

ADMINISTRATIVE LAW IN PUBLIC-SECTOR EMPLOYMENT RELATIONSHIPS

RICHARD STACEY*

Teaching and Research Assistant, University of Cape Town

I INTRODUCTION

*One fine day in the middle of the night,
Two dead men got up to fight,
Back to back they faced each other,
Drew their swords and shot each other.*

— *Shoolyard rhyme, 19th Century*¹

This nonsense verse is a series of impossibilities. The possibility of the event or situation described in the second part of each line is negated by the conditions described in the first part. The combination of mutually destructive conditions makes each development in the vignette ridiculous. However appropriate impossibilities are in nonsense verse, they are wholly inappropriate in law. Where the law does contemplate an impossible situation something is wrong, and legal reasoning that leads to an impossible situation must be faulty.

A difference of opinion has emerged in the courts recently as to whether public-sector employment decisions are subject to the controls of administrative law or not. However, the reasoning relied on by the judges that have held that administrative law does not apply to public-sector employment leads to an impossible situation. The necessary rejection of this reasoning has important consequences for administrative justice and the role that it has to play in the legal control of public-sector employment relationships.

Administrative law is intended to control the exercise of public power. The right to administrative justice in s 33 of the Constitution ensures that exercises of public power remain in accordance with principles of procedural fairness, lawfulness and reasonableness.² The Promotion of Administrative

* BA (Hons) LLB (Wits). PhD candidate, Institute for Law and Society, New York University.

¹ Peter & Iona Opie *The Lore and Language of Schoolchildren* (1959) 24–6.

² Section 33 of the Constitution of the Republic of South Africa, 1996 reads: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must — (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial

Justice Act 3 of 2000 (PAJA) has been enacted to give meaning to this right, and is now the gateway to the constitutional right to administrative justice.³ Actions or decisions that fit the definition of 'administrative action' in s 1 of PAJA must adhere to the principles of administrative justice, and are reviewable by the courts where they fail to do so.

The courts have been required on a number of occasions over the last few years to decide if the actions of the state as an employer are subject to the controls of administrative law and must be consistent with the principles of administrative justice.⁴ A number of contrasting and conflicting approaches have emerged in the High Courts, the Supreme Court of Appeal (SCA) and the Constitutional Court, and it is the implications of these judgments that form the subject of this article. Plasket J held in *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*⁵ (POPCRU) that the Minister's decision to dismiss persons employed by the Department of Correctional Services as correctional officers amounted to administrative action and proceeded to review the decision, while Murphy AJ held in *SA Police Union v National Commissioner of the SA Police Service*⁶ (SAPU) that the Commissioner's decision unilaterally to change the arrangement of working hours of members of the South African Police Service did not amount to administrative action.⁷ The SCA held by a plurality in *Transnet Ltd & others v Chirwa*⁸ (Chirwa SCA) that the employment decisions of organs of state are

tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'

³ The Constitutional Court has held that a litigant cannot seek to rely on the protections of the right to administrative justice in s 33 of the Constitution without relying on PAJA. It is not possible to go behind PAJA and rely directly on s 33. Any attempt to access the right to administrative justice must therefore begin with reliance on the provisions of PAJA. See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 96 (per Chaskalson CJ), para 436 (per Ngcobo J) and para 586 (per Sachs J). A minority of judges in *New Clicks* held that it was not necessary to decide if PAJA was applicable (see para 671 per Moseneke J).

⁴ Although there is not a great deal of academic commentary in this area as yet, see generally Cora Hoexter *Administrative Law in South Africa* (2007) 194–9, Carl Mischke 'Administrative action and employment law: Do employees in the public sector enjoy additional remedies?' (2006) 15 *Contemporary Labour Law* 86, Stefan van Eck & Ronell Jordaan-Parkin 'Administrative, labour and constitutional law — A jurisdictional labyrinth' (2006) 27 *ILJ* 1987, Dhaya Pillay, 'PAJA v labour law' (2005) 20 *SAPL* 413 (considering a broader range of issues), and P A K le Roux 'Individual labour law' 2006 *Current Labour Law* 1 at 12–17.

⁵ [2006] 2 All SA 175 (E).

⁶ (2005) 26 *ILJ* 2403 (LC).

⁷ There are a number of decisions of the High Courts that support each of these views. Plasket J's conclusions are mirrored in the cases of *Mbayeka v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk), *Simela v MEC for Education, Eastern Cape* [2001] 9 BLLR 1085 (LC) and *Dunn v Minister of Defence* [2005] JOL 15881 (T), while Murphy AJ's view is supported by *Public Servants' Association obo Haschke v MEC for Agriculture* [2004] 8 BLLR 822 (LC) and followed in *Hlope v Minister of Safety and Security* [2006] 3 BLLR 297 (LC).

⁸ 2007 (2) SA 198 (SCA).

not subject to the controls of administrative law. Mthiyane JA (Jafta JA concurring) agreed with Murphy AJ that public-sector employment decisions are simply not 'administrative action' as defined in PAJA because they lack a public nature and evade classification as exercises of public power or performances of public functions. Conradie JA was 'prepared to accept' that this class of decisions amounts to 'administrative action',⁹ but nevertheless held that the application of labour law to public-sector employment decisions covered the field and left no room for the application of administrative law principles. Cameron JA (with Mpati DP concurring) agreed with Conradie JA that public-sector employment decisions are administrative action, but found no reason to withhold the protections of administrative law from the subjects of those decisions.

In the Constitutional Court judgment in the same matter¹⁰ the majority, per Skweyiya J, noted its agreement with Conradie JA's approach even though it decided the matter on the basis of jurisdiction.¹¹ Ngcobo J filed a separate judgment, concurred in by the same majority, in which he emphasized that the application of the labour-law regime to public-sector employees obviates the need for the application of administrative law to public-sector employment decisions.¹² Langa CJ's minority judgment, concurred in by O'Regan and Mokgoro JJ, followed Cameron JA's approach in deciding whether the decision constituted an administrative action, but reached a different conclusion to that of Cameron JA.¹³

Even though the implication of the majority decision in the Constitutional Court is that organs of state need not comply with principles of administrative justice when taking employment decisions, there is no consensus on the principles underlying this position. Both the Constitutional Court and the SCA were divided on the proper approach to be taken to deciding if an employment decision constitutes administrative action. Langa CJ and Cameron JA disagreed with the approach taken by their colleagues, although Langa CJ ultimately agreed with the order made by the majority. Consequently, two questions of principle remain without an authoritative answer. First, what approach should be taken to the question whether public-sector employment decisions are administrative action? Secondly, does the applicability of labour law and the Labour Relations Act 66 of 1995 (the LRA) preclude the application of PAJA and the protections of administrative law?¹⁴ I explain in parts II and III of this article that the answer to these questions is implicit in decisions already made by the Constitutional

⁹ Ibid para 26.

¹⁰ *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) (*Chirwa (CC)*).

¹¹ Ibid paras 36–44 and 73.

¹² Ibid para 148.

¹³ Ibid paras 186–94.

