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Public sector employment in the new Constitutional era

Chirwa v Transnet (Ltd) & Others [2008] 2 BLLR 97 (CC)

Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the LLM Labour Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM Labour Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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I. Introduction

The most recent Constitutional Court case to traverse the landscape of both labour and administrative law is the long-awaited judgment of *Chirwa v Transnet (Ltd) & Others*[1] (*Chirwa*). This Court was asked to address the two most formidable issues within public sector employment. Firstly, whether public sector disputes are justiciable in the High Court, and secondly, whether the termination of a public sector employment contract amounts to administrative action. The uncertainty around these issues can be said to have arisen because of two irreconcilable viewpoints. The first view contests that dismissals and other public sector employment disputes do not amount to administrative action, and therefore cannot be the subject of litigation under the common law, the Promotion of Administrative Justice Act[2] (PAJA), or the Constitution of the Republic of South Africa[3] (the Constitution). On the other hand, the second view contests that public sector disputes, including employment disputes, arise from administrative action, and by parity of reasoning, are subject to the PAJA.

This dissertation will preoccupy itself with the Constitutional Court judgment in *Chirwa*. Whether this court has finally settled the law relating to this vexed area of employment disputes is questionable. Notably, this case was preceded by a voluminous amount of judgments which failed to reach consensus on the appropriate means of regulating public sector employment. As *Chirwa* purports to settle the law relating to this problematic area, this judgment will be analysed and discussed in light of the issues outlined above. Before proceeding, an outline of the chapters will be most appropriate.

Chapter 1 tracks the development of public sector employment from its origins in monarchial times to its current state in a modern bureaucracy. The manner in which this relationship was regulated will also be enunciated. The dissertation will then narrow the focus and discuss public sector employment in South Africa. This dissertation will highlight the two main debates around this area of employment, namely, the

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[1] [2008] 2 BLLR 97 (CC).
[2] 3 of 2000.
[3] 1996.

interpretative and normative debates. The former debate attempts to illuminate the different interpretations of legislative provisions which deal particularly with public sector employment. The latter debate focuses on the question as to whether public sector employment disputes ought to be regulated by labour law, administrative law or both. Chapter 2 provides a general outline of South Africa's current labour regime and the concomitant legislation. More particularly, it will focus on the background to the drafting of the Labour Relations Act[4] (1995 LRA/new LRA) by referring to the Draft Labour Relations Bill (the Draft Bill/the Bill) and the accompanying Explanatory Memorandum. The advent of the new labour legislation has particular bearing on public sector employment as these relationships are now included within its ambit where previously this was not the case. Chapter 3 speaks particularly to the negation of constitutional rights. In this light, it advocates an integrated approach towards these respective rights, one informed by the values underlying the Constitution. Chapter 4 briefly raises the debate around contracts entered into by public bodies and this discussion is informed by both the 'purely contractual' and the 'public law' approaches. The dissertation then continues to deal with the manner by which these debates have informed the constitutional jurisprudence dealing with public sector employment. This dissertation then proceeds to argue that the formalistic approach adopted by the majority in *Chirwa* in delineating state-as-employer conduct ignores the distinctive public elements present in the respective employment relationship. It asserts that in certain respects this conduct does amount to the exercise of public power as understood under PAJA. This dissertation finally concludes by proposing that the minority judgment of Langa CJ in *Chirwa* be utilized in dealing with public sector employment disputes.

This dissertation thus aims to add valuably to the debate around public sector employment disputes by critically evaluating both the judicial and legislative stances taken towards public sector employment disputes. Notably, this dissertation intends to provide an analytical survey on the law relating to public sector employment disputes.

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[4] 66 of 1995.

II. Public sector regulation

1. History

By reflecting on the paradigms of state structure both in monarchial times and in our present century, it is quite patent that the state has undergone drastic changes both in her composition and functions. This dissertation focuses on one aspect of this development, namely, the employment relationship between the state and her employees. This section of the dissertation attempts to outline the trajectory that was followed in the evolution of the state, and more particularly, the change in the general conceptualization of the employment relationship between the state and her employees. The aim is thus to provide a backdrop to the differential treatment of public sector employment and the legal regulation which applied. This evolution of the state and public sector employment is characterised by a few distinguished events which will henceforth be canvassed through the readings of Veneziani. [5] He provides a very informative discussion on the beginnings and evolution of the public service which, he states, occurred in three phases.[6]

a) Servants of the Monarch

The legal framework governing state employees harks back to a time where they were considered to be the personal retinue of the monarch.[7] In monarchial states, the Crown conferred on state officials titles in lieu of a salary.[8] Along with the titles were concomitant personal and hereditary benefits.[9] The state office held was in the form of a freehold and was thus transferable on sale by the holder.[10]

b) Dismantling of rights and privileges

In the second phase, Veneziani describes how there were attempts to depersonalize the duty of loyalty.[11] This occurred simultaneously with changes in the

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[5] Veneziani, B *The Evolution of the Contract of Employment* Chapter 1 at 31 in Hepple, B "The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945" (1986).
[6] Ibid, at 50-51.
[7] Hepple, B & Fredman, S *Labour Law & Industrial Relations in Great Britain* 2nd ed (1992) at 118.
[8] Veneziani (note 5) at 50-51.
[9] Ibid, at 51.
[10] Ibid.
[11] Ibid.

institutional form of the state.[12] In constitutional monarchies, there was wide sweeping consideration of transforming the position of state official into a recognised vocation.[13] He notes that this change occurred for two reasons: firstly, the desire to ensure a stable relationship between the state official and the state as opposed to the transient and precarious position with which these states offices were held; and secondly, due to the supremacy of the new constitutional charters.[14] These nascent constitutions allowed for neutrality in relation to the granting of state positions, as they came to be known, and there was a gradual progression towards dismantling the rights and privileges of the aristocracy.[15] In this regard, one of the significant changes introduced by these constitutions was that all citizens could apply for civil or military offices and they were no longer afforded through the ranks of nobility.[16]

c) Depersonalization and Neutrality

The third phase, and probably the most revolutionary, was 'the complete depersonalization of public office and the political neutralization of the bureaucratic machine'.[17] Legal power thus supplanted traditional power.[18] Veneziani notes a similar change in Great Britain where Parliament now had ultimate power over public servants.[19] However, even with the eventual introduction of a meritocratic system, the historical genesis of the relationship between the Crown and its servants thwarted its incorporation within the parameters of the inchoate contract of service.[20]

d) The legal framework regulating the relationship

The legal framework regulating the relationship between public sector employees and the state occurred as follows. By separating the executive from legislative power, the relationship was depersonalized.[21] Furthermore, Burns notes that the state could no

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[12] Veneziani (note 5) at 51.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid, at 52.
[20] Ibid.
[21] Ibid.

longer be characterized as the 'night-watch state of the nineteenth century' but has been replaced by the 'welfare state of the twentieth century'.[22] With the rapid growth of administrative bodies to regulate activities of the state, particularly in areas such as health, welfare and education, the state became subject to additional duties and responsibilities.[23] In order to operate effectively, the modern state restructured their administrations to reflect market orientated practices.[24] Hence, with time the role of the state has been redefined and had become more complex.

In the area of employment, careers were reflected according to the bureaucratic structure of the state and employment relationships was characterised as private, purportedly modeled on the traditional *locatio conductio operarum.*[25] However, to many, the 'private' law element purportedly embodied in the relationship between the state and its employee amounted to nothing more than a legal fiction as the ethical and juridical considerations involved in the regulation of the employment relationship, particularly in its termination by the state, injected public law elements into the contractual relationship.[26] Due to the presence of these public elements, in the form of special legal rules, the claim that the relationship is private was not defensible.[27] These employees were subject to a more restrictive and thus separate labour law regime than their private sector counterparts.

This differential treatment of public sector employees, as was shown, harks back to a time where their status was that of servants of the monarch to whom absolute loyalty was owed. In modern times, this allegiance and servitude to the Crown came to be reflected in the doctrine of State Sovereignty where the State was answerable to the legislature alone, and any interference with its employment decisions, whether unilateral or other, by interests groups was inconceivable.[28] In this respect, many of the limitations

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[22] Burns, Y *Government contracts and the public/private law divide* (1998) 13 *SAPL* 234.
[23] Ibid.
[24] Ibid.
[25] Veneziani (note 5) at 52-53.
[26] Ibid.
[27] Ibid.
[28] Fredman, S & Morris, G *Is There A Public/Private Labour Law Divide* 14 *Comp. Lab. L.* 115 at 118.

imposed on public sector employees particularly pertaining to industrial action, collective bargaining and the freedom to associate, were seen to be justified.[29]

However, with the dawning of the bureaucratic state there have been more strident moves to draw certain parallels between the private and public sectors and to therefore justify the application of the same labour law regime. The adoption of market orientated practices and particularly the existence of the contract of employment seemed to justify similar treatment to private sector employees. However, the unique characteristics attaching to the state-as-employer have proven to refute such a proposition. Hence, continuous debate centered around the issue of whether the public sector employment relationship should be characterized as private or public, which would have an effect on the apposite body of law which would regulate the relationship.[30] These relationships seemed to straddle both the private and public law domains. There was therefore no clarity or consensus on the nature of the public employment relationship and the proper means of regulation.[31] Notably, this debate is as alive today.

2. Public sector regulation in South Africa

Prior to the 1995 LRA, South African labour law drew a clear distinction between the public and private sector.[32] This was premised on the view that these sectors have distinct differences which called for different forms of legal regulation. The Labour Relations Act[33] (old LRA) applied to a part of the private and public sectors. The Public Service Act[34] (PSA) and the Public Service Staff Code regulated part of the public sector. In 1993, the Public Service Labour Relations Act[35] (PSLRA) was promulgated and substituted the PSA. Educators were governed by the Education Labour Relations Act[36] (ELRA) and the agricultural sector was covered by the Agricultural Labour Act[37]

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[29] Fredman (note 28).
[30] Veneziani (note 5) at 54.
[31] Ibid.
[32] Stewart, A *The Characteristics of the State as Employer: Implications for Labour Law* (1995) 16 ILJ 15.
[33] 28 of 1956.
[34] 111 of 1984. Now the Public Service Act of 1994: Proc 103/94 *Gazette* 15791 of 3 June 1994.
[35] 102 of 1993.
[36] 146 of 1993.
[37] 147 of 1993.

(ALA).[38] The three latter mentioned Acts were, in varied degrees, modeled on the old LRA.[39] The application of the PSLRA was short-lived as a new LRA was enacted in 1995.[40] This brought about significant changes in the manner in which labour relations was previously understood under the pre-constitutional dispensation. Of the many significant changes that the 1995 LRA introduced, the fact that it now governed both the private and public sector added another dimension to the debate surrounding public sector employment.

a) The position before the enactment of the 1995 LRA

Under the common law, an employee's contract of employment could be terminated without a fair reason being given, or a fair procedure being carried out.[41] Thus, this employee was not entitled to a fair hearing, as principles of natural justice did not apply to private, contractual relationships.[42] With the advent of the old LRA, private sector employees were granted protection from unfair labour practices through the equity-based jurisprudence developed by the then Industrial Courts.[43] However, these protections were not extended to public sector employees.[44] This was partly attributable to both the application of the doctrine of state sovereignty and the exclusion, for the most part, of public sector employees from the protections offered by the LRA. However, the *audi alteram partem* doctrine[45], emanating from administrative law, was later introduced into the contractual relationship between public sector employees and their employers by three landmark judgments.[46] Initially, the courts allowed a review of an employment

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[38] Explanatory Memorandum to the Labour Relations Draft Bill (*Prepared by the Ministerial Legal Task Team January 1995*) (1995) 16 *Indus. L.J.* 278 at 281.
[39] Ibid.
[40] Stewart (note 32).
[41] Pretorious, P & Myburgh A *A Dual System of Dismissal Law: Comment on Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA) (2007) 28 *ILJ* 2172 at 2174.
[42] Ibid.
[43] Van Eck, S & Jordaan-Parkin, R *Administrative, Labour and Constitutional Law – A Jurisdictional Labyrinth* (2006) 27 *ILJ* 1987 at 1988.
[44] Ibid.
[45] Refers to the common law maxim, "hear the other side". Thus, it refers to a person's right to be heard before any decision can be taken that may adversely affect the rights of the concerned individual – Hoexter, C 'Administrative Law in South Africa' 2007 at 326.
[46] Ngcukaitobi T & Brickhill J "A Difficult Boundary: Public Sector Employment and Administrative Law" (2007) 28 *ILJ* 769 at 770.

decision where a disciplinary action was being exercised.[47] Subsequently, the court further extended its power to review to decisions that were not disciplinary in nature but adversely affected the rights of parties to the concerned individual.[48] In *Administrator of the Transvaal & others Traub & others*[49], *Administrator, Transvaal & others v Zenzile*[50] (*Zenzile*), and *Administrator, Natal v Sibiya*[51], the then Appellate Division set aside employer decisions because of non-conformity with the *audi alteram partem* doctrine. These judicial pronouncements represented a volte face in the way in which public sector employment was regulated, as any functionary exercising public power, was required to apply the principles of fairness to their employment relationships, in line with administrative law. Having accepted such employer conduct to be administrative action the courts soon extended the scope of protection to decisions to retrench, suspend, transfer, promote and deprive of benefits.[52]

With the obliteration of the Apartheid regime, and the enactment of the Constitution, the terrain of employment relationships had changed. These relationships were no longer constrained by the law of contract, but also the labour legislation, pursuant to the right to fair labour practices. Further, state actions and their decisions, are governed by PAJA, pursuant to the right to lawful, reasonable and procedurally fair administrative action. On the face of it, it would seem that a public sector employee who is subject to a labour dispute has three causes of action, emanating either from the contract itself, the right to fair labour practice, or the right to just administrative action. Whether this is indeed the case has been a debate which has confronted our courts for more than a decade. Notably, both South Africa's court jurisprudence and legislation fails to provide clear guidance as to this vexed area of dispute.

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[47] Ngcukaitobi (note 46).
[48] Ibid.
[49] (1989) 10 ILJ 823 (A).
[50] (1991) 12 ILJ 259 (A).
[51] 1992 (4) SA 532 (A).
[52] See *Administrator, Natal & another v Sibiya & another* 1992 (4) SA 532 (A); *Bula v Minister of Education* 1992 (4) SA 716 (TkA); *Hlongwa v Minister of Justice, KwaZulu* 1993 (2) SA 269 (A); (1992) 13 *ILJ* 338 (A) and *Foster v Chairman, Commissioner for Administration & another* 1991 (4) SA 403 (C).

3. An outline of the debate

In any enquiry of this kind, an instructive starting point would be to look at the legal regulation within the specific country. South Africa, being a democracy has the Constitution as its highest authority. All laws have to conform to its values and standards. A significant part of this document is the Bill of Rights[53] (Bill of Rights) which, with many of its rights, instructs the legislature to give effect to the rights by promulgating constitutionally mandated legislation. The two rights that this paper calls into operation are the right to fair labour practices[54] and the right to just administrative action[55]. Before extrapolating on their scope of operation and significance in a democratic state it would be instructive at this point to note that these rights have significant overlap in the area of public sector employment. In this respect, the apposite area of law which should apply to employment decisions which straddle the private and public domains is called into question.

In South Africa, the debate takes place on two levels. The first one is interpretative and essentially relates to the proper reading of certain legislative and constitutional provisions. The second debate is normative and the question is formulated as follows. Should public sector employment disputes be regulated by public law, private law or both? The Constitutional Court in *Chirwa*, which purports to have settled the law relating to this vexed area, confronts both these debates and thus sets the tone for this chapter.

In *Chirwa*, the Ncgobo J formulated the issues in the following manner. Firstly, whether public sector disputes are justiciable in the High Court, and secondly, whether the termination of a public sector employment contract amounts to administrative action.[56] From a survey of academic writings to case law, it becomes evident that the uncertainty around these formulated issues can be said to have arisen because of two irreconcilable viewpoints. The first view contests that dismissals and other public sector

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[53] Chapter 2 of the Constitution of the Republic of South Africa, 1996.
[54] Ibid, section 23.
[55] Ibid, section 33.
[56] *Chirwa* (note 1) at para 80.

employment disputes do not amount to administrative action, and therefore cannot be the subject of litigation under the common law, the PAJA, or the Constitution.[57] On the other hand, the second view contests that public sector disputes, including employment disputes, attract both administrative law and labour law, and by parity of reasoning, litigants have remedies available in both respective branches of law.[58]

a) Interpretative Debate: Reflections through the cases

It will now be instructive to analyse how the courts have dealt with this obfuscated area. In past jurisprudence, and even within the *Chirwa* judgment itself, it becomes evident that the courts themselves were perplexed by this complex dispute area. Difficult and, at many times, incoherent jurisprudence emerged relating to competing jurisdictions between the Labour Court and the High Court. In essence, it would seem that the true enquiry related to the apposite area of law that should govern public sector employment disputes following the enactment of the LRA. This is strongly resonated in the majority judgment in *Chirwa*, where both Skweyiya J and Ngcobo J opine that the Labour Tribunals, and thus labour law, are the proper forums to resolve employment disputes, including those involving the public sector.[59]

A possible reason why courts might have directed themselves to the question of competing jurisdiction between the aforementioned courts might lay in their attempt to reconcile certain constitutional and legislative provisions. Section 169 of the Constitution is of particular significance in this debate as it confers on the High Court the power to decide any constitutional matter except in certain circumstances. Section 169(a)(ii) of the Constitution states that the High Court's jurisdiction can only be ousted if a matter is assigned by an Act of Parliament to another court which has similar status to that of the High Court. Thus, as in the *Chirwa* case, where a litigant is dismissed for poor work performance, instead of laying a claim in terms of the LRA, claims a violation of her section 33 constitutional right to just administrative action and subsequently seeks recourse in the High Court. By virtue of section 169, recourse to this court would seem

[57] Hoexter (note 45) at 194.
[58] Ibid.
[59] *Chirwa* case (note 1) at para 63, 125.

faultless. However, as simple this may seem, this scenario is further complicated when courts have regard to the true substance and nature of the claim. In the scenario above, the nature of the litigants claim is essentially a claim based on unfair dismissal, and as the LRA regulates employment and labour disputes, would it follow that the Labour Tribunals and not the High Court should be the proper forum to resolve the dispute? A purposive reading of section 157 of the LRA seems to suggest this.

However, before treading that path, for the sake of clarity, it would be apposite to explain the procedure relating to the resolution of unfair dismissal, and unfair labour practice disputes, under the LRA, as this has a significant bearing on the application of section 169 of the Constitution.

In section 191 of the LRA, the procedure for resolving a dispute based on unfair dismissal or an unfair labour practice is prescribed. Ideally, the matter would first proceed to conciliation, following which, arbitration (both which occur either at the bargaining council or the CCMA) or adjudication in the Labour Court. A matter rarely ever bypasses the initial dispute resolution procedures and proceeds straight to the Labour Court for adjudication. In *Fredericks and others v MEC for Education and Training, Eastern Cape and others*[60]('*Fredericks*'), O'Regan J is at pains to note that where a claim is formulated as a violation of a constitutional right, except the right to fair labour practice, but the nature of the claim is that of an unfair dismissal or unfair labour practice, the jurisdiction of the High Court will not be ousted. This is so for two reasons: the CCMA is evidently not a court of similar status, and secondly that the review of a CCMA decision by the Labour Court, by virtue of section 158(1)(g)[61], is not a substitute for considering a matter afresh. Thus, section 169 of the Constitution maintains the High Court's jurisdiction in this instance.[62]

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[60] 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC); (2002) 23 ILJ 81 (CC).

[61] Section 158(1)(g) of the LRA:

> 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;[...]

