accordingly, the right of an employee to enforce a common law contract was held not to have been abrogated by the LRA.[15] *Digomo* is substantially to the same effect. There it was held that the remedies that the LRA provides for conduct which constitutes unfair labour practice are not exhaustive of the remedies that may be available to employees in the course of the employment relationship.[16] The conduct of the employer might constitute both an unfair labour practice, for which the LRA provides a specific remedy, and may also give rise to other rights of action.[17]

[27] Apart from the above-mentioned decisions of the Supreme Court of Appeal, Mthiyane JA also relied upon the High Court decision of *Mbayeka and Another v MEC for Welfare, Eastern Cape*.[18] In that case public sector employees had challenged their suspension from duty without pay as being invalid and unconstitutional, and sought reinstatement in the High Court. The employer resisted the application on the basis that the High Court had no jurisdiction in the matter as the matter fell within the exclusive jurisdiction of the Labour Court under section 157(1)

[13] [2005] 12 BLLR 1169 (SCA); (2005) 26 *ILJ* 1957 (SCA).

[14] See above n 12 at para 22.

[15] Id at para 17.

[16] See above n 13 at para 4.

[17] Id.

[18] 2001 (4) BCLR 374 (Tk); [2001] 1 All SA 567 (Tk).

of the LRA. In rejecting this argument, the High Court held that on a proper interpretation of section 157(2) of the LRA:

> ". . . the Labour Court will never enjoy exclusive constitutional jurisdiction even in matters where the cause of action is confined to an alleged violation of the right to fair labour practices simply because that is a constitutional right in terms of section 23 of the Constitution."[19]

[28] However, Mthiyane JA concluded that the applicant had to fail because she had not established that her dismissal constituted administrative action as defined in section 1 of PAJA. He reasoned that from the papers that it was clear that in terminating the applicant's contract of employment, Transnet was not exercising public power or performing a public function in terms of any legislation. The fact that Transnet, an organ of state, derives its powers to enter into a contract from a statute does not mean that its right to terminate the contract is also derived from public power.

[29] In a concurrence with the order of Mthiyane JA, Conradie JA accepted, without deciding, that the dismissal of the applicant constituted administrative action. However, he found that since the advent of the LRA, dismissals in the public domain are no longer to be dealt with as administrative acts. He reasoned that the legislative intent which is evident from the LRA is to subject an unfair dismissal dispute of any employee falling within its scope to the dispute resolution mechanisms established by the Act. In addition, he held that even if the applicant had a cause of action under

[19] Id at para 17.

PAJA, she was nevertheless limited to relief under the LRA. He reasoned that the provisions of section 158(1)(h) of the LRA confer a jurisdiction on the Labour Court to review an administrative act performed by the State as an employer.[20]

[30] In addition, Conradie JA relied upon the High Court decisions of *Jones & another v Telkom SA Ltd & others*,[21] *Mcosini v Mancotywa & another*[22] and *Mgijima v Eastern Cape Appropriate Technology Unit and Another*.[23] These cases involved attempts by employees to bypass the Labour Court by grounding a cause of action on a violation of fundamental rights in the Constitution. In these cases it was held that the fact that the action or actions of an employer may violate more than one of the employee's fundamental rights does not alter the nature of the cause of action; which was found to be a labour matter. Conradie JA accordingly held that a High Court had no jurisdiction as the claims in issue fell within the exclusive jurisdiction of the Labour Court.

[31] Cameron JA wrote a dissenting judgment in which Mpati DP concurred. He made the following findings.

[32] Firstly, Cameron JA upheld the jurisdiction of the High Court in matters like that of the applicant, holding that where the same conduct gives rise to different

[20] Section 158(1)(h) of the LRA provides that the Labour Court may "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."

[21] [2006] 5 BLLR 513 (T).

[22] (1998) 19 *ILJ* 1413 (Tk).

[23] 2000 (2) SA 291 (Tk).

causes of action, employees may choose the forum and the legislation under which they wish to pursue their actions. Cameron JA noted that neither the LRA nor PAJA expressly deprives the High Court of jurisdiction to adjudicate disputes arising from public sector employment. In the case of Ms Chirwa, he states the position as follows:

> "When Transnet dismissed Ms Chirwa, its action trenched on two constitutional rights: her right to fair labour practices, and her right to just administrative action. The Legislature has augmented the right to fair labour practices by affording employees an elaborate set of remedies in the LRA. When conciliation under the LRA failed, she could have subjected her unfair dismissal claim to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) (LRA sections 133-150). She chose not to. Instead, she launched this application for relief in express reliance on PAJA, asserting that two causes of action arose from her dismissal – one under the LRA; the other under the Constitution and PAJA. That assertion was in my view right."[24] (Footnotes omitted.)

He held that the existence of the LRA does not prevent public sector employees from pressing claims under PAJA and concluded that the fact that an employee has remedies under the LRA does not preclude her or him from approaching the ordinary courts (the High Court in Ms Chirwa's case) in vindication of her PAJA rights.

[33] Secondly, on the question of whether public sector dismissals constitute administrative action, Cameron JA held that they could be classified as such. In the case of Ms Chirwa, he found that even if her employment relationship with Transnet was not regulated by a particular statutory provision, the fact was that Transnet is a

[24] Above n 1 at para 57.

public entity, created by statute. That being so, according to Cameron JA, "[i]ts every act derives from its public, statutory character, including the dismissal at issue here."[25]

[34] Thirdly, he agreed with the High Court that Ms Chirwa was entitled to relief. He however, took a view different from that of the High Court on the form of such relief. The High Court had declared Ms Chirwa's dismissal to be a nullity and had ordered her reinstatement to her former position with the Fund with retrospective effect. Cameron JA, on the other hand, preferred that the matter be remitted to Transnet so that it could hold a fresh and proper hearing.

[35] In effect, the judgment of the Supreme Court of Appeal makes no definitive finding as to whether conduct by the State and its organs as an employer should be reviewable under PAJA, as the Court was split on this issue. Mthiyane JA held that the termination of Ms Chirwa's contract of employment with Transnet did not amount to exercise of public power and thus this excludes the applicability of PAJA; whereas Cameron JA agreed that Ms Chirwa was at liberty to frame the cause of action under PAJA and should have been afforded relief in terms of its provisions.

[36] The separate judgment of Conradie JA takes the matter no further. Although he accepted that Transnet's conduct amounted to administrative action, he was of the view that the LRA deprived Ms Chirwa of framing her cause of action under PAJA. He concluded that a complaint which rises from a procedurally unfair dismissal for

[25] Id at para 52.

poor work performance is a "quintessential LRA matter, [for which] relief under PAJA is not intended to be available."[26] I agree with this conclusion.

[37] Cameron JA first determined whether the conduct by Transnet (through the Fund) amounts to administrative action, and only thereafter did he turn to the question of jurisdiction. His finding in this regard is that since the Labour Courts are not afforded general jurisdiction in employment matters by the LRA, the jurisdiction of the High Court "is not ousted simply because a dispute falls within the sphere of employment relations".[27] It appears that for Cameron JA, *Zenzile* remains as relevant today as it was before the dawn of our new constitutional era.

[38] The reasoning employed by the Appellate Division in *Zenzile* cannot be faulted save to point out that the judgment was delivered in a particular context whereby state employees were not able to access processes aligned with natural justice principles in the forum of the old Labour Relations Act[28] in instances concerning employment disputes. This, of course, has changed since the adoption of the present Constitution and the LRA. Section 185 of the LRA confers the rights not to be unfairly dismissed or subjected to unfair labour practices, both of which extend to employees of the State, including the employees of Transnet.

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[26] Id at para 30.

[27] Id at para 59.

[28] Act 28 of 1956.

[39] The decisions in *Zenzile* and *Sibiya*[29] were made in circumstances where public sector employees were not accorded such rights in terms of the labour legislation applicable at the time. In the absence of such rights being afforded to them there was, in my view, a judicial duty on the judicial officers to extend protection to state employees. As the previous paragraph makes clear, the LRA has changed the content of that duty.

[40] State employees not only have all the benefits of the protection of the LRA, but also have the right to approach the civil courts for relief under PAJA and are thus in a preferred position. Although one should be loathe depriving a litigant of existing rights where she or he is accorded more than one right by the Constitution or any other enabling legislation, it is unsatisfactory that the High Court should be approached to decide review applications in terms of PAJA where the LRA already regulates the same issue to be reviewed. Cameron JA himself cautions that—

> "[t]he employee's insistence on approaching the ordinary courts – when the LRA afforded her ample remedies, including retrospective reinstatement and compensation if her employer failed to discharge the burden of proving that her dismissal was both procedurally and substantively fair – is not without consequence: the ordinary courts must be careful in employment-related cases brought by public employees not to usurp the labour courts' remedial powers, and their special skills and expertise."[30]

[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums

[29] *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A).

[30] Above n 1 at para 67.

should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.

[42] The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alterum partum principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.

[43] Judicial review of an administrative decision can only result in an administrative decision being set aside. This does not prevent an employer from restarting a disciplinary process; neither does it prevent an employee from being dismissed after a fresh hearing that cures the original defect. On the other hand, the

forums provided for by the LRA allow for a variety of purpose-built, employment-focused relief; none of which is available under the provisions of PAJA.

[44] This line of reasoning has been endorsed by Conradie JA. I can do no better than to repeat his conclusion:

> "If an application for the review of administrative action succeeds, the applicant is usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant's case and only in rare cases substitutes its decision for that of the decision-maker. The guiding principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one. Under the LRA, the procedure to have a dismissal overturned or adjusted involves a rehearing with evidence by the parties and the substitution of a correct decision for an incorrect one. The scope for relief consequent upon such an order is extensive. It is quite unlike that afforded by an administrative law review."[31] (Footnotes omitted.)

In this Court

[45] Ms Chirwa has approached this Court for leave to appeal against the majority judgment of the Supreme Court of Appeal. She also seeks condonation for the late filing of the documents and the defective manner in which they were lodged. There is no reason to refuse her condonation application as the non-compliance with the rules of this Court has not resulted in any apparent prejudice to the other parties to the application.

[31] Id at para 31.

[46] The question of jurisdiction arises in this matter because dismissals of public sector employees appear to implicate not only labour rights but also those of administrative justice. This is at least what Ms Chirwa is asserting. The two rights are entrenched in two separate provisions in the Constitution,[32] each with its own aims and specialised legislation (the LRA and PAJA) that seeks to give effect to its own distinct objectives.[33] This was emphasised in *South African Police Union & Another v National Commissioner of the South African Police Service & Another* (*SAPU*):[34]

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[32] Section 23 of the Constitution provides:

> "(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;
> (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)."

Section 33 of the Constitution provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must—
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

[33] The LRA directs fairness in the employer-employee context whilst PAJA codifies administrative law and demands due process and rationality in the sphere of public service.

[34] [2006] 1 BLLR 42 (LC).

> "[O]ur Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement."[35]

[47] The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public.[36] The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes.

[48] The Explanatory Memorandum on the Labour Relations Bill (the Memorandum)[37] describes the LRA mechanisms as a product of an extensive process of negotiation between all the affected stakeholders.[38] One of the express aims of the Labour Relations Bill[39] was to address the "lack of an overall and integrated

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[35] Id at para 54.

[36] Sachs J stated the following in this regard in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 583:

> "I believe that s 33 and PAJA are together designed to control the exercise of public power in a special and focused manner, with the object of protecting individuals or small groups in their dealings with the public administration from unfair processes or unreasonable decisions. This function should not be diffused. It involves the micro-management of public power, and is all the more effective because of its intense and coherent focus."

[37] "Explanatory Memorandum" (1995) 16 *ILJ* 278. The Memorandum was prepared by the Ministerial Legal Task Team (the Task Team) with the express objective of revealing the underlying thinking behind the proposed innovations which led to the current form of the LRA.

[38] The Task Team responsible for the Labour Relations Bill comprised of lawyers representing trade unions and employers, and was at all times assisted by the International Labour Organisation. Id at 280.

[39] Draft Negotiating Document in the Form of a Labour Relations Bill, GN 97 GG 16259, 10 February 1995.

legislative framework for regulating labour relations", which arose as a result of a multiplicity of laws governing different sectors, especially the private sector and the public sector.[40] Therefore, the object of the Bill was to eradicate the "inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion" caused by the multiplicity of laws by proposing a single statute that was to apply to the whole economy whilst accommodating the special features of its different sectors.[41]

[49] Section 210 of the LRA provides:

> "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

[50] This section heralds the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act. Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters. When PAJA was promulgated, five years after the current LRA came into force, section 210 remained untouched. The legislature, aware of the implications of this provision in the LRA, enacted PAJA without altering section 210.[42] This is significant, in that it would appear that the legislature intended that PAJA should not detract from the pre-eminence of the LRA and its specialised labour disputes mechanisms.

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[40] The Memorandum above n 37 at 281.

[41] Id at 281-282.

[42] In *Rex v Padsha* 1923 AD 281 at 312 it was held that "Parliament is presumed to know the law".

[51] In the light of the aims of the LRA, the CCMA was proposed as a forum which "recognizes and actively promotes private procedures negotiated between the parties for the resolution of disputes and adopts a simple non-technical and non-jurisdictional approach to dispute resolution."[43]

[52] In a similar vein, this Court in *National Education Health and Allied Workers Union v University of Cape Town and Others* (*NEHAWU*)[44] made the following finding about the specialised Labour Court structure created by the LRA:

> "The LAC is a specialised court, which functions in a specialised area of law. The LAC and the Labour Court were established by Parliament specifically to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and experience, Judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily."[45]

[53] It is in this context that section 157 of the LRA and its consequences must be analysed. Section 157 provides:

> "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in

[43] The Memorandum above n 37 at 283-284.