¹⁴ These questions are succinctly put by Cameron JA early in his judgment where he states (para 49): 'The problem the employee's claim presents may be considered in two stages. If there were no LRA, would the employee be able to bring her claim under PAJA? Though my colleague Mthiyane says No, I conclude that she can.'

Court, and that the majority of the court in the *Chirwa* matter, in taking the approach that it did, has ignored its own jurisprudence. The principles that can be extracted from *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*¹⁵ suggest, in the first place, that public-sector employment decisions can under certain circumstances be considered ‘administrative action’ for the purposes of PAJA, while the reasoning of the majority of the court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹⁶ suggests, in the second place, that, since private-law remedies may not be sought for public-law wrongs, public-law remedies must be available for public-law wrongs. If public-sector employment decisions amount to exercises of public power, and if they can therefore be ‘public-law wrongs’, then they should, on the strength of *Steenkamp*, be exposed to the remedial measures of public law. And I argue on the strength of *AAA Investments* that public-sector employment decisions can be defined as ‘administrative actions’ and must be considered ‘public-law wrongs’ whenever they are unlawful, unreasonable or procedurally unfair.

The separate concurring judgment of Sachs J in the *Steenkamp* case provides the fulcrum for my argument. Sachs J holds that the Constitution does not contemplate the duplication of remedies, and that it is constitutionally impermissible for remedies rooted in separate fields of law to function side by side.¹⁷ Sachs J’s judgment thus encapsulates the reasoning underpinning the approach that Ngcobo J, Skweyiya J, Conradie JA and Murphy AJ have taken, and sums up a position in direct opposition to the conclusions I reach. Justice Sachs, as a proponent of this opposing position, will be my interlocutor in part IV of this article. I defend my thesis by showing, through an imagined conversation with Justice Sachs, that the outcomes of the position he represents are inconsistent with the constitutional reasoning at the heart of the *AAA Investments* and *Steenkamp* decisions.¹⁸ My argument for rejecting the opposing approach takes the form of a *reductio ad absurdum*, showing that the conclusions the approach leads to are absurd, impossible and constitutionally unsupportable. I suggest that the *Chirwa* case should have been decided by a particular process of constitutional reasoning. The majority in the Constitutional Court adopted an approach inconsistent with this process and, in so doing, failed to pay due regard to jurisprudential principles the court has itself outlined. The result of this failure is, in cases of public-sector employment decisions, logically impossible.

Second, does the LRA obstruct that conclusion? Though my colleague Conradie JA says Yes, I conclude that it does not.⁷

¹⁵ 2006 (11) BCLR 1255 (CC).

¹⁶ 2007 (3) SA 121 (CC).

¹⁷ *Ibid* para 99.

¹⁸ When I refer to the comments made in a judicial setting, I will refer to ‘Sachs J’, but when I engage in imagined conversation it will be with ‘Justice Sachs’.

II AAA INVESTMENTS — DEFINING ‘PUBLIC POWER’

1. *The definition of ‘administrative action’ in PAJA*

Skweyiya J avoided engaging with the definition of administrative action in the *Chirwa* case by deciding that the High Court did not have jurisdiction in terms of the LRA to adjudicate any cause of action pursued by Ms Chirwa in the High Court — including one based on administrative law. Section 157(1) of the LRA provides that the Labour Court has exclusive jurisdiction over all matters that are in terms of the LRA or any other legislation ‘to be determined by the Labour Court’. In terms of s 157(2) of the LRA, the High Courts and the Labour Court enjoy ‘concurrent jurisdiction’ in respect of any threatened or alleged violation of rights entrenched in the Bill of Rights and arising from employment or labour relations or any executive act of the state in its capacity as an employer.¹⁹ In characterizing Ms Chirwa’s claim as one based on a failure to comply with requirements set out in the LRA, Skweyiya J found that the matter was to be decided by the Labour Court and concluded that whether the decision to dismiss Ms Chirwa was administrative action was of no consequence.²⁰ In his separate judgment Ngcobo J emphasized the importance of addressing whether Ms Chirwa’s dismissal amounted to an administrative action, but nevertheless prefaced these considerations with jurisdictional ones.²¹ Langa CJ, on the other hand, pointed out that jurisdiction is a secondary inquiry. The primary question is whether PAJA affords Ms Chirwa a cause of action other than those provided in the LRA.²² To answer the jurisdictional question — or to decide if an applicant’s case is a matter to be decided by the Labour Court — first, would ‘have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the Court could only consider if it had jurisdiction in the first place’.²³ As Langa CJ observes:

¹⁹ The relevant text of the LRA reads in full:

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

²⁰ *Chirwa (CC)* supra note 10 para 73.

²¹ *Ibid* para 80.

²² *Ibid* paras 154 and 157–9.

²³ *Ibid* para 169.

‘The claim concerns whether an action is an “administrative act . . . by the State in its capacity as employer”, and if so, whether that act should be set aside. This is exactly what section 157(2)(b) of the LRA places in the concurrent jurisdiction of both the High Court and the Labour Court.’²⁴

Following Langa CJ’s approach, an investigation of whether the employment decisions of the state constitute administrative action must begin where just about all the judgments dealing with the issue do — namely, with the definition of administrative action in s 1 of PAJA. The definition has a positive element that sets out the necessary elements of ‘administrative action’, as well as a negative element that excludes a number of decisions. The disagreement as to whether public-sector employment decisions are ‘administrative action’ turns on the positive elements of the definition, and the exclusions need not be dealt with here. Section 1 of PAJA states that ‘administrative action’ is

‘any decision taken, or any failure to take a decision, by —

- (a) an organ of state, when —
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;

. . .

which adversely affects the rights of any person and which has a direct external legal effect’.²⁵

It is not difficult to determine in each case whether an employer is an organ of state. The definition assigned to the term in s 1 of PAJA is the same as that given to the term in s 239 of the Constitution, and includes any department of state or administration in the national, provincial or local sphere of government as well as any other functionary exercising a public power or performing a public function in terms of any legislation. The troublesome parts of the definition in this context are whether the power or function is exercised or performed in terms of legislation and whether the power or function is ‘public’.

2. *A decision of a purely private nature*

In the *SAPU* case Murphy AJ acknowledged that the powers of the National Commissioner in regard to labour matters are rooted in the terms of the South African Police Service Act 68 of 1995 (the SAPS Act).²⁶ Section 24(1) of that Act empowers the Minister of Safety and Security to make regulations relating to the conditions of service of members of the South African Police

²⁴ Ibid para 168.

²⁵ Part (b) of the definition above deals with the decisions of ‘a natural or juristic person other than an organ of state’. The decisions under consideration in this article were all taken by organs of state, and the parts of the definition that concern persons or institutions other than organs of state can be ignored.

²⁶ Supra note 6 paras 51–2.