[62] *Fredericks* case (note 60) at para 31.

aa) Scope of section 157 of the LRA

It becomes evident that the problem of jurisdiction thus lies in further legislative provisions. On reading jurisprudence relating to this area of debate, section 157 of the LRA seems to have been the cause of much of the ambiguity. The section reads as follows:

> "Section 157(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 law are to be determined by the Labour Court.
> Section 157(2):
> The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-
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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 employer; and
> (c) the application of any law for the administration of which the Minister is responsible."

In the *Chirwa* case, Langa CJ notes that two schools of thought have developed around this particular legislative section.[63] One school of thought adopts a literal reading of the section, and the other adopts a purposive reading.[64] The former reading adopts the view that only matters that are explicitly assigned to the Labour Court by virtue of the LRA are excluded from the High Court's constitutional jurisdiction.[65] The latter reading adopts the view that employment claims are the sole prerogative of Labour Tribunals.[66]

bb) Adherents of the literal reading:

A long line of cases have adopted a literal interpretation of section 157 of the LRA. According to this viewpoint, both the Labour and the High Court have concurrent jurisdiction to determine employment disputes.

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[63] *Chirwa* case (note 1) at para 161, 162.
[64] Ibid.
[65] Ibid, at para 162.
[66] Ibid, at para 161.

In *Fedlife Assurance Ltd v Wolfaardt*[67] (*Fedlife*), the Supreme Court of Appeal ('SCA') was of the view that the High Court and the Labour Court had concurrent jurisdiction to resolve labour disputes which arose from the common law contract of employment.[68] In *United National Public Servants Association of SA v Digomo NO*[69], the SCA held that an employer's conduct could amount to both an unfair labour practice under the LRA, and it may also give rise to other causes of action.[70] In this case, the litigants alleged unlawfulness in the selection process pursuant to promotions.[71] The selection was conducted by a task team appointed by the Department of Health of the North Province. The litigants, instead of claiming an unfair labour practice, based their claim on a violation of their right to just administrative action.[72] In the SCA rendition of *Transnet (Ltd) & others v Chirwa*[73] (*Chirwa SCA*), Cameron AJ (now Justice of the Constitutional Court), in his separate judgment, held that the LRA does not serve to exclude other causes of action, such as the right to just administrative action.[74] In employment disputes, the LRA does not confer exclusive jurisdiction on the Labour Court, and the ordinary courts retain their jurisdiction to hear disputes relating to the alleged violation of a constitutional right.[75] The Judge proceeded in saying that if the legislature intended to prefer one right over the other, it would have done so explicitly.[76] In the absence of a legislative provision expressly implying this intention, the High Court and the Labour Court have concurrent jurisdiction.[77]

i) *Fredericks v MEC for Education & Training*[78]:

In 2002, the Constitutional Court handed down judgment in the *Fredericks* matter. The merits of the dispute involved the Education Departments initiative in offering incumbent teachers voluntary severance packages to reduce their numbers.

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[67] (2002) 1 SA 49 (SCA).
[68] *Fedlife* (note 67) at para 22.
[69] (2005) 26 ILJ 1957 (SCA).
[70] Ibid, at para 5.
[71] Ibid, at para 2.
[72] Ibid, at para 4.
[73] (2007) 11 BLLR 10 (SCA).
[74] Ibid, at para 58.
[75] Ibid, at para 59.
[76] Ibid, at para 62-63.
[77] Ibid, at para 65.
[78] *Fredericks* case (note 60).

When the applicants applied to be retrenched, their applications were refused. The applicants contended that the refusal breached their right to equality and their right to just administrative action. The Constitutional Court had to decide the scope of the High Court's jurisdiction to determine certain complaints arising out of an employment relationship.[79]

Written on behalf of a unanimous court, O'Regan J adopts the second school of thought, and states that section 157 of the LRA should properly be interpreted in light of section 169 of the Constitution.[80] By virtue of the latter section, the constitutional jurisdiction of the High Court can only be ousted when a matter is assigned by legislation to a court of similar status to the High Court. As was iterated above, the Justice held that the CCMA is evidently not a court of similar status, and further the review of a CCMA decision by the Labour Court is not a substitute for considering a matter afresh.[81] Thus, in respect of the adjudication of constitutional matters, section 157(1) of the LRA must be read as only including matters that are considered by the Labour Court sitting as a court of first instance. Therefore, O'Regan J found that were there is no provision explicitly conferring exclusive jurisdiction on the Labour Court, the High Court maintains its jurisdiction in terms of section 169 of the Constitution.[82]

The Justice further held that as to the issue of whether the Labour Court had exclusive jurisdiction over the dispute, the court noted that in terms of the LRA the Labour Court has exclusive jurisdiction to decide matters which the LRA requires it to decide. The Act does not confer on the Labour Court a general jurisdiction over labour matters.[83] There is no express provision conferring exclusive jurisdiction on the Labour Court to determine disputes concerning alleged infringements of constitutional rights by the state acting in its capacity as employer. To the argument that section 158(1)(h) read with section 157(1) might imply this, the Court held that this would be an incorrect reading of the legislation as it contradicts the express conferral of concurrent jurisdiction

[79] *Fredericks* (note 60) at para 1.
[80] Ibid, at para 38.
[81] Ibid, at para 31.
[82] Ibid, at para 44.
[83] Ibid, at para 38.

in section 157(2). Further, that the power of review explicit in section 158(1)(h) is a review power and does not confer exclusive competence of the Labour Court to settle or decide matters where the State acts in its capacity as employer.[84]

It therefore does not follow that because the Labour Court has power to decide such matters, it has exclusive jurisdiction to do so. The High Court's jurisdiction to entertain the dispute was accordingly not excluded by the LRA. This case is thus authority, and the highest at that, for the proposition that the High Court has concurrent jurisdiction with the Labour Court to determine employment disputes that implicate constitutional rights.

cc) Adherents of the purposive interpretation:

An equal number of cases have endorsed the view that the Labour Court has exclusive jurisdiction over employment disputes, including those that implicate constitutional rights, where the LRA expressly provides for this exclusivity.

In *Public Servants Association obo Haschke v MEC for Agriculture and other*[85], which concerned the refusal by the CCMA not to condone a delay in a referral for conciliation and arbitration, the court maintained that labour law and administrative law are two separate bodies of law.[86] As the 1995 LRA, the Employment Equity Act[87], and the Basic Conditions of Employment Act[88] have codified the labour laws, full expression has been given to the right to fair labour practice.[89] Thus, in an employment context, where there is a conflict between the right to just administrative action and the right to fair labour practices, the employment dispute will be governed by labour legislation, and not the PAJA.[90] The court, insisting on maintaining a clear distinction between administrative and labour law, held that where the labour laws themselves are deficient,

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[84] *Fredericks* (note 60) at para 43.
[85] (2004) 25 ILJ 1750 (LC).
[86] Ibid, at para 1,11.
[87] 55 of 1998.
[88] 75 of 1997.
[89] *Haschke* (note 85) at para 12.
[90] Ibid, at para 14.

the litigant can rely directly on the right to fair labour practices.[91] In *SA Police Union & another v National Commissioner of the SA Police Service & another*[92] (*SAPU*), the dispute concerned the unilateral change by the employer of shift hours.[93] The complainants relied on PAJA, claiming that the conduct was procedurally unfair, unreasonable or irrational administrative action.[94] The court however held that the exercise of power did not amount to administrative action as defined by the PAJA.[95] It did however derive from employment law and was constrained by the right to fair labour practices. The court was further of the view that since the codification of labour laws and administrative laws, the areas of labour law that had progressively developed to cover public sector employees have been supplanted by the labour laws, and have thus become redundant.[96] In *Hlope & others v Minister of Safety & Security & others*[97], the court held that the LRA now guarantees labour rights to public sector employees, and their disputes should therefore be directed to these forums, not the High Court.[98]

i) *Chirwa v Transnet (Ltd) & others*[99]:

The most recent case that emerged from the Constitutional Court on this matter was the *Chirwa* judgment. The case is illustrative of the debates around this vexed area of law, and its pronouncements on these pertinent issues seem to be in direct contrast to its earlier pronouncements in the *Fredericks* case. The questions that one is faced with at the end of the judgment are whether this court has indeed overruled the *Fredericks* case, and in that respect whether it has settled this obfuscated area of law.

The facts of the *Chirwa* case are briefly the following. Ms Chirwa was a public sector employee of Transnet Pension Fund, a business unit of Transnet Limited. She was dismissed for alleged incompetence following an enquiry in which she refused to

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[91] Ibid, at para 16.
[92] (2005) 26 ILJ 2403 (LC); [2006] 1 BLLR 42 (LC).
[93] Ibid, at para 2.
[94] Ibid, at para 36.
[95] Ibid, at para 68.
[96] Ibid, at para 66.
[97] [2006] 3 BLLR 297 (LC).
[98] Ibid, at para 13.
[99] *Chirwa* case (note 1).

participate as she was adamant that the presiding manager was biased or that there was a reasonable apprehension of bias against her. Initially she referred her dispute to the CCMA for conciliation. When this failed, instead of pursuing arbitration proceedings under the auspices of the LRA, she challenged her dismissal in the High Court as an infringement of her right to lawful, reasonable and procedurally fair administrative action in terms of the PAJA, alternatively section 33[100] of the Constitution. In the High Court[101], Brassey AJ applied the principle of natural justice applicable to public sector dismissals, and held that Transnet had breached the *audi alteram partem* rule.

Supreme Court of Appeal

On appeal to the SCA, Transnet contended that Chirwa's dispute was one in which the Labour Court had exclusive jurisdiction in terms of section 157(1) of the LRA, alternatively, that her dismissal did not constitute administrative action as defined in section 1 of the PAJA. Put simply, the issue was thus whether Ms Chirwa had an administrative justice cause of action justiciable in the High Court. To the issue of jurisdiction, four of the five judges who heard the appeal held that the High Court and the Labour Court had concurrent jurisdiction to hear the dispute. Three of the five judges held that the dismissal by Transnet entailed the exercise of administrative action. However, Ms Chirwa was unsuccessful on appeal as only two judges, Cameron JA (now Justice of the Constitutional Court) and Mpathi DJP, found in her favour on both the issues relating to jurisdiction and administrative action. The dissertation will solely focus on the judgments of Conradie JA and Cameron JA as they represent the two contrasting approaches taken towards this vexed area of public sector employment disputes.

Conradie JA

In his judgment, Conradie JA addressed three issues. The first issue was whether the High Court had jurisdiction to entertain Chirwa's claim. He held that the High Court

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[100] Section 33 of the Constitution: *Just administrative action*
(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 given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must [...]

[101] *Chirwa v Transnet (Ltd) & Others* Case No 1052/03.

did not and relied on section 157(1) read with section 157(1)(h) of the LRA.[102] On this basis, he held that the legislative intent is clearly to confer exclusive jurisdiction on the Labour Court to review the dismissal of an employee by the State or an organ of State.[103] He added that this determination only applies to matters that fall within the exclusive jurisdiction of the Labour Courts, hence, a cause of action that falls beyond the scope of the Act[104] is not removed.[105] As Chirwa's claim fell within the parameters of the LRA, the Labour Court had exclusive jurisdiction to deal with the dispute.[106]

The second issue dealt with the enquiry as to whether the dismissal amounted to administrative action. Conradie JA accepted that it did.[107] However, he opines that this does not necessarily imply that the dismissal constitutes administrative action as defined under the PAJA.[108] Instead of delving into the issue of whether the conduct by Transnet amounted to the exercise of public power, he sought to rather answer this question in the following manner: 'whether the structure of the legislation entails that dismissals in the public domain be dealt with as administrative acts; since the advent of the LRA'.[109] In answering this, he adopted a policy orientated approach.[110] By inferring the legislative intent from the structure of the PAJA and the LRA, he concluded that matters regulated by the LRA cannot be litigated under the PAJA.[111] The LRA evidences to a large degree the intention to create a 'comprehensive scheme of labour regulation' and further that it subjects 'a dispute about the unfair dismissal of any employee falling within its scope to the dispute resolution mechanisms of that Act'.[112]

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[102] *Chirwa SCA* (note 73) at para 33-34.
[103] *Chirwa SCA* (note 73) at para 34.
[104] LRA (note 4).
[105] *Chirwa SCA* (note 73) at para 30.
[106] Ibid, at para 36.
[107] Ibid, at para 26.
[108] Ibid.
[109] Ibid, at para 27
[110] Ibid, at para 26.
[111] Ibid, at paras 28,29,34,36.
[112] Ibid, at para 27.

Conradie JA's last enquiry dealt the issue of whether Chirwa could found a claim directly on a right included in the Bill of Rights.[113] In this regard, he held that the litigant cannot rely directly on a right without first seeking recourse to an applicable statute.[114] Where this statute provides a direct remedy, the statutory provisions cannot be circumvented.[115] Therefore, in this matter, the LRA afforded Chirwa remedies and her reliance on section 33 of the Constitution was thus misplaced.[116]

Conradie JA judgment has been criticized as being narrow and conservative.[117] By denying Chirwa a cause of action under the PAJA, it has been viewed as a retreat from *Zenzile*.[118] Furthermore, Conradie JA's attempt to base his decision on the structure of the LRA, has been found to be questionable. Partington *et al*, faults Conradie JA's reasoning on a clear reading of both the PAJA and the LRA.[119] To the Judge's first issue, Partington *et al*, notes a glaring provision within the PAJA that thwarts the conclusion reached by Conradie JA. According to section 7(3)[120] and section 7(4)[121] of PAJA 'only the High Court or the Constitutional Court can review administrative action in terms of PAJA until such time as the rules of procedure for judicial review in terms of the PAJA have been implemented'.[122] Partington thus notes that since this has not yet transpired, Conradie JA's contention that the Labour Court is a competent court to adjudicate PAJA matters cannot be sustained.[123] With regards to a reading of the LRA, the authors note

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[113] Ibid, at para 37.
[114] Ibid, at paras 40,43,44.
[115] *Chirwa SCA* (note 73) at para 40.
[116] Ibid, at para 44.
[117] Holness, D & Devenish, G *The Law in Relation to Employee Claims Relating to Dismissal: Jurisprudential Principle or Legal Pragmatism? Transnet Ltd v Chirwa* 2007 2 SA 198 (SCA) 2008 (71) *THRHR* 142.
[118] Ibid, at 150.
[119] Partington, JP & van der Walt, JA *Does the Promotion of Administrative Justice Act Apply to Dismissals in the Public Sector? Transnet Ltd v Chirwa* (2007) 11 BLLR 10 SCA 2007 28(2) *Obiter* 388 at 393.
[120] Section 7(3) of PAJA: **Procedure for Judicial Review**
"The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (...), must within three years after the date of commencement of section 10 of this Act, make rules of procedure for judicial review."
[121] Section 7(4) of PAJA: **Procedure for Judicial Review**
"Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another courts having jurisdiction."
[122] Partington (note 119) at 393.
[123] Ibid.

that Conradie JA's view cannot be reconciled with section 157(1)(h) read with section 157(1) of the LRA.[124] Nowhere in the PAJA is there an indication that the LRA can hear certain disputes in terms of the PAJA.[125] For this reason, PAJA 'cannot be the source of the Labour Court's exclusive jurisdiction over all employment–related or "pure" employment disputes'.[126] Conradie JA's attempt to establish legislative intent from the LRA and the PAJA is therefore questionable.[127]

Cameron JA

Cameron JA essentially adopts a liberal approach to this particular dispute area and reaffirms the principle expounded in *Zenzile* that the existence of contract does not exclude the application of administrative law principles.[128] This Judge used as his starting point the Constitution which, he states, seeks to control and regulate the exercise of all power, and therefore entitles all person to the rights set out in section 23 and section 33 in the Constitution.[129]

He centered the case on a two stage enquiry. Firstly, if there were no LRA, would Chirwa have the ability to bring a claim under the PAJA? Secondly, does the LRA prevent such a conclusion?[130]

The answer to the first enquiry centered on the question as to whether dismissals by an organ of state amount to administrative action under the PAJA.[131] According to the Judge, the fact that Transnet was now a profit-driven commercial entity was of no consequence to this enquiry.[132] In reaching his answer, the Judge relied heavily on pre-constitutional jurisprudence in the form of *Zenzile*. This case holds a great deal of significance in the area of public sector employment. As was mentioned before, it was

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[124] Ibid.
[125] Ibid.
[126] Partington (note 119) at 393.
[127] Holness (note 117) at 152.
[128] Ibid, at 150-151.
[129] Chirwa SCA (note 73) at para 49.
[130] Ibid.
[131] Ibid.
[132] Ibid, at para 50.

indeed the one of the first cases which extended the reach of administrative law principles to public sector employment disputes. It held that an employment relationship which is partly governed by statute, regulations and contract cannot be equated with the ordinary master-servant relationship.[133] As the statute injects public elements into the relationship, the principles of natural justice would apply.[134] Where the employer is a public authority whose decisions in terms of the relationship are regulated by statute, those decisions would amount to the exercise of public power.[135] By virtue of this fact, the court in *Zenzile* held that the action to dismiss fell squarely within the purview of administrative law and hence was subject to the principles of natural justice.[136]

In this case, the decision to dismiss derived from the statute and accordingly attracted the application of the *audi* rule.[137] *Zenzile* thus rightly held that a state employee occupies a different position to their private sector counter parts. The public element injected into the employment relationship necessitates the need for regulation that surpasses private law controls. This view was shared Cameron JA when he stated:

> "Despite the allusion to 'the statute', it is in my view of no significance that the employee's contract of employment, or Transnet's authority to employ her, did not derive from a particular, discernible, statutory provision. Transnet is a public entity created by legislation and operating under statutory authority. It would not exist without statute. Its every act derives from its public, statutory character, including the dismissal at issue here. The doctrine propounded in *Zenzile*, and the cases that followed it, was that employment with a public body attracts the protections of natural justice because the employer is a public authority whose employment-related decisions involve the exercise of public power. That power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution. Its exercise therefore constitutes administrative action. That reasoning is as compelling today as it was a decade and a half ago."[138]

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[133] *Zenzile* (note 50) at 270.
[134] *Zenzile* (note 50) at 270.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] *Chirwa SCA* (note 73) at para 52.

Cameron JA thus relied on the fundamental principle enunciated in *Zenzile* that the public dimension triggered by the employment contract with an organ of state imposes public duties which the courts will supervise.[139] In this regard, the Judge held that by dismissing an employee, the organ of state engages in administrative action.[140]

To the second enquiry, Cameron JA held that the when Transnet dismissed Chirwa, this conduct impacted on both section 23 and section 33 of the Constitution.[141] He held that the right to fair labour practices supplements the right to just administrative action 'and not exhaust the rights and remedies accruing to an employee on termination of employment'.[142] Therefore, the existence of remedies under the LRA does not preclude reliance of right under PAJA.[143]

Cameron JA's judgment therefore clearly evidences the view that administrative principles (as expounded in *Zenzile*) has been subsumed under the Constitution and given effect to by the PAJA.[144] It has thus been argued that PAJA should be interpreted in light of these administrative principles and 'its scope determined accordingly'.[145] It has further been argued that notwithstanding the fact that Cameron JA's judgment could lead to forum-shopping, his approach acknowledges that the Constitution acts as a safeguard against the abuse of state power.[146] In addition, it 'is in accordance with constitutional interpretation, which must be in a liberal spirit'.[147] This liberal interpretation is in accordance with section 39(1) of the Constitution which directs that constitutional values should inform the interpretation of fundamental rights.[148] Cameron JA, in coming to his conclusion, finds no need to strain legislative texts but simply fortifies existing case authority and legal principles. This approach acknowledges that the scope of section 33 of the Constitution cannot be constrained and, where necessary, should find application.

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[139] Ibid, at para 56.
[140] Ibid, at para 53.
[141] *Chirwa SCA* (note 73) at para 57.
[142] Ibid, at para 59.
[143] Ibid, at para 58.
[144] Partington (note 119) at 391.
[145] Ibid.
[146] Holness (note 117) at 152.
[147] Ibid, at 151.
[148] Ibid.