[44] 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[45] Id at para 30.

Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

(3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."

[54] The authorities that have attempted to grapple with this provision have come to conflicting interpretations. Keeping in mind the aim of the LRA to be a one-stop shop dispute resolution structure in the employment sphere, it is not difficult to see that the concurrent jurisdiction provided for in section 157(2) of the LRA is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights. However, this cannot be seen as derogating from the jurisdiction of the High Court in constitutional matters, assigned to it by section 169 of the

Constitution, unless it can be shown that a particular matter falls into the exclusive jurisdiction of the Labour Court.[46]

Ms Chirwa's submissions

[55] In this Court Ms Chirwa has persisted with her contention that the High Court had concurrent jurisdiction with the Labour Court in respect of her claim. She further contends that her dismissal as an employee of an organ of state amounts to an administrative act, as contemplated in the Constitution and in section 1 of PAJA, because it constitutes the exercise of public power. In the alternative, she relies on section 195 of the Constitution which specifies a number of constitutional controls that govern the public administration.[47] Both arguments raise constitutional issues.[48]

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[46] Compare the decision of this Court in *Fredericks* above n 10.

[47] Section 195 of the Constitution provides:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> (a) A high standard of professional ethics must be promoted and maintained.
> (b) Efficient, economic and effective use of resources must be promoted.
> (c) Public administration must be development-oriented.
> (d) Services must be provided impartially, fairly, equitably and without bias.
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
> (f) Public administration must be accountable.
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
>
> (2) The above principles apply to—
> (a) administration in every sphere of government;
> (b) organs of state; and
> (c) public enterprises.
>
> (3) National legislation must ensure the promotion of the values and principles listed in subsection (1).
>
> (4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

Does the High Court have concurrent jurisdiction with the Labour Court in this matter?

[56] In *Fredericks*,[49] this Court considered the scope of the jurisdiction of the High Court to determine certain complaints arising out of an employment relationship. That case concerned the refusal by the Department of Education to approve applications for voluntary retrenchment packages. Following the first democratic elections in 1994 there was an amalgamation of a number of education departments, and it was realised that there was a need to reduce the number of teachers. An agreement was reached at the Education Labour Relations Council concerning amongst other things, a process of voluntary retrenchments in terms of which teachers would be permitted to apply for voluntary severance packages. Initially, applications for voluntary retrenchments were approved but were later refused. The applicants in that case challenged the refusal of their applications on the grounds that it infringed their rights under section 9 (the right to equality) and section 33 (right to just administrative action) of the Constitution. The High Court held that the dispute concerned a collective agreement, a matter governed by section 24 of the LRA and in

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(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

[48] The proper interpretation and application of a statute that gives effect to a constitutional right, as PAJA does, raised a constitutional matter. See *NEHAWU* above n 44 at para 15. The interpretation of a provision of the Constitution, in this matter section 195, also amounts to a constitutional matter. See section 167(7) of the Constitution.

[49] See above n 10.

respect of which the Labour Court had exclusive jurisdiction under section 157(1) of the LRA.

[57] On appeal to this Court, the applicants alleged that the State, in its capacity as employer, did not act procedurally fairly in the administration of the collective agreement, and in particular in considering their applications for voluntary retrenchment packages. This Court found that the applicants' claim was not based on contract but was based on their constitutional rights to administrative justice and equal treatment and flowed "from the special duties imposed upon the state by the Constitution."[50]

[58] *Fredericks* is distinguishable from the present case. Notably, the applicants in *Fredericks* expressly disavowed any reliance on section 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in *Fredericks* rely on the fair labour practice provisions of the LRA or any other provision of the LRA. The Court therefore did not consider, but left open, the question whether a dispute arising out of the interpretation or application of a collective agreement can also give rise to a constitutional complaint as envisaged in section 157(2) of the LRA.

[59] The starting point for the enquiry as to whether the High Court has concurrent jurisdiction with the Labour Court in respect of Ms Chirwa's claim is section 157(1)

[50] Id at para 32.

of the LRA, which provides that the Labour Court has exclusive jurisdiction over all matters that "are to be determined by the Labour Court." Thus where exclusive jurisdiction over a matter is conferred upon the Labour Court by the LRA or other legislation, the jurisdiction of the High Court is ousted.[51] The effect of section 157(1) is therefore to divest the High Court of jurisdiction in matters that the Labour Court is required to decide except where the LRA provides otherwise.

[60] It is apparent from the provisions of section 157(1) that it does not confer "exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee."[52] It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the words of section 157(1) "are to be determined by the Labour Court." This is evident from section 157(2), which contemplates concurrent jurisdiction in constitutional matters arising from employment and labour relations.

[61] Ms Chirwa's complaint is that Mr Smith "failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the LRA." Schedule 8 contains the Code that sets out guidelines that must be taken into account by "[a]ny person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal

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[51] Id at para 37.

[52] *Fedlife* above n 12 at para 25.

was effected in accordance with a fair procedure”.[53] Thus, unlike in *Fredericks*, the applicant here expressly relies upon those provisions of the LRA which deal with unfair dismissals. Indeed, this is the claim she asserted when she approached the CCMA. It is apparent that when she approached the High Court, she made it clear that her claim was based on a violation of the provisions of the LRA, including items 8 and 9 of Schedule 8 to that Act. However, she elected to vindicate her rights not under the provisions of the LRA, but instead under the provisions of PAJA.

[62] The LRA provides procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration, for which the CCMA is established; and establishes the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from it. Unfair dismissals and unfair labour practice are dealt with in Chapter VIII. Section 188 provides that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason or that the dismissal was effected in accordance with a fair procedure. Item 9 in Schedule 8 to the LRA sets out the guidelines in cases of dismissal for poor work performance.

[63] Ms Chirwa’s claim is that the disciplinary enquiry held to determine her poor work performance was not conducted fairly and therefore her dismissal following such enquiry was not effected in accordance with a fair procedure. This is a dispute envisaged by section 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration and review by the Labour Court. The dispute

[53] Section 188(2) of the LRA.

concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter.

[64] Ms Chirwa was correct in referring her dismissal to the CCMA as an unfair dismissal in terms of section 191(1)(a)(ii) of the LRA. The constitutional right she sought to vindicate is regulated in detail by the LRA. In this regard, the remarks made by Ngcobo J in relation to a specialist tribunal in *Hoffmann v South African Airways*[54] are apposite. Ngcobo J, when invited to express an opinion on SAA's policy to test aspirant employees for HIV/AIDS, said the following:

> "The question of testing in order to determine suitability for employment is a matter that is now governed by s 7(2), read with s 50(4), of the Employment Equity Act. In my view there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the Legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that Court which, in the first instance, should deal with issues relating to testing in the context of employment."[55] (Footnote omitted.) (Emphasis added.)

[54] 2001 (1) SA 1 (CC); (2000) 11 BCLR 1211 (CC).

[55] Id at para 20. It should however be noted that the Employment Equity Act 55 of 1998 not only regulates the direct application of the right to equality in the sphere of employment law in detail, but also provides specifically for the exclusive jurisdiction of the Labour Court.

The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the State and its organs as employers.

[65] Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance.[56] She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty to relegate the finely-tuned dispute resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.

[66] Ms Chirwa is not afforded an election. She cannot be in a preferential position simply because of her status as a public sector employee. There is no reason why this should be so, as section 23 of the Constitution, which the LRA seeks to regulate and give effect to, serves as the principal guarantee for all employees. All employees (including public service employees, save for the members of the defence force, the intelligence agency and the secret service, academy of intelligence and Comsec[57]), are covered by unfair dismissal provisions and dispute resolution mechanisms under the

[56] See para [16] above for the text of item 9 of Schedule 8 to the LRA.

[57] Electronic Communications Security (Pty) Ltd.

LRA.[58] The LRA does not differentiate between the State and its organs as an employer, and any other employer. Thus, it must be concluded that the State and other employers should be treated in similar fashion.

[67] Nonetheless, Ms Chirwa chose to abandon the process she had started in the CCMA and approached the High Court where she contended that her right to administrative justice, protected by section 33 of the Constitution, had been breached. She was ill-advised in abandoning the process that she had started in the CCMA. This is the route that she should have followed to its very end.

[68] Further, even if Ms Chirwa, or a similarly situated employee, sought to challenge the dismissal by relying on a constitutional issue other than one implemented through PAJA (as has been done here by relying on section 195 of the Constitution), for example discrimination, it is necessary that all remedies under the LRA are exhausted before raising such an issue in a different forum. This is required so that the LRA and its structures, which were crafted to provide a comprehensive framework for labour dispute resolution, are not undermined.

[69] However, this line of reasoning will not apply if Ms Chirwa had sought to challenge the provisions of the LRA on the basis that they were inadequate in providing protection to employees in the form contemplated by section 23 of the

[58] Section 2 of the LRA.

Constitution. This would raise a constitutional matter that is justiciable in the High Court. This is not the case in this matter.

[70] The provisions of section 157(2)[59] of the LRA has resulted in complex jurisdictional disputes insofar as determining where the jurisdiction of the Labour Court ends and that of the High Court begins, and also insofar as determining whether public sector employees are at liberty to circumvent the provisions of the LRA and frame their causes of action as ones arising under the provisions of PAJA. The choice of an appropriate forum by public sector employees in instances where they are at loggerheads with their employers concerning dismissal has been a difficult one. The High Courts and the Supreme Court of Appeal in the present case have not been unanimous on the issue.[60]

[71] To the extent that PAJA and the LRA overlap in providing public sector employees with remedies for labour-related issues, there is an urgent need for the legislature to revisit the provisions of section 157(2) of the LRA to ensure development of a coherent legal framework within which all labour disputes may be speedily resolved.

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[59] See para [53] above for the text of section 157(2) of the LRA.

[60] Compare *Hlope & others v Minister of Safety and Security & others* [2006] 3 BLLR 297 (LC); *SAPU & another v National Commissioner of the South African Police Service & another* [2006] 1 BLLR 42 (LC); and *PSA obo Haschke v MEC for Agriculture & others* [2004] 8 BLLR 822 (LC) with *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and others* [2006] 10 BLLR 960 (LC); *Nell v Minister of Justice & Constitutional Development & another* [2006] 7 BLLR 716 (T); and *POPCRU & others v Minister of Correctional Services & others* [2006] 4 BLLR 385 (E) and *United National Public Servants Association of SA v Digomo NO & others* [2005] 12 BLLR 1169 (SCA).

Did Ms Chirwa's dismissal amount to administrative action?

[72] Only acts of an administrative nature are subject to the administrative justice right in section 33(1) of the Constitution. The focus of the enquiry as to whether conduct constitutes administrative action is not on the position which the functionary occupies but rather on the nature of the power being exercised. This Court has held in a number of cases that in this enquiry what matters is not so much the functionary as the function; that the question is whether the task itself is administrative or not and that the focus of the enquiry is not on the arm of government to which the relevant functionary belongs but on the nature of the power such functionary is exercising.[61]

[73] My finding that the High Court does not have concurrent jurisdiction with the Labour Court in this matter makes it unnecessary that I should arrive at a firm decision on the question of whether the dismissal of Ms Chirwa by Transnet constitutes administrative action. If, however, I had been called upon to answer that question, I would have come to the same conclusion as Ngcobo J: namely, that the conduct of Transnet did not constitute administrative action under section 33 of the Constitution for the reasons that he advances in his judgment.[62]

Applicability of section 195 of the Constitution

[61] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 447-450 and 476; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 104; *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); 2000 (3) BCLR 241 (CC) at para 78; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 141.

[62] See para [142] below.

[74] Even if the applicant was permitted to bypass the specialised framework of the LRA in the attempt to challenge her dismissal, the reliance on section 195 is misplaced. This is illustrated by the reasoning in *Institute for Democracy in South Africa and Others v African National Congress and Others* (*IDASA*).[63] The Court in that case relied on the decision in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*,[64] where it was held:

> "The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights."[65]

[75] Consequently, the court in *IDASA* held that—

> ". . . the same considerations apply to the other sections of the Constitution . . . [including] 195(1). These sections all have reference to government and the duties of government, inter alia, to be accountable and transparent. . . . In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise or protect by means of access to the respondents' donations records. The language and syntax of these provisions are not couched in the form of rights, especially when compared with the clear provisions of ch 2. Reliance upon the sections in question for purposes of demonstrating a right is therefore inapposite."[66]

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[63] 2005 (5) SA 39 (C); 2005 (10) BCLR 995 (C) at para 40.

[64] 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

[65] Id at para 21.

[66] Above n 63 at para 40.

[76] Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action.

Conclusion

[77] Although on her pleadings the applicant appears to be out of court, she is not left without a remedy. She must follow the route created by the LRA and exhaust all the remedies that are still available to her within that specialised framework. A condonation procedure is provided for by section 136(1) of the LRA, and thus the applicant may still pursue the route of arbitration. If she is dissatisfied with the outcome, she has the further option of pursuing the review of the arbitration award in the Labour Court, in terms of section 145 of the LRA.