Service. In making regulations the Minister conferred on the National Commissioner of the South African Police Service the authority to determine working hours, among other things, which prerogative may be exercised unilaterally or bilaterally, in terms of existing contracts of employment or collective agreements. The National Commissioner's decision to change working hours was taken in terms of this legislative framework; and although Murphy AJ held that the decision-making power was therefore derived from a public source,²⁷ he held that the change in the working hours was effected in terms of a collective agreement concluded between the SA Police Union and the National Commissioner.²⁸ This agreement, as 'a contract concluded on equal terms between equal parties "without any element of superiority or authority" deriving from the SAPS's public position',²⁹ Murphy AJ continued, located the National Commissioner's decision squarely in the private realm.

It looks at first as if Murphy AJ is confused as to the source of the power, and that it is at once both public and private — but the explanation of this confusion lies in seeing the source of the decision-making power as the legislation, and thus public, and the decision itself as bounded by the terms of the private collective agreement. The source of a power, however, is not dispositive of the question of whether that power is public.³⁰ The Constitutional Court indicated in *SARFU* that while the source of power is relevant to determining whether it is a public power, other factors to be considered include the nature of the power, its subject matter and whether it involves the exercise of a public duty.³¹ Murphy AJ recognized and relied on this principle to look beyond the underlying legislative source of the National Commissioner's power to determine working conditions.³² Indeed, in cases like *SAPU*, where the decision straddles the public and private domains, the source of the power becomes incidental.³³ The crisp question, and the question squarely before Murphy AJ, was whether the power exercised in the case was public. Murphy AJ was unequivocal in describing it as free from any public characteristics:

²⁷ *Ibid* para 51.

²⁸ *Ibid* para 53.

²⁹ *Ibid*. The quote is taken from *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 10.

³⁰ *President of the Republic of South Africa v South African Rugby Union* 2000 (1) SA 1 (CC) (*SARFU*) para 143.

³¹ *Ibid*.

³² *SAPU* supra note 6 para 51.

³³ In the case of bodies other than organs of state the inquiry as to the source of the power is virtually meaningless. In terms of the definition in *PAJA*, a decision or failure to take a decision by a natural or juristic person other than an organ of state is an administrative action if, among other things, it is taken in terms of an 'empowering provision'. An 'empowering provision' is in turn defined extremely widely to include 'a law, a rule of common law, customary law, or an agreement, instrument or other document'.

‘There is nothing inherently public about the setting of working hours of police officers. Nor is there any public law concern here, the matter falls far more readily within the domain of contractual regulation of private employment relations. The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government’s conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. The powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. One is instinctively drawn to the conclusion that the concept of administrative law action is not intended to embrace acts properly regulated by private law.’³⁴

Ambiguity surrounding the source of the power aside, the important conclusion was that on a conspectus of factors the power was entirely private in nature and properly the subject of private contractual rather than public administrative control.

The source of the power played a central role in Mthiyane JA’s judgment in the *Chirwa* matter, however. Mthiyane JA concedes early on that Transnet is an ‘organ of state’,³⁵ which s 239 of the Constitution defines as any ‘functionary or institution exercising a public power or performing a public function in terms of any legislation’. He held that although Transnet is an organ of state and derives its authority to enter into contracts from statute,³⁶ its power to terminate contracts does not derive from the same source.³⁷ In this regard, at least, Mthiyane JA is correct. The Legal Succession to the South African Transport Services Act 9 of 1989, the statute that establishes Transnet and sets out its powers, does not confer on Transnet the power to dismiss employees. The power to terminate contracts must be found entirely in the terms of the contracts themselves.³⁸ Mthiyane JA concluded that

‘the nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public function in terms of legislation.’³⁹

³⁴ *SAPU* supra note 6 para 51.

³⁵ *Chirwa (SCA)* supra note 8 para 10.

³⁶ See in this regard *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) paras 37–8.

³⁷ *Supra* note 8 para 14.

³⁸ Much was made of this in Transnet’s heads of argument filed in the Constitutional Court. Paragraphs 46–52 show quite convincingly that Transnet’s power to dismiss Ms Chirwa springs from the contract between her and Transnet and not from any overtly public source (respondent’s heads of arguments, available at <http://www.constitutionalcourt.org.za/Archimages/9154.PDF>, last accessed 19 April 2007). Further, Transnet argued that since the expiry of a period of two years from the establishment of Transnet, its employees have in terms of the Act not been considered ‘state’ employees. Employees of Transnet are now to be considered on the same basis as ordinary private-sector employees (s 9(2) read with s 9(3)). See also *Industrial Council for the Building Industry (Western Province) v Transnet Industrial Council* 1999 (1) SA 505 (SCA) at 511B–H.

³⁹ *Chirwa (SCA)* supra note 8 para 15.

When Transnet dismissed Ms Chirwa it was acting, in Mthiyane JA's view, on the basis of contract in its capacity as an employer and not in terms of legislation in its capacity as a public authority.⁴⁰ Langa CJ agrees with this view, holding that the dismissal took place in terms of the contract of employment and not in terms of any legislation.⁴¹ The Chief Justice notes later on that the contractual source of a power is not decisive of whether it is public.⁴² What Langa CJ's judgment makes clear is that where a decision is in terms of legislation, it must be an exercise of public power if it is to be an administrative action in terms of PAJA. Where a decision is taken in terms of legislation, whether it is public is decisive. The Constitutional Court's approach in *AAA Investments* rejects the idea that a decision is not public simply because the immediate source of the decision is contract, and describes the circumstances under which public-sector decisions are to be considered exercises of public power — their contractual basis notwithstanding.

3. Contractual public power

The *AAA Investments* case concerned a challenge to the validity of rules regulating the micro-lending industry. In terms of a ministerial exemption to the now-repealed Usury Act 73 of 1968,⁴³ loans of less than a certain amount were not subject to the usury and interest controls of the Act. The micro-finance industry grew 'exponentially' in the wake of the exemption but, in the absence of any significant constraints on lenders, complaints of abuse began to surface.⁴⁴ Seeing the need for regulation, the Minister of Trade and Industry issued a second exemption notice that required all micro lenders to register with a regulatory institution approved by the Minister and comply with the rules set by that institution.⁴⁵ The Micro Finance Regulatory Council (the Council) was formed and subsequently recognized by the Minister as the regulatory body.⁴⁶ It was thereby authorized to make rules regulating the activities of money-lenders. The source of the power is clearly public. It arises only from the terms of the legislation.⁴⁷ But this inquiry has only incidental value. The issue before the court, and the issue of relevance here, was whether a private regulatory body with the power in

⁴⁰ Ibid.

⁴¹ *Chirwa (CC)* supra note 10 para 185.

⁴² Ibid para 189.

⁴³ The notice of exemption was issued by the Minister of Trade and Industry in GN 3451 GG 14498 of 31 December 1992.

⁴⁴ *AAA Investments* supra note 15 para 10.

⁴⁵ GN 713 GG 20145 of 1 June 1999. See also *AAA Investments* supra note 15 para 12.

⁴⁶ GN 911 GG 20307 of 16 July 1999.

⁴⁷ The ministerial notices form part of the Act by virtue of the definition of 'national legislation' in s 239 of the Constitution, which includes 'subordinate legislation made in terms of an Act of Parliament'. See *AAA Investments* supra note 15 para 42.

terms of legislation to make rules regulating an industry exercises public power when it does so.