Constitutional Court judgment

On appeal to the Constitutional Court, Chirwa's claim was dismissed unanimously. The majority of the court concurred in two judgments of the court, one written by Skweyiya J, and the other by Ngcobo J. Langa CJ wrote a minority judgment which also dismissed the appeal, but not on the grounds of jurisdiction. He was at pains to note that the issue of jurisdiction had already been settled by the Court's pronouncements in the *Fredericks* case.[149]

Skweyiya J

In essence, Skweyiya J's decision revolves around the issue of jurisdiction. The Justice is at pains at noting that in an employment dispute, notwithstanding the fact that it involves a public sector employee, should be governed by the LRA, and the dispute mechanisms that it encumbers.[150] The purpose of the LRA, he states, is to create a dispute system under which all labour matters can be resolved.[151] This is further implied by the provisions of section 210[152] of the LRA, as well as in the purposes of the CCMA, and the concomitant specialist labour tribunals.[153] To this end, he views the purpose of section 157(2) of the LRA as extending the jurisdiction of the Labour Courts to employment matters that implicate constitutional rights.[154] He further states that the High Court's jurisdiction will only be ousted when matters, which, according to section 157(1) are to be determined by the Labour Court.[155] This, he states, is further implied by section 191[156] of the LRA, which vests unfair dismissal jurisdiction on the Labour Court, and not the

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[149] *Chirwa* (note 1) at para 163.
[150] Ibid, at para 41.
[151] Ibid, at para 47.
[152] Section 210 of the LRA: *Application of the Act when in conflict with other laws*
(1) 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.
[153] *Chirwa* (note 1) at para 50, 51.
[154] Ibid, at para 54.
[155] Ibid, at para 59.
[156] Section 191 of the LRA: *Disputes about unfair dismissals and unfair labour practices*
[...]
(5)If a council or a commissioner has certified that the dispute remains unresolved, [...]
(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is [...]

High Court. Thus, if section 157 is interpreted in light of section 191, the High Court's jurisdiction is ousted by section 157(1).[157] On this basis the Justice distinguishes the *Fredericks* case from the matter at hand on the basis that the applicants in that case disavowed themselves of their labour rights under section 23 of the Constitution, and relied instead on their right to equality and their right to just administrative action.[158]

The Justice states that the true nature of Ms Chirwa's claim is a labour matter as her claim was based on an allegation of unfair dismissal for alleged poor work performance.[159] By interpreting section 157 in light of section 191 of the LRA, it would therefore stand to reason that in matters of unfair dismissal and unfair labour practices the Labour Court is the appropriate forum. If the court were to allow complainants more than one course of action, a dual system of law would develop, one in the civil court, and one under the LRA.[160] This would run contrary to the proposed aims of the LRA, which is to create a coherent system for dispute resolution in respect of labour matters. Thus, the Justice concluded in saying that Ms Chirwa should first exhaust all remedies and procedures as provided for in the LRA, in respect of her claim for unfair dismissal.[161]

The Justice's arguments in this respect, which flows from a mischaracterization of Ms Chirwa's claim, are questionable. Skweyiya J states that Chirwa's claim is based on the violation of the mandatory provisions provided for in the LRA, her basis for approaching the CCMA.[162] He held that this was the same basis for her cause of action in the High Court, however, she sought to vindicate her rights under section 33 of the Constitution and not section 23.[163] Notwithstanding this point, Skweyiya J still maintained that her dispute was one concerning an unfair dismissal which fell within the jurisdiction of the Labour Court.[164] However, in Chirwa's heads of argument there is

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[157] *Chirwa* (note 1) at para 63.
[158] *Chirwa* (note 1) at para 58.
[159] Ibid, at para 65.
[160] Ibid.
[161] Ibid, at para 67, 68.
[162] Ibid, at para 61.
[163] Ibid.
[164] Ibid, at para 65.

clear evidence that her claim was based on the violation of provisions in the PAJA.[165] Furthermore, Langa CJ reinforces the contention that Skweyiya J's formulation of the claim was incorrectly characterised.[166] Langa CJ's views will be assessed further into the dissertation.

Even if it is accepted that Chirwa's claim might have been based on her right to fair labour practices, Skweyiya J's decision is in direct contrast to the *ratio decidendi* in the *Fredericks* matter. In that case, as was noted earlier, the Court held that as the CCMA is not a court of similar status to the High Court, if one were to interpret section 157 of the LRA in terms of section 169 of the Constitution, the jurisdiction of the High Court cannot be ousted. Therefore, the review provisions in section 191 of the LRA, does not confer exclusive jurisdiction on the Labour Court in terms of section 157(1) of the LRA. In the later judgment of *Nakin v MEC, Department of Education & others*[167] (*Nakin*), Froneman J asserted the aforementioned view, and opined that the way in which Skweyiya J characterizes Chirwa's dispute as an unfair labour practice under the LRA, 'distinguishes *Fredericks* without making a difference to, or challenging, its *ratio decidendi*'.[168] The pronouncements in the *Nakin* judgment will be discussed in more detail further in the essay. Suffice to say that Froneman J opined that the *Chirwa* case did not overrule the judgment in *Fredericks*.[169]

Ngcobo J

Ngcobo's J judgment is more comprehensive in dealing with the scope of section 157 of the LRA. In his decision, he attempts to reconcile section 157(1) and section 157(2).[170] He states that this can only be accomplished by having regard to the primary objects of the LRA itself, and thus the intention of the legislature.[171] He recognises that

[165] The PAJA provisions mentioned are ss 3(2)(b); ss 16(2)(a)(iii); ss 3(3)(a); ss 6(2)(b); ss 6(2)(f)(i) of the PAJA. See Applicant's Heads of Argument. Available at http://www.constitutionalcourt.org.za [Accessed 28 November 2008].
[166] *Chirwa* (note 1) at para 157.
[167] (2008) 29 ILJ 1426 (E).
[168] Ibid, at para 18.
[169] Ibid, at para 24, 28.
[170] *Chirwa* (note 1) at para 91.
[171] Ibid, at para 97.

the problems that the legislature sort to address in enacting the LRA, was to overcome the perpetual tribulations caused by the multiplicity of laws.[172] Further, the legislature sort to address the overlapping and competing jurisdictions of the different courts.[173] The LRA thus seeks to create a comprehensive system of law governing labour and employment relations across the board.[174] Further, it seeks to create specialist tribunals that have, as its purpose, the resolution of employment disputes.[175] Thus, the effect of section 157(1) is to vest the Labour Court, and the Labour Appeal Court, with exclusive jurisdiction to deal with employment matters.[176] The concomitant effect of section 157(2) is to vest the Labour Court with limited constitutional jurisdiction in employment matters that implicate constitutional rights. [177]

He states that constitutional authority for the proposition that the Labour Court has this exclusive jurisdiction is afforded by section 169(a)(ii)[178] and section 170[179] of the Constitution.[180] The former section ousts the constitutional jurisdiction of the High Court where legislation provides for matters to be assigned to a court of similar status. The latter section vests the Labour Court with constitutional jurisdiction.

Section 157(2) has thus extended the jurisdiction of the Labour Court to employment and labour relations disputes that arise directly from the provisions of the Bill or Rights.[181] It has not sought to confer jurisdiction on the High Court to deal with these types of matters. Justice Ngcobo thus states that in order to reconcile section 157(1)

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[172] Ibid, at para 98.
[173] Ibid, at para 99.
[174] *Chirwa* (note 1) at para 101.
[175] Ibid, at para 104.
[176] Ibid, at para 113.
[177] Ibid,at para 120.
[178] Section 169(a)(ii) of the Constitution: A High Court may decide-
(a) any constitutional matter except a matter that-
(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court [...]
[179] Section 170 of the Constitution: Magistrates' Courts and other courts
Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into a rule on the constitutionality of any legislation or any conduct of the President.
[180] *Chirwa* (note 1) at para 120, 116.
[181] Ibid, at para 120.

and section 157(2), a restrictive meaning should be attributed to the latter provision.[182] The Justice finally concludes in stating that the intention of the legislature could not have been to allow an employee to raise what is in substance a labour matter under the LRA as a constitutional issue under section 157(2). [183]

Ngcobo J's judgment adopts a purposive interpretation to section 157 of the LRA. In his view, the LRA is constitutionally mandated legislation which gives full effect to section 23[184] of the Constitution. Particularly because the LRA includes public sector employees within its ambit, its processes should be a litigant's first port of call in employment disputes.[185] This litigant cannot rely directly on the Constitution or PAJA and the Justice reiterated the constitutional principle explicitly endorsed in *South African National Defence Union v Minister of Defence and Others*[186] where the Court held the following: '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'.[187] It would then stand to reason that a litigant cannot rely directly on section 23 either. The only violation of this right would be an unconstitutional provision in the LRA itself where the High Court would have jurisdiction by virtue of section 169 of the Constitution. It thus becomes evident, by virtue of majority judgments in *Chirwa* that public sector employees have lost their ability to forum shop.

The judgments by both Skweyiya J and Ngcobo J, to an extent, follow a related line of reasoning to Conradie JA judgment in *Chirwa*. The three judgments represent similar policy orientated approaches in reaching their outcomes. As with Conradie JA's judgment, the majority in *Chirwa* places similar reliance on and interpretation of legislative provisions. These interpretations have evidently been open to dispute. Perusing the judgment of the majority in *Chirwa* and Conradie JA's judgment, one can

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[182] Ibid, at para 123.
[183] Ibid, at para 124.
[184] Section 23 of the Constitution: *Labour Relations*
(1) Everyone has the right to fair labour practices [...]
[185] *Chirwa* case (note 1) at para 102.
[186] 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC).
[187] *SANDU* case (note 186) at para 51; *Chirwa* (note 1) at para 123.

immediately appreciate the aspirations to ensure that South Africa's employment jurisprudence aspires to some form of coherency. Indeed, this is the set ambition of our labour legislation. However, where set conclusions precede a proper analysis of legislative and constitutional provisions, the judgment is open to doubt. The arguments seem strained for the simple reason that it cannot be reconciled with clear legislative and constitutional provisions which indicate an outcome to the contrary. In addition, the fact that the *Fredericks* judgment still stands as a matter of law, questions the credibility of the reasoning in the judgments. Given the fact that LRA does not expressly, or even implicitly, rule out a litigant's recourse to PAJA is as much indicative of legislative intention. Perhaps, the majority has reached a desirable outcome for this contentious dispute area. Perhaps, public sector employee should be confined to the remedies provided by the LRA. However, the fact that these provisions are still in the statute book calls into question the true legislative intention. These cases seem to prove that perhaps a policy orientated approach is not the solution to this area of dispute. Not surprisingly, the following reservations were expressed by the Chief Justice in denouncing the outcome of the majority:

> "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."[188]

dd) Has the *Chirwa* judgment overruled the *Fredericks* judgment?

In his minority judgment, Langa CJ held the view that the *Fredericks* judgment had already settled the issue relating to jurisdiction, thus Ms Chirwa's claim cannot be distinguished from that matter.[189] The misapprehension in Skweyiya J's judgment rests on an incorrect formulation of Chirwa's claim. The Chief Justice therefore held that after *Fredericks*, the only pertinent question that should be asked in relation to jurisdiction is whether the LRA contains a provision referring a particular constitutional matter to the exclusive jurisdiction of the Labour Court. [190]

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[188] *Chirwa* (note 1) at para 174.
[189] Ibid, at para 163.
[190] Ibid, at para 165.

In this case, the Chief Justice notes that section 191(5) of the LRA might vest the Labour Court with exclusive jurisdiction, as it confers a limited scope on this court to address questions of unfair dismissal.[191] However, the Chief Justice held that in this specific matter, the provisions of this section do not apply for two reasons. Firstly, Chirwa's claim is based on the PAJA, not the LRA.[192] The claim must be approached as it was pleaded.[193] Secondly, in the *Fredericks* case it was stated that section 169 of the Constitution requires that the LRA should be interpreted so as not to exclude the jurisdiction of the High Court where matters are referred to bodies that are not similar in status to the High Court.[194] The Chief Justice noted that most unfair dismissal claims will not initially be considered by the Labour Court, but rather by the CCMA. Chirwa's claim falls to be considered first by the CCMA, therefore excluding the exclusive jurisdiction of the Labour Court, and the High Court thus maintains concurrent jurisdiction by virtue of section 169 of the Constitution.[195]

Thus, Langa CJ held that as Chirwa's claim is based on PAJA, alternatively the Constitution, it is not distinguishable from *Fredericks*.[196] Although the Chief Justice is in the minority, his judgment carries much weight, specifically where *Fredericks* has not expressly been overruled in the majority judgments.

ee) The subsequent *Nakin* judgment

Notwithstanding the fact that *Nakin* is a High Court judgment, it has been included in this dissertation to demonstrate the approach that courts have taken subsequent to the *Chirwa* decision. In the *Nakin* case, the merits of the dispute were briefly as follows. The applicant was a public sector employee at a Government school. He lost his post as school principal through no fault of his own. To rectify this mistake, the Department approved a recommendation that the applicant be reinstated, that his

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[191] *Chirwa* (note 1) at para 166.
[192] Ibid, at para 167.
[193] Ibid, at para 168.
[194] Ibid, at para 170.
[195] Ibid.
[196] Ibid at para 165.

salary be corrected, as well as to receive outstanding benefits. In this regard, he was required to be transferred to another school at the same level which he originally attained. Post the recommendation, the applicant's salary and benefits had still not been corrected. The applicant claimed unjust administrative action under the PAJA, and sought his relief in the High Court.[197] This court had to decide whether it had the requisite jurisdiction post-*Chirwa*.

The Judge held that *Chirwa* might be distinguishable from the matter before him on the basis that *Chirwa* deals only with unfair dismissal cases, thus the *Fredericks* decision could still apply in order to decide the jurisdictional issue.[198] He states that this approach is further justified as the majority in *Chirwa*, distinguished but did not explicitly overrule *Fredericks*. [199]

He further notes that the majority judgment implies either one of two things. Firstly, that the Labour Court has exclusive jurisdiction to decide unfair dismissal disputes, or secondly that the conciliation or arbitration institution under the LRA may now have exclusive jurisdiction ousting the jurisdiction of the High Court.[200] The first implication is in direct contrast to the legislative provisions provided for under section 157(5) of the LRA, and the second implication in direct contrast to the constitutional provision, namely, section 169.[201] From this observation, Froneman J is of the view that neither one of them can be harmonized with the reasoning and findings in the *Fredericks* judgment.[202]

In the *Nakin* case, Froneman J is of the view that the Constitutional Court decision in *Chirwa* does not purport to overrule their decision in *Fredericks*, but the reasoning does appear to be incompatible with the *ratio decidendi* in *Fredericks*.[203] According to Froneman J, the majority of the court in *Chirwa* were primarily concerned with the

[197] *Nakin* (note 167) at para 1,2.
[198] Ibid, at para 14, 24.
[199] Ibid.
[200] Ibid, at para 25.
[201] Ibid.
[202] Ibid.
[203] Ibid, at para 26.

coherence of employment law were the High Court to exercise concurrent jurisdiction along with the Labour Court.[204] However, this Judge is of the view that the coherence of employment law should depend primarily on the proper expression given to the constitutional right to fair labour practices by the courts.[205] He states the following:

> "Approached from the perspective the question that needs to be asked is whether the coherence of employment law has gained or lost from an administrative law insights relating to employment in the public sector, [...]. Opinions may differ on this, but my own view is that the developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law."[206]

In relation to a litigant's reliance on the right to just administrative action, the Judge was of the opinion that fundamental constitutional rights are not mutually exclusive, and at many instances overlap.[207] At the very least the fundamental values of the Constitution resist compartmentalization, and underlie the application of these rights notwithstanding the court within which the matters is heard. Further he says that reflections on administrative law concerns can, if anything, assist in the conceptualization of the term 'fairness' in public sector disputes, as its contents may differ in the private sector.[208] The Judge thus states the following:

> "Substantive coherence in employment law may thus be achieved and developed in different courts, provided that these courts give a broadly similar effect to the underlying constitutional right to fair labour practices. The content given to that right can also be enriched by recognizing and giving appropriate expression to the interconnected between that right and other fundamental rights, such as the right to just administrative action."[209] (Emphasis my own)

The aforementioned statements seem to answer Ngcobo J's concern relating to the proliferation of laws were the litigant's to be allowed more that one cause of action. To Ngcobo J's concern relating to the overlapping and competing jurisdictions, Froneman J

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[204] Nakin (note 167) at para 29.
[205] Ibid, at para 30.
[206] Ibid.
[207] Ibid, at para 31.
[208] Ibid at para 35.
[209] Ibid, at para 37.

was of the opinion that the institutional control of this process can be achieved by various means. Firstly, the High Court may refer the matter to the institutional provided or in the LRA, and secondly, the Constitutional Court, being the highest authority in constitutional matters, final institutional control would lie with them.[210] Thus, the Judge followed the *Fredericks* judgment, and held that the High Court had jurisdiction to determine whether the litigant had a claim based on the alleged unlawful administrative action.[211]

ff) Cases post-*Chirwa*

Nakin has not been the only case dealing with public sector employment since the advent of *Chirwa*. The subsequent SCA decision of *Makambi v MEC, Education, Eastern Cape*[212] (*Makambi*) displays the discordant views held towards the *Chirwa* judgment. In this case, the majority judgment followed the precedent set in *Chirwa*. Notwithstanding this fact, Farlam JA acknowledged that there were two applicable precedents that could be followed, either the one set in *Fredericks* or the *Chirwa* judgment.[213] In deciding which one applies, one needs to consider the manner in which the complainant formulated her claim.[214] If the claim is based on section 23 of the Constitution, the reasoning in the *Chirwa* judgment would apply. Similarly, if the claim is formulated on the right to just administrative action, the *Fredericks* judgment would find application. In a manner of speaking, this election that courts are drawn into when settling a dispute of this nature is a clear indication that *Chirwa* has indeed failed to settle the law relating to public sector employment disputes. In addition, an evident loophole exists whereby complainants can escape the reach of *Chirwa* by properly formulating their claim on their right to just administrative action. In this respect, *Fredericks* would find application. Whether their claim succeeds or not is a matter to be decided on a case-by-case basis.