Costs

[78] Although ultimately unsuccessful, Ms Chirwa has raised important constitutional issues. As such, it would not be appropriate to award costs against her. Accordingly, I make no order as to costs.

Order

[79] The following order is made:

(a) The application for leave to appeal is granted.

(b) Condonation for non-compliance with the Rules of this Court is granted.

(c) The appeal is dismissed.

(d) There is no order as to costs.

Moseneke DCJ, Madala J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J and Van der Westhuizen J concur in the judgment of Skweyiya J.

NGCOBO J:

Introduction

[80] I have had the benefit of reading the judgment prepared by Skweyiya J. I concur in the order proposed by him. There are two troublesome issues for me that Skweyiya J does not address. The one is the scope of the operation of the provisions of section 157(1) and (2), and the other, which flows from the first, is the characterisation of dismissal as administrative action. These two issues have given rise to complex jurisdictional problems for both the High Court and the Labour Court. There are conflicting judicial views on how to resolve these issues. Far from abating, the problems generated by these issues are becoming more frequent in the courts as illustrated by the present case. These issues arise squarely in this case. And it is these issues that I deal with in this judgment. The manner in which I resolve them, leads me to the same destination as that reached by Skweyiya J.

[81] The issues presented in this case are a variant of familiar problems that have arisen since the enactment of section 157(2) of the Labour Relations Act, 1995

(LRA),[1] which confers concurrent jurisdiction on the Labour Court with the High Court in certain matters.[2] This provision inevitably gives rise to difficult problems of jurisdiction of the Labour Court and the High Court in labour and employment matters. In the abstract these problems come to courts as ordinary questions of statutory construction but they involve a more complicated and perspicacious process than is conveyed by the elusive phrase "ascertaining the intention of the legislature". They involve issues of "mystifying complexity"[3] and "jurisdictional complexities".[4] The irony is that section 157(2) has given rise to the very problems that the LRA was supposed to address. Two of the primary objects of the LRA, as I will demonstrate later in this judgment, are to address the problem of overlapping and competing jurisdictions and the use of different courts. These problems conspired to give rise to jurisdictional complexities and prevent the development of a coherent jurisprudence on labour and employment relations.[5]

[82] In *Langeveldt v Vryburg Transitional Local Council and Others*,[6] the Labour Appeal Court considered some of the jurisdictional problems arising from the overlap in jurisdiction between the Labour Court and the High Court. The Court noted that within four years of the Labour Court becoming fully operational, a number of employment and labour matters came before the High Courts. In those cases, the

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[1] Act 66 of 1995.

[2] Section 157 is quoted below at para [88].

[3] *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA); (2006) 27 *ILJ* 2294 (SCA); [2007] 1 BLLR 10 (SCA) per Conradie JA at para 33.

[4] *Langeveldt v Vryburg Transitional Local Council and Others* (2001) 22 *ILJ* 1116 (LAC); [2001] 5 BLLR 501 (LAC) at para 23.

[5] Explanatory Memorandum prepared by the Ministerial Legal Task Team (1995) 16 *ILJ* 278 at 281 and 326.

[6] Above n 4 at paras 23-68.

High Courts were confronted time and again with the question whether they had jurisdiction despite the existence of the Labour Court. After examining some fifteen decisions, the Labour Appeal Court concluded that these cases clearly reveal the jurisdictional complexities which the provisions of section 157(2) have generated. It called for the repeal of section 157(2) so as to deprive the High Court of jurisdiction in employment and labour matters. That was in 2001. The provision is still on our statute books.

[83] The Labour Appeal Court in *Langeveldt* also highlighted the nature of the problems that have not only arisen, but also those that were likely to arise as a consequence of overlapping jurisdictions. Prophetically, the Court identified as one of the problems likely to arise, the case of an employee who challenges his or her dismissal in the High Court on the grounds that it is unlawful or unconstitutional and simultaneously initiates proceedings in the Commission for Conciliation, Mediation and Arbitration (CCMA), but has the latter proceedings stayed pending the outcome of the proceedings in the High Court.

[84] In the present case we are concerned with a variant of that problem: the employee initiated proceedings in the CCMA on the grounds that her dismissal was unfair. When conciliation failed to resolve the dispute, she did not proceed with the CCMA process; instead she instituted proceedings in the High Court alleging that in dismissing her, her employer had failed to comply with the mandatory provisions of the LRA and that its conduct was therefore in breach of her constitutional right to just

administrative action as given effect by the Promotion of Administrative Justice Act, 2000 (PAJA).[7] She did so because she was advised that she had two causes of action; one flowing from the provisions of the LRA, and another flowing from the right to just administrative action guaranteed in section 33 of the Constitution as given effect to by the provisions of PAJA.

[85] Ordinarily and as a matter of judicial policy, even if the High Court had concurrent jurisdiction with the Labour Court in this matter, it should be impermissible for a party to initiate the process in the CCMA alleging one cause of action, namely, unfair labour practice, and halfway through that process, allege another cause of action and initiate proceedings in the High Court. It seems to me that where two courts have concurrent jurisdiction, and a party initiates proceedings in one system alleging a particular cause of action, the party is bound to complete the process initiated under the system that she or he has elected. Concurrent jurisdiction means that a party must make an election before initiating proceedings. A party should not be allowed to change his or her cause of action mid-stream and then switch from one court system to another. In effect, the applicant is inviting us to countenance such a practice. It is an invitation which, in my view, should be firmly rejected.

[86] But the issues raised by the applicant are too important for this case to be disposed of on this narrow basis. The two questions which flow from the applicant's allegations are, firstly, the scope of the operation of the provisions of section 157(2) of

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[7] Act 3 of 2000.

the LRA, and secondly, whether the applicant had two causes of action, one flowing from the provisions of the LRA and another from the right to just administrative action in section 33 of the Constitution as given effect to by PAJA. I will deal with these questions in turn.

The scope of the provisions of section 157 of the LRA

[87] It will be convenient, first, to identify the statutory provisions applicable; second to consider the views of the Supreme Court of Appeal and other courts on this issue; then to identify the primary objects of the LRA that are relevant to the determination of this issue; and ultimately to consider the meaning to be attributed to section 157(2).

[88] Section 157 of the LRA governs the jurisdiction of the Labour Court and in relevant part provides:

> "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—
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> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

> (c) the application of any law for the administration of which the Minister is responsible."

[89] One of the questions which the courts below had to consider was whether the applicant's complaint was justiciable in the High Court. Four judges of the Supreme Court of Appeal held that the High Court had jurisdiction to adjudicate the applicant's complaint. Mthiyane JA with Jafta JA concurring, held that where an employment dispute raised an alleged violation of a constitutional right, a litigant is not confined to the remedies under the LRA and the jurisdiction of the High Court is not ousted either. He cited with approval a statement from the High Court decision in *Mbayeka v MEC for Welfare, Eastern Cape*[8] to the effect that the Labour Court will never enjoy exclusive jurisdiction even in matters concerning unfair labour practice because the right to fair labour practices is a constitutional right guaranteed in section 23.[9] Cameron JA, with Mpati JA concurring, approached the matter on the footing that the High Court had jurisdiction. He found that when Transnet dismissed the applicant, it trenched on two constitutional rights, namely, her right to fair labour practices and her right to just administrative action.[10] Conradie JA held that a complaint arising from a procedurally unfair dismissal for work performance, is a quintessentially LRA matter.[11] He concluded that the applicant went to the wrong forum.[12]

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[8] *Mbayeka and Another v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) at para 17.

[9] Above n 3 at para 9.

[10] Id at para 57.

[11] Id at para 30.

[12] Id at para 44.

[90] The views expressed by Cameron and Mthiyane JJA have subsequently been reaffirmed in two recent decisions of the Supreme Court of Appeal.[13] The views of the Supreme Court of Appeal on the provisions of section 157 are summarised in *Boxer Superstores Mthatha and Another v Mbenya* as follows:

> "The exclusive jurisdiction of the Labour Court has been carefully circumscribed in recent years. Section 157(1) of the LRA provides that subject to the Constitution and the Labour Appeal Court's jurisdiction, and except where the LRA itself provides otherwise, 'the labour court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the labour court'. Despite the seeming breadth of this provision, it is now well established that—
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> (i) (as Peko ADJP observed in dismissing the jurisdictional objection) s 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between the employer and employee (*Fedlife Assurance Ltd v Wolfaardt*), and since the LRA affords the Labour Court no general jurisdiction in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations (*Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others*);
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> (ii) the LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship—particular conduct may not only constitute an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice (*United National Public Servants Association of SA v Digomo NO and Others*);
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> (iii) an employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract giving rise to a claim for damages (as in *Fedlife*);

[13] *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) and *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA).

> (iv) similarly, an employee may sue in the High Court for damages for a dismissal in breach of the employer's own disciplinary code which forms part of the contract of employment between the parties (*Denel (Edms) Bpk v Vorster*)."[14] (Footnotes omitted.)

[91] The views expressed by the Supreme Court of Appeal and other courts on section 157 highlight the fundamental problem, namely, how to reconcile the provisions of subsections (1) and (2). Subsection (1) purports to confer on the Labour Court "exclusive jurisdiction in respect of all matters that elsewhere in terms of [the LRA] or in terms of any other law are to be determined by the Labour Court." On the other hand subsection (2) confers on the Labour Court "concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in [the Bill of Rights]". However the alleged or threatened violation must arise from the employment or labour relations or constitutionality of any executive or administrative act of the State as an employer.

[92] In *United National Public Servants Association of SA v Digomo and Others*[15] the Supreme Court of Appeal held that provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could have been formulated as an unfair labour practice. The difficulty with this view is that it leaves it to the employee to decide in which court the dispute is to be heard. By characterising the manner in which the disciplinary hearing was conducted as unfair dismissal, the

[14] *Boxer Superstores* above n 13 at para 5.

[15] (2005) 26 *ILJ* 1957 (SCA) at paras 4-5; see also *Boxer Superstores* above n 13 at para 5(ii).

employee could have the dispute heard in the Labour Court. Yet by characterising the same dispute as constituting a violation of a constitutional right to just administrative action, the employee could have the same dispute heard in the High Court. It could not have been the intention of the legislature to bring about this consequence.

[93] Some High Courts, notably in *Mgijima v Eastern Cape Appropriate Technology Unit and Another*[16] and *Mcosini v Mancotywa and Another*,[17] have expressed the view that courts should look not at how the employee has characterised the dispute but the substance of the dispute. If the substance and the nature of the dispute is one that falls under the LRA, the Labour Court has exclusive jurisdiction under section 157(1). These cases hold that what is in essence a labour dispute under the LRA should not be labelled a constitutional dispute simply by reason of the fact that the same sets of facts and the issues raised could also support a conclusion that the employer conduct complained of amounts to a violation of a right entrenched in the Constitution. The exclusive jurisdiction of the Labour Court cannot be avoided by alleging a fundamental right other than the right to fair labour practices.[18]

[94] In *Jones and Another v Telkom SA Ltd and Others*,[19] the Pretoria High Court expressed a similar view holding that:

[16] 2000 (2) SA 291 (Tk) at 309C-E.

[17] (1998) 19 *ILJ* 1413 (Tk) at 1413C-E.

[18] Id at 1417C-E.

[19] (2006) 5 BLLR 513 (T).

> "In this case I am convinced that a vital component of the issue to be determined concerns unfair dismissals, unfair labour practices and dismissals based on operational requirements, all issues that ultimately resort under the exclusive jurisdiction of the Labour Court. The applicants have attempted to disavow a reliance on unfair dismissal in their prayers, but it is clear from the body of their affidavits that they consider the process adopted by the first respondent as one that has unfairly led to the termination of their employment, either as from 31 March 2005 or from 31 May 2005.
>
> It does not help to say that it is a constitutional issue. Even to determine whether the process followed was fair constitutionally speaking; one will have to begin to establish whether it was fair in terms of the Labour Relations Act. Constitutional issues cannot be determined in the abstract. In this case what is at stake is the fairness of a restructuring process. Whether the process was fair has to be judged according to the facts of the case and in the context of the national legislation that gives effect to s 23(1) of the Constitution."[20] (Footnotes omitted.)

[95] However in *Boxer Superstores* the Supreme Court of Appeal expressed a different view. There it was contended that what matters is not the form of the employee's complaint but the substance of the complaint.[21] The Supreme Court of Appeal held that the focus on the substance of the dispute leaves out of account the fact that jurisdictional limitations often involve questions of form.[22] It noted that the employee in that case "formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness."[23] This illustrates the difficulty of relying on form rather than substance to which I alluded earlier. This would enable

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[20] Id at 515E-H. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC); (2003) 24 *ILJ* 95 (CC) (*NEHAWU*) at paras 19, 21-22, 33-34 and 41 and *Manyahti v MEC for Transport, KwaZulu-Natal, and Another* 2002 (2) SA 262 (N) at 266G; (2002) 23 *ILJ* 273 (N) at 276I.

[21] *Boxer Superstores* above n 13 at para 11.

[22] Id at para 12.

[23] Id.

an astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the LRA and rob the Labour Courts of their need to exist.[24] But is this what the legislature intended when it enacted the provisions of section 157(2)?