The judgment of the SCA in the *AAA Investments* case⁴⁸ relied on the nature of the relationship between the Micro Finance Regulatory Council and those subject to its control to determine the nature of the power exercised by the council. It held that since the council was a private regulator exercising power only over those who participate, voluntarily, in the micro-finance industry, none of its actions or decisions could be considered 'public':

'The Council is not, and does not purport to be, a public regulator with authority unilaterally to exercise powers over outside parties. It is a company that conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation, it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent.'⁴⁹

On this view, the council's rules operated only in the private sphere by reason of the contractual relationship.⁵⁰ The rules had no effect on the public at large, but applied only to micro-lenders who had consented to being so bound.⁵¹ This was enough to convince the SCA that the council did not exercise public power when it made the rules, and did not need to comply with the principles of the doctrine of legality in doing so.⁵²

The Constitutional Court rejected this formalistic and categorical approach. Recognizing that traditionally governmental functions are to an increasing degree being outsourced to private entities, Yacoob J (writing for the majority) referred with approval to the comment of the US Supreme Court that government cannot 'evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form'.⁵³ The important question whether a private body exercising a power traditionally exercised by government should be subject to the same controls of legality as

⁴⁸ Reported as *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd* 2006 (1) SA 27 (SCA).

⁴⁹ *Ibid* para 24.

⁵⁰ *AAA Investments* supra note 15 para 4.

⁵¹ *Micro Finance Regulatory Council v AAA Investments* supra note 48 para 26.

⁵² Courts have in the past relied on the existence of a contract to exclude the principles of administrative law: see *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A), *Sibanyoni v University of Fort Hare* 1985 (1) SA 19 (Ck), *Mkhize v Rector, University of Zululand* 1986 (1) SA 901 (D) and *Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates)* 1993 (1) SA 405 (T). All of these cases and the formalism of their reasoning are discussed by Cora Hoexter 'Contracts in administrative law: Life after formalism?' (2004) 121 *SALJ* 595.

⁵³ *Lebron v National Railroad Passenger Corporation* 513 US 374 (1995) at 397, referred to with approval by the court in *AAA Investments* supra note 15 para 33. See also Hoexter op cit note 4 at 147-9 and 179, and Yvonne Burns 'Government contracts and the public/private law divide' (1998) 13 *SA Public Law* 234.

if government exercised that power itself cannot be made to rest entirely on the fact that the private body concerned exercises power only over those who, in terms of contracts, agree to be subject to that power. Yacoob J made this quite clear where he outlined the terms of the inquiry before the court in the case:

‘If the Council performs its functions in terms of national legislation, *and these functions are public in character*, it is subject to the legality principle. . . . In our constitutional structure, the Council or any other entity does not have to be part of government or the government itself to be bound by the Constitution as a whole. The way is now open to an investigation of the nature of the Council and the nature of the function it performs.’⁵⁴

I am not overly concerned here with the factors the court relied on to establish the public nature of the council’s functions, or the factors that courts before now have relied on.⁵⁵ As Hoexter notes, ‘what gives a power its “public” character is a question that the courts are currently answering in an incremental fashion’,⁵⁶ and this article is not intended to examine the present state of that process of incremental development. Rather, my point is that the determination of whether a power or function is public or not depends on a range of factors that is broader than simply whether the power or its extent is set out in a contract. After weighing up all the relevant factors, Yacoob J concluded that the functions of the council could not be considered private despite the fact that the council was a private company:

‘The Council’s composition and mandate show that although its legal form is that of a private company, its functions are essentially regulatory of an industry . . . I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates in the public interest and in the performance of a public duty. Its decisions and Rules are subject to constitutional control.’⁵⁷

It is clear from *AAA Investments* that powers exercised in terms of contract can nevertheless be public. The contractual source or definition of a power does not, on its own, exclude it from the realm of public decisions and the controls the Constitution imposes on those decisions. It is not open to the courts to refuse to apply administrative law only because the power is exercised in terms of a contract or has its source in contract. On the contrary, courts are obliged to examine the nature of power itself to determine if it is in

⁵⁴ *AAA Investments* supra note 15 para 41 (footnote omitted, emphasis added).

⁵⁵ The jurisprudence in this regard is rich. See for example *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W), *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (AD) at 152E — I, and *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 1 All ER 564 (CA). The court’s consideration of these factors and a discussion of approaches in comparable jurisdictions are to be found in paras 31–8. For a review of the court’s conclusions see Hoexter op cit note 4 at 181–3.

⁵⁶ Op cit note 4 at 179.

⁵⁷ Supra note 15 para 45.

fact 'public'. This obligation operates similarly in the context of public-sector employment decisions.

4. *The extension of administrative justice to state employees — the Zenzile decision*

The rejection of this categorical approach is only half the answer. Even though contractual powers cannot be categorically shielded from the controls of public law, it still has to be decided in every case whether a decision in terms of a contract is of a public nature or not. *AAA Investments* is no authority for the proposition that all exercises of contractual power by the state, organs of state or even private regulatory bodies are public. Rather, the case entrenches the principle that exercises of power in terms of contract can in certain circumstances be public, and it must be determined on an examination of the nature of the power itself, as well as a conspectus of other relevant factors, whether each exercise of contractual power is public.

In this light, the Appellate Division's decision in *Administrator, Transvaal & others v Zenzile & others*,⁵⁸ that the employment decisions of public authorities do involve the exercise of public power, is important. The case concerned a challenge to a decision to dismiss a handful of public servants for misconduct. The respondents had been employed as cleaners and ward aids at the Natalspruit Hospital, and participated in a two-day work stoppage in support of a demand that a previously dismissed colleague be reinstated. The question before the court was whether the decision to dismiss the respondents was properly subject to the requirements of natural justice. Sitting in 1991, long before the intellectual constraints of PAJA's convoluted definition of 'administrative action', the Appellate Division was able to engage directly with the nature of the impugned decision. Hoexter JA, writing for a unanimous court, made reference to the nature of the functions of the public hospital at which the respondents were employed. Responding to the appellants' argument that the relationship between the parties was simply one of master and servant and governed by the common law of contract, Hoexter JA said:

'I am unable to accept that argument. One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decisionmaker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct.'⁵⁹

The Appellate Division's approach here is consistent with the Constitutional Court's approach in *AAA Investments* and the jurisprudence on which

⁵⁸ 1991 (1) SA 21 (A).