In the same case, Nugent JA wrote a separate judgment concurring in the decision reached by Farlam JA, however, his was based on different grounds.[215] This judgment

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[210] *Nakin* (note 167) at para 38, 39.
[211] Ibid, at para 40.
[212] (2008) 29 *ILJ* 2129 (SCA).
[213] Ibid, at para 15.
[214] Ibid.
[215] Ibid, at para 21.

reflects a more critical approach to *Chirwa*. Nugent JA expressly states, as this paper does, that there is a clear absence of any form of legal basis for the outcome in *Chirwa*, notwithstanding the existence of clear policy reasons.[216] He states that the question of jurisdiction was categorically settled in *Fredericks*.[217] On the findings of this judgment, he finds no legal reasons for denying a complainant the right to commence proceeding in the High Court on the basis of their section 33 right.[218] Jurisdiction is determined by the nature of the right being enforced.[219] He does, however, acknowledge that there is clear merit to the outcome reached in *Chirwa* if viewed broadly in terms of policy. He thus notes that the distinction between *Chirwa* and *Fredericks* lies in the premise upon which each case was decided.[220] That is to say, *Chirwa* was determined on policy grounds, whilst *Fredericks* was determined on the basis of law.[221] In totality, Nugent JA held that notwithstanding the fact that the outcome in *Chirwa* might be desirable, the Court was not bound to adopt and apply 'a supposed policy if the legislature has not embodied that policy in law'.[222]

Similarly, in *Mkumatela v Nelson Mandela Metropolitan Municipality & another*[223], the Court looked at the manner in which the complainants claim was formulated. The following passage can be observed:

> "Even though the Labour Relations Act is the primary source in matters concerning disputes about unfair dismissal and unfair labour practices, it would appear that a properly formulated right would not be excluded by the *Chirwa* judgment."[224]

This Court followed the same approach as was seen in *Nakin* and in the separate judgment by Nugent JA in *Makambi*. The Court thus accepted that public sector employees could claim on the basis of their section 33 right to just administrative action

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[216] *Makambi* (note 212) at para 21.
[217] Ibid, at para 30.
[218] Ibid, at para 34.
[219] Ibid, at para 30.
[220] Ibid, at para 36.
[221] Ibid.
[222] Ibid, at para 39.
[223] [2008] JOL 21686 (SE).
[224] Ibid, at para 9.

and that this could be justiciable in the High Court.[225] Interestingly enough, the Court found it appropriate to approach the matter with due regard to both *Fredericks* and *Chirwa*.[226] In this respect, it was held that the complainant has an election as to which court he could approach.[227]

Two divergent positions have thus been adopted by cases dealing with public sector employment disputes post-*Chirwa*. On the one hand, courts have either tentatively accepted *Chirwa* as binding precedent, which in itself displays certain skepticism towards the outcome reached in *Chirwa*. On the other hand, courts have preferred the *Fredericks* case over *Chirwa*, which presents itself as clear evidence that *Chirwa* has indeed not settled the law relating to this vexed area of employment law. If the *Chirwa* decision was the result of policy-making, then clearly, the outcome of the judgment is open to doubt. However, as it stands, *Chirwa* is a decision by the highest court in the land and, at the very least, it unquestionably carries immense authority in South Africa's employment law.

b) Normative debate: Should there be one system?

Skweyiya J

In the *Chirwa* judgment, Skweyiya J is at pains to note that in an employment dispute, notwithstanding the fact that it involves a public sector employee, should be governed under the LRA, and the dispute mechanisms that it encumbers.[228] He notes that the LRA does include administrative law principles, notably the *audi alteram partem* doctrine, the rules of natural justice, and the concept of fairness.[229] In section 188 of the LRA, the concepts of substantive and procedural fairness are explicitly endorsed in dismissal disputes. Further, the Justice notes that with regards to remedies, the LRA provides protracted one's at that, thus according a complainant sufficient protection without the necessity of having recourse to administrative law.[230] The purpose of the

[225] *Mkumatela* (note 223) at para 12.
[226] Ibid, at para 10.
[227] Ibid.
[228] *Chirwa* (note 1) at para 41.
[229] Ibid, at para 42.
[230] Ibid, at para 43.

LRA, he states, is to create a dispute system under which all labour matters can be resolved.[231] This is further implied by the provisions of section 210 of the LRA, as well as in the purposes of the CCMA, and the concomitant specialist labour tribunals.[232]

The Justice further states that the true nature of Ms Chirwa's claim is a labour matter as her claim was based on an allegation of unfair dismissal for alleged poor work performance.[233] It would therefore stand to reason that in matters of unfair dismissal and unfair labour practices, the Labour Court is the appropriate forum.[234] If the court were to allow complainants more than one course of action, a dual system of law would develop, one in the civil court, and one under the LRA.[235] This would run contrary to the proposed aims of the LRA, which is to create a coherent system for dispute resolution in respect of labour matters.[236] Skweyiya J further states that public sector employee should not be placed in a preferential position, as the LRA does not differentiate between public and private sector employees.[237] Thus, the Justice concluded in saying that Ms Chirwa should first exhaust all remedies and procedures as provided for in the LRA, in respect of her claim for unfair dismissal.[238] Skweyiya J thus concluded that, with reference to the substance of Chirwa's dispute, the Labour Court has exclusive jurisdiction to determine the dispute.[239]

To Skweyiya J's argument that the LRA includes the principles of natural justice, and thus administrative law principles, this dissertation argues differently. Even if the substantive fairness requirement can account for irrational and arbitrary decisions, and similarly, the procedural fairness requirement can account for the *audi alteram partem* principle and the rule against bias, the LRA fails to test the lawfulness of the employer's decision. Ngcukaitobi notes that the concept of substantive fairness as understood under

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[231] Chirwa (note 1) at para 48.
[232] Ibid, at para 50-52.
[233] Ibid, at para 61,65.
[234] Ibid at para 64.
[235] Ibid, at para 65.
[236] Ibid.
[237] Ibid, at para 66.
[238] Ibid, at para 68.
[239] Ibid, at para 63.

the LRA is not concerned with the issue of the lawfulness of employer conduct.[240] In making this submission he relied on the distinction between lawfulness and fairness as enunciated in *Fedlife*. This Court stated the following:

> "Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a 'dismissal' as defined in chap 8)."[241] (Emphasis my own)

The dissertation thus maintains that notwithstanding the fact that certain administrative law principles are embedded in labour law, the labour and administrative law rights are nevertheless distinct in their application. Section 33 is concerned with administrative action that is lawful, reasonable and procedurally fair, whilst section 23 is concerned with substantive and procedural fairness.[242] More pertinently, in the context of PAJA, the lawfulness of the exercise of public power or the performance of a public function is a constitutional imperative. Hoexter notes that 'lawful' administrative action essentially denotes the following meaning: '[T]hat administrative actions and decisions must be duly authorized by law and that any statutory requirements or preconditions that attach to the exercise of the power must be complied with'.[243] As will be shown later in this dissertation, certain state-as-employer decisions can indeed amount to exercises of

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[240] Ngcukaitobi, T *Life After Chirwa: Is There Scope for Harmony Between Public Sector Labour Law and Administrative Law?* (2008) 29 *ILJ* 841 at 853.
[241] *Fedlife* (note 67) at para 27.
[242] Ngcukaitobi (note 240) at 853.
[243] Hoexter (note 45) at 224.

public power. For this reason, the purpose of section 33 of the Constitution and PAJA would prove futile if it cannot test the lawfulness of this conduct.

Ngcobo J

Ngcobo J recognises that the problems that the legislature sort to address in enacting the LRA, was to overcome the perpetual tribulations caused by the multiplicity of laws, which lead to jurisdictional problems.[244] Further, the legislature sort to address the overlapping and competing jurisdictions of the different courts.[245] The LRA thus seeks to create a comprehensive system of law governing labour and employment relations across the board.[246] Further, it seeks to create specialist tribunals that have, as its purpose, the resolution of employment disputes.[247] The Justice held that in a dispute such as the one before it, the litigant cannot bypass the provisions of the LRA and rely directly on the Bill of Rights.[248] The LRA is constitutionally mandated legislation that gives full effect to the right to fair labour practices. It provides for special dispute resolution procedures, and should be a litigant's first port of call in employment disputes.

The Justice finally concludes in stating that the intention of the legislature could not have been to allow an employee to raise what is in substance a labour matter under the LRA as a constitutional issue under section 157(2).[249] If the resolution of the dispute at hand is provided for under the LRA, it must be determined exclusively by the Labour Court. This result cannot be avoided by claiming a violation of a constitutional right other than the right to fair labour practices.[250] In his view, the LRA is constitutionally mandated legislation which gives full effect to section 23 of the Constitution, particularly section 157(1) of the LRA.[251] Particularly because the LRA includes public sector employees within its ambit, its processes should be a litigant's first port of call in employment disputes. This litigant cannot rely directly on the Constitution or PAJA. It

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[244] *Chirwa* (note 1) at 100.
[245] Ibid, at para 103.
[246] Ibid, at para 104.
[247] Ibid, at para 105.
[248] Ibid, at para 124.
[249] Ibid.
[250] Ibid.
[251] Ibid.

would then stand to reason that a litigant cannot rely directly on section 23 either. The only violation of this right would be an unconstitutional provision in the LRA itself. In this instance the High Court will have jurisdiction by virtue of section 169 of the Constitution.

Therefore, according to the majority in *Chirwa*, the legislative intention was to create a coherent system of employment dispute resolution, this being the purpose of the LRA. A litigant cannot therefore rely on a violation outside of the LRA. It thus becomes evident, by virtue of these judgments, that public sector employees have lost their ability to forum shop. Further, in South Africa's constitutional era, the LRA has supplanted administrative law and has thus made it redundant in the field of public sector employment disputes.

Langa CJ represents a contrary view to the majority. Firstly, he states that there is a notable distinction between an unfair dismissal claim and an unfair administrative action, and if the legislature preferred one right over the other, it should have explicitly stated this.[252] There is therefore no reason why the adjudication of one claim should supersede the other.[253] Secondly, whether public sector employees are placed in a preferential position to other employees, is irrelevant to the question of jurisdiction.[254] The Chief Justice acknowledges that rights overlap.[255] Thirdly, he concedes that the negation of forum shopping might be a valid aim, however, this is an unavoidable consequence of the clear legislative decision set in section 157(2) of the LRA.[256] Lastly, to the concern around the danger of legal incoherency, inconsistency and unfairness, the Chief Justice held that our law has always developed with conflicting opinions which can always be resolved on appeal.[257]

[252] Chirwa (note 1) at para 173-174.
[253] Ibid, at para 175.
[254] Ibid, at para 176.
[255] Ibid.
[256] Ibid, at para 177.
[257] Ibid, at para 178.

In summary, the Constitutional Court in *Chirwa* has thus implicitly recognised that all employment disputes are to be governed by labour law, to the exclusion of administrative law. In this light, dismissals of public sector employees' do not amount to administrative action. The majority's concern about the coherence of employment law is understandable in light of the objects and purpose of the LRA. However, the fact remains that the existence of certain legislative provisions, particularly section 157(2) of the LRA, poses a formidable obstacle in the way of attaining coherence as understood by the majority. There seems to be an evident lack of any form of coherent integration between the constitutional and legislative provisions which as a result have left both the courts and litigants perplexed. This might call for certain reform and amendments in the area of employment legislation. However, as these legislative provisions remain in the statute books, it poses great difficulty in fully appreciating the majority's reasoning. Further, the *Fredericks* judgment is no doubt good law, and whether the majority's way of distinguishing it fully justifies a departure from *Fredericks* is questionable. As it stands, the *Nakin* case clearly displays this dubiousness. Froneman J's explanation on the proper expression to be given to section 23 of the Constitution takes full account of the permeability of the values of the Constitution, and rightfully recognizes that constitutional rights, in this instance, the right to fair labour practices and the right to just administrative action, at many times overlap. His comment clearly resonates Cameron JA's emphasis (in the SCA judgment of *Chirwa*) on the dangers of subjugating constitutional rights.[258] To this end, the *Fredericks* judgment and the *Chirwa* judgment seem to stand on opposite sides of this possibly continuous debate. If courts, as displayed by the *Nakin* judgment, approach *Chirwa* as exclusively dealing with unfair dismissal disputes in the public sector, instead of all public sector employment disputes, it would follow that the *Chirwa* judgment has failed to lay this ghost to rest.

As this dissertation progresses, there are two sections that inform the normative debate as to whether there should be one system to govern both private and public sectors. The first section deals directly with the question as to whether the Constitution implies a separate form of regulation for the mentioned sectors. This argument follows

[258] *Chirwa SCA* (note 73) at 62-63.

under section IV. The second issue requires a normative analysis as to whether the unique characteristics that attaches to the state justifies differential treatment. This will be dealt with under section V.

III. A framework of the South Africa's labour law regime

Du Toit notes that the impetus behind the overhaul of labour legislation in South Africa stemmed from the requirements of the interim Constitution.[259] Included within this was the Bill of Rights which sought to entrench fundamental rights and thus protect the citizenry from the possible abuse of state power.[260] Relevant to this paper is the inclusion of section 27 of the Constitution which entrenched the right to fair labour practices within the Bill of Rights. Coupled with the right to equality, freedom of assembly and expression, freedom of association and the freedom to engage in economic activity, the conceptualization and concomitant legal regulation of the employment relationship called for a profound alteration of employment law in the new democratic era.[261] It is against this background that South Africa's current labour legislation was drafted. This chapter seeks to briefly outline the underlying reasons for the revamping of South Africa's labour law regime, with particular reference to the Draft Bill and the accompanying Explanatory Memorandum.

1. The Draft Bill and Explanatory Memorandum

In conformity with the Interim Constitution and International Labour Organisation Conventions[262] (ILO Conventions), the reform of labour legislation was seen as a natural step in reconstructing and democratizing the economy and society.[263] In 1994, a Ministerial Legal Task Team was established to draft a Draft Labour Relations Bill which was subsequently open for public discussion and negotiation by the three key players within the labour relations arena, namely, organized labour, business and government. In the following year, they produced a Draft Negotiating Document in the

[259] Du Toit, D et al 'Labour Relations Law: A Comprehensive Guide' 5th ed (2006) at 19.
[260] Ibid.
[261] Ibid.
[262] More particularly, the Freedom of Association and the Right to Organise Convention, 1948 (No 87); the Right to Organise and Collective Bargaining Convention , 1949 (No 98); and the Discrimination in Respect of Employment and Occupation Convention, 1958 (No 111).
[263] Du Toit (note 259) at 5, 19.

Form of a Labour Relations Bill. Accompanying this Draft Bill was an 'Explanatory Memorandum' detailing the key innovations in the Bill and furthermore providing an informative description of the thoughts underlying the Bill.[264] The Draft Bill and accompanying memorandum is a reflection of the unanimous views of the Task Team.

Beyond conforming to the Constitution and ILO Conventions, sentiments have long been echoed that South Africa was in dire need of a complete, or at least a substantial, overhaul of its labour legislation.[265] A notable trademark of the previous labour dispensation was its plethora of labour legislation which governed the different sectors. The old LRA applied to a part of the private and public sectors.[266] The PSLRA governed part of the public service.[267] Educators were governed by the ELRA and the agricultural sector was covered by the ALA.[268] The three latter mentioned Acts were, in varied degrees, modeled on the old LRA.[269]

With this multiplicity of substantive and procedural laws presenting themselves to both litigants and the courts, there was little leeway for the development of a structured labour relations jurisprudence. With this ad hoc development there was evident inconsistency in the application of laws. With no predictability as to the laws and its application, elements of uncertainty hovered over labour relations in all sectors with employers and employees baffled by the complexity of these laws.[270] Needless to say, the Industrial Courts were left no better off. The Task Team had recognised that such a multiplicity of laws creates 'inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion.'[271] In this vein, it was recommended that a single statute should be promulgated that would regulate all sectors and at the same time being mindful of the unique features that each embodies.[272]

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[264] Explanatory Memorandum (note 38) at 278.
[265] Ibid, at 280-281.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid, at 287.
[271] Ibid.
[272] Ibid, at 281-282.

Furthermore, there were clear discrepancies in the manner of regulation between public and private sector employment. They were most pervasive in the areas of collective bargaining, dispute resolution, and industrial action. Thus, beyond having as its main focus the regulation of collective bargaining, the Draft Bill also regulated unfair dismissal.[273]

The different Acts also perpetuated a form of inequality in the treatment of employees.[274] The inconsistencies in the different laws as well as in their application deprived employees of similar standards of treatment. The separate Acts also had the effect of duplicating resources and administrative structures.[275] This, it is said, places a hefty burden on the shoulders of both the state and the ordinary taxpayer.[276] In addition to the above problems, questions of jurisdiction are called to the fore, particularly where the state is seen to be taking a more active role in the private sector as a direct result of privatization. As the state operates in both the public and private sectors, it becomes difficult to ascertain which Act regulates its activities.[277]

In light of the above, the Bill proposed a simple solution, that is, one Act should ideally regulate all the sectors, subject to a few categories of employment.[278] The Task Team has found no theoretical justification in providing for separate Acts to regulate, *inter alia*, the public service.[279] They argue that the historical and political arguments that are used to justify separate regulation are out of touch with the true reality relating to both the functioning of the state and its present relationship with its employees.[280] In conformity with both the Constitution and ILO Conventions, they further argue that the public sector employment relationship is no different from its public counterpart.[281]

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[273] Explanatory Memorandum (note 38) at 282.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Explanatory Memorandum (note 38) at 287.
[280] Ibid, at 287-288.
[281] Ibid, at 288.

The Task Team is thus unequivocal in their belief that the private sector employees should be governed by the same Act along with other employees, notwithstanding the different sectors they might belong to. Indeed there is merit to the argument that to ensure consistency and fairness, labour laws should be consolidated into a single Act. If anything, this paper does not argue for a more restrictive form of regulation for public sector employees denying those rights conferred on other employees. This paper approaches the argument from the standpoint that, notwithstanding this unitary approach to labour laws, public sector employees have rights in the PAJA as well. It argues that the paradigm of public sector employment relationship is broader relative to other employees specifically because their employer, who also acts in its capacity as the state, exercises a certain power in its dealings with its employees which would not ordinarily be found in the private employment relationship. In this respect, a different dimension is added to the relationship. This paper thus looks at the nuances in the public sector employment relationship by focusing on the power the state employer exercises in the employment relationship. In this respect, an argument can be made that public sector employment relationship are indeed different from their private counterparts and should be treated as such. The unique power that the state exercises cannot be undermined or overlooked. This argument is further developed in later parts of this paper. Suffice to say at this point that other legislation, in this case the PAJA, confers rights of recourse to public sector employees which should not be negated by the existence of another Act, more specifically, the LRA.

2. Labour Relations Act 66 of 1995

Indeed, the LRA evidences, to a large degree, the effectiveness of a single statute to regulate all sectors. Although this Act[282] has been subject to numerous amendments over a span of time, it preserves the main provisions found in the Draft Bill. Whilst repealing the separate legislation for the public service, educational and agricultural

[282] LRA (note 4).

sectors, the LRA has included within its scope of protection employees falling within these sectors.[283]

The contents of the LRA are numerous and inclusive. It seeks to give full effect to all the labour rights set out in section 23 of the Constitution.[284] It expressly regulates both collective and individual labour relations. As the LRA is, by its nature, an inclusive legislation, its application is wide-ranging and seeks to accommodate both the private and public sector, subject to the exceptions set out in section 2[285]. Chapter III regulates collective bargaining which is considered to be the key vehicle for advancing 'economic development, social justice, labour peace and the democratization of the workplace'.[286] In this regard, the LRA sets out a framework for collective bargaining which includes the regulation of the bargaining process, the disclosure of information, centralized bargaining forums, and collective agreements concluded at both plant- and sectoral level.[287] The LRA further includes provisions relating to strikes and lock-outs, workplace forums and

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[283] Du Toit (note 259) at 28; Schedule 6 of the LRA (Laws Repealed by Section 212).

[284] Section 23: **Labour Relations**
(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 and employers' organization; and
  b. to participate in the activities and programmes of an employers' organization.
(4) Every trade union and every employers' organization has the right –
  a. to determine its own administration, programmes and activities;
  b. to organize; and
  c. to form and join a federation.
(5) Every trade union, employers' organization 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 mat recognize union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in the Chapter, the limitation must comply with section 36(1).

[285] Section 2 of the LRA: **Exclusions from application of this Act**
This Act does not apply to members of –
  (a) the National Defence Force;
  (b) the National Intelligence Agency;
  (c) the South African Secret Service;
  (d) the South African National Academy of Intelligence;
  (e) Comsec.

[286] Section 1 of the LRA.