[96] In expressing their views, the courts in *Mgijima*, *Mcosini* and *Jones*, relied on the intention of the legislature in enacting the LRA. In *Mgijima*, the Court expressed its view as follows:

> "In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter under the provisions of s 157(2) of the Act. In my view it would run counter to the purpose and objects of the Act with which I have dealt earlier in this judgment. To conclude otherwise would mean that the High Court is effectively called upon to determine a right which has been given effect to and which is regulated by the Act. To hold otherwise would be to ignore the remainder of the provisions of the Act and would enable the astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the Act. This may give rise to 'forum shopping' simply because it is convenient to do so or because one of the parties failed to comply with the time-limits laid down by the Act as contended by the first respondent in the present matter."[25]

[97] In my view, the provisions of subsection (1) and subsection (2) of section 157 can be reconciled by having regard to the primary objects of the LRA.

The primary objects of the LRA

[24] *Mgijima* above n 16 at 309A-C.

[25] Id. See also above n 19 at 515D-H.

[98] Section 3(a) and (b) of the LRA requires that the provisions of the LRA must be construed in the light of the primary objects of the LRA and the provisions of the Constitution. Two of the problems that existed prior to the enactment of the LRA were (a) the multiplicity of laws governing labour and employment relations; and (b) the overlapping and competing jurisdictions of different courts.

Multiplicity of laws

[99] Prior to the enactment of the LRA there were different statutes governing the labour and employment relations. The Labour Relations Act, 1956[26] applied partly to private sector employees and partly to public sector employees. The Public Service Labour Relations Act, 1994,[27] which was largely modelled on the 1956 LRA, governed part of the public service employees. The Education Labour Relations Act, 1993[28] applied to educators. The employees in the agricultural sector were governed by the Agricultural Labour Act, 1993.[29] Members of the police force were governed by separate legislation.[30] There were employees such as domestic workers who were not protected by legislation.

[100] These multiple pieces of legislation created inconsistency and unnecessary duplication of resources as well as jurisdictional problems. The Explanatory Memorandum identified some of the consequences of the multiplicity of laws:

[26] Act 28 of 1956.

[27] Proclamation 105 of 1994.

[28] Act 146 of 1993.

[29] Act 147 of 1993.

[30] South African Police Service Labour Relations Regulations, GG No 16702, No R 1489, 1995.

> "The multiplicity of laws regulating labour relations has had a number of consequences. These include—
>
> *inconsistency, uncertainty and complexity*. For example, each Act has a different unfair labour practice definition and the Industrial Court is required to determine disputes in terms of these different definitions;
>
> *inequality*. The state is charged by the Constitution to treat all workers equally, yet the different Acts, either in their formulation or through judicial interpretation, result in unjustifiable inequality of treatment. This inequality will deepen over time because different institutions are charged with interpreting and giving effect to the different laws and different Ministries administer them. As things stand, public service employees and teachers are disadvantaged because the statutes applicable to them, while based on the LRA, abandon many of its checks and balances;
>
> *duplication of resources and administration*. Separate Acts and administrative structures place an unnecessary financial burden on taxpayers and the state;
>
> *overlap of private and public sector activities*. Certain of the state's activities place it in competition with the private sector. To have separate negotiating forums for what is essentially one industry is not logical; and
>
> *jurisdictional problems*. Given the constantly changing interface between the public and private sectors resulting from privatization, the expansion of the state's activities and other factors, it is difficult for parties to know which statute regulates their activities."[31]

[101] Against this background, the drafters of the LRA proposed "a comprehensive framework of law governing the collective relations between employers and trade unions in all sectors of the economy."[32] As the Explanatory Memorandum explains, the Bill was intended to apply "to all sectors with the exception of the members of the

[31] Above n 5 at 286-287.

[32] Id at 287.

South African National Defence Force, agencies or services established in terms of the Intelligence Services Act, and the South African Police Service."[33] The principle underlying the LRA is "one Act for all sectors".[34] Explaining the rationale of one statute for all sectors, the drafters of the LRA said:

> "Firstly, the changing nature of the state and the extension of its activities into areas such as education, health care and welfare and commercial endeavours such as forestry, agriculture, etc have undermined the notion that its employees are its servants. Secondly, developments at the international level have encouraged the erosion of the public/private labour law divide. ILO Convention 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize and the European Social Charter apply equally to the private and public sectors. These international requirements, together with Conventions 98 and 151 of 1978, guarantee to public and private sector employees (excluding the police and armed forces) the full range of freedom of association and collective bargaining rights.
>
> The starting point must be that all workers should be treated equally and any deviation from this principle should be justified. The mere fact that employees are state employees is not sufficient justification. Restrictive treatment of employees must be justified on the basis of the service that they perform and, even then, it should be narrower than necessary and should be accompanied by reciprocal guarantees. For instance, essential services must be restrictively defined and where the right to strike is denied it must be replaced with final and binding arbitration. The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework."[35]

[33] Id.

[34] Id.

[35] Id at 288.

[102] Consistently with this objective, the LRA brings all employees, whether employed in the public sector or private sector under it, except those specifically excluded. The powers given to the Labour Court under section 158(1)(h) to review the executive or administrative acts of the State as an employer give effect to the intention to bring public sector employees under one comprehensive framework of law governing all employees. So too is the repeal of the legislation such as Public Service Labour Relations Act and the Education Labour Relations Act. One of the manifest objects of the LRA is therefore to subject all employees, whether in the public sector or in the private sector, to its provisions except those who are specifically excluded from its operation.

Overlapping and competing jurisdictions

[103] The other defect which was associated with the old labour relations regime was the overlapping and competing jurisdictions and the use of different courts to adjudicate labour and employment issues. The Industrial Court and the former Labour Appeal Court did not have exclusive jurisdiction in labour matters. The Supreme Court, now the High Court, retained jurisdiction to review proceedings of the Industrial Court. Strikes and lock-outs could be interdicted in either the Industrial Court or the Supreme Court. Proceedings could be brought in respect of a breach of contract or breach of a statutory duty or delict in relation to unlawful industrial action in the Supreme Court. [36] A forum was largely determined not by the nature of the dispute but by the sector in which an employee was employed. A complaint about the

[36] Id at 326.

unfairness of the procedure followed in a dismissal case could be brought in the Industrial Court if the employee was in the private sector, and in the Supreme Court if the employee was in the public sector. All of this prevented the development of a coherent labour and employment relations jurisprudence.

[104] To address this problem, the LRA creates a specialised set of forums and tribunals to deal with labour and employment-related matters. It establishes an interlinked structure consisting of, among others, various bargaining councils, the CCMA, the Labour Court and the Labour Appeal Court. It also creates procedures designed to accomplish the objective of simple, inexpensive and accessible resolution of labour disputes, which is one of the purposes of the LRA. In this scheme the role of the CCMA and the exclusive jurisdiction of the Labour Court are vital. The Labour Court does not itself generally hear disputes as a court of first instance. But neither does the CCMA have exclusive jurisdiction as against the Labour Court. The Labour Court sits as a court of first instance in certain matters.[37] And in some cases it does so after conciliation has been unsuccessful.[38] The dispute resolution scheme of the LRA is therefore all-embracing and leaves no room for intervention from another court.[39]

[105] The declared intention of the LRA is "to establish the Labour Court and the Labour Appeal Court as superior courts with exclusive jurisdiction to decide matters

[37] See sections 59, 66, 68, 77(2), 103-105, 141(4) and (5) and 142(3) of the LRA.

[38] See sections 9, 26, 63, 69, and 191(5)(b) of the LRA.

[39] *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others* 1999 (2) SA 234 (T) (*IMATU*) at 239C-F.

arising from the [LRA]".[40] These are specialised courts which function in a specialised area of law. They were established by Parliament specifically to administer the LRA. Their primary responsibility is to oversee the ongoing interpretation and application of the LRA and the development of labour relations policy and precedent.[41] Through their skills and experience, judges of the Labour Court and the Labour Appeal Court accumulate expertise which enables them to resolve labour and employment disputes speedily. Indeed judges of the Labour Court and the Labour Appeal Court are appointed to these courts based upon, amongst other qualifications, their "knowledge, experience, and expertise in labour law."[42] The appointment of women and men with expertise in labour law to specialised labour courts is to ensure the development of a coherent labour and employment relations jurisprudence. Moreover, the Labour Court is a superior court and has the authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of the High Court.

[106] The creation of a comprehensive framework of law governing labour and employment relations in both the public and private sectors must be understood in the context of the constitutional right to fair labour practices in section 23(1) of the Constitution. This provision guarantees to everyone, a right to fair labour practices. It envisages legislation that would give effect to this right. Indeed, one of the primary objectives of the LRA is to give effect to the right to fair labour practices. Section 185

[40] See Preamble to the LRA.

[41] *NEHAWU* above n 20 at para 34.

[42] Section 153(2) and (6) of the LRA.

of the LRA affirms the right of everyone not to be unfairly dismissed or subjected to unfair labour practices.

[107] The LRA provides simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration, for which the CCMA is established. It establishes the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from it. Section 188 provides that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason or that the dismissal was effected in accordance with a fair procedure. Thus the LRA protects employees covered by it against both substantively and procedurally unfair dismissal. Item 8 of Schedule 8 of the LRA deals with the manner of dealing with an employee who is on probation. Item 9 of Schedule 8 of the LRA sets out the guidelines in cases of dismissal for poor work performance.

[108] A dispute about the procedural fairness of a dismissal must, like all other disputes, be dealt with in terms of section 191. The bargaining council having jurisdiction or the CCMA must attempt to resolve the dispute through conciliation.[43] If the dispute remains unresolved for a period of 30 days and if, as in this case, a dispute relates to the conduct of an employee, the dispute must be referred for arbitration.[44] In certain instances a dispute may be referred to the Labour Court.[45] There is no appeal against an award made by a commissioner of the CCMA. The only

[43] Section 191(1).

[44] Section 191(5)(a)(i).

[45] Section 191(6).

remedy available to a party aggrieved by the decision of a commissioner is to take the award on review to the Labour Court. Arbitration awards may be reviewed by the Labour Court on a specified ground.[46] In addition, the Labour Court has the power to review the performance of any function provided for in the LRA on any grounds that are permissible in law.[47] Finally, section 158(1)(h) empowers the Labour Court to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

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[46] Section 145 of the LRA provides:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
>
> (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.
>
> (1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).
>
> (2) A defect referred to in subsection (1), means—
>
> (a) that the commissioner—
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained.
>
> (3) The Labour Court may stay the enforcement of the award pending its decision.
>
> (4) If the award is set aside, the Labour Court may—
>
> (a) determine the dispute in the manner it considers appropriate; or
>
> (b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

[47] Section 158(1)(g).

[109] It is in this context and in the light of these primary objects of the LRA that the provisions of section 157 must be understood and construed.

[110] The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA. The clear intention of the legislature was to create specialised forums to deal with labour and employment matters and for which the LRA provides specific resolution procedures.

[111] When enacting the LRA, Parliament did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply the law. It went on to entrust the primary interpretation and application of its rules to specific and specially constituted tribunals and forums and prescribed a particular procedure for resolving disputes arising under the LRA. Parliament evidently considered that centralised administration and adjudication by specialised tribunals and forums was necessary to achieve uniform application of its substantive rules and to avoid incompatible and

conflicting decisions that are likely to arise from a multiplicity of tribunals and diversity of rules of substantive law.

[112] When a proposed interpretation of the jurisdiction of the Labour Court and the High Court threatens to interfere with the clearly indicated policy of the LRA to set up specialised tribunals and forums to deal with labour and employment relations disputes, such a construction ought not to be preferred. Rather, the one that gives full effect to the policy and the objectives of the LRA must be preferred. The principle involved is that where Parliament in the exercise of its legislative powers and in fulfilment of its constitutional obligation to give effect to a constitutional right, enacts the law, courts must give full effect to that law and its purpose. The provisions of the law should not be construed in a manner that undermines its primary objectives. The provisions of subsections (1) and (2) of section 157 must therefore be construed purposively in a manner that gives full effect to each without undermining the purpose of each.

[113] The purpose of section 157(1) was to give effect to the declared object of the LRA to establish specialist tribunals "with exclusive jurisdiction to decide matters arising from [it]". To this extent, it has given exclusive jurisdiction to the Labour Court and Labour Appeal Court to deal with matters arising from the LRA.

[114] Section 157(2) was only included in the LRA in 1998. It must be understood in its historical context. The LRA was enacted subsequent to the interim Constitution.

In terms of the interim Constitution there were limitations that were placed on the jurisdiction of certain courts to consider constitutional issues. Section 101(3) of the interim Constitution conferred limited jurisdiction on the High Court to consider constitutional issues which included "any alleged violation of any fundamental right" and "any dispute over the constitutionality of any executive or administrative act".[48] Section 103 dealt with "other courts" which includes the Labour Court and did not expressly confer any constitutional jurisdiction on such courts.[49]

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[48] Section 101(3) provided—

> "Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely—
>
> (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
>
> (c) any inquiry into the constitutionality of any law applicable within its area of jurisdiction, other than an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
>
> (d) any dispute of a constitutional nature between local governments or between a local and provincial government;
>
> (e) any dispute over the constitutionality of a Bill before a provincial legislature, subject to section 98(9);
>
> (f) the determination of questions whether any matter falls within its jurisdiction; and
>
> (g) the determination of any other matters as may be entrusted to it by an Act of Parliament."