⁵⁹ *Ibid* at 34B–D.

the court relied. In *Dawnlaan Beleggings*, for example, the High Court relied on the fact that the Johannesburg Stock Exchange, although a private body exercising power over its members in terms of contract, was required by the legislation establishing it to carry on its business ‘with due regard to the public interest’, to make rules to safeguard and further the public interest and list securities only if that was in the public interest.⁶⁰ And in *R v Panel on Take-overs and Mergers, ex parte Datafin plc*⁶¹ the Court of Appeal held that the panel was subject to the controls of administrative law because it performed an important public function and its decisions indirectly affect the public. This was so, the Court of Appeal held, notwithstanding the fact that the panel was a private body not created in terms of any legislation whose sole source of power was a ‘consensual submission to its jurisdiction’.⁶² The Constitutional Court referred to both of these cases in support of its conclusions in *AAA Investments*.⁶³ In the *POPCRU* case Plasket J refined this approach by indicating that ‘the elusive concept of public power is not limited to exercises of public power that impact on the public at large’.⁶⁴ What makes the power ‘public’ is rather ‘the fact that it has been vested in a public functionary who is required to exercise it in the public interest.’⁶⁵ Plasket J therefore concluded that *Zenzile* was still good law and considered himself bound by it.⁶⁶

The *AAA Investments* case makes it clear that the denial of the principles of administrative law to decisions taken in a contractual setting cannot be justified merely on the basis that a contract is involved. The nature of the decision itself must be engaged with, as must the nature and objects of the institution exercising the power in terms of which the decision is taken. It is hard to see how *Zenzile* is not determinative of the outcome in the *Chirwa* case — but the outcome of *Chirwa*, on the particular facts and circumstances of the case, is not really my focus here. Following this reasoning, Langa CJ found on the facts that the decision did not amount to an exercise of public power.⁶⁷ My concern is rather the objection that *Zenzile*, although correct, is no longer relevant, and that public-sector employment decisions, even though properly considered exercises of a public power, should nevertheless be exempted from the controls of administrative law.

⁶⁰ *Dawnlaan* supra note 55 at 361F and 364C-D.

⁶¹ Supra note 55 at 577a-d.

⁶² Ibid at 577a-b.

⁶³ Supra note 15 paras 31-2.

⁶⁴ Supra note 5 para 53.

⁶⁵ Ibid.

⁶⁶ Ibid para 64.

⁶⁷ Langa CJ held that Ms Chirwa’s dismissal would have a very small impact on the public since the department of Transnet in which she worked does not have the same public character that the Department of Correctional Services does, for example. When Transnet dismissed Ms Chirwa it was not acting in the public interest but in the best interests of the particular business unit of Transnet in which Ms Chirwa was employed (supra note 10 paras 188, 192-3).

III THE SEPARATION OF PUBLIC LAW AND PRIVATE LAW

1. *Substituting labour law for administrative law*

There are two steps in the argument dismissing the precedent of *Zenzile*. The first step is to claim that the decision can no longer be justified since its ‘doctrinal underpinnings’⁶⁸ are out of place in the constitutional era. At the time *Zenzile* was decided the Labour Relations Act 28 of 1956 was in force.⁶⁹ The 1956 Labour Relations Act specifically excluded state employees from its ambit.⁷⁰ State employees could not rely on the protections of labour law at all, despite the fact that they found themselves in the same poor bargaining position in relation to their employers as their private-sector counterparts. In order to offer some protection against the state-as-employer, the courts subjected the actions of the state-as-employer to the requirements of natural justice. ‘Historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed.’⁷¹ Since 1995, however, public-sector and state employees have been included within the ambit of the LRA.⁷² The justification and the motivation for extending the protections of administrative law to state employees has been undermined, Murphy AJ held in *SAPU*, by the extension of the protections of labour law to those employees:

‘It follows from this line of thought that the progressive decisions of our courts, extending labour rights to public sector employees by categorizing employer conduct as administrative action, have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA. Courts might therefore justifiably be expected to reconsider previous doctrine in the light of the new constitutional and statutory framework.’⁷³

Conradie JA concluded for similar reasons in *Chirwa* that the answer to the question whether dismissals in the public domain should be dealt with as administrative acts must ‘since the advent of the LRA . . . be no’.⁷⁴ Similarly,

⁶⁸ *SAPU* supra note 6 para 67.

⁶⁹ This Act was repealed in 1995 by s 212 read with Schedule 6 of the LRA.

⁷⁰ Section 2(2) of the 1956 Act. Along with state employees, employees of local authorities and persons who taught, educated or trained other persons at any university, technikon, college, school or other educational institution maintained wholly or partly from public funds were excluded from the application of the 1956 LRA.

⁷¹ *Chirwa (CC)* supra note 10 para 148 per Ngcobo J. See also *Public Servants Association obo Haschke* supra note 7 para 11 and *SAPU* supra note 6 para 64, where this idea is expressed in similar terms.

⁷² In terms of s 2 of the LRA only ‘soldiers and spies’ are excluded from the application of the LRA. There have however been a number of decisions recently considering the extent to which members of the South African National Defence Force can rely on the constitutional right in s 23(5) to engage in collective bargaining with their employer, the state. See, for example, *SA National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC).

⁷³ *SAPU* supra note 6 para 66.

⁷⁴ Supra note 8 para 27.

Ngcobo J held that it is no longer necessary to subject public-sector employees to the protection of administrative law,⁷⁵ while Skweyiya J supported Conradie J's conclusion in no uncertain terms.⁷⁶

The second step in the argument is to draw an impenetrable line between administrative law and labour law. Pillay J draws this line most starkly in the *Haschke* case:

'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.'⁷⁷

Given this fissure between the fields of labour law and administrative law, the two are mutually exclusive. The conclusion to which Murphy AJ was 'instinctively drawn' in *SAPU* was that administrative action does not embrace acts properly regulated by private law.⁷⁸ Where the LRA applies, then, administrative law does not:

'By extending the benefits of the LRA to, and imposing its restrictions on, employees of the state and its organs the legislature . . . took dismissals out of the realm of administrative law.'⁷⁹

On this view an act or decision to which the LRA applies — like a dismissal — which meets all the requirements of 'administrative action' so defined and could therefore be expected to be subject to the controls of administrative law and PAJA, will nevertheless be cloaked from scrutiny in terms of administrative law by the LRA.

2. *The Steenkamp decision*

The majority of the Constitutional Court in the *Steenkamp* case followed a line somewhat similar to this to the extent that its judgment preserves a distinction between different fields of law. But what the *Steenkamp* decision does not contemplate is the ousting of one set of legal principles by the mere applicability of another.

The question before the court in *Steenkamp* was whether damages in delict can be claimed as a remedy for a public-law wrong.⁸⁰ The applicant in the case, Steenkamp, acted in his capacity as the liquidator of a company called Balraz. The company had won a tender to provide certain services to the Eastern Cape provincial government, and had incurred expenses in performing in terms of the tender contract. The tender award was, however,

⁷⁵ *Chirwa (CC)* supra note 10 para 148.

⁷⁶ *Ibid* paras 38–44.

⁷⁷ *Supra* note 7 para 11.

⁷⁸ *Supra* note 6 para 51.

⁷⁹ *Chirwa (SCA)* supra note 8 para 29 per Conradie JA.

⁸⁰ *Supra* note 16 para 1: 'The narrow issue is whether financial loss caused by improper performance of a statutory or administrative function should attract liability for damages in delict.'

challenged before the Bisho High Court and set aside.⁸¹ Because it had been placed in liquidation by the time of the judgment, Balraz was unable to contest the second tender process. The company thus found itself out of pocket for the money it had spent before the award of the tender contract was set aside and without any means of recovering those costs.⁸² Steenkamp's argument was that the respondent (the Provincial Tender Board) had, in making a reviewable decision, breached obligations imposed by administrative law. He argued that the Provincial Tender Board owed Balraz a duty in law to exercise its powers fairly and impartially, to take reasonable care in the evaluation of tenders, and to ensure that the award of the tender was reasonable in the circumstances.⁸³ Steenkamp sought to advance the argument that the breach of this administrative-law duty was wrongful for the purposes of the law of delict and attracted liability for damages in delict.