[287] Chapter III of the LRA.

the regulations of trade unions and employers organizations.[288] In terms of individual labour relations, the LRA regulates disputes regarding unfair dismissal, in addition to unfair labour practices.[289] Most importantly, the Act has a chapter set aside for dispute resolution in the event of a dispute arising which relates either to collective bargaining or individual labour relations.[290] Depending on the nature of the particular dispute, the LRA sets out the various procedures to be followed in its resolution.[291] Most notably, the Act establishes the creation of specialist dispute tribunals and courts which deal exclusively with issues arising from the LRA.[292] Applicable remedies are also stipulated in the Act.[293]

From the above expose, it can be deduced that the LRA does include provisions regulating both collective and individual labour relations in the public sector. In regards to dispute resolution, it provides for both the procedures and remedies. In this respect, the Draft Bill has succeeded in providing an integrated legislative framework for regulating labour relations across the board. An argument can indeed be made that all labour disputes, both individual and collective should thus be regulated by the LRA and its sister legislations.[294] Similarly, there is merit in Skweyiya J's statement that the LRA should be a litigant's first port of call in matters dealing with labour disputes. This contention can be clearly deduced from the Explanatory Memorandum accompanying the Draft Bill. The LRA clearly seeks to provide consistency and simplicity in the application of labour rights by consolidating these rights into a single Act.

3. Further Comment on the Explanatory Memorandum and the LRA

As was noted earlier on in the paper, public sector employees were considered to be servants of the monarch to whom they owed absolute loyalty. The subsequent doctrine of state sovereignty, which regards the state as solely accountable to the legislature,

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[288] Chapters IV; V; and VI of the LRA respectively.
[289] Chapter VIII of the LRA.
[290] Chapter VII of the LRA.
[291] Ibid.
[292] Part A; B; D; and E in Chapter VII of the LRA.
[293] Chapter VII of the LRA.
[294] In this regard, reference is made to the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998.

immunized its right to act unilaterally, particularly in the employment sphere, from the impact of trade unions, collective bargaining and other employment protections.[295] In this respect, public sector employees were subject to a more restrictive labour regime than their private sector counterparts.[296] The memorandum argues for an inclusive labour Act which would extend its protection to these employees. It argues against restrictive regulation, save for a few categories of public servants. It does not state that if a valid claim can be founded on another right, that that claim cannot be sustained. Where another right in the Constitution finds application, a litigant should not be denied its protection and subsequent usage. If anything, the memorandum does not seek to deprive public sector employees of their constitutional rights but rather seeks to ameliorate their precarious position in relation to their labour law rights.

When the memorandum refers to the problems of the multiplicity of laws and the concomitant overlapping of jurisdictions prevalent under the old labour dispensation, it refers to it in the context of labour law alone. The PSLRA, ELRA and the ALA were all modeled on the old LRA, and as a direct result of different laws being applied by the different administrators or Ministers in numerous different ways, the problems alluded to in the Explanatory Memorandum arose. All these Acts were meant to regulate labour relations in their respective sectors. They were not intended to regulate acts of administrative nature. This is an area that remains to be dealt with under public law and the administrative law principles. These are two distinct bodies of law. Therefore, this dissertation argues that when the Explanatory Memorandum aims to consolidate laws, it alludes solely to labour laws. It does not attempt to supplant administrative laws with labour laws. On this understanding, recourse to a public sector employee's right to administrative action is left unscathed by the LRA. Providing the respective employee meets the requirements of section 33 of the Constitution, state employment activities could amount to administrative action and rightly be the subject of judicial review by the civil courts.

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[295] Fredman (note 28) at 118.
[296] Morris, GS *Employment in Public Services: The Case for Special Treatment* (2000) 20(2) *Oxford Journal of Legal Studies* 167 at 168.

The argument for the application of administrative principles to certain state employment actions does not use as its justification the historical relationship between the protagonists, namely that the employee is a servant of the state and should axiomatically occupy a different position to other employees, nor the notion that labour laws are deficient. This dissertation argues twofold: firstly, section 33 is applicable because state-as-employer conduct does amount to the exercise of administrative action; and secondly, PAJA is applicable where the state exercises public power when engaging with its employee in the employment relationship. It is well founded that administrative action can affect individual rights adversely, and this includes private persons. The PAJA and Constitution are unequivocal when it comes to this.[297] The same logic should thus find application in the employment relationship. Thus, the dual role that the state occupies in its employment relationship makes its actions, providing they amount to administrative action, susceptible to review by administrative law principles.

This dissertation further asserts that the Task Team's conception of 'forum-shopping' is not similar to the majority's conception of the same term in the *Chirwa* case. When the Explanatory Memorandum refers to this term in understands it in relation to other labour legislation, not as between constitutional rights. In this light, in the context of the employment relationship, can act both in a private and public capacity resulting in both the section 23 and section 33 constitutional rights being made available to the respective employee. Merely because the LRA provides a mechanism to deal with acts of the state-as-employer is not sufficient justification in confining disputes to the labour law arena. A litigant should be given the choice of applying either right. The argument that forum-shopping will perpetuate the application of a multiplicity of laws resulting in overlapping and competing jurisdictions, is negated by the very structure of the Constitution.

IV. The negation of constitutional rights

A central question which is illuminated in *Chirwa* is the availability of more than one constitutional right to a litigant. This dissertation argues that the dual role played by

[297] Section 33 of the Constitution; and section 3 of the PAJA.

the state in an employment context impacts on more than one right. Langa CJ's judgment in *Chirwa* is consistent with this view in that he asserts that the dismissal of public servant affects both the administrative law and labour right of the employee.[298] In cases akin to *Chirwa*, section 23 and section 33 of the Constitution should find application. This view is premised on the belief that despite the substantive differences between these rights, they both seek to fulfill a similar purpose, that is, to curb the exercise of power. Our Constitution is founded on the notion that its rights exist to give effect to this particular purpose. Ngcukaitobi argues that the question that needs to be asked in every case is 'whether there are sufficient safeguards for the control of the exercise of state power'.[299] He proposes that the structure of the Constitution requires a 'harmonious reading' of its provisions.[300] Once done, it can be evidenced that the Constitution does not call for the negation of rights.[301]

Indeed, section 36 of our Constitution contemplates the possibility of a limitation of rights, but even in this sense, the actual right being limited is still acknowledged as being applicable. However, in *Chirwa*, the majority hold the view that state-as-employer conduct can never amount to administrative action, therefore, section 33 could never find application. This implies not a limitation of section 33 but rather a negation of this right all together. In *Chirwa*, Ncgobo J argues that the exclusion of section 33 is fully justified by the structure of the Constitution.[302] This, he states, is implied by the different forms of regulation, review and enforcement of these rights.[303] He thus notes that a dichotomy exists between labour and administrative law. This dictum echoes those of Judge Pillay in *Haschke* where she unequivocally draws a distinction between these two bodies of law:

> "Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law."[304]

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[298] *Chirwa* (note 1) at para 175.
[299] Ncgukaitobi (note 240) at 862.
[300] Ibid.
[301] Ibid.
[302] *Chirwa* (note 1) at para 143.
[303] Ibid, at para 144.
[304] *Haschke* (note 85) at para 11.

In her article, Pillay notes that prior to the constitutionalisation of the right to fair labour practices, elements of natural justice sought to cure the deficiencies that existed in the labour legislation.[305] As was noted earlier, the application of administrative law principles were also later applied to public sector employment disputes. However, Pillay opines that with the advent of the new labour legislations, administrative law no longer has a role to play in industrial relations as these statutes now regulate employment law and includes both the private and public sector within its scope.[306] By insisting on the application of administrative law, more particularly PAJA, to labour disputes would undermine the 'objective of equality' as mentioned in the Explanatory Memorandum.[307] Furthermore, by virtue of the fact that the LRA and the PAJA have different objectives as well as different forms of regulation, enforcement procedures and remedies, they are thus to be considered two different bodies of law, particularly in an employment context.[308] Pillay thus argued that to allow an overlap in these areas would have dire consequence for the effective resolution of labour disputes.[309]

Indeed, there is some merit to this argument. As was noted above, the LRA specifically regulates collective bargaining and the adjudication of individual labour disputes and in this way attempts to cover the field of employment law. These indicators do suggest that section 23 and section 33 of the Constitution are distinct rights which regulate different bodies of law. However, notwithstanding this fact, both these rights operate from the same premise, namely, controlling the exercise of power.[310] The manner in which these rights fulfill this purpose will henceforth be extrapolated upon.

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[305] Pillay, D *PAJA v labour law* (2005) 20 *SAPL* 413.
[306] Ibid, at 425-426.
[307] Ibid, at 425.
[308] Ibid, at 424-426.
[309] Ibid, at 425.
[310] Ngcukaitobi (note 240) at 841, 853. In this article, Ngcukaitobi argues that the underlying purpose of both section 23 and section 33 of the Constitution (that is, the control of power) negates a disjunctive interpretation of the Constitution.

a) The right to fair labour practices – section 23 of the Constitution

Historically, employment relationships were never subject to principles of equity.[311] The contract of employment between the employee and employer reflected to a large degree the existence of power discrepancies. This was attributable to the common law rules regulating their relationship which failed to reflect the desires of these respective employees.[312] The creation of labour law was thus a reaction to the deficiencies in the common law. Otto Kahn-Freund, one of the most eminent labour lawyers of the 20th century had the following to say about the employment relationship:

> "[T]he relation between and employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission may be concealed by that indispensable figment of the legal mind known as the "contract of employment". The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[313]

The principle of equity injected into employment relations was thus a manifestation of the belief that activities arising from the employment relationships should not only be lawful but in addition to this, they should be fair. Thus, contracting parties to an employment relationship were bound by both the common law principles of lawfulness emanating from the contract and the principles of equity.[314] Where a party sought to test the lawfulness of actions performed in pursuit of the contract, they would have recourse to the ordinary civil courts. In contrast, where a party sought to test the fairness of actions, it would resort to the Industrial Courts. The latter Court's main prerogative was thus to test the fairness of employment actions. Notably, the abolition of the Industrial

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[311] Van Eck (note 43) at 1988.
[312] Garbers, C *The Battle of the Courts: Forum-shopping in the aftermath of Wolfaardt and Fredericks* 2002(1) *LDD* 97 at 104.
[313] Davies & Freedland *Kahn-Freund's Labour and the Law* 3rd ed (1983) at 18.
[314] Van Eck (note 43) at 1988.

Court did not see the withering of its equity-based jurisprudence.[315] In conformity with the Constitution, the LRA gives effect to the right to fair labour practices.[316] This right thus has its genesis in the equity-based jurisprudence developed by the Industrial Courts. Although streamlined by the LRA, principles of fairness remain to be the cornerstone of labour laws. As was indicated beforehand, the Act[317] unequivocally requires that for a dismissal to be considered 'fair', both requirements of substantive and procedural fairness have to be met.[318] These rules thus manifest the section 23 constitutional safeguard against the abuse of employer power. Ngcukaitobi opines that '[w]ithout the constitutional injunction to act fairly, there is no guarantee that employers will act fairly and respect the rights of employees in the workplace'.[319] As the LRA now includes within its purview public sector employees, section 23 acts as a bulwark against abuse of state employer actions.

b) The right to just administrative action – s33 of the Constitution

In *Pharmaceutical Manufacturers Association of South Africa and Another v In RE: The Ex Parte Application: The President of the Republic of South Africa and Others*[320] , the Constitutional Court described administrative law as 'an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government'.[321] Thus bodies, whether they be public or private, will be subject to regulation under administrative law if they exercise public powers or perform public functions.[322] This is premised on the view that all state action is constrained by the rule of law and all conduct thus has to remain within these set boundaries, lest they risk reprisals.

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[315] Du Toit (note 259) at 481.
[316] Ibid; see also section 23 of the Constitution.
[317] Labour Relations Act 66 of 1995.
[318] Section 188 of the LRA.
[319] Ngcukaitobi (note 240) at 849.
[320] (2000) 2 SA 674 (CC).
[321] Ibid, at para 45.
[322] Hoexter (note 45) at 2.

Prior to the Interim Constitution, judicial review constituted the primary expedient in controlling administrative power in pre-democratic South Africa.[323] Courts were endowed with inherent review jurisdiction through which they developed the body of principles constituting administrative law.[324] However, a countervailing force lay in the doctrine of parliamentary sovereignty. In this way, courts were constrained in testing the legality of administrative conduct as Parliament has the power to delineate conduct that was legal and illegal.[325] In this way, in addition to the ouster clauses, courts were vetoed from taking full advantage of their review jurisdiction.[326] Administrative law thus developed in a vacuum, free from devotion to the principles of accountability and restraint. Public power was left unimpeded. In this same period, South Africa was marked by a history of racial discrimination of the worse kind. The policies of the government at the time came to be reflected in legislation. As a means of entrenching racism in all facets of South African life and to thus satisfy their racial ends, the Apartheid government used the law to legitimize their conduct. These very edicts adversely affected the lives of a majority of South African and the courts were powerless to provide any remedy. The following extract from *Sachs v Minister of Justice*[327] clearly reflects the courts' capitulation to the will of parliament and the executive:

> "[O]nce we are satisfied on a proper construction of the Act, that it gives to the Minister an unfettered discretion, it is not function of the Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometime advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will."[328]

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[323] Hoexter (note 45) at 12.
[324] Ibid at 13.
[325] Ibid.
[326] Ibid, at 14.
[327] *Sachs v Minister of Justice & Diamond v Minister of Justice* 1933 AD 32.
[328] Ibid, at 36-37.

This approach by the courts in pre-democratic South Africa was a common stance adopted by the bench. However, with the enactment of the Interim Constitution[329] and subsequently the final Constitution, the terrain of administrative law had changed vastly. Section 33 constitutionalised the right to just administrative action. Pillay opines that this development is quite unique as the very purpose of the Constitution is to 'regulate the exercise of power by the state or other public authority'.[330] Notably, in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[331] (*SARFU*), the Constitutional Court viewed the principal function of section 33 as follows:

> "...to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice."[332]

In addition, the PAJA was promulgated in November of 2000 to give effect to this right. In this way, the exercise of public power or the performance of a public function is monitored by the courts and can be tested against democratic values of human dignity, equality and freedom. The Act[333] lays down grounds of review, mechanisms for its enforcement and stipulates the applicable remedies. In this way, judicial review can operate effectively unimpeded by the other branches of government and the courts can ensure that administrative action that is exercised is lawful, reasonable and procedurally fair. Similarly, section 33 is a constitutional guarantee to citizens and the like that the existence of an equitable system of administrative law is possible under the Constitution. In *SARFU*, the court reiterated the Constitution's role in overseeing public administration:

> "The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the

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[329] 1993.
[330] Pillay (note 305) at 414.
[331] 2000 (1) SA 1; 1999 (10) BCLR 1059.
[332] Ibid, at para 136.
[333] PAJA (note 2).

> administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights and accountability. The new Constitution envisages the role and obligations of government quite differently."[334]

In this light, section 33, as with section 23, acts as a bulwark against abuse of public power.[335] In this respect, many of the activities of the state would fall under review providing they amount to the exercise of public power or the performance of a public function.

c) Comment

From the above analysis of section 23 and section 33 of the Constitution, it is quite evident that the respective rights, although distinct in substance, do overlap. A natural incident of this overlap is 'forum-shopping'.[336] If the legislature sought to prevent this result, it should have done so expressly through legislative amendments.[337] However, as has been shown above, the legislative intention implies a contrary view, which is that the High Court has jurisdiction to entertain public sector employment disputes.[338] Cameron JA and Langa J's judgments in *Chirwa* allows for 'forum-shopping'. In this regard, Holness opines that this approach could fully be justified if the need to safeguard against the abuse of public power is given priority over 'forum-shopping'.[339] This dissertation argues that until the legislature adopts a contrary approach to that of Cameron JA and Langa CJ, public sector employees should be allowed to rely on their section 33 right. Furthermore, this dissertation agrees with Ngcukaitobi who argues that the necessity to

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[334] *SARFU* (note 330) at para 133.
[335] Ngcukaitobi (note 240) at 847; 849; and 862.
[336] *Chirwa* (note 1) at para 177.
[337] Ibid, at para 175.
[338] Ibid, at para 176.
[339] Holness (note 117) at 152.

choose one right over is constitutional unsound.[340] By approaching constitutional rights as being complementary in nature, it can be accepted that both section 23 and section 33 are vehicles to be used in the control of public power. The following extract by Ngcukaitobi captures the proper understanding of the existing synergy between the respective rights and the role each plays within a constitutional setting:

> "The fact that they are worded differently and contained in different provisions does not mean that their objects are contradictory. Their objects should, after all, be the vindication of our Constitution as a living instrument, whose principal purpose is the transformation of society, the inculcation of a culture of accountability and affirmation of dignity for all citizens."[341]

d) An Integrated Approach to Constitutional Rights[342]

Chirwa has in effect immunized state employment activities from judicial review under administrative law. In his judgment, Ngcobo J states that the Constitution draws a clear distinction between labour relations and administrative law and hence all employment action, including those of the state, are matters that are exclusively regulated by section 23 and the LRA.[343] However, by privatizing the employment relationship and its concomitant decisions, is to deny that at many times state employment decisions could amount to administrative action. Surely the existence of the employment relationship between the state and its employee cannot be indicative of the fact that the power being exercised is private.

It is well recognized in our legal system that certain activities of state actors can at once seem both private and public. By assuming that the relationship is private, hence, immune from administrative law scrutiny, makes it unnecessary to enquire into whether the power being exercised is public or private. By isolating these cases from such an enquiry is devoid of any meaningful engagement with the facts at hand and a denial of the true state of affairs.

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[340] Ngcukaitobi (note 240) at 841.
[341] Ngcukaitobi (note 240) at 862.
[342] Ibid, at 860-862. This author similarly advocates an integrated approach to South Africa's constitutional jurisprudence.
[343] *Chirwa* (note 1) at para 143.

In the same way, to justify the privatization of public sector employment decisions according to 'the structure of the Constitution'[344], is to delineate section 33 in such a manner that its purpose is constrained and the right cannot find its true application. In a constitutional democracy, rights should be able to be exercised in a manner that takes full advantage of the protections that it affords the complainant. Its application should not be limited merely because of certain policy reasons. It is respectfully submitted that this conception of constitutional rights is misplaced.

The state-as-employer occupies a unique relationship to both the section 23 and the section 33 rights. Depending on which right is exercised, this power will be subject to different requirements. Where section 23 is concerned with substantive and procedural fairness, section 33 is concerned with lawfulness, rationality and procedural fairness. This dissertation argues that both rights find equal application to state action. Under the new LRA, the form of the power exercised by the state is not a pre-requisite for its application. It is sufficient if an employment relationship is established between the state employer and its respective employee. However, under the PAJA, it has to be established that the state either exercised public power or performed a public function when engaging in its activity with its employee. An argument that will be canvassed later in this dissertation is that certain state actions are indeed susceptible to judicial review under the PAJA as their conduct, notwithstanding the employment context, can amount to the exercise of public power or the performance of a public function. *Chirwa*, on the other hand, implies that PAJA has no role to play in these instances. This dogmatic and formalistic approach to constitutional rights, however, ignores the purpose of the aforementioned rights and lends itself to a disjunctive interpretation which does not sit comfortably with the overall spirit of the Constitution.

In *POPCRU & Others v Minister of Correctional Services & Others*[345], Judge Plaskett dealt with the argument as to whether the Constitution ostensibly implied this

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[344] Ibid, at para 143.
[345] [2006] 4 BLLR 385 (E).

disjunctive interpretation. He adopted the reasoning that constitutional rights are mutually reinforcing and thus complementary. In this, he observes the following:

> "There is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts....[I]n my view, the protections afforded by labour law and administrative law are complementary and cumulative, not destructive of each other simply because they are different....When the distinction between labour law and administrative law is elevated to a distinction of the order of importance accorded to it in some of the Labour Court judgments, the result, in my view, is a degree of formalism that rivals the old and discredited classification of functions approach..."[346]

In this respect, it is argued that section 23 and section 33 reinforce each other. This assumes, and implies, that Constitutional rights are reinforcing, interdependent and indivisible[347], and the existence of one right does not necessarily negate another. It accepts that, at many times, the administrative and labour right overlaps resulting in a multiplicity of forums and remedies available to a claimant. There is considerable judicial support for this view. Cameron JA (in *Chirwa SCA*) and Froneman's judgments (in *Nakin*) both argue for an integrated approach to our constitutional jurisprudence. In *Chirwa SCA*, Cameron JA categorically states that the Constitution permits recourse to section 33 where employment dismissals constitute administrative action.[348] The Constitution, as a hallmark of our democracy, regulates all power and grants protection against unfair labour practices as well as unjust administrative action.[349] As was mentioned above, Cameron JA approached the question as to whether the LRA indeed deprives Chirwa of her section 33 right by first having due regard to the precise purpose of the Constitution, which is to control all power.[350] By giving the rights a liberal interpretation, he gave effect to section 39(1) of the Constitution. This approach therefore implicitly recognizes that constitutional rights are indeed complementary and reinforcing.