[49] Section 103 provided—

> "(1) The establishment, jurisdiction, composition and functioning of all other courts shall be as prescribed by or under a law.
>
> (2) If in any proceedings before a court referred to in subsection (1), it is alleged that any law or provision of such law is invalid on the ground of its inconsistency with a provision of this Constitution, the court shall, subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid.
>
> (3) If in any proceedings before a court referred to in subsection (1), the presiding officer is of the opinion that it is in the interest of justice to do so, he or she may postpone the proceedings to enable the party who has alleged that a relevant law or provision is invalid, to apply to a provincial or local division of the Supreme Court for relief in terms of subsection (4).
>
> (4) If the provincial or local division hearing an application referred to in subsection (3), is of the opinion that a decision regarding the validity of the law or provision is

[115] The effect of section 157(2) is to confer limited constitutional jurisdiction on the Labour Court in respect of matters involving alleged or threatened violations of the rights in the Bill of Rights. It did so in a language similar to section 101(3) of the interim Constitution with one notable difference; the constitutional jurisdiction of the Labour Court is limited to issues arising out of employment and labour relations. The manifest purpose of section 157(2) was therefore to confer constitutional jurisdiction on the Labour Court. It did so in terms which were almost identical to the jurisdiction conferred on the High Court.

[116] The provisions of the section 101(3) of the interim Constitution have been repealed by the Constitution. In terms of section 169 of the Constitution, a High Court may decide any constitutional matter except a matter that is within the exclusive jurisdiction of the Constitutional Court or "a matter that is assigned by an Act of Parliament to another court of a status similar to a High Court."[50] It is clear from the provisions of section 169(a)(ii) of the Constitution that a High Court has no jurisdiction to determine a matter that is assigned by the LRA to the Labour Court.

> material to the adjudication of the matter before the court referred to in subsection (1), and that there is a reasonable prospect that the relevant law or provision will be held to be invalid, and that it is in the interest of justice to do so, the provincial or local division shall—
>
> (a) if the issue raised is within its jurisdiction, deal with such issue itself, and if it is in the exclusive jurisdiction of the Constitutional Court, refer it to the Constitutional Court for its decision after making a finding on any evidence which may be relevant to such issue; and
>
> (b) suspend the proceedings before the court referred to in subsection (1) pending the decision of the provincial or local division or the Constitutional Court, as the case may be."

[50] Section 169(a)(ii) of the Constitution.

Section 170 of the Constitution makes it plain that the Labour Court has constitutional jurisdiction in respect of matters assigned to it by the LRA. It provides that "a court of a status lower than a High Court may not enquire into or rule on constitutionality of any legislation or other conduct of the President." The Labour Court is a court which has a status similar to that of a High Court. The scope of section 157(2) must be determined in the light of the objects of the LRA to which I have already referred.

[117] What must be stressed is the point already made, namely, that one of the primary objects of the LRA is to establish specialist courts with exclusive jurisdiction to decide matters arising from labour and employment relations. It is perhaps worth repeating what we said in *National Education Health & Allied Workers Union v University of Cape Town and Others (NEHAWU)*[51] concerning the role of the Labour Appeal Court and the Labour Court. There we said:

> "The LAC is a specialised court, which functions in a specialised area of law. The LAC and the Labour Court were established by Parliament specifically to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and experience, Judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve labour disputes speedily."[52]

[118] The achievement of the objective to develop a coherent and evolving jurisprudence in labour and employment relations, lies in the ability of the Labour Court to deal with all matters arising from labour and employment relations, whether

[51] *NEHAWU* above n 20.

[52] Id at para 30.

such matters arise from the LRA or directly from the provisions of the Bill of Rights. By extending the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights, which arise from employment and labour relations, section 157(2) has brought within the reach of the Labour Court, employment and labour relations disputes that arise directly from the provisions of the Bill of Rights. The power of the Labour Court to deal with such disputes is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.

[119] The objective to establish a one-stop court for labour and employment relations is apparent in other provisions of the LRA. Section 157(3) confers on the Labour Court jurisdiction to review arbitrations conducted under the Arbitration Act, 1965[53] "in respect of any dispute that may be referred to arbitration in terms of [the LRA]".[54] The Labour Court has the power to review the performance of any function which is provided for in the LRA;[55] and to review any decision taken or any act performed by the State in its capacity as an employer.[56] All these provisions are designed to

[53] Act 42 of 1965.

[54] Section 157(3) of the LRA provides:

> "Any reference to the Court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act."

[55] Section 158(1)(g) provides:

> "The Labour Court may subject to section 145, review the performance or purported performance of any function provided for in *this* Act on any grounds that are permissible in law".

[56] Section 158(1)(h) provides:

> "The Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

strengthen the power of the Labour Court to deal with disputes arising from labour and employment relations.

[120] Viewed in this context, the primary purpose of section 157(2) was not so much to confer jurisdiction on the High Court to deal with labour and employment relations disputes, but rather to empower the Labour Court to deal with causes of action that are founded on the provisions of the Bill of Rights but which arise from employment and labour relations. The constitutional authority of the legislature to confer that power on the Labour Court is found in section 169(a)(ii) of the Constitution. That provision authorises Parliament to assign any constitutional matter "to another court of a status similar to a High Court" and to deprive the High Court of the jurisdiction in respect of a matter assigned to another court.

[121] Given the manifest purpose of section 157(2) the use of the word "concurrent" is unfortunate. Concurrent jurisdiction may well give rise to forum-shopping with all its unfortunate consequences. As the High Court observed in *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others* (*IMATU)*:

> "Concurrent jurisdiction may give rise to 'forum shopping'. This is evident in the present case. For unlike the applicant, the aggrieved members have followed the route of conciliation/arbitration and we have parallel cases about the same subject-matter. In addition concurrent jurisdiction may lead to conflicting irresoluble decisions of the Labour Court and High Court on the same issue."[57]

[57] *IMATU* above n 39 at 240 B-C.

[122] The legislature may well have achieved its objective to extend the jurisdiction of the Labour Court to causes of action founded on the provisions of the Bill of Rights arising from employment and labour relations without using the word "concurrent". It did so in relation to the power of the Labour Court to "review any decision taken or any act performed by the State in its capacity as an employer".[58] The use of the word "concurrent" has regrettably led some courts to express the view that given the fact that the right to fair labour practices is a right guaranteed in section 23(1) of the Constitution, there will never be a situation where the Labour Court will have exclusive jurisdiction even in matters concerning unfair labour practices.[59] This view simply illustrates the danger in giving section 157(2) a wider meaning than its context and the objects of the LRA require. As I see it, the problem is one of reconciling the provisions of subsections (1) and (2) of section 157 and harmonising them with the primary objects of the LRA.

[123] While section 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of section 157(2) and harmonise them with those of section 157(1) and the primary

[58] Section 158(1)(h).

[59] *Mbayeka* above n 8 at para 17 and *Chirwa* above n 3 per Mthiyane JA at para 9.

objects of the LRA, is to give section 157(2) a narrow meaning. The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle that we have recently reinstated, namely, that "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."[60]

[124] Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case "for practical considerations". What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.

[60] *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC) at para 51.

[125] The question therefore is whether a dispute about a failure to comply with the mandatory provisions of item 8 and item 9 of Schedule 8 to the LRA is a dispute which falls to be resolved under the dispute resolution provisions of the LRA. In the light of the principles to which I have referred, the answer is clear; a dispute concerning the alleged non-compliance with the provisions of the LRA is a matter which under the LRA, must be determined exclusively by the Labour Court. This result cannot be avoided by alleging, as the applicant does, that the conduct of Transnet violates the provisions of the LRA in question and violates a constitutional right to just administrative action in section 33 of the Constitution and is therefore reviewable under PAJA.

[126] It now remains to consider the other troublesome issue, namely, whether the applicant has more than one cause of action; one flowing from the LRA and the other flowing from the constitutional right to just administrative action. It is to that issue that I now turn.

Does the applicant have more than one cause of action?

[127] One of the unintended consequences of the provisions of section 157(2) has been that employees in the public sector consider themselves as having more than one cause of action as the applicant contended. Public sector employees normally allege that when a State employer dismisses them, such conduct amounts to the exercise of public power and therefore constitutes administrative action. Much store is placed by

the decision in *Administrator, Transvaal, and Others v Zenzile and Others*[61] and its progeny, which held that the dismissal of a public sector employee is an exercise of public power. Public sector employees contend therefore that this implicates the constitutional right to just administrative action in section 33 of the Constitution. This, they argue, entitles them to approach the High Court under section 157(2) of the LRA. But do they have more than one cause of action?

[128] The argument that the decision by Transnet to dismiss the applicant gave rise to two causes of action is premised on the assumption that the dismissal of a public sector employee constitutes administrative action. Judicial opinion on this issue is not harmonious. The debate reduces itself to how powers exercised by a public entity in its employment relations ought to be characterised. One school of thought holds the view that all employment relationships should be governed by labour law, including the right to fair labour practices in section 23 of the Constitution to the exclusion of administrative law, PAJA and the right to just administrative action in section 33. This school of thought has been adopted in a number of cases.[62] The other school of thought holds the view that the exercise of public power inevitably attracts both

[61] 1991 (1) SA 21 (A) at 34B-D; (1991) 12 *ILJ* 259 (A) at 270G.

[62] See *Western Cape Workers Association v Minister of Labour* [2006] 1 BLLR 79 (LC) at para 10 (PAJA is not applicable to labour disputes); *Hlope & Others v Minister of Safety and Security & Others* [2006] 3 BLLR 297 (LC) at para 10 (transfer of employees does not constitute administrative action); *Greyvenstein v Kommissaris van die SA Inkomste Diens* (2005) 26 *ILJ* 1395 (T) at 1402F-G (instituting disciplinary proceedings is not an exercise of public power); *Louw v SA Rail Commuter Corporation Ltd & Another* (2005) 26 *ILJ* 1960 (W) at paras 16-18 (decision to dismiss not governed by PAJA); *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 *ILJ* 2403 (LC); [2006] 1 BLLR 42 (LC); (*SA Police Union*) at paras 50-51 (setting the working hours of police officers does not constitute administrative action); and *Public Servants Association on behalf of Haschke v MEC for Agriculture & Others* (2004) 25 *ILJ* 1750 (LC) (*Public Servants Association*) at paras 11-12, where Pillay J held that labour law is not administrative law. In addition, she noted that historically administrative law had been used to advance labour rights where labour laws were considered to be inadequate.

administrative law and labour law with the result that public sector employees have remedies under both branches of law. This approach too has been adopted in several cases.[63]

[129] What ultimately divides these schools of thought is a disagreement over whether the decision of a public entity to dismiss an employee should be characterised as the exercise of public power. The views expressed by members of the Supreme Court of Appeal in this case reflect this disagreement. It will be convenient, first, to consider these two schools of thought; then to identify the principles laid down in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (*SARFU*)[64] on what constitutes administrative action; and ultimately, to apply those principles – retooled insofar as may be necessary, to the facts of the case now under consideration.

[130] Mthiyane JA held that the nature of the conduct involved in this case is the termination of a contract of employment which is based on a contract. The conduct of Transnet in terminating the employment contract did not therefore involve the

[63] See *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* (2006) 27 *ILJ* 555 (E); [2006] 4 BLLR 385 (E) (*POPCRU*) at para 64 (the decision to dismiss correctional service employees constitutes administrative action); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others* [2006] 10 BLLR 960 (LC) at paras 56-58 and 64 (transfer of correctional services employee constitutes administrative action); *Nell v Minister of Justice & Constitutional Development & Another* [2006] 7 BLLR 716 (T) at para 23 (purported dismissal was administrative action in terms of PAJA); *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W) at para 14 (a decision to terminate certain pension funds amounted to administrative action under PAJA); *Mbayeka* above n 8 at para 29 (failure to hear employees before suspending them was unconstitutional administrative action); and *Simela & Others v MEC for Education, Province of the Eastern Cape & Another* [2001] 9 BLLR 1085 (LC) at paras 42 and 59 (decision to transfer an employee without consultation amounted to both an unfair labour practice and unjust administrative action).

[64] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 141.

exercise of public power or performance of a public function in terms of some legislation as required by PAJA.[65] He reasoned that the mere fact that Transnet is an organ of State "does not impart a public law character to its employment contract with the applicant."[66] Its power to dismiss is not found in legislation but in the employment contract between it and the applicant. When Transnet dismissed the applicant it "did not act as a public authority but simply in its capacity as employer."[67] He further reasoned that "ordinarily" the employment contract has no public element and is not governed by administrative law. He held that the applicant was protected by the provisions of the LRA.[68] He concluded that the conduct of Transnet in dismissing the applicant did not therefore constitute administrative action as defined in PAJA nor did it violate the applicant's rights under section 33 of the Constitution.[69]

[131] Cameron JA held that the decision of a State organ to dismiss an employee constitutes administrative action.[70] He relied upon *Zenzile*[71] which held that a public sector employer is a public authority whose decision to dismiss involves the exercise of public power.[72] That the applicant's contract of employment or Transnet's authority to employ the applicant "did not derive from a particular, discernable,

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[65] Above n 3 at paras 14-15.

[66] Id at para 15.

[67] Id.

[68] Id.

[69] Id. Conradie JA assumed that the conduct of Transnet in dismissing the applicant constituted administrative action, id at para 26.

[70] Id at para 47.

[71] Above n 61.