The majority of the court disagreed with this argument. Its starting point in doing so was the distinction between private law and public law. Moseneke DCJ, writing for the majority, held as follows:

‘It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. . . . It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function.’⁸⁴

The judgment makes it clear that public-law remedies apply to public-law wrongs, and similarly, that private-law remedies are available for private-law wrongs. The majority disagreed with the contention that the breach of the administrative-law duty constituted a wrongful act in delict and that the Provincial Tender Board had therefore perpetrated a private-law wrong against Balraz.⁸⁵ The wrong suffered by Balraz could not be said to be a private-law wrong, and the applicant was in actual fact seeking a private-law remedy for a public-law wrong that, in light of the separation of public- and private-law remedies, was not available to him.⁸⁶

⁸¹ The judgment is reported as *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck).

⁸² *Supra* note 16 para 11.

⁸³ *Ibid* para 27.

⁸⁴ *Ibid* para 29 (footnote omitted).

⁸⁵ *Ibid* paras 55–6.

⁸⁶ Langa CJ and O'Regan J filed a dissenting judgment in which Mokgoro J concurred. Although they reach quite the opposite conclusion and hold that the applicant should have been able to claim damages in delict (paras 92–94), they do so within the conceptual framework proposed by Moseneke DCJ. They accept Moseneke DCJ's premise that private law remedies are not available for public-law wrongs — but do not accept Moseneke DCJ's categorical conclusion that breaches of administrative justice will never amount to delictually wrongful acts. Rather, they considered whether on the facts the wrong committed could be regarded as a private-law wrong, and found that ‘although it will often be so that no delictual claim will lie

If any act can be shown to be a public-law wrong, then public-law remedies must be available to correct the consequences of that act. If a public-sector employment decision is the exercise of a public power and amounts to administrative action, then, on the strength of the reasoning in *Steenkamp*, the remedies of public law and administrative justice must be available to the subjects of those decisions. On the strength of *AAA Investments* read with *Zenzile*, I argue that this class of decisions does indeed fall within the scope of public law. Sachs J, however, reads Moseneke DCJ's majority judgment to mean something else. In his view, the applicability of administrative law ousts the benefits and protections of the law of delict. If this is the correct reading of the law, and the 'ousting' of alternate branches of law is acceptable, then Skweyiya J, Ngcobo J, Conradie JA and Murphy AJ are justified in concluding that public-sector employees enjoy the protections of labour law alone. By engaging directly with this 'law-ousting-law' argument, however, I am able to show that its results are logically impossible.

IV THE IMPOSSIBLE OUTCOMES OF 'LAW OUSTING LAW'

My reading of Moseneke DCJ's judgment in *Steenkamp* is simply that a public-law wrong will attract public-law remedies. Sachs J agrees with this view to the extent that he sees the wrong suffered by Balraz as a public-law wrong which must be remedied by the application of public-law principles.

But Sachs J goes further than Moseneke DCJ. He concludes that the existence of a public-law remedy precludes any private-law remedies that may have been available. He states the following in this regard:

'Both the interim Constitution and the final Constitution envisage a right to just administrative action. The implication is that a constitutionalised form of judicial review is intended to cover the field, both in substantive and remedial terms. To my mind it would not only be jurisprudentially inelegant and functionally duplicatory to permit remedies under constitutionalised administrative law, and remedies under the common law, to function side by side. It would be constitutionally impermissible. The provision in PAJA to the effect that in special circumstances a court reviewing administrative action could award compensation, did not invent the public law remedy it articulates. On the contrary, it gave precise expression to a remedy already implicit in the interim Constitution and, later, in the final Constitution.

The existence of this constitutionally-based public law remedy renders it unnecessary and inappropriate to hybridise and stretch the common-law delict of injury beyond its traditional limits in this area. Just compensation today can be achieved where necessary by means of PAJA.'⁸⁷

It may seem at first that this conclusion is at odds with the decisions of

against the Tender Board . . . there will be times when an action for damages will lie' (para 89). Their conclusion was simply that Balraz had suffered a private-law wrong in the form of delict, the wrongfulness element of which had been satisfied by the breach of an administrative-law duty.

⁸⁷ Ibid paras 99–100.

Murphy AJ in *SAPU* and Skweyiya J, Ngcobo J, and Conradie JA in *Chirwa*: while those judgments deny the application of administrative law, Sachs J affirms its application in very clear terms. However, the structure of the reasoning underpinning each judgment is the same. All of the judgments rest on premise that our law does not admit the possibility of two remedies in two separate branches of law for a single act. The approach demands that where a comprehensive set of remedies is available under one branch of law for the correction or prevention of an actionable wrong, the principles of that branch of law must be applied to give effect to those remedies. The consequently categorical application of one branch of law precludes recourse to remedies under any other branch of law. But there are a number of serious problems with this approach, and with Justice Sachs as my interlocutor, I turn now to these problems.

1. *The duplication of remedies*

The effect of the law-ousting-law approach in the public-sector employment arena is to deny the constitutional protections of rights to administrative justice where they are nevertheless applicable. The suggestion that rights enshrined in the Bill of Rights can be withheld from individuals because they have other legal options available to them is a jarring one when viewed in terms of the spirit and objects of the Bill of Rights. Moreover, it seems wholly inconsistent with the principle that the Bill of Rights applies to all law⁸⁸ as well as the principle that law or conduct inconsistent with the Constitution is invalid.⁸⁹ As Plasket J says in *POPCRU*, this approach fails 'to give individuals the full measure of their fundamental rights'.⁹⁰ He goes on to note that there is 'nothing incongruous' about more than one fundamental right applying to the same act.⁹¹ But even apart from concerns about emaciating the Bill of Rights, our law has always accepted the overlap of different fields of law.⁹² It is not unusual for the same set of facts to give rise to more than one legal action, or even legal actions in different branches of law, and for individuals to elect which action to pursue. Contractual and delictual claims often overlap, and the validity of simultaneous actions lying to an individual was recognized in *Bayer South Africa (Pty) Ltd v Frost*.⁹³ In that case the Appellate Division held that a negligent misstatement inducing a contract gave rise not only to a claim in contract but also, if that misstatement caused loss, to a claim in delict.⁹⁴ In *Fedlife Assurance Ltd v Wolfaardt* the SCA held that the protections of the LRA supplemented employees' common-law

⁸⁸ Section 8(1) of the Constitution.

⁸⁹ Section 2 of the Constitution.

⁹⁰ *Supra* note 5 para 60.

⁹¹ *Ibid.*

⁹² *Ibid* para 61.

⁹³ 1991 (4) SA 559 (A).