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[346] *POPCRU* (note 344) at para 61.
[347] Ngcukaitobi (note 240) at 860.
[348] *Chirwa SCA* (note 73) at para 47.
[349] Ibid, at para 49.
[350] Ibid.

An evident concern of the majority in *Chirwa* is the effect on the coherence of employment law if forum-shopping were to be allowed. Indeed, this begs the question whether the development of an innately labour dispute under section 33 informs or subtracts from the coherency of employment law. In this regard, Froneman J opines that this coherence is not primarily determined by its development in one exclusive forum.[351] Rather, the development of employment jurisprudence should depend on the proper expression given by the courts to the right to fair labour practice.[352] In this light he observes the following:

> "Approached from that perspective the question that needs to be asked is whether the coherence of employment law has gained or lost from administrative law insights relating to employment in the public sector, or from the development of the common law contract of employment to incorporate in its fabric some aspects of the constitutional right to fair labour practices. Opinions may differ on this, but my own view is that developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law. If that is the case, does it matter as a matter of substance rather than form where the development takes place, in the civil courts or in the labour court?"[353]

Thus, it needs to be made patent that the misconception that the section 33 right competes with the section 23 right in public sector employment disputes is misplaced. At the very least, it complements the latter right. Similarly, reflections on administrative law concerns can, if anything, assist in the conceptualization of the term 'fairness' in public sector disputes, as its contents may differ in the private sector 'for reasons relating to constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service'.[354] In this regard, Judge Froneman states the following:

> "Substantive coherence in employment law may thus be achieved and developed in different courts, provided that these courts give a broadly similar effect to the underlying constitutional right to fair labour practices. The content given to that

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[351] *Nakin* (note 167) at para 30.
[352] Ibid.
[353] Ibid.
[354] Ibid, at para 35.

> right can also be enriched by recognising and giving appropriate expression to the inter-connectedness between that right and other fundamental rights, such as the right to just administrative action."[355]

This affirms the dictum in the Constitutional Case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[356] (*Sidumo*) where Navsa AJ had the following to say about the indivisibility of constitutional rights:

> "This .... is based on the misconception that the rights in sections 23, 33 and 34 [of the Constitution] are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected."[357]

The Court in *Nakin* further noted the following trends in the development of South African jurisprudence in the courts, particularly when it came to re-examining the common law contract of employment in light of constitutional principles. In *Old Mutual Life Assurance Co SA Ltd v Gumbi*[358] (*Gumbi*), the right to a pre-dismissal hearing was incorporated into the contract of employment. This SCA decision is thus authority for the view that the contractual right to a fair hearing exists alongside the statutory protections offered by the LRA.[359] Similarly, in *MEC, Department of Roads &Transport, Eastern Cape & another v Giyose*[360] (*Giyose*), the common law contract was further extended to include a right to a pre-transfer hearing for public employees. This court noted that the question should essentially not relate to which area of law would appropriately govern. Rather, the focus should be on how best expression can be given to the right to fair labour practices in the context of employment law.[361] By having due regard to the section 23

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[355] *Nakin* (note 167) at para 37
[356] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).
[357] Ibid, at para 112.
[358] 2007 (5) SA 552 (SCA).
[359] Ibid, at para 6; see also *Murray v Minister of Defence* [2008] 3 ALL SA 66 (SCA).
[360] [2008] 5 BLLR 472 (E).
[361] *Giyose* (note 360) at para 18.

right has two advantages. Firstly, it clarifies the issue, and secondly, it assists in illuminating whether the dispute should be more appropriately governed by administrative law.[362] This approach in *Giyose* underscores the profound importance of maintaining and aspiring to a form of harmonization of our employment laws. At the same time, it does not detract or undermine the similar importance and application of the right to just administrative action and the concomitant effect it could have in the attainment of coherency in our employment law. Further, this case conforms to the notion that underlying the Bill of Rights are its principle values which ensure that rights are indeed mutually reinforcing and interconnected. This approach is therefore useful in informing our conceptualization of a particular area of law, more specifically, employment law.

Of late, the Labour Court in *Mogothle v Premier of the North-West Province*[363], confronted with a claim based on breach of contract, breach of statute[364] and PAJA, held that the judgment of *Chirwa* does not deny the claimant recourse to the civil courts where a breach of contract is claimed.[365] The Court held that *Chirwa* does not have the effect of confining litigants to the remedies provided for in the LRA. In this light, it held that employees are not deprived of their common law contractual rights, nor their recourse to the civil courts.[366] It confirmed the SCA judgments of *Fedlife*, *Gumbi* and *Murray v The Minister of Defence*[367] *(Murray)* which asserted the existence of the common law contractual rights alongside the statutory labour rights. The Court did, however, acknowledge the controversy around the development of the common law at the expense of the statutory labour remedies.[368] It, however, noted that where the courts seek to develop the common law, it should be guided by the unfair dismissal and unfair labour

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[362] *Giyose* (note 360) at para 19.
[363] Case no J 2622/08.
[364] The statute referred to in the judgment is the 'SMS Code', a code of conduct governing senior management service within the public service. See *Mogothle* (note 363) at para 4.
[365] *Mogothle* (note 363) at para 28; notably, in this case the court declined to consider whether the claimant had a right based on the PAJA[at para 5]. It further held that the claimant had no discernable right stemming from the code as statute[at para 4].
[366] Ibid.
[367] (383/2006) [2008] ZASCA 44 (31 March 2008).
[368] *Mogothle* (note 363) at para 24.

practice jurisprudence developed in the labour courts and tribunals.[369] Furthermore, it noted that the 'dual stream' jurisprudence that emerges is a matter for the legislature to resolve.[370]

Evidenced clearly from the above jurisprudence is that our courts are not refraining from developing the common law alongside the statutory protections of the LRA. In these respects, developments in the Labour Courts are, in actuality, informing developments in the civil courts. It is therefore not clear why the relationship between the LRA and PAJA should be treated any differently. If parallels are to be drawn between, firstly, the LRA and the common law, and secondly, the LRA and the PAJA, one struggles to understand the formalistic approach adopted by the majority in *Chirwa* towards the latter and not the former relationship. This dissertation argues that the same form of liberalism should be espoused towards the relationship between the LRA and PAJA. This dissertation further argues that the concern around the coherency of employment law, although well founded, is maintained not through a rigid separation between constitutional rights, but rather through a consistent application of constitutional values.

aa) Constitutional values

An important aspect that cannot be understated is the existence of constitutional values as well as the defined role they play in the development of South African law. These values inform the operation and application of these rights notwithstanding the court within which the matter is heard.[371] By acknowledging the permeability of these values, one can appreciate the coexistence of administrative and labour law. In *Sidumo*, Sachs J was explicit in this regard:

> "The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the

[369] *Mogothle* (note 363) at para 30.
[370] Ibid.
[371] *Nakin* (note 167) at para 35.

> text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation."[372]

An aspiration towards any form of constitutional justice requires a development of rights that takes into account the recognised fact that values inform and underlie their application. In which ever court this development might occur, these values will ensure a coherency of employment law of a greater magnitude than that envisioned by the majority in *Chirwa*. This is the ideal towards which our Constitution strives. Thus, the fact that the same values underlie the application of the mentioned rights and cannot be separated from each other implies that the development of employment law, particularly in the area of public sector employment, must always seek aspire to this mentioned form of constitutional justice via these very values. Through this conception of integration, can we begin to appreciate that the permeability of values thwarts an approach that seeks to subjugate rights. This integrated approach thus accepts the rightful proposition that constitutional rights are indivisible and complementary.[373]

The words of Froneman J therefore resonates the approach proposed by both this dissertation and certain academics in regards to the development of South Africa's employment laws:[374]

> "To insulate the development of the common law contract of employment by compartmentalising and narrowing not only the constitutional right upon which such development might occur, but also to state that any such development may not occur in the general courts of the land in addition to specialised courts, runs counter to the constitutional objective of ensuring that the judiciary in general has a duty to play its part in effecting the constitutional transformation of our society."[375][Emphasis my own]

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[372] *Sidumo* (note 356) at para 149.
[373] Ngcukaitobi (note 240) at 860.
[374] Ibid, at 862.
[375] *Nakin* (note 167) at para 36.

This chapter thus sought to prevail upon the reader that the contention that the structure of the Constitution implies the negation of constitutional rights is not a sound one. If anything, the Constitution implies quite the opposite. A stream of court jurisprudence evidences the coexistence and interdependency of rights. This dissertation thus argues that, instead of subjugating rights, our courts should seek to establish a proper synergy between them, informed by the values underlying our Constitution.

V. Regulating public sector employment disputes

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[376]

Reflecting on the words of James Madison, one understands that the chief aim of the Constitution is to control government. The rights in Chapter 2[377] should thus be at the full disposal of citizens who allege infringement by the state. With particular relevance to this dissertation, and as was mentioned above, section 33 of the Constitution ensures that the administrative action performed by the state is just. The state has particular constitutional duties, which includes having a public administration that is accountable, responsive and transparent.[378] For anyone who doubts that the state-as-employer role is limited to the private sphere need only look at the pervasiveness of its conduct and the manner by which the statute imposes public duties that make it incumbent on the public office to uphold. Their demeanor is thus constrained in ways incomparable to the private sector. A constant theme running throughout this dissertation pertains to the enquiry into whether the public sector employment should be equated with the private sector, and the

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[376] Madison, James *The Federalist*, No 51. Available at http://www.foundingfathers.info/federalistpapers/fed51.htm [Accessed 27 January 2009]
[377] of the Bill of Rights.
[378] See PAJA Preamble.

question that would logically follow, whether these two sectors should be regulated similarly.

It should be made clear at the outset of this chapter that this dissertation does not argue for a separate or more restrictive form of regulation for public sector employees in Chirwa's position. In the Explanatory Memorandum, the point is made quite decisively that this approach is outrightly rejected by the structure and aims of the LRA. On the contrary, the hypothesis is simply that public sector employees should not be deprived of their section 33 right. This is based purely on the basis that certain forms of actions taken by the state in their employment relations should be subject to administrative law principles. This section, however, deals with the issue as to whether the unique characteristics of the state-as-employer can justify differential treatment of its employees.

This area of law has shown to be particularly troublesome because when the state performs actions within the employment relationship, it combines both public and private functions. Distinguishing these public and private elements has proven to be an arduous task. Fredman *et al*, argue that too scant attention has been paid to the unique characteristics attaching to the state-as-employer, 'a role in which the public and private are too closely connected to warrant a rigid line between them'.[379] Fredman further asserts that through the process of structural and organizational change in the course of privatization, competitive tendering and the like, coupled with the importation of private sector managerial techniques into the public sector, the boundary between the two sectors have become less distinct.[380]

1. The distinct character of the state-as-employer

The Court in *Chirwa* was content to confine public sector employment disputes within the parameters of labour law. This axiomatically leads to the suggestion that the respective relationship is a private one. This, however, denies the existence of any public elements within the employment relationship. In this way it is implied that the state as

[379] Fredman (note 28) at 298.
[380] Fredman, S *The Legal Context: Public or Private* Chapter 3 at 53 in Corby, S & White, G 'Employee Relations in the Public Services: Themes & Issues' (Routledge: 1999).

employer is no different from a private employer and further that the public employment relationship should be wholly governed by labour law. However, there are certain defining characteristics attaching to the state which cannot ignore the public elements involved in the execution of its activities. Fredman *et al*, have identified five features of the state which underscore this point. Although they have been identified with reference to the United Kingdom, the features find much relevance in present day South Africa and will thus be applied in the mentioned context.

The first feature that the authors allude to is the source of the state's power to make employment decisions. The state has the power to initiate legislation and govern. In employment relationships, the source of the power to make many employment decisions is endowed by legislation.[381] This characteristic clearly displays the dual role inherent in the state-as-employer paradigm. Thus, in a democratic system, the state would be accountable to the legislature for actions taken in pursuit of legislation.[382] In private employment relationships, this form of accountability is not as acute. In this regard, Morris argues that the principle of democratic accountability, and the nature of State power, places constrains foreign to those found in private employment relationships.[383] The second feature alluded to is that the state possesses the power to endow managerial decisions with the force of law. Employment legislation is regularly enacted by Parliament and at many times gives discretionary powers to executive members and constrains public employees in ways in which private employees would not be.[384] Thirdly, the executive has exclusive powers to decide issues of national security. Once again, constrains can legitimately be placed on public employees where national interests calls for it.[385] This justification gives moral authority to its employment decisions. Fourthly, the constitutional constraints to which it is subject to clearly does not apply to many private employment relationships. Furthermore, the state is a bureaucratic structure and the hierarchy it establishes calls for a form of accountability not know to the private

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[381] Fredman, S & Morris, G *Public or Private? State Employees and Judicial Review* (1991) 107 *LQR* 298 at 309.
[382] Fredman (note 28) at 5.
[383] Morris (note 296) at 171.
[384] Fredman (note 381) at 310.
[385] Ibid, at 310-311.

sector.[386] The last feature alluded to by Fredman *et al* is that the government derives its revenue to pay employees primarily from taxation, rather than profits.[387] This changes the nature of the power relations within employment. When making its decisions the State is therefore largely subject to political and macroeconomic rather than market-led constraints.[388]

Stewart asserts that the employment relationship is essentially one characterised by subordination and submission. In the public sector, these features are born from different premises.[389] Stewart identifies the traditional arguments for distinguishing the state from the private sector which have been presented as the following. Firstly, the capital-labour dichotomy is absent in public employment.[390] Secondly, the bureaucratic nature of public sector employment distinguishes itself from the private sector.[391] Lastly, the government is a different industry to private sector and axiomatically necessitates a different form of regulation.[392]

He, however, looks beyond these conventional justifications and opines that the differences between the two sectors originate primarily in two interrelated phenomenon. Firstly, the rationale for decision-making is political rather than economic or profit induced. Beyond this, social and ideological factors impact on the decision. In this regard, public interest is placed at the centre of the decisions makers' considerations. Similarly, decisions are constrained by a set budget and political goals can override commercial concerns[393], whereas in private employment, decisions are subject to market control.[394]

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[386] Ibid, at 311.
[387] Ibid.
[388] Fredman (note 28) at 5.
[389] Stewart, A *The Characteristics of the State as Employer: Implications for Labour Law* (1995) 16 *ILJ* 15 at 16.
[390] Ibid.
[391] Ibid.
[392] Ibid, at 16-17.
[393] Ibid, at 17-18.
[394] Ibid, at 18.

The second phenomenon is that the source of the authority to make the decision in each sector is different.[395] In the public sector, the decision gains its authority from the populace and is thus 'an expression of public power and carries the authority of the popular will and often carries the force of law'.[396] In private relationships, the decisions are based on contractual power and the authority is derived from the ownership of capital. These two phenomena converge through the political process.[397] The employment decisions which result thus hold the authority of the popular mandate.[398]

Morris identifies further characteristics of the State which requires its autonomy as employer to be truncated in ways not necessarily mirrored in the private sector.[399] She focuses on a particular distinctive feature, namely, the principle of democratic accountability, which places further constrains on the conduct of the state-as-employer.[400] The first constraint is organizational.[401] The delegation of responsibility is inherent in both the public and private sector, however, in the former, there is a politically accountable person to answer for them.[402] The second constraint is the use of public money.[403] Whereas private employers can structure their employment contracts and practices with much discretion, [404] in the public sector, these arrangements would open themselves up to scrutiny by the Public Service Commission, the Public Protector, and the Auditor General, amongst others. Lastly, the State's autonomy is further constrained in that where any wrongdoing is perpetrated by one of its employees it cannot conceal this occurrence as a private employer might be able to.[405]

After this analysis on the distinctive features that attach to the state-as-employer, it can be correct to contend that there are significant differences between the public and

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[395] Ibid, at 17.
[396] Stewart (note 389) at 17.
[397] Ibid.
[398] Ibid.
[399] Morris (note 296) at 176-177.
[400] Ibid, at 174.
[401] Ibid.
[402] Ibid.
[403] Ibid.
[404] Ibid.
[405] Ibid, at 175.

private employment. However, to what extent should these differences impact on the way in which public sector employment is regulated in South Africa?

As was mentioned beforehand, the constant struggle in attempting to reach a consensus as to whether the relationships is a private or public one has purportedly been answered in *Chirwa*. In effect, what this case has done is that it has relocated public sector employment disputes into the realm of labour law and placed it beyond the reach of section 33 of the Constitution and PAJA. By overruling *Zenzile*, it has disregarded the contention that the state's distinct characteristics impacts on every facet of its existence, and this includes it employment relationships with their employees. Although there has been a gradual tendency to equate the private sector with the public, as evidenced by South Africa's labour legislation, this approach ignores the overt reality that the distinctive features attaching to the state-as-employer, thwarts a complete integration of state conduct into the labour laws.

There is thus a clear need for a form of regulation that accounts for features unique to the public sector employment relationship. As statutes are manifestations of the will of the people, there is a clear public interest when decisions are taken in accordance with the statute as public duties are thus imposed. Where decisions are confined to the private realm of labour law, the regulation afforded does not answer to values of state accountability, transparency and responsiveness. When adjudicated under the LRA, the conduct is not tested against the requirement of lawfulness but rather fairness. As the state exercises power entrusted to it by our laws, it is compelled to act within the constraints of the rule of law. If it fails to do this, surely the legality of its conduct should be tested under the appropriate means. The purpose of section 33 of the Constitution is expressly to control the exercise of this power and its application should not be negated when lawfulness of state conduct needs to be tested.

VI. Public law versus private law regulation

When the state engages in an employment relationship, questions arise as to whether the respective relationship should be characterized as being public or private. On

this basis, a determination can be made as to which body of law should regulate the respective relationship. In public sector employment, state employment decisions tend to straddle the public/private law divide, thus, providing a definitive answer as to the appropriate form of regulation is, at many times, a difficult exercise. Approaches towards resolving such a dilemma vary. On the one hand, some have argued that the relationship between the state and its employees are akin to the ordinary private employment relationship, and should thus be regulated by private law. On the other hand, certain arguments lend themselves to the idea that public elements are injected into the employment relationship and its presence necessitates regulation by public law. This chapter of the dissertation focuses on this very divide and argues that the high premium placed on maintaining this divide is unworkable and, at best, unwarranted in public sector employment. Instead, it proposes that the focus should shift to a clear analysis on the question as to whether the exercise of state-as-employer conduct necessitates administrative law controls.

In South Africa, employment contracts are generally regarded as private law concerns. In this respect, any dispute arising from the relationship is either regulated by labour law or the common law of contract, depending on the election made by the complainant[406] Either way, private law claims dominion over these employment disputes. In public sector employment, however, relationships are regulated by legislation, regulations and contract, resulting in a blurring of the public/private law divide. It would therefore necessarily follow that the state-as-employer can exercise both public and private powers within the relationship. An exercise of public power would make state conduct susceptible to judicial review under administrative law, whereas the exercise of private power would not.