[72] Id at 34B-D; 270F-G.

statutory provision" is of no significance, Cameron JA reasoned.[73] What matters, he said, is that Transnet is a public entity created by legislation and operating under statutory authority. Cameron JA concluded that when Transnet dismissed the applicant, its action trenched on two constitutional rights, namely, her right to fair labour practices and her right to just administrative action.[74]

[132] Cameron JA therefore upheld the applicant's contention that she had two causes of action as a result of her dismissal; one under the LRA, the other under the Constitution and PAJA. In upholding this contention he reasoned that the fact that an employee has remedies under the LRA does not preclude the employee from approaching the High Court for relief.[75] He expressed the view that he could not find any doctrine of constitutional law which confines a beneficiary of more than one constitutional right to only one remedy.[76] Nor, he reasoned, could he find any "intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them."[77]

[133] It is necessary to refer to two recent decisions of the Labour Court and the High Court which reach different conclusions on this issue. The first is *SA Police Union and Another v National Commissioner of SA Police Services and Another* (*SA Police*

[73] Above n 3 at para 52.

[74] Id at para 57.

[75] Id at paras 63-65.

[76] Id at para 63.

[77] Id at para 65.

Union), a decision of the Labour Court.[78] In this case the primary issue was whether the decision of the Commissioner to introduce the adapted eight hour shift constituted administrative action. The Court concluded that the conduct of the Commissioner in question did not constitute administrative action.[79] The reasoning of the Labour Court rests on three main propositions. The first is that the Constitution draws a distinction between administrative action and labour relations. The Court reasoned that these are "two distinct species of juridical acts [to which the Constitution] subjects . . . different forms of regulation, review and enforcement."[80] The second is that "[t]here is nothing inherently public about setting the working hours of police officers".[81] Employment relations, the Court said, "are conducted internally in service of the immediate objectives of the organ of state and are premised upon a contractual relationship of trust and good faith."[82]

[134] Lastly, the Court held that there was "no logical, legitimate or justifiable basis upon which to categorise all employment conduct in the public sector as administrative action".[83] But *Zenzile*, which held that the dismissal of workers by a public body does not fall beyond the reach of administrative law and that the decision to dismiss a public sector employee involved the exercise of public power, stood in its way. The Court reasoned that because the LRA has been extended to virtually all

[78] *SA Police Union* above n 62. This decision was followed by the Labour Court in *Hlope* above n 62.

[79] *SA Police Union* above n 62 at para 51.

[80] Id at para 54.

[81] Id at para 51.

[82] Id at para 52.

[83] Id at para 62.

employees, including those in the public sector, it is no longer necessary to apply the principles of administrative law to the field of employment relations. It concluded that cases such as *Zenzile* which extended labour rights to public sector employees "have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA."[84]

[135] This decision must be contrasted with the High Court decision in *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (*POPCRU*),[85] which was handed down by the Eastern Cape High Court after the Labour Court decision in *SA Police Union*. This case concerned an application to review the decision of the Department of Correctional Services to dismiss some of its employees. The Department contended that the decision to dismiss its employees did not constitute administrative action and consequently was not reviewable under the provisions of PAJA. The Court held that the decision in question constituted the exercise of public power and thus amounted to administrative action.[86] Factors which influenced the Court in concluding that the power involved was public, included the statutory basis of the power to employ and dismiss correctional officers, the subservience of the officials to the Constitution generally, and the public character of the Department.[87]

[84] Id at para 66.

[85] *POPCRU* above n 63. This decision was followed by the Labour Court in *Nxele* above n 63.

[86] *POPCRU* above n 63 at para 54.

[87] Id.

[136] The Court rejected the argument that it is neither necessary nor desirable for one act to attract the protection of both labour law and administrative law. It reasoned firstly that the fundamental right to fair labour practices does not trump every other right.[88] The right to administrative justice and the right to fair labour practices provide employees with rights which "are complimentary and cumulative, not destructive of each other simply because they are different."[89] The second proposition is that there is nothing incongruous about individuals having more legal protection rather than less, or more than one fundamental right applying to one act, or more than one branch of law applying to the same set of facts.[90] The third proposition is that section 157(2) of the LRA envisages that certain employment-related acts will also be administrative acts when vesting jurisdiction in the Labour Court concurrent with the jurisdiction of the High Court.[91]

[137] In this case the Chief Justice holds that the High Court had jurisdiction because the applicant alleged a violation of the constitutional right to administrative action, a right in the Bill of Rights. However, he finds that the decision to terminate the applicant's employment contract did not constitute administrative action under PAJA for two reasons. First, the dismissal of the applicant did not take place in terms of any statutory authority, but rather in terms of the contract of employment.[92] Second, the

[88] Id at para 59.

[89] Id at para 60.

[90] Id.

[91] Id at para 62.

[92] Para [185].

dismissal did not constitute the exercise of public power.[93] In this regard he finds that the source of Transnet's power to dismiss is contractual and this "point[s] strongly in the direction that the power is not a public one."[94]

[138] I am unable to agree with the view that in dismissing the applicant Transnet did not exercise public power. In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, "[t]hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution."[95] Indeed, in *Hoffmann v South African Airways*,[96] this Court held that "Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest."[97]

[139] However, the fact that the conduct of Transnet, in terminating the applicant's employment contract, involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative

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[93] Para [194].

[94] Para [189].

[95] Id.

[96] 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); (2000) 21 *ILJ* 2357 (CC); [2000] 12 BLLR 1365 (CC).

[97] Id at para 23.

action. The question whether particular conduct constitutes administrative action must be determined by reference to section 33 of the Constitution. Section 33 of the Constitution confines its operation to "administrative action", as does PAJA. Therefore to determine whether conduct is subject to review under section 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under section 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution.[98] The question therefore is whether the conduct of Transnet in terminating the applicant's contract of employment constitutes administrative action under section 33.

[140] In *SARFU,*[99] this Court emphasised that not all conduct of State functionaries entrusted with public authority will constitute administrative action under section 33. The Court illustrated this by drawing a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation. It pointed out that the former constitutes administrative action, while the latter does not. It held that "the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of

[98] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22 at para 202 and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 100.

[99] Above n 64.

government."[100] But what matters is the function that is performed. The question is whether the task that is performed is itself administrative action or not.[101]

[141] Against this background the Court concluded:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."[102] (Footnotes omitted.)

[142] The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was

[100] Id at para 141.

[101] Id.

[102] Id at para 143.

exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not, in my view, constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33.

[143] Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under section 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 laws. It is true they may share some characteristics. Administrative law falls exclusively in the category of public law while labour law has elements of administrative law, procedural law, private law and commercial law.[103]

[144] The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement. It deals with labour and

[103] *Public Servants Association* above n 62 at paras 11-13.

employment relations separately. This is dealt with in section 23 under the heading "Labour Relations". In particular, section 23(1) guarantees to "[e]veryone . . . the right to fair labour practices." The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices. To this extent, section 23 of the Constitution guarantees the right of every employee and every employer to form and join a trade union or an employers' organisation, as the case may be.

[145] Nor is there anything, either in the language of section 23 or the context in which that section occurs, to support the proposition that the resolution of labour and employment disputes in the public sector should be regulated differently from disputes in the private sector. On the contrary, section 23 contemplates that employees regardless of the sector in which they are employed will be governed by it. The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as in the private sector, namely, through collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action.[104] It is apparent from the Public Administration provisions of the Constitution that employment relations in the public service are governed by fair employment practices.

[104] *SA Police Union* above n 62 at para 55.

[146] Section 195 which sets out the basic values and principles governing public administration, includes as part of those values and principles, "employment and personnel management practices based on . . . fairness".[105] These provisions contemplate fair employment practices. In addition, one of the powers and functions of the Public Service Commission is "to give directions aimed at ensuring that personnel procedures relating to . . . dismissals comply with [fair employment practices]".[106] This flows from the requirement that dismissals in the public service must comply with the values set out in section 195(1). These provisions echo the right to fair labour practices in section 23(1). And finally, section 197(2) provides that the terms and conditions of employment in the Public Service must be regulated by national legislation.

[147] These provisions must be understood in the light of section 23 of the Constitution which deals with labour relations, and in particular, section 23(1) which guarantees to everyone the right to fair labour practices. Section 197(2) does not detract from this. It must be read as complementing and supplementing section 23 in affording employees protection. Indeed, the LRA, which was enacted to give effect to section 23 of the Constitution, and the Public Service Act, 1994,[107] which was enacted to give effect to section 197(2) of the Constitution, complement and supplement one another. By its own terms, the LRA governs all employees, including those in the public sector except those specifically excluded. For its part, the Public Service Act

[105] Section 195(1).

[106] Section 198(4)(d).

[107] Act 103 of 1994.

which governs, among other things, the "terms and conditions of employment" expressly provides that the power to discharge an officer or employee "shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995".[108]

[148] As pointed out earlier, the line of cases which hold the power to dismiss amounts to administrative action rely on *Zenzile*. This case and its progeny must be understood in the light of our history. Historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed. Since the advent of the new constitutional order, all that has changed. Section 23 of the Constitution guarantees to every employee, including public sector employees, the right to fair labour practices. The LRA, the Employment Equity Act, 1998,[109] and the Basic Conditions of Employment Act, 1997,[110] have codified labour and employment rights. The purpose of the LRA and the Basic Conditions of Employment Act[111] is to give effect to and regulate the fundamental right to fair labour practices conferred by section 23 of the Constitution. Both the LRA and the Basic Conditions of Employment Act, were enacted to give effect to section 23, now govern the public sector employees, except those who are specifically excluded from its provisions. Labour and employment rights such as the right to a fair hearing, substantive fairness and remedies for non-compliance are now codified in the

[108] Section 17(1).

[109] Act 55 of 1998.

[110] Act 75 of 1997.

[111] Id at section 2(a).

LRA.[112] It is no longer necessary therefore to treat public sector employees differently and subject them to the protection of administrative law.

[149] In my judgement labour and employment relations are dealt with comprehensively in section 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.

[150] I conclude that the decision by Transnet to terminate the applicant's contract of employment did not constitute administrative action under section 33 of the Constitution. This conclusion renders it unnecessary to decide whether PAJA applies.

[112] Sections 138, 185-188 and 193-195 of the LRA.

[151] For all these reasons, I hold that the dispute between the applicant and Transnet falls within the exclusive jurisdiction of the Labour Court. It follows therefore that the High Court did not have jurisdiction in respect of the applicant's claim.

[152] This is not however a matter in which costs should be ordered. The applicant has urged an important question which has been plaguing labour and employment relations since the inception of the labour courts. By coming here she has helped to resolve this problem.

[153] One final observation must be made in this case. The applicant approached the High Court because she was advised to do so. The state of the law was uncertain at the time. Her approach to the High Court is therefore understandable. Should she decide to pursue her claim in the right forum, one can only hope that the circumstances that led her to abandon the CCMA process and the length of time it has taken to resolve the important legal question she raised, will be taken into consideration in considering the reasonableness or otherwise of her delay in approaching the appropriate forum.

Moseneke DCJ, Madala J, Navsa AJ, Nkabinde J, Sachs J and Van der Westhuizen J concur in the judgment of Ngcobo J.

LANGA CJ:

Introduction

[154] I have had the pleasure of reading the judgment of Skweyiya J. I concur in the outcome he reaches but unfortunately cannot agree with his reasoning and conclusion regarding the issue of jurisdiction. In my view, the primary question for this Court to consider is whether the applicant's dismissal constitutes administrative action in terms of the Promotion of Administrative Justice Act (PAJA).[1] I shall come to this question later in my judgment. However, because Skweyiya J deals with the case on the basis of the jurisdiction alone; and in so doing seeks to distinguish an earlier unanimous decision of this Court, I consider it necessary to set out my reasoning in respect of the jurisdiction question as well.

The correct approach to determining jurisdiction

[155] It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it. That much was recognised by this Court in *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)*.[2] Van der Westhuizen J, when deciding on what constitutes a constitutional issue, held as follows:

[1] Act 3 of 2000.

[2] 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

> "An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgment by this Court that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it."[3]

The corollary of the last sentence must be that the mere fact that an argument must eventually fail cannot deprive a court of jurisdiction.[4]

[156] The analogy to *Fraser* is appropriate in the present context because the jurisdiction of the High Court in labour matters is also defined along somewhat substantive lines. Sections 157(1) and (2) of the Labour Relations Act (LRA)[5] read together make it clear that the High Court retains its existing jurisdiction except for those "matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court." So, while the question for this Court's jurisdiction is whether a case raises a "constitutional matter", the question in this case is whether a claim has been assigned by law to the Labour Court. We must therefore ask whether the claim before us is a claim that has been assigned to the Labour Court.

The nature of the applicant's claim

[3] Id at para 40.

[4] As I explain below at paras 4-5, Ms Chirwa's claim is not merely couched in administrative language; it is grounded squarely in PAJA.

[5] Act 66 of 1995.

[157] According to Skweyiya J, "Ms Chirwa's complaint is that Mr Smith 'failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the LRA'."[6] I take a different view of the applicant's claim. While the quoted sentence does indeed appear in the applicant's submissions, it forms only a small part of her argument. The bulk of her submissions were devoted to arguments based squarely on PAJA. Firstly, she contends that her dismissal is administrative action as understood by PAJA. In addition, her substantive complaints were that the alleged administrative action contravened: (a) section 3(2)(b) of PAJA[7] for failing to provide adequate notice; (b) section 6(2)(a)(iii) of PAJA[8] because the administrator was biased; and (c) section 3(3)(a) of PAJA[9] because she was prevented from obtaining assistance or representation. The reference to items 8 and 9[10] is used solely to bolster a further argument that her dismissal also violated sections 6(2)(b)[11] and 6(2)(f)(i)[12] of PAJA.