⁹⁴ *Ibid* at 568F-569E.

rights against unfair dismissal.⁹⁵ Rights in terms of a contract of employment do not disappear simply because the LRA affords additional rights:

‘[T]here can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment.’⁹⁶

Further, it is clear from the scheme of other labour legislation like the Basic Conditions of Employment Act 75 of 1997 that the legislation offers a minimum of protection that can be supplemented by contractual terms or other laws. Section 4 of the Basic Conditions of Employment Act states that a ‘basic condition’ provided in the Act constitutes a term of any contract of employment unless any other law or the terms of the contract of employment itself are more favourable to the employee.⁹⁷ The codification of labour rights in legislation and the establishment of what purports to be a comprehensive system of labour law does not diminish or undermine rights and remedies located outside the provisions of that legislation.

Where the law recognizes that private-law remedies coexist, and that the establishment of new private-law remedies does not deprive individuals of private-law remedies they enjoyed previously, it can hardly be suggested that the existence of a framework of private-law remedies deprives individuals of the protections afforded to them by the public-law rights embedded in the Bill of Rights. Langa CJ argues that litigants are entitled to the protection of all applicable rights, even where they cover the same ground, and agrees with Cameron JA that where the legislature intends to prefer one right over others it must say so in explicit and unambiguous terms.⁹⁸

To this Justice Sachs might reply that the Constitutional Court has already rejected the side-by-side operation of remedies under the common law and under the Constitution. Early in our constitutional jurisprudence the SCA tried to maintain a distinction between systems of law in the *Container Logistics* case, holding that ‘judicial review under the Constitution and under the common law are different concepts’;⁹⁹ but in *Pharmaceutical Manufacturers* the Constitutional Court stated forcefully that there is only one system of law, and that all law derives its force from, and is shaped by, the Constitution.¹⁰⁰ The court has since held that it is not open to litigants to rely

⁹⁵ 2002 (1) SA 49 (SCA) para 13 per Nugent AJA.

⁹⁶ *Ibid* para 15. See also *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784D-H, where it was stated that a statute will be interpreted to deprive individuals of existing remedies only if that is expressly stated or necessarily implied in the statute, and *United National Public Servants Association of South Africa v Digomo NO* (2005) 26 ILJ 1957 (SCA) para 4.

⁹⁷ See Marylyn Christianson, Carl Mischke & E M L Strydom (eds) *Essential Labour Law* 3 ed (2002) 331–2.

⁹⁸ *Chirwa (CC)* supra note 10 para 175.

⁹⁹ *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) para 20.

¹⁰⁰ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

separately on the provisions of legislation on one hand and on the common law and the Constitution on the other, since this would lead to the development of ‘parallel streams’ of jurisprudence.¹⁰¹ Justice Sachs might argue on this basis that the ousting of certain sets of legal provisions is consistent with the court’s approach and the scheme of our Constitution.

This objection is mirrored in, and perhaps explains, a resistance to ‘forum shopping’.¹⁰² The extension of administrative as well as labour-law remedies to public-sector employees allows them to choose whether to pursue claims in the High Court or in the Labour Court, and will allow the development of parallel streams of jurisprudence in these separate fora. The situation is further complicated by the fact that the remedies of the LRA and PAJA are significantly different,¹⁰³ and public-sector employees can claim protections that their counterparts in the private sector cannot claim.¹⁰⁴

What these arguments fail to recognize, though, is that drawing away from the development of parallel streams of jurisprudence is motivated by a need to preserve conceptual integrity within a single branch of law — and within a single forum. The *Pharmaceutical Manufacturers* approach denies the concurrent availability of common-law and constitutional remedies for administrative wrongs, and by extension denies the concurrent availability of common-law and constitutional remedies for labour wrongs. But the approach certainly does not go so far as to deny the concurrent availability of administrative-law remedies and contract-law remedies, for example. The approach is premised on the fact that the protections of administrative justice and fair labour practices derive from the Constitution, and that accessing those protections proceeds according to the scheme envisaged by the Constitution. Rights in contract or in delict are not within the constitutional scheme of either fair labour practices or administrative justice, however, and allowing these rights to operate alongside administrative or labour rights does not raise the danger of parallel streams of jurisprudence within a single set of legal principles. Similarly, the development of labour-law jurisprudence in the Labour Court and administrative-law jurisprudence in the High Court does not represent the development of parallel streams of jurisprudence in regard to a single set of legal principles. There is no constitutional reason to flee the phantom of forum-shopping.

¹⁰¹ See *New Clicks* supra note 3 paras 431–6 (Ngcobo J) and the authority referred to there.

¹⁰² Van Eck & Jordaan-Parkin ‘Administrative, labour and constitutional law — A jurisdictional labyrinth’ op cit note 4 at 1990. Ngcobo J also refers to forum-shopping and ‘all its unfortunate consequences’ in his judgment in *Chirwa CC* supra note 10 para 121.

¹⁰³ Skweyiya J argues that the ‘purpose-built’ remedies of labour law should take precedence over ‘non-purpose-built processes and forums in situations involving employment-related matters’ (*Chirwa (CC)* supra note 10 para 41). See also Van Eck & Jordaan-Parkin op cit note 4 at 1995 and Pillay ‘PAJA v labour law’ op cit note 4 at 421.

¹⁰⁴ Van Eck & Jordaan-Parkin op cit note 4 at 1990.

To the extent that a choice between legal protections and forums is open to public-sector employees and not private employees, this inequality flows from the constitutional framework itself. It cannot be remedied by creative interpretation of the Constitution, PAJA or the LRA without undermining the principles of the constitutional protections of administrative justice and fair labour practices. The inequality can only be remedied by the legislature — a point that Langa CJ makes.¹⁰⁵

2. *Selecting the applicable branch of law*

Sachs J's approach presupposes an ordering of legal remedies that is not apparent from the principles on which he relies. Without an ordering of remedies it is impossible to know which set of remedies is to take precedence and which, in light of the primacy of the other, is to be ousted.

Justice Sachs's answer would perhaps turn on a consideration of the intention of the legislature. He says in *Steenkamp* that the constitutionalized administrative-law system is intended to 'cover the field'.¹⁰⁶ For this reason the constitutionalized system of administrative law excludes the remedies of other branches of law whenever they run into each other. In *New Clicks* the 'cover the field' argument was used to assert that one cannot sidestep the requirements of PAJA by relying directly on s 33 of the Constitution.¹⁰⁷ PAJA is required by s 33(3) of the Constitution to cover the field and it purports to do so. There is no basis in law for accessing administrative-justice rights except through the provisions of PAJA. However, this response suffers from the same defect as the response in the previous section. PAJA and the constitutionalized system of review are intended to cover the field of administrative law. It is not the intention of s 33, nor could it have been the intention of the legislature when it drafted PAJA, that the system of administrative law should cover a field of law other than administrative law. The answer that the system of law that 'covers the field' is the system that will take precedence over other remedies does not advance Justice Sachs's cause, because the covering of 'a field' does not affect the validity or availability of legal remedies in another field. This response does not supply a reason for why the subjects of decisions should not be able to seek, at their election, remedies that are appropriate to the wrong perpetrated against them.