The above is an attempt at simplifying a rather complex issue. When delving into the true nature of public sector employment, it becomes evident that the contract, at many times, disguises the exercise of public power by the state. Attempting to delineate the

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[406] See *Fedlife* (note 67) where a claim based on the breach of contract was held to exist alongside the statutory protections of labour laws.

exercise of private power from public power by relying on the source of the power, namely, the contract or legislation has proven to be defective. This is particularly so because, as our law well recognizes, public power can emanate from a contract.

1. 'Purely contractual' versus 'public law' approaches

South African law is well-accustomed with the debate centered on contracts entered into by public bodies. Two differing approaches have been adopted by our courts. Firstly, the 'purely contractual' approach, as the name suggests, proposes that the relations between the parties are entirely contractual devoid of any public law elements.[407] Secondly, the 'public-law' approach proposes that the contract cannot be separated from 'its public law framework'.[408] Hoexter notes that with the former approach, the public nature of the state is made to seem irrelevant and administrative principles are thus 'neatly sidelined', whereas, with the latter approach these factors are given centre-stage.[409] Notably, in the pre-democratic era, the 'purely contractual' approach dominated.[410] This, however, changed with the advent of the *Zenzile* judgment where the Appellate Division (now the SCA) adopted the 'public law' approach resulting in the application of administrative law principles of natural justice to purely contractual relations.[411] In this light, the Court held that the fact that the employer was a public body

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[407] Hoexter, C *Contracts in Administrative Law: Life After Formalism* (2004) 121 *SALJ* 595 at 599.
[408] Ibid, at 605.
[409] Ibid, at 599, 605.
[410] Hoexter (note 45), at 400. In *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A). The appellants , racially classified as Indians, were entitled to occupy land under the Native Trust and Land Act 18 of 1936. A few years later, they were given notice to vacate the premises, a decision purely based on their race. The Court rejected their argument that the Minister acted discriminatory and that he had ulterior motives. It was held that the Minister had been exercising purely contractual right and not a statutory power. Even though the permit and their terms and conditions were governed by the Act, the matter became a contractual one as soon as the permit was granted and accepted by the appellants. Therefore, the occupiers liability to be given notice arose from their voluntary consent based on the contract, and not on the statutory provisions. The termination of the contract was not governed by any statutory provision. In his dissenting judgment, Schreiner JA criticised the majority, and adopted the 'public– law' approach. He held that the Minister did not act as a private owner, but rather as a public authority who received his powers from the statute alone and had to act within its limitations. Thus the Minister could only act within the terms of the Act and the regulations made under it. See Hoexter (note 45) at 399-400. This author opines that the Court in *Mustapha* falsely attempted a 'total fissure' between contractual powers and the statute which was the actual source of the power. See Hoexter (note 45) at 404.
[411] Ibid, at 401. Notably, in this case, the Court's decision relied on the adverse effect of the dismissal and the disciplinary nature of the decision. The power to terminate the contract was sourced in the statute, therefore, the Court held that the decisions amounted to administrative action.

exercising public powers in terms of a statute, made its decision applicable to administrative law principles.[412]

In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[413](*Cape Metro*), purely contractual reasoning was relied on in the context of an outsourcing agreement entered into pursuant to a tender process. In terms of a contract, a private firm would collect levies on behalf of the local council and claim commission on the levies collected. The council cancelled the contract on the basis of fraud, without hearing the respondents. The SCA held that the creation of the contract involved the exercise of public power, however, the termination entailed the exercise of private, contractual power.[414] Therefore, it did not constitute administrative action for the purposes of section 33 of the Constitution, and therefore did not attract the principle of procedural fairness.[415] The Court furthermore emphasized the equality of bargaining power between the parties when concluding the contract.[416] In this regard, when the council terminated the contract, it did not act in a position of superiority or authority.[417]

In *Logbro Properties CC v Bedderson NO and Others*[418] (*Logbro*), the respondent challenged a tender award granted to a third party by the provincial government in that it allegedly failed to comply with tender conditions. It was argued largely on the basis of *Cape Metro* that a tender contract between parties gave the public authority contractual rights that could be exercised without regard to public duties of fairness. The SCA chose to retreat from this general proposition.[419] It held that *Cape Metro* was a case that established that a public authority's invocation of a contractual power of cancellation is not an exercise of public power 'in a contract concluded on equal terms with a major commercial undertaking, without any element of authority deriving from its public position'.[420] The Court held that *Cape Metro* turned on its own facts. However, in the

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[412] *Zenzile* (note 50) at 270.
[413] 2001 (3) SA 1013 (SCA).
[414] *Cape Metro* (note 413) at para 18.
[415] Ibid.
[416] Ibid.
[417] Ibid.
[418] 2003 (2) SA 460 (SCA).
[419] Ibid, at para 10.
[420] Ibid.

present case, the province had dictated the tender conditions and was undoubtedly acting from a position of superiority by virtue of being a public authority.[421] Thus, even if the tender conditions constituted a contract (which was not in issue), the principles of administrative justice still framed the contractual relationship.[422]

The Court in *Logbro* therefore overruled *Mustapha*[423]. However, *Cape Metro*, in its 'undiluted form', was relied on by Mthiyane JA in *Chirwa SCA*, where the Judge held that a dismissal in the public sector was based on contract and did not involve the exercise of public power.[424] It held that Transnet, in dismissing its employee, acted as an employer, not as a public authority. Cameroon JA however insisted that *Cape Metro* had left the core doctrine of *Zenzile* intact, that is, when terminating a contract of employment entered into by virtue of statutory powers, a public body engages in administrative action.[425]

It is thus evident from the above jurisprudence that various factors have been used in determining whether administrative law ought to govern contracts entered into by public bodies.[426] The general position that can be evidenced is that where action taken in a contractual context entails the use of public power, it is governed by the Constitution and by principles of administrative law.[427] The terms of the contract will however inform the exact ambit of the duty to act fairly.[428] The termination of the contract will generally entail the use of public power except where equality of bargaining power is a feature.[429]

Although not in an employment context, the judgment of *Mustapha*, *Cape Metro* and *Logbro* have direct relevance to the issue relating to the public sector employment relationship. In this regard, the two approaches adopted by our courts exemplifies the

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[421] Ibid, at para 11-14.
[422] *Logbro* (note 418) at para 11-14.
[423] See fn 10.
[424] Hoexter (note 45) at 404; *Chirwa SCA* (note 73) at para15.
[425] *Chirwa SCA* (note 73) at para 54.
[426] Namely: equality of bargaining power, source of the power, nature of the power, etc.
[427] Hoexter (note 45) at 403.
[428] Ibid, at 404.
[429] Ibid.

complexities in dealing with a contract to which the state is party to. The need to scrutinize the relationship between the parties to such contract conforms to the notion that the state, notwithstanding the contract, is bound by public duties and its every action bound by the rule of law, and thus opens itself up to administrative law controls.

From the above jurisprudence, it can further be evidenced that the state cannot disguise its exercise of public power through the device of the contract. Partington *et al*, note that when courts insist on distinguishing the contract (private law) from public administration (administrative law) this 'ignores the reality that statutory bodies are inevitably required to use contract as a means to carry out their functions and duties, and exercise their powers'.[430] Thus, where the state acts with a measure of authority, public elements negate the assumption that the contract is purely private.[431] This dissertation does recognize that it is indeed fallacious to approach the public and private domains as hermetic spheres, particularly where the state is a party to a contract. As an employer, it acts in both a private and public capacity. Determining the exact power exercised has proven to be a taxing and, at many times, futile exercise. The existence of the contract cannot be the basis for determining the nature of the power exercised by the state. This is both erroneous and has been out rightly rejected by our courts. Through the use of expedient logic it could be useful to merely state that private law should regulate private conduct and the same could be said of public law and public conduct. However, any meaningful engagement with the issue would suggest a more pragmatic and authentic approach. The 'public law' approach typifies the stance taken in this dissertation, namely, that the state can never really detach itself from the controls of administrative law. Its contracts cannot be viewed as an ordinary, private contract. The unique characteristics that attaches to the state, places constraints on its conduct that are not present in private relationships. In summary, this section has sought to illuminate the approaches taken by the courts in regard to contracts entered into by public bodies.

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[430] Partington (note 119) at 391.
[431] Burn, Y *Government contracts and the public/private law divide* (1998) 13 *SAPL* 234 at 244.

2. Delineating state-as-employer conduct

The 'purely contractual' versus 'public law' debate informs our understanding as to how courts ought to characterize public sector employment relationships. This dissertation will henceforth analyse and discuss the manner by which our courts have sought to delineate state-as-employer conduct in public sector employment relationships.

The dawn of the constitutional era introduced section 23 and section 33 of the Constitution. The overlap between the respective rights has been mentioned at length in this dissertation and will not be repeated here. Suffice to say, this development spurred the debate as to how the powers exercised by the state in an employment relationship ought to be characterized, particularly where labour rights have been conferred a certain status within the Constitution and public sector employees are included within its ambit.[432] Two approaches to this problem are evident. The first approach states that all employment disputes are now governed by labour law by virtue of section 23 of the Constitution. Recourse to PAJA and section 33 are thus excluded.[433] The second approach states that the exercise of public power in a public sector employment relationship attracts both administrative and labour law.[434]

This dissertation argues for the applicability of administrative law controls to public sector employment disputes. This, however, does not axiomatically lead to the conclusion that review under the PAJA will also follow. The enquiry into whether PAJA is applicable, although closely related to the question as to whether the body of administrative law applies, is more focused and specific. This enquiry is paramount because even if conduct does not amount to administrative action under the PAJA, it can still be the subject of review under either section 33 of the Constitution or the principle of constitutional legality.[435]

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[432] Hoexter (note 45) at 194.
[433] Ibid.
[434] Ibid.
[435] Ibid, at 127-128.

3. Is state-as-employer conduct subject to PAJA?

Before the advent of *Chirwa*, our courts have on many occasions answered the question as to whether state employment decisions constitute administrative action by having due regard to the definition of administrative action as provided for under the PAJA.[436] Stacey notes in his article that the dissimilar views around the issue as to whether state employment decisions amount to administrative action or not, centers on the positive elements provided in the definition.[437] Notably, the most troublesome section is whether the power exercised or the function performed is 'public'.[438]

In order to be the subject of judicial review under the PAJA, conduct has to amount to the exercise of public power or the performance of a public function. Whether the power being exercised is public or the function being performed is public is a determination which thus lies at the heart of administrative law. Our courts have not readily defined 'public' in terms of both power and function, but have proposed certain indicators that might assist in this determination. 'Public' power or function is generally thought to be synonymous with a coercive or superior exercise of authority[439] which has an effect on the public.[440] Other relevant factors which courts have considered in determining 'public power' is the source of the power[441] and the degree of state control over the function.[442]

Notably, none of the aforementioned factors are decisive on their own but suffice to say that they are all equally relevant in making a determination. In *SARFU*, the Constitution Court held that while the source of the power is relevant in determining whether the power is public or not, others factors that carry equal weight in an enquiry of this kind include 'the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely related it is on the one hand to policy matters,

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[436] See section 1 (a) of the PAJA.
[437] Stacey, R *Administrative Law in Public Sector Employment Relationships* (2008) 125(2) *SALJ* 307 at 312.
[438] Ibid, at 313.
[439] Hoexter (note 45) at 4.
[440] Ibid.
[441] Ibid.
[442] Ibid.

which are not administrative, and on the other hand to the implementation of legislation, which is'. [443]

In *SAPU*, the Court was confronted with a challenge to the National Commissioner's decision to introduce a new shift system for certain members of the police service. The unions brought their claim on PAJA and section 33 of the Constitution. The court found that the commissioner was not exercising a public power nor performing a public function when he made the decision. The source of his powers was section 24(1) of the Police Act 68 of 1995.[444] In this regard, the Court did acknowledge that the Commissioner's power derived from a public source, but held that the source of the power, while relevant, was not necessarily decisive.[445] With reference to the *SARFU* judgment, the court looked beyond the legislative source and found that there was nothing inherently public about setting the working hours of police officers.[446] Further, there was no public law concern. The matter fell more readily within the domain of the contractual regulation of private employment relations. An important factor in Murphy AJ's judgment was that the workers were in the same bargaining position as their employer when the collective agreement between the unions and the Commissioner was concluded. As the change in the shift system was effected in terms of this respective agreement, the relationship was viewed as private and thus subject to regulation under labour law.[447]

In *POPCRU & Others v Minister of Correctional Services & Others*[448](*POPCRU*), a contrary view was taken to *SAPU*. The former case involved the dismissal of a number of correctional officers for refusing to work. The Court held that the dismissal need not affect the public at large in order for it to amount to the exercise of public power. Of paramount importance is that the power 'has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own

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[443] *SARFU* (note 330) at para 143.
[444] *SAPU* (note 92) at para 51.
[445] Ibid.
[446] Ibid.
[447] Ibid, at para 53.
[448] [2006] 4 BLLR 385 (E).

private interest or at his or her own whim'.[449] In this case, the Court held that the decision to dismiss did constitute the exercise of public power. Further factors that fortified this conclusion was that the power to dismiss and employ derived from the statute, the department was subservient to the Constitution generally and to section 195[450] 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 respective statute.[451]

It is evident that no definitive formula exists for determining whether state-as-employer conduct amounts to the exercise of public power under the PAJA. Notably, the factors mentioned in *SARFU* have been used in varying degrees in the cases. This

[449] Ibid, at para 53.

[450] **195. Basic values and principles governing public administration**

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
    1. A high standard of professional ethics must be promoted and maintained.
    2. Efficient, economic and effective use of resources must be promoted.
    3. Public administration must be development-oriented.
    4. Services must be provided impartially, fairly, equitably and without bias.
    5. People's needs must be responded to, and the public must be encouraged to participate in policy-making.
    6. Public administration must be accountable.
    7. Transparency must be fostered by providing the public with timely, accessible and accurate information.
    8. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
    9. 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
    1. administration in every sphere of government;
    2. organs of state; and
    3. 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.
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.

[451] *POPCRU* (note 449) at para 54.

dissertation has made it quite patent that the source of the power alone cannot determine the proper characterization of the power exercised. In public sector employment relationships, whether the conduct performed by the state is made in terms of the employment contract or legislation, the relationship contains both private and public elements. This is so for the specific reason that 'public-policy rules have been penetrating labour law and rules protecting the individual have been penetrating public service law'.[452] Due to this amalgamation, determining the rules that should apply to the employment relationship is made even more complex. Similarly, determining whether the conduct should amount to the exercise of public power is also further complicated.

4. The *Chirwa* judgment

Ngcobo J

In the *Chirwa* judgment, Ngcobo J framed the issue as follows: Does Chirwa have more than one cause of action?[453] He notes that two schools of thought have developed around this question.[454] The first school of thought adopts the view that all employment disputes are to be governed under the labour law and section 23 of the Constitution, to the exclusion of administrative law, the PAJA, and section 33 of the Constitution.[455] The second school of thought adopts the view that the exercise of public power attracts both administrative and labour law, thus conferring more than one cause of action on the litigant. This view has equally been adopted by a long line of cases.[456]

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[452] Supiot, A *Work and the public/private dichotomy* (1996) 135(6) *International Labour Review* 653 at 661.

[453] *Chirwa* (note 1) at para 126.

[454] Ibid, at para 128.

[455] This view has been adopted by a long line of cases. In *Hlope* (transfer of employees does not constitute administrative action); *SAPU* (setting the working hours of police officers does not constitute administrative action); and *Haschke*, 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.

[456] In *POPCRU* (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 & another v MEC for Welfare, Eastern Cape* (2001) 1 ALL SA 567 (Tk) at para 29.

The Justice further states that the antagonism between the schools of thought in essence relates to the question of whether the dismissal should be characterized as the exercise of public power.[457] In this regard the Justice draws a fine line between the exercise of public power and conduct amounting to administrative action in terms of section 33 of the Constitution. It was held that the only time a public employee can have recourse to the PAJA is if the latter power is established. One therefore needs to ask whether the task performed is administrative action or not in terms of section 33.[458] On the facts of this case, the Justice held that the mere fact that Transnet is an organ of state does not transform its conduct into administrative action.[459] The Justice referred to *SARFU* and endorsed the view that section 33 does not include all executive decisions.[460] He further noted that the Constitution itself draws a fine line between administrative law and labour relations.[461] In this regard, as Chirwa's claim was more of an employment dispute, it did not amount to administrative action in terms of section 33, and thus it would fail to be considered under the PAJA.[462] He is therefore of the opinion that section 23 of the Constitution, and not section 33 deals with employment disputes, including the public sector. The Justice thus bypasses the *Zenzile* judgment in so far as it applied administrative law. In conclusion, the Justice held that Chirwa does not have two causes of action as the conduct of Transnet in this regard is governed by section 23, which is given full effect to by the LRA.[463]

Ngcobo J's reasoning thus favours the first school of thought and would naturally follow from his aforementioned arguments relating to the issue of jurisdiction. He clearly states that the Labour Court has exclusive jurisdiction in all employment disputes, and by

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(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).

[457] *Chirwa* (note 1) at para 129.

[458] Ibid, at para 139.

[459] Ibid, at para 142.

[460] Ibid, at para 140.

[461] Ibid, at para 143.

[462] Ibid, at para 142.

[463] Ibid.

parity of reasoning, dismissal in the public sector would fall under the LRA, not PAJA nor the Constitution. Notably, both Ncgobo J and Skweyiya J fail to address the specific issue as to whether the dismissal amounted to the exercise of public power under the PAJA. Evidently this is so because Ncgobo J relied directly on the Constitution to negate the application of administrative law to this particular dispute area. This dissertation argues that this formalistic approach adopted by the majority ignores the salient fact that administrative law does indeed have a bearing on the exercise of state conduct in its employment relationship. Even if the conduct does not amount to the exercise of public power as understood under the PAJA, it nevertheless amounts to administrative action under section 33 of the Constitution. As was argued throughout this dissertation, the pigeonholing of state-as-employer conduct encourages superfluous formalism which dispenses with the essential enquiry into the true exercise of power by the state.

That being said, the former Justice did, however, hold that the dismissal amounted to an exercise of public power. In this regard, Ncgobo J stated the following:

> '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." Indeed, in *Hoffmann v South African Airways*, 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."'[464]

In the context of Ncgobo's judgment, this assertion seems misplaced. Firstly, he states that Transnet's conduct amounted to public power. Following this, he states that

[464] *Chirwa* (note 1) at para 138.

this conduct, however, does not amount to administrative action under section 33 of the Constitution. It would thus follow that the ostensible public power exercised would therefore not be reviewable under PAJA either. Notably, the majority in *Chirwa* did not pronounce on the last statement.

In rebuttal, this dissertation argues that all public power now derives its force from the Constitution and is reviewable, if not under PAJA, under section 33 of the Constitution or the principle of constitutional legality.[465] Either way, administrative law principles would apply. Administrative law could be perceived as having three main objectives. Firstly, 'it should control government power and protect individual rights', secondly, it ensures that 'the administration effectively performs the tasks assigned to it', or lastly, it ensures 'governmental accountability, and foster participation by interested parties in the decision-making process'.[466] Stewart thus states that without having to adopt any which view, it can be seen that the chief concern of administrative law is to control public power. If Transnet indeed exercised public powers when dismissing Chirwa, as Ncgobo J noted, one questions whether his justifications for excluding this conduct from the control of administrative law are warranted. This judgment is as much a strain on the eye as it is on the logic. Be that as it may, the majority in *Chirwa* assert that the dismissal of a public sector employee does not amount to administrative action under section 33 of the Constitution, and that the conduct should more appropriately be governed by the protections of labour law.