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[6] Above at para 61.

[7] Section 3(2)(b)(i) reads—

> "In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
> (i) adequate notice of the nature and purpose of the proposed administrative action".

[8] Section 6(2)(a)(iii) reads—

> "A court or tribunal has the power to judicially review an administrative action if—
> (a) the administrator who took it—
> (iii) was biased or reasonably suspected of bias".

[9] Section 3(3)(a) reads—

> "In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—
> (a) obtain assistance and, in serious or complex cases, legal representation".

[10] Item 8 deals with the disciplining of employees on probation. Item 9 provides guidelines for dismissal for poor work performance.

[11] Section 6(2)(b) reads—

> "A court or tribunal has the power to judicially review an administrative action if—
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

[12] Section 6(2)(f)(i) reads—

These sections provide for the review of actions that are not permitted by the empowering provision or contravene another law.

[158] While that argument alone might have been construed as a disguised reliance on the LRA, in the broader context of her argument, I do not believe that is a fair or correct characterisation. It should be added that it was not a characterisation urged upon us by the applicant's counsel in argument; nor one adopted in any of the three judgments in the Supreme Court of Appeal, nor in the High Court judgments. In my view, it is incorrect.

[159] Most of my disagreement with the judgment of Skweyiya J flows from this mischaracterisation. It seems clear to me that, evaluated as a whole, the applicant's complaint is that her dismissal should be evaluated in terms of PAJA, not the LRA. Whatever we think of the wisdom of her election to avoid the specialised provisions of the LRA, we must evaluate the claim as it was presented to us. I should add here that her claim constitutes a constitutional matter as it concerns her right to administrative justice under section 33 of the Constitution, as given effect to by PAJA.[13]

Has the applicant's claim been assigned to the Labour Court?

> "A court or tribunal has the power to judicially review an administrative action if—
>
> (f) the action itself—
>
> (i) contravenes a law or is not authorised by the empowering provision".

[13] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC); (2003) 24 *ILJ* 95 (CC) at para 15.

[160] The next question must be whether the claim as described is a matter that has been assigned to the Labour Court. Sections 157(1) and (2) of the LRA read:

> "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—
>
> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
>
> (c) the application of any law for the administration of which the Minister is responsible."

[161] This section has been the subject of considerable debate in the High Court. That debate can be roughly divided into two schools of thought, both in terms of outcome and reasoning. The one approach adopts a purposive reading of the section that claims to give effect to the purpose of the LRA to have labour disputes adjudicated solely within the structures it created.[14] This is typified by the following passage of Van Zyl J in *Mgijima v Eastern Cape Appropriate Technology Unit and Another*:

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[14] See, for example, *Mgijima v Eastern Cape Appropriate Technology Unit and Another* 2000 (2) SA 291 (Tk) at 308-309; *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others* 1999 (2) SA 234 (T) at 239-240; *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others* 1998 (1) SA 685 (C) at 688 and 690; and *Mcosini v Mancotywa and Another* (1998) 19 *ILJ* 1413 (Tk) at 1417.

> "I am of the view that for purposes of s 157(2) of the Act the substance of the dispute between the parties should in every case be determined. What is in essence a labour dispute as envisaged by the Act should not be labelled a constitutional dispute simply by reason of the fact that the facts thereof and the issues raised could also support a conclusion that the conduct of the employer complained of amounts to a violation of entrenched rights in the Constitution and should be declared as such. In every case it should rather be determined if the facts of the case giving rise to the dispute and the issues between the parties are to be characterised a 'matter' provided for in the Act, and if that 'matter' is in terms of s 157(1) to be determined by the Labour Court, the High Court is precluded from exercising jurisdiction."[15]

It is also the approach adopted by Conradie JA in the Supreme Court of Appeal.[16]

[162] A different school of thought adopts what has been described as a more literal approach to the section.[17] It is of the opinion that only those matters explicitly assigned to the Labour Court by the LRA are excluded from the High Court's jurisdiction.[18] This judicial view relies primarily on what it regards to be the plain meaning of the section. But their interpretation is also buttressed by more substantive concerns. As Jafta J explained in *Mbayeka and Another v MEC for Welfare, Eastern Cape*:

> "[T]o hold that special dispute resolution procedures cannot be side-stepped by reliance on the breach of the rights to fair labour practices, just administrative action, the right to dignity or the right to equality in a labour matter constitutes a down-

[15] *Mgijima* above n 14 at 309D-F.

[16] *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA); [2007] 1 All SA 184 (SCA); [2007] 1 BLLR 10 (SCA); (2006) 27 *ILJ* 2294 (SCA).

[17] *Ndzamela v Eastern Cape Development Corporation Ltd* [2003] 6 BLLR 619 (Tk) at para 27.

[18] See, for example, *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 27; *Mbayeka and Another v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) at paras 19-27; *Runeli v Minister of Home Affairs and Others* 2000 (2) SA 314 (Tk) at 322-323; *Jacot-Guillarmod v Provincial Government, Gauteng, and Another* 1999 (3) SA 594 (T) at 598-600.

> grading of such constitutional rights to the level of ordinary statutory rights as the direct consequence thereof is that the Labour Court has exclusive jurisdiction over labour disputes wherein such rights are violated within the context of labour matters. The fact that these rights might have been given effect to in ordinary statutory legislation does not change their status at all – they remain constitutionally entrenched rights enforceable in the High Courts as well. To hold otherwise would lead to a serious anomalous situation and the effect thereof would deeply emasculate the constitutional jurisdiction of the High Courts."[19]

This approach in essence is reflected in the judgments of Mthiyane and Cameron JJA in the Supreme Court of Appeal.[20]

[163] Difficult and interesting as this debate is, it has in my view been decided by this Court's judgment in *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others*.[21] The applicants in that matter challenged a refusal to accept their application for voluntary retrenchment as violating their rights to equality and administrative justice. O'Regan J, writing for a unanimous Court, endorsed the latter approach. She held that section 157(1) had to be interpreted in light of section 169 of the Constitution.[22] That section permits constitutional matters to be assigned to courts other than the High Court, but they must be courts of equal status. O'Regan J held that the Commission for Conciliation, Mediation and Arbitration (CCMA) is not

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[19] *Mbayeka* above n 18 at para 24.

[20] Above n 16.

[21] 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC); (2002) 23 *ILJ* 81 (CC).

[22] The section reads—

> "A High Court may decide—
> (a) any constitutional matter except a matter that—
> (i) only the Constitutional Court may decide; or
> (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
> (b) any other matter not assigned to another court by an Act of Parliament."

a court of equal status and that the review of CCMA decisions is not a substitute for considering a matter afresh.[23] Section 157(1) of the LRA must, she concluded, insofar as it concerns constitutional matters, be read to refer only to matters assigned for initial consideration by the Labour Court.[24]

[164] This Court also found that:

> "It is quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. . . . As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations."[25]

The Court concluded that, absent a specific provision conferring jurisdiction of a constitutional matter on the Labour Court, the High Court enjoyed concurrent jurisdiction to decide constitutional matters, including administrative action claims.[26]

[165] After *Fredericks*, the debate is not whether a claim is in "essence" a labour matter or a matter that the general scheme of the LRA intended be addressed by the Labour Court. The much more limited question is whether the LRA contains a provision referring a particular constitutional matter to the jurisdiction of the Labour Court. I should add, therefore, that I do not find it possible to distinguish *Fredericks*

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[23] Above n 21 at para 31.

[24] Id at para 40.

[25] Id at paras 38 and 40.

[26] Id at para 44.

from the case at hand narrowly as Skweyiya J does. The distinction he finds rests on his characterisation of the claim made by Ms Chirwa as, in essence, a claim under the LRA.[27] For the reasons given above, I disagree. It follows therefore that I disagree also with his attempt to distinguish *Fredericks*.

[166] In this case, the only provision that might be understood to confer a particular jurisdiction upon the Labour Court so as to render its jurisdiction exclusive within the terms of section 157(1) of the LRA is section 191(5) of the LRA that gives the Labour Court limited scope to address questions of unfair dismissal,[28] but this case does not fall within its terms. There are two reasons for this conclusion.

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[27] Above at para 61.

[28] Section 191(5) reads—

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if—
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
> (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
> (iii) the employee does not know the reason for dismissal; or
> (iv) the dispute concerns an unfair labour practice; or
>
> (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
>
> (i) automatically unfair;
> (ii) based on the employer's operational requirements;
> (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
> (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[167] Firstly, as I stressed earlier, the applicant's claim is not based on the LRA or notions of "unfair dismissal", but on PAJA. But, is there not an overlap between the two? Indeed there is. How great the extent of overlap is not a matter for decision now. However, in regard to the question of jurisdiction, that the understanding of "fairness" in the two legislative schemes may nearly always overlap in relation to employment law is, as the Supreme Court of Appeal has stressed,[29] irrelevant. This approach is the same as that considered and approved by this Court in *Fredericks* where an administrative action claim that might potentially have been brought in terms of the LRA was held to fall properly in the concurrent jurisdiction of the High Court and the Labour Court.

[168] The applicant's claim cannot, therefore, baldly be characterised as a claim for "unfair dismissal" as understood in the LRA. Instead the claim must be approached as it was pleaded (and understood by both the Supreme Court of Appeal and the High Court). The claim concerns whether an action is an "administrative act . . . by the State in its capacity as an employer", and if so, whether that act should be set aside. This is exactly what section 157(2)(b) of the LRA places in the concurrent jurisdiction of both the High Court and the Labour Court.

[169] I must stress again that this finding does not depend on the dismissal qualifying as "administrative action" in terms of PAJA. The determination of whether the

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[29] See *Fedlife* above n 18 at para 27 where it was held that a claim of breach of contract did not fall under the Labour Court's exclusive jurisdiction to determine "unfair dismissals" and "the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry".

dismissal does constitute administrative action is part of the merits of the claim, not a jurisdictional requirement.[30] The finding, however, rests on the case as pleaded by Ms Chirwa. She formulated her case on the basis of PAJA, and a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this Court has rejected.[31] It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the Court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.

[170] The second reason why this matter cannot fall under section 157(1) concerns the first part of the reasoning in *Fredericks* that I described above.[32] *Fredericks* held that section 169 of the Constitution requires that the LRA be interpreted so as not to exclude the jurisdiction of the High Court in constitutional matters that are referred to bodies that are not of similar status. The present matter is just such a case. Section 191(5)(a)(i) requires disputes about unfair dismissals for reason of conduct or capacity, which after 30 days have not been resolved by conciliation, to be decided by arbitration by a council or the CCMA, not by the Labour Court. While it is in the Director's discretion to refer such a matter to the Labour Court after considering a number of factors,[33] there is no guarantee that she or he will do so. It therefore follows, under the LRA, that in most cases unfair dismissal claims will not be decided

[30] See, for example, *Legal Aid Board v Jordaan* 2007 (3) SA 327 (SCA) at para 6.

[31] *Fraser* above n 2 at para 40.

[32] Above para 163.

[33] Sections 191(6), (9) and (10) of the LRA.

at first instance by the Labour Court, but by the CCMA. Ms Chirwa was dismissed for reasons of conduct and capacity. Her claim falls to be adjudicated at first instance by the CCMA. Exclusive jurisdiction to determine the claim cannot, therefore, be conferred upon the Labour Court. The High Court must, therefore, have had jurisdiction to consider this case.

Policy concerns

[171] The judgments of Skweyiya and Ngcobo JJ raise a number of important policy considerations that, in their view, point in favour of a finding that the Labour Court must enjoy exclusive jurisdiction. These can briefly be described as follows: (i) specialised tribunals should address specialised issues; (ii) there is no reason to afford public employees greater protection than private employees; (iii) we should not permit litigants to forum-shop; and (iv) there is a 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 (LRA – unfair dismissal; PAJA – procedural unfairness). I address each in turn.

[172] It is undoubtedly advantageous for specialised issues to be decided by specialist tribunals. As Skweyiya J notes, this principle has been endorsed both by this Court[34] and other courts.[35]

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[34] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); [2000] 12 BLLR 1365 (CC); (2000) 21 *ILJ* 2357 (CC) at para 20.

[35] See, for example, *Minister of Correctional Services and Others v Ngubo and Others* 2000 (2) SA 668 (N) at 673D-E and *Coin Security* above n 14 at 688E-H.

[173] However, that principle does not seem entirely applicable in the present context. As I have been at pains to note, there is a difference between a claim that a dismissal is unfair and a claim that administrative action is unfair. The claims may refer to the same facts and raise similar substantive concerns, but they are not identical; they serve different purposes and operate in different ways. The applicant is not asking a "non-labour" court to decide a purely "labour issue"; instead, she is asking a High Court to decide an administrative law issue. The mere fact that her claims arose from the employment context cannot rob them of their administrative nature. Section 157(2)(b) of the LRA makes it clear that it was the legislature's intention for this to be the case.