Langa CJ

At this point in Langa CJ's judgment, he had already conceded that Ms Chirwa had a claim based on section 33 of the Constitution, and therefore in terms of PAJA. He refers to section 1 of the PAJA, and states that part (a)(ii)[467] is the relevant provision.[468]

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[465] Ngcukaitobi (note 46) at 789.
[466] Stewart (note 389) at 22.
[467] Section 1 of the PAJA: **Definition**
In this Act, unless the context indicates otherwise-
'administrative action' means an decision taken, or any failure to take a decision, by –
(a) an organ of state, when-
[...]

Of particular significance in his judgment is his enquiry into whether the power is indeed sourced in legislation. He states that something more is required than merely relying on the fact that the body was created by Statute. He notes that there are thus different types of executive decisions which do not amount to administrative action. One needs to look into the source of the power to determine whether the action was administrative action as understood under PAJA, and not an employment decision, which, does not amount to administrative action. In this case, the Justice held that the power to terminate the employment contract was not sourced in legislation, but rather in the contract itself. Transnet's conduct thus constituted an executive, employment decision and not administrative action.[469] Langa CJ's observations are interesting in this regard. It is implied that even though the source of the power might not have been statute, the exercise of public power can nevertheless be derived from the contract. Therefore, Langa CJ further enquires into the issue of whether Transnet exercised public power or performed a public function. The relevant factors listed by the Chief Justice in making this determination are the following: 'the relationship of coercion or power that the actor has in its capacity as a public institution'; 'the impact of the decision on the public'; 'the source of the power'; and 'where there is a need for a decision to be exercised in the public interest'.[470] In considering these factors, the Court exercises its discretion.

To the first factor, Langa CJ referred to *Cape Metro* and held that because of the equal power relations that existed between Chirwa and Transnet on the conclusion of the contract, Transnet could not have been exercising administrative action when terminating the respective contract. Further, it was held that Chirwa's dismissal did not affect the public at large. As was noted, Langa CJ found that the source of the power was the contract. Although not decisive, this factor does strongly insinuate that the power exercised was not public. Langa CJ also referred to *POPCRU* and held that Chirwa's case

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

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

[468] *Chirwa* (note 1) at para 181.

[469] Ibid, at para 182-185.

[470] Ibid, at para 186.

was distinguishable because when the third respondent (Mr Smith) dismissed Chirwa, he acted in the private interest of Transnet and not in the public interest.

In this light, the Chief Justice held that Transnet's decision to terminate Chirwa's contract did not constitute the exercise of public power or the performance of a public function. On the facts of this case, the dismissal was not administrative action in terms of the PAJA. The Justice however makes it explicitly clear that it is possible for a dismissal of a public sector employee to constitute administrative action under the PAJA. This would have to depend on the specific merits of the case. [471]

5. Comment

It is submitted that the Chief Justice's arguments in this regard, albeit in the minority, are the most instructive. It conforms to the Court's prior decision in *Fredericks*, which was not explicitly overruled by the majority but rather tenuously distinguished. The Chief Justice's argument further retains the *Zenzile* ruling as part of our law. The Justice thus acknowledges that there remains the possibility that employer actions, albeit not in *Chirwa*, can fall under the province of the constitutional right to just administrative action and the PAJA. This dictum is important for it recognises that public sector employment relationships lend themselves to oversight by administrative law controls particularly because the state, at many times, wields power as an 'instrument of public policy' which adversely affects the rights of the respective employee. The unique characteristics of the state-as-employer come to bear on the question as to the manner in which these respective employment relationships should be characterized. It has been noted that it is indeed not a purely private one. The public elements present in the relationship strengthen such an assertion. It is thus evident that the state is capable of exercising public power in its employment relationship, and when it does so, its conduct should be subject to the controls of administrative law.

Evident from the Langa CJ's judgment, the enquiry into the exercise of the power raises the ostensible dichotomy that exists between the public and the private realms.

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[471] *Chirwa* (note 1) at para 186-194.

From an assessment of the above jurisprudence, it can be seen that crucial in characterizing state-as-employer is the presence, or absence, of public elements within the employment relationship. This dissertation argues that the pervasiveness of state employment conduct extends not merely to its relationship with its employees, but also to its relationship with its citizenry. As the state provides services vicariously through it employees, it has a direct, or indirect, link with the people it serves. Any decision that seeks to further the public interest and affects both the employee as well as the public, or at the very least involves public considerations, calls for regulation by administrative law in terms of section 33 of the Constitution. The majority in *Chirwa* have effectively held that conduct in public sector employment relationships cannot be the subject of judicial review. However, this ignores both the unique character of the state, the pervasiveness of its conduct, and its relationship with the public, not merely the respective employee. These employment relationships are unique and cannot be equated with private employment. The political dimension present in the relationship includes a plurality of interests and for this reason the public sector is encased in a much more complex relationship as opposed to their private sector counterpart.[472]

By privatizing the dispute and discounting the public interest, the state is not held accountable. A clear example would be where the state retrenches a large number of its prison wardens and this affects not only the employees but also the running of the prison, by privatizing this type of dispute, no consideration is paid to the effect the decision has on the provision of the service. This aspect cannot be ignored and should be susceptible to judicial review under the PAJA. This conforms to the clear purpose of section 33 of the Constitution which seeks to scrutinize state conduct in order to ascertain whether it was made within the bounds of the law. Therefore, in determining whether state conduct should be subject to administrative or labour law principles, a link needs to be made between conduct by the state and whether it furthers or impedes public interests. The factors mentioned by Langa CJ, in *Chirwa*, clearly typify this approach.[473] His judgment strongly reinforces the notion that employment decisions can have ramifications that

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[472] Storey *HR Management in the public sector* 1992a:56 in Fredman (note 380).
[473] See fn 473.

affect the public. The issue thus extends beyond the confines of the employment relationship. State action should at the very least be scrutinized in order to determine whether it is acting within the constraints mentioned above. As was noted earlier, the main purpose of section 33 of the Constitution is to act as a bulwark against abuse of public power and so too is the purpose of PAJA, as it purports to give effect to this right. Issues of accountability are thus paramount when a body exercises public power as understood by PAJA.

Therefore, this dissertation suggests that the approach espoused by Langa CJ be adopted in addressing public sector employment disputes. At its core, the judgment acknowledges the dual role played by the state in this respective relationship. In addition, this approach cuts across the public and private divide which, as this paper has suggested, disguises and obscures the true nature of the power being exercised by the state-as employer. By adopting Langa CJ's approach, we can appreciate the transformed role that the state has adopted over time, namely, the modern, bureaucratic state which, amongst other things, provides services to it citizenry through a controlled political machine. It further acknowledges that the medium through which they act is their employees, and that certain state-as-employer conduct needs to answer to its appropriateness within the scheme of both industrial relations and proper public administration.

Furthermore, this dissertation acknowledges, as the court in *Zenzile* did, that the public sector employment relationship is not akin to the ordinary master-servant relationship. The state does indeed occupy a special position in relation to its employees. This approach further takes into consideration the unique characteristics that attaches to the state-as-employer which constrain it in ways that are not found in the ordinary private employment relations. This dissertation thus argues that certain state-as-employer conduct should be subject to administrative law control and that the existence of section 23 of the Constitution should not be able to negate the application of section 33 of the Constitution to public sector employment disputes.

It should be noted that this dissertation is aware of the fact that in *Zenzile*, the power to terminate the contract derived from the statute and on this basis is

distinguishable from *Chirwa*. It is further acknowledged that Chirwa's dismissal did not involve the exercise of public power. Indeed, the outcome of the *Chirwa* matter was correct, however, the reasoning of the majority seems flawed. This casuistry leads to a situation which fails to give effect to the exact constitutional purpose of section 33.

VII. Conclusion

Through a critical analysis of the Constitutional Court judgment of *Chirwa*, this dissertation has sought to illuminate the troubling issues around public sector employment which has confronted our courts for so long. In this regard, it has traced the genesis of this particular employment to monarchial rule and progressively shown how this particular relationship has developed over time. The purpose being to enable a better understanding of the manner in which public sector employment is innately different from its private sector counterpart. This dissertation has attempted to show that the distinct characteristics attaching to the state-as-employer thwarts complete regulation by our labour laws. It has been argued that administrative law can control state-as-employer conduct in ways that labour law cannot. Contrary to the majority in *Chirwa*, this dissertation has endeavoured to show that section 33 of the Constitution should not be negated by section 23 and that an approach where rights are understood as complementary and indivisible should be preferred. This pays homage to a notion of constitutional justice which has as it purpose the protection of all employees from the abuse of both state power as well as employer power.

This dissertation does, however, acknowledge that there is indeed merit to the majority judgments in *Chirwa*. Their concerns relating to forum-shopping, the multiplicity of laws and overlapping jurisdictions are issues which should be prevented. It is, however, argued that the solution to this problem should not be the negation of section 33 of the Constitution. If the legislature desires such a result, it should amend the current legislation to reflect such an intention. This seems to be the only apposite solution to the public sector debate. As evidenced by the cases post-*Chirwa*, courts seem reluctant to follow the judgment laid down in *Chirwa*, particularly where *Fredericks* still stands as law.

This dissertation further sought to illustrate that an attempt to delineate state-as-employer conduct as either constituting public or private acts does not conform to a proper understanding of the dual role that the state plays in these respective employment paradigms. It has been shown that where the employment relationship is regulated by both legislation and contract, public elements are injected into this seemingly 'private' relationship. The state-as-employer is therefore vested with a certain authority which section 33 and the PAJA seeks to control and regulate. By virtue of the *Chirwa* judgment, decisions made by the state in an employment context are not susceptible to regulation by this respective right. This approach ignores the clear public interest in subjecting these decisions to principles of lawfulness. It is trite that when the state acts, it must stay within the bounds of the law. By removing state-as-employer conduct from the realm of administrative law, a key constitutional principle is lost. The question should indeed be whether there is a clear need for administrative law regulation in each case.

This dissertation has thus argued that administrative law should find application in public sector employment disputes. It does, however, acknowledge that not all state-as-employer conduct will amount to the exercise of public power, and thus be subject to review under the PAJA. It has noted that in determining whether conduct amounted to the exercise of public power, there has been no definitive formula. This dissertation prefers the method espoused by Langa CJ in making this determination. It acknowledges that at many times the state acts from a position of authority in its employment relationship, and that the existence of the contract should not disguise this fact. Furthermore, it recognizes that the public sector employment paradigm is not akin to the ordinary, private employment relationship. This is particularly so because when the state's conduct does amount to the exercise of public power in terms of PAJA, the ramifications extend beyond the employment relationship and also affects the public. Where there is a clear public interest in reviewing state conduct, then administrative law should find application.

In summary, it is argued that public sector employment disputes should be subject to regulation by both administrative and labour law. Where conduct amounts to the exercise of public power or the performance of a public function, this conduct should be

reviewable under the PAJA, provided the conduct meets the remaining requirements set out in section 1 of the PAJA. These submissions are made in light of the findings that the Constitutional Court in *Chirwa* has indeed not settled the law relating to public sector employment disputes.

BIBLIOGRAPHY:

Secondary Sources

Books

- Corby, S & White, G 'Employee Relations in the Public Services: Themes & Issues' (Routledge: 1999).
- Davies & Freedland 'Kahn-Freund's Labour and the Law' (3 ed Stevens & Sons Ltd London 1983).
- Du Toit, D *et al* 'Labour Relations Law: A Comprehensive Guide' (5th ed LexisNexis Butterworths Durban 2006).
- Hepple, B 'The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945' (Mansell Publishing Limited London 1986).
- Hepple, B & Fredman, S 'Labour Law & Industrial Relations in Great Britain' (2nd ed Kluwer Law and Taxation Publishers 1992).
- Hoexter, C 'Administrative Law in South Africa' (Juta & Co. Ltd Cape Town 2007).

Articles

- Burns, Y *Government contracts and the public/private law divide* (1998) 13 *SAPL* 234.
- Fredman, S & Morris, G *Is There A Public/Private Labour Law Divide* 14 *Comp. Lab. L.* 115.
- Fredman, S & Morris, G *Public or Private? State Employees and Judicial Review* (1991) 107 *LQR* 298.
- Garbers, C *The Battle of the Courts: Forum-shopping in the aftermath of Wolfaardt and Fredericks* 2002(1) *LDD* 97.
- Holness, D & Devenish, G *The Law in Relation to Employee Claims Relating to Dismissal: Jurisprudential Principle or Legal Pragmatism? Transnet Ltd v Chirwa* 2007 2 SA 198 (SCA) 2008 (71) *THRHR* 142.
- Hoexter, C *Contracts in Administrative Law: Life After Formalism* (2004) 121 *SALJ* 595.
- Morris, GS *Employment in Public Services: The Case for Special Treatment* (2000) 20(2) *Oxford Journal of Legal Studies* 167.
- Ngcukaitobi, T *Life After Chirwa: Is There Scope for Harmony Between Public Sector Labour Law and Administrative Law?* (2008) 29 *ILJ* 841.

- Ngcukaitobi T & Brickhill J "A Difficult Boundary: Public Sector Employment and Administrative Law" (2007) 28 *ILJ* 769.
- Partington, JP & van der Walt, JA *Does the Promotion of Administrative Justice Act Apply to Dismissals in the Public Sector? Transnet Ltd v Chirwa* (2007) 11 BLLR 10 SCA 2007 28(2) *Obiter* 388.
- Pillay, D *PAJA v labour law* (2005) 20 *SAPL* 413.
- Pretorious, P & Myburgh A *A Dual System of Dismissal Law: Comment on Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA) (2007) 28 *ILJ* 2172.
- Supiot, A *Work and the public/private dichotomy* (1996) 135(6) *International Labour Review* 653.
- Stacey, R *Administrative Law in Public Sector Employment Relationships* (2008) 125(2) *SALJ* 307.
- Stewart, A *The Characteristics of the State as Employer: Implications for Labour Law* (1995) 16 *ILJ* 15.
- Van Eck, S & Jordaan-Parkin, R *Administrative, Labour and Constitutional Law – A Jurisdictional Labyrinth* (2006) 27 *ILJ* 1987.

Others

- Explanatory Memorandum to the Labour Relations Draft Bill (*Prepared by the Ministerial Legal Task Team January 1995*) (1995) 16 *Indus. L.J.* 278.
- *Chirwa v Transnet (Ltd) & Others* [2008] 2 BLLR 97 (CC): Applicant's Heads of Argument. Available at http://www.constitutionalcourt.org.za [Accessed 28 November 2008].
- Madison, James *The Federalist*, No 51. Available at http://www.foundingfathers.info/federalistpapers/fed51.htm [Accessed 27 January 2009].

Primary Sources

Cases

- *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A).
- *Administrator, Transvaal & others v Zenzile* (1991) 12 ILJ 259 (A).
- *Administrator of the Transvaal & others Traub & others* (1989) 10 ILJ 823 (A).
- *Bula v Minister of Education* 1992 (4) SA 716 (TkA).

- *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA).
- *Chirwa v Transnet (Ltd) & Others* [2008] 2 BLLR 97 (CC).
- *Chirwa v Transnet (Ltd) & Others* Case No 1052/03.
- *Fedlife Assurance Ltd v Wolfaardt* (2002) 1 SA 49 (SCA).
- *Foster v Chairman, Commissioner for Administration & another* 1991 (4) SA 403 (C).
- *Fredericks and others v MEC for Education and Training, Eastern Cape and others* 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC); (2002) 23 ILJ 81 (CC).
- *Hlongwa v Minister of Justice, KwaZulu* 1993 (2) SA 269 (A); (1992) 13 *ILJ* 338 (A)
- *Hlope & others v Minister of Safety & Security & others* [2006] 3 BLLR 297 (LC).
- *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W).
- *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA).
- *Makambi v MEC, Education, Eastern Cape* (2008) 29 *ILJ* 2129 (SCA).
- *Mbayeka & another v MEC for Welfare, Eastern Cape* (2001) 1 ALL SA 567 (Tk).
- *MEC, Department of Roads &Transport, Eastern Cape & another v Giyose* [2008] 5 BLLR 472 (E).
- *Mkumatela v Nelson Mandela Metropolitan Municipality & another* [2008] JOL 21686 (SE).
- *Mogothle v Premier of the North-West Province* Case no J 2622/08.
- *Murray v The Minister of Defence* (383/2006) [2008] ZASCA 44 (31 March 2008).
- *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A).
- *Nakin v MEC, Department of Education & others* (2008) 29 ILJ 1426 (E).

- *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA).
- *Chirwa v Transnet (Ltd) & Others* [2008] 2 BLLR 97 (CC).
- *Chirwa v Transnet (Ltd) & Others* Case No 1052/03.
- *Fedlife Assurance Ltd v Wolfaardt* (2002) 1 SA 49 (SCA).
- *Foster v Chairman, Commissioner for Administration & another* 1991 (4) SA 403 (C).
- *Fredericks and others v MEC for Education and Training, Eastern Cape and others* 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC); (2002) 23 ILJ 81 (CC).
- *Hlongwa v Minister of Justice, KwaZulu* 1993 (2) SA 269 (A); (1992) 13 *ILJ* 338 (A)
- *Hlope & others v Minister of Safety & Security & others* [2006] 3 BLLR 297 (LC).
- *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W).
- *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA).
- *Makambi v MEC, Education, Eastern Cape* (2008) 29 *ILJ* 2129 (SCA).
- *Mbayeka & another v MEC for Welfare, Eastern Cape* (2001) 1 ALL SA 567 (Tk).
- *MEC, Department of Roads &Transport, Eastern Cape & another v Giyose* [2008] 5 BLLR 472 (E).
- *Mkumatela v Nelson Mandela Metropolitan Municipality & another* [2008] JOL 21686 (SE).
- *Mogothle v Premier of the North-West Province* Case no J 2622/08.
- *Murray v The Minister of Defence* (383/2006) [2008] ZASCA 44 (31 March 2008).
- *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A).
- *Nakin v MEC, Department of Education & others* (2008) 29 ILJ 1426 (E).

- *Nell v Minister of Justice & Constitutional Development & Another* [2006] 7 BLLR 716 (T).
- *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others* [2006] 10 BLLR 960 (LC).
- *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).
- *Pharmaceutical Manufacturers Association of South Africa and Another v In RE: The Ex Parte Application: The President of the Republic of South Africa and Others* (2000) 2 SA 674 (CC).
- *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E).
- *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1; 1999 (10) BCLR 1059.
- *Public Servants Association obo Haschke v MEC for Agriculture and other* (2004) 25 ILJ 1750 (LC).
- *Sachs v Minister of Justice & Diamond v Minister of Justice* 1933 AD 32.
- *SA Police Union & another v National Commissioner of the SA Police Service & another* (2005) 26 ILJ 2403 (LC); [2006] 1 BLLR 42 (LC).
- *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).
- *Simela & Others v MEC for Education, Province of the Eastern Cape & Another* [2001] 9 BLLR 1085 (LC).
- *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).
- *Transnet (Ltd) & others v Chirwa* (2007) 11 BLLR 10 (SCA).
- *United National Public Servants Association of SA v Digomo NO* (2005) 26 ILJ 1957 (SCA).

Statutes

- Agricultural Labour Act 147 of 1993.
- Basic Conditions of Employment Act 75 of 1997.

- Constitution of the Republic of South Africa 1996.
- Education Labour Relations Act 146 of 1993.
- Employment Equity Act 55 of 1998.
- Labour Relations Act 66 of 1995.
- Labour Relations Act 28 of 1956.
- Promotion of Administrative Justice Act 3 of 2000.
- Public Service Labour Relations Act 102 of 1993.
- Public Service Act of 1994: Proc 103/94 *Gazette* 15791 of 3 June 1994.
- Public Service Act 111 of 1984.
- Skills Development Act 97 of 1998.

Other

- Interim Constitution, 1993.
- ILO Freedom of Association and the Right to Organise Convention, 1948 (No 87).
- ILO Right to Organise and Collective Bargaining Convention , 1949 (No 98).
- ILO Discrimination in Respect of Employment and Occupation Convention, 1958 (No 111).