[174] While we may question that intention and may have preferred a legislative scheme that more neatly divided responsibilities between the different courts, that is not the path the legislature has chosen. We must be careful as a court not to substitute our preferred policy choices for those of the legislature. The legislature is the democratically elected body entrusted with legislative powers and this Court must respect the legislation it enacts, as long as the legislation does not offend the Constitution. The effect of the approach of Skweyiya J is to adopt an interpretation of sections 157(1) and (2) of the LRA inconsistent with the previous jurisprudence of this Court and inconsistent with the clear language of the provisions. It may well be that it would be desirable for the legislature to reconsider the division of labour it has drawn between the Labour Court and the High Court in section 157 of the Labour

Relations Act, as the Labour Appeal Court has suggested,[36] but it is not for this Court to adopt an interpretation of section 157 at odds with the language of the section to achieve such a purpose.

[175] There is an important principle at play here. Both PAJA and the LRA protect important constitutional rights and we should not presume that one should be protected before another or presume to determine that the "essence" of a claim engages one right more than another. A litigant is entitled to the full protection of both rights, even when they seem to cover the same ground. I agree with Cameron JA that, while it may be possible for the legislature to prefer one right over another, it must do so much more explicitly than it has in the LRA and PAJA.[37] Cameron JA concluded:

> "We must end where we began: with the Constitution. I can find in it no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them."[38] (Footnote omitted.)

The implication is that there is no constitutional reason to prefer adjudication of a claim that may simultaneously constitute both a dismissal and administrative action, under the LRA rather than under PAJA. I should add that the legislature could resolve any potential problems of duplication by conferring sole jurisdiction to deal with any

[36] *Langeveldt v Vryburg Transitional Local Council and Others* [2001] 5 BLLR 501 (LAC); (2001) 22 *ILJ* 1116 (LAC) at paras 23-69.

[37] *Chirwa* above n 16 at para 62.

[38] Id at para 65.

disputes concerning administrative action under PAJA arising out of employment upon the Labour Court. So far the legislature has not chosen this route.

[176] The second concern referred to above was that public employees should not be given greater protection than private employees. To my mind that point is not relevant. Firstly, I do not see how it is relevant to jurisdiction. Even if the High Court had jurisdiction, people in the position of the applicant would still be able to assert claims under both the LRA and PAJA in the Labour Court.[39] Secondly, that the rights to fair labour practices and just administrative action may overlap in the case of public employees is not a reason to sacrifice one right without a clear legislative provision to the contrary.[40]

[177] The concern of forum-shopping is a valid one. It is, as this Court has recently implied,[41] undesirable for litigants to pick and choose where they institute actions in the hope of a better outcome. However, while forum-shopping may not be ideal, section 157(2) of the LRA as interpreted in *Fredericks* confers concurrent jurisdiction to decide a claim concerning the right to administrative justice in the labour context on two courts. The possibility of forum-shopping is an unavoidable consequence of that legislative decision. There have been calls for legislative intervention to alter that decision and those calls are not without merit. But unless and until the call is heeded, the meaning of section 157(2) is set.

[39] See sections 157(2)(b) and 158(1)(h) of the LRA.

[40] *Chirwa* above n 16 at paras 62 and 65 (Cameron JA).

[41] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22 at para 97.

[178] The final concern relates to possible incoherence in the law which may develop from having two different courts adjudicating the issue. I do not think this is a serious problem. Our law often develops with conflicting opinions from different divisions of the High Court. That has not posed any intractable problems as disputes may ultimately be settled on appeal. It is also, again, what is envisaged by section 157(2).

[179] I disagree therefore with Skweyiya J's conclusion that the High Court did not have jurisdiction to hear this matter. In brief, Ms Chirwa based her claim in the High Court on PAJA, not the LRA. Section 157(2) of the LRA makes it clear that the High Court and the Labour Court have "concurrent jurisdiction" over any dispute concerning the "constitutionality of any executive or administrative act . . . by the State in its capacity as an employer". That section cannot in my firm view be reasonably read to mean that the High Court did not have jurisdiction in this case. The real question that needs to be determined in this case is whether the dismissal of Ms Chirwa by Transnet constituted administrative action within the meaning of section 33 of the Constitution and PAJA. It is to that central question which I now turn.

Administrative action

[180] Section 1 of PAJA defines administrative action as follows:

> "any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect".

[181] The relevant part of the definition in this matter is contained in sub-section (a)(ii). In order for the dismissal of the applicant to constitute administrative action under that part of the definition, seven requirements must be met:[42] the dismissal must be (i) a decision,[43] (ii) by an organ of state, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in section 1 of PAJA.[44] The dismissal clearly

[42] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 21.

[43] PAJA defines "decision" as—

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly".

[44] Those exclusions are—

"(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

constituted a decision by an organ of state[45] that adversely and directly affected someone's rights, which did not fall under any of the enumerated exclusions. I shall now consider whether it was taken in terms of any legislation and whether it amounted to an exercise of public power or the performance of a public function. The conclusions I reach on those questions make it unnecessary to consider whether the decision had an "external" effect.

In terms of any legislation

[182] The South African Transport Services Conditions of Service Act[46] used to govern the conditions of service of Transnet employees. After this Act lapsed,[47] no successor was enacted in its place. Currently the terms and conditions of service are controlled through contracts.

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
(ii) any decision taken, or failure to take a decision, in terms of section 4(1)".

[45] *Hoffmann* above n 34 at para 23: "Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest." The Court went on to hold that SAA, as a business unit of Transnet was also an organ of state. The Transnet Pension Fund is also a business unit of Transnet and is therefore also an organ of state.

[46] Act 41 of 1988.

[47] The Act lapsed as of 6 October 1991.

[183] However, it could be argued that the Legal Succession to the South African Transport Services Act,[48] the statute founding Transnet, is the source of all powers and functions providing the basis for its operational activities, including those of a contractual nature.[49] This argument cannot hold water. It would render the requirement that the decision be taken "in terms of any legislation" meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would have expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.

[184] There is, furthermore, no legislative provision in other legislation providing for the appointment and dismissal of persons in the position previously occupied by the applicant.[50] The Transnet Pension Fund Amendment Act[51] only makes provision for the appointment of employees in particular positions, which are generally of a managerial or other high-responsibility nature.[52]

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[48] Act 9 of 1989.

[49] *Chirwa* above n 16 at para 52 (Cameron JA).

[50] The absence of a statutory power to dismiss immediately distinguishes the current case from *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A) at 543E-F and *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 26D-E. In both cases the decision to dismiss was taken in terms of a statutory power.

[51] Act 41 of 2000.

[52] For example s 12(1) of the Amendment Act governs the appointment and dismissal of a Manager (Principal Officer): "The Managing Director shall appoint a member of the personnel of the employer to be the Manager (Principal Officer) of the Fund and may, at any stage, terminate such appointment." Similarly, the appointment and dismissal of the Secretary is regulated by s 13(1): "The Managing Director shall appoint a member of the personnel of an employer as the Secretary of the Fund and may, at any stage, terminate any such appointment."

[185] It follows, in my view, that the dismissal of the applicant did not take place in terms of any statutory authority, but rather in terms of the contract itself. Therefore, the decision cannot, for this reason alone, amount to administrative action.[53] Nevertheless, due in part to the importance of this case to administrative law in general and in part to the fact that the two requirements currently under consideration are closely interrelated, I shall also consider whether the dismissal amounted to the exercise of a public power or performance of a public function.

Exercising a public power or performing a public function

[186] Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.

[187] The first factor was particularly relevant in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* where the Supreme Court of Appeal found that a decision to terminate a contract was not administrative action, because the organ of state in question had contracted in an equal power relation with a

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[53] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (SCA) at para 18.

powerful commercial entity without any additional advantage *flowing from its public position*.[54] In this case, in exercising its contractual rights Transnet has no specific authority over its employees, in general, and gains no advantage over the applicant in particular, by virtue of the fact that it is a public body. The power it has over its employees flows merely from its position as an employer and would be identical if it had been a private company.[55] In this context, therefore, the presence of a power imbalance between the applicant and Transnet is of diminished importance.

[188] Secondly, the applicant's dismissal will have a very small impact, if any on the public.[56] While Transnet conducts work that has a constant and significant public impact, it is important to recognise the applicant's role in that venture. Her job was to ensure the smooth running of the Transnet Pension Fund. While that is important to Transnet employees, its impact on the public at large is further removed. She affects the proper functioning of the body that ensures the future of Transnet employees after retirement. She does not take decisions regarding transport policy or practice, and while her work may in some way affect the morale of the people who do take those

[54] Id at para 18. See also *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 10.

[55] This fact immediately distinguishes the current case from those cases that deal with state tendering. See, for example, *Logbro* above n 54 at para 8 where Cameron JA held, in the tendering context, that "[t]he principles of administrative justice . . . framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract." In this respect, I agree with the comments of Murphy AJ in *SAPU and Another v National Commissioner of the South African Police Service and Another* [2006] 1 BLLR 42 (LC); (2005) 26 *ILJ* 2403 (LC) at para 52, that "there is considerable contextual difference between tendering and employment. Tendering serves the public interest in promoting competition in the provision of services to government and advances equality in business development. . . . Employment relationships, on the other hand, are conducted internally in service of the immediate objectives of the organ of state and are premised upon a contractual relationship of trust and good faith."

[56] Impact on the public was the deciding factor in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152E-I and *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W) at 364H-365A.

decisions, the ultimate effect of her dismissal on the public service provided by Transnet is negligible.

[189] The next relevant factor is the source of the power.[57] As noted above, in this case, the power is contractual. I must again stress that this factor is not always decisive,[58] but is one that can have relevance. In this instance, it seems to me simply to point strongly in the direction that the power is not a public one.

[190] Finally, certain powers must be exercised for public, rather than private benefit. In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (*POPCRU*)[59] the question arose whether the dismissal of a number of correctional officers for refusing to work amounted to the exercise of a public power. The Court held that where there was limited or no impact on the public at large,

> "what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim."[60]

[191] Factors that strengthened the view of the Court that the dismissal did amount to the exercise of a public power were: the subservience of the Department to the

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[57] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 143; *Cape Metropolitan* above n 53 at paras 17-18; and *SAPU* above n 55 at para 51.

[58] Id. See also *Logbro* above n 54 at paras 5-11.

[59] [2006] 2 All SA 175 (E); [2006] 4 BLLR 385 (E); (2006) 27 *ILJ* 555 (E).

[60] Id at para 53.

Constitution generally and section 195 in particular; the public character of the Department and the "pre-eminence of the public interest" in the proper administration of prisons; and the attainment of the purposes specified in the Correctional Services Act 111 of 1998.[61]

[192] None of these "strengthening factors" are present in the case before us. Whilst Transnet is certainly subservient to the Constitution, so are all business entities in South Africa. In any event, subservience to the Constitution can very rarely be decisive, since every legal person, whether private or public, is subservient to the Constitution. The Transnet Pension Fund does not have the same public character that the Correctional Services Department has. Section 2 of the Correctional Services Act sets out the aims of the Department,[62] which clearly have a public element. The Transnet Pension Fund does not have such obviously public goals.[63] Lastly, whilst there is a clear "pre-eminence" of public interest in the proper administration of correctional services, the same cannot be said for the Human Resources Department of the Transnet Pension Fund.

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[61] Id at para 54.

[62] Section 2 reads—

> "The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by—
> (a) enforcing sentences of the courts in the manner prescribed by this Act;
> (b) detaining all prisoners in safe custody whilst ensuring their human dignity; and
> (c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections."

[63] According to rule 2.2 of the Pension Fund Rules published in Government Gazette 21817 GN 1300, 1 December 2000, the sole object of the Transnet Pension Fund is

> "to invest and administer the credit amounts in the Member Accounts and Reserve Accounts in respect of every Member for the benefit of such Member or their Dependants or Nominees as the case may be."

[193] The approach followed in *POPCRU* is similar to that adopted by the Supreme Court of Appeal in *Bullock NO and Others v Provincial Government, North West Province, and Another*.[64] The case concerned a decision of the North West Government to grant rights over land it owned on Hartebeestpoort Dam to a single private person. In holding that the decision, despite flowing from the Government's rights as owner, constituted administrative action, the Court held:

> "The dam is a valuable recreational resource available to the public at large. . . . A decision by the [North West Government] to grant, in perpetuity, a right over a part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public."[65]

This factor is, of course, intimately linked to the impact a decision has on the public. In this case, there does not seem to be any similar duty for Mr Smith to have acted in the public interest. Instead, he was acting in the best interests of the Transnet Pension Fund and Transnet's employees by ensuring the smooth running of their pension fund.

[194] For all these reasons, I conclude that the applicant's dismissal did not constitute the exercise of a "public" power or the performance of a "public" function, and therefore was not administrative action under PAJA. It is important to note, however, that my reasoning does not entail that dismissals of public employees will never constitute "administrative action" under PAJA. Where, for example, the person in

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[64] *Bullock NO and Others v Provincial Government, North West Province, and Another* 2004 (5) SA 262 (SCA); [2004] 2 All SA 249 (SCA).

[65] Id at para 14.

question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed, the requirements of the definition of "administrative action" may be fulfilled.

Section 195 of the Constitution

[195] I agree with Skweyiya J that section 195 of the Constitution does not give rise to directly enforceable rights.

Conclusion

[196] For the reasons I have given, I too would dismiss the appeal and therefore concur in the order of my brother Skweyiya J.

Mokgoro J and O'Regan J concur in the judgment of Langa CJ.

For the applicant:	Advocate MR Madlanga SC and Advocate AM Da Silva instructed by Tloubatla Attorneys.
For the respondents:	Advocate TJ Bruinders SC and Advocate K Green instructed by Maserumule Inc.