3. *The impossible outcome*

Something of an ordering of legal remedies could perhaps be gleaned from the principle of avoidance, which suggests that the Constitution is to be relied upon directly only as a last resort.¹⁰⁸ Again, this approach is useful only

¹⁰⁵ *Chirwa (CC)* supra note 10 para 177. See also Van Eck & Jordaan-Parkin op cit note 4 at 1998 and Plasket J in *POPCRU* supra note 5 para 59.

¹⁰⁶ *Steenkamp* supra note 16 para 99.

¹⁰⁷ Supra note 3 para 95 per Chaskalson CJ.

¹⁰⁸ *S v Mhlungu* 1995 (3) SA 867 (CC) para 59, *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) paras 2–5, *Transvaal Agricultural Union v Minister of Land Affairs* 1997

where constitutional and non-constitutional remedies exist within a single branch of law, and does not offer a solution where the available remedies are located in different branches of law. Apart from the fact that Sachs J's approach is in stark contrast to the principle of avoidance, in prioritizing the constitutional remedy over the common-law remedy, a more fundamental problem is that his approach makes no room for the operation of the principle where remedies based on two constitutional rights are available.

On Justice Sachs's approach, where labour law and administrative law apply to the same factual scenario, the outcome is absurd. The application of either system of law makes the application of the other impossible — but if both systems of law do apply, then each system ousts the other. Public-sector employment decisions are thus governed by both administrative law and labour law, and by neither administrative law nor labour law. If Sachs J is correct that it is constitutionally impermissible for remedies to be duplicated, and that where administrative law applies it ousts the application of other branches of law because it covers the field, then it must be the case that where labour law applies, which also purports to cover the field, it ousts the application of all other branches of law.¹⁰⁹ The logic that leads to Sachs J's conclusion in *Steenkamp* is the same in form and structure as the logic that leads to the conclusions of Skweyiya J, Ngcobo J and Conradie JA in *Chirwa* and Murphy AJ in *SAPU*: if either of the arguments is sound, then so is the other. But if either argument is sound, then the other cannot be. When the arguments run into each other, as in *Chirwa* where administrative law and labour law are both relevant, the absurdity of this approach is patent.

Judge Sachs might argue, as the majority of the Constitutional Court in *Chirwa* does,¹¹⁰ that in drafting s 210 of the LRA the legislature intended the LRA to take precedence in the case of conflict over the provisions of any other Act of Parliament.¹¹¹ The problem is that if Sachs J's *Steenkamp* argument is to be accepted, then even s 210 would be ousted by

(2) SA 621 (CC) para 18. See also Iain Currie 'Judicious avoidance' (1999) 15 *SAJHR* 138 and Theunis Roux 'Turning a deaf ear: The right to be heard by the Constitutional Court: *Transvaal Agricultural Union v Minister of Land Affairs* 1996 (12) BCLR (CC)' (1997) 13 *SAJHR* 216.

¹⁰⁹ Section 1 of the LRA makes it quite clear that the Act is intended to give effect to and regulate the rights protected in s 23 of the Constitution, in exactly the same way that PAJA gives flesh to the rights in s 33(1) and (2). The Constitutional Court has recognized the similarity between the Acts for this reason, stating that, because they are both pieces of legislation regulating rights conferred in the Bill of Rights, legal questions about the interpretation of the Acts will always be constitutional issues (see *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) para 14 and *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) para 23).

¹¹⁰ *Chirwa* (CC) supra note 10 paras 49–50.

¹¹¹ Section 210 of the LRA reads:

'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.'

administrative law and the application of PAJA. The body of labour law and all its protections, on Sachs J's view, are not permitted to function side by side with the protections of administrative law. If the arguments of Sachs J on one hand and Skweyiya J, Ngcobo J, Conradie JA and Murphy AJ on the other are accepted, the outcome is impossible. The two arguments are mutually destructive, and cannot operate within the same legal system. The simple solution would be to throw out the conclusions of just one of the arguments, leaving the conclusions of the other argument intact: restore the possibility of a fine sunny day by Tipp-Exing over 'the middle of the night' part of the rhyme. Rejecting one of these arguments, however, necessarily entails the rejection of the other, because the structure and form of the arguments are identical. It is not that the conclusion of one argument is incompatible with the other, but that the logic that supports both conclusions itself leads to the impossible situation. The impossible situation is inherent in the argument, and the argument, for this reason, cannot correctly form part of our law.

To put the situation to which this reasoning leads in less austere legal terms, Sachs J and Skweyiya J (or Ngcobo J, Conradie JA or Murphy AJ) are facing each other back to back, at midnight on a fine day, and shooting each other with their swords.

V CONCLUSION

Labour legislation is premised on the idea that those seeking employment are in a weaker bargaining position than those giving employment. Contracts of employment or the terms on which employment is taken are therefore likely to be dictated by employers rather than employees.¹¹² The framework of labour legislation, and indeed the constitutional right to fair labour practices, is intended to reduce the disparity in bargaining power, and offer employees legal protections they would most probably otherwise not enjoy. The SCA has suggested that one of the considerations in deciding whether a contractual power is public is whether the subject of the power was in a substantially weaker bargaining position when the contract was entered into.¹¹³ Since those to whom labour legislation applies are in a weaker bargaining position than their employers, it seems axiomatic that powers of employment, when exercised by the state or organs of state, are public

See *Public Servants Association obo Haschke* supra note 7 para 15 and Pillay 'PAJA v labour law' op cit note 4 for argument s on this point. The argument must in any case bear the criticism that it undermines other fundamental rights. It is easy to proffer an alternative interpretation of s 210 that, whatever the intention of the legislature was in including it, it was not to diminish or strip the Bill of Rights of its content.

¹¹² See Christianson et al op cit note 97 at 11–12.

¹¹³ *Logbro Properties CC v Bedderson NO* supra note 29 para 10 and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) para 18. See also the High Court judgment in the *AAA Investments* matter: *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2004 (6) SA 557 (T), where the court emphasized that micro-lenders had no option but to comply with the council's rules (at 564H–565B).

powers. An obvious retort here could be that since state employees have the protections of labour law they are no longer in a weaker bargaining position. But this response begs the question why labour law should be able to pre-empt the application of administrative law in the first place. I have argued that there is no categorical reason to deny the protections of administrative law to public-sector employees. Langa CJ supports this view, saying that his conclusion on the facts does not mean that dismissals of public-sector employees will never constitute administrative action in terms of PAJA.¹¹⁴ The question whether a public-sector employment decision is public for the purposes of judicial review depends on the particular facts and circumstances of each case; and a meaningful investigation of the nature of the power or function and the purpose of the institution exercising it is required. The justifications that have been given for the categorical approach to the application of labour law or administrative law cannot be accepted. First, the arguments in support of those justifications are flawed, and secondly, the ultimate conclusions of the approach are absurd.

It is telling that the majority decision in *Chirwa* has been uncomfortably received in the lower courts. In *Nakin v The MEC, Department of Education, Eastern Cape Province and another*¹¹⁵ Froneman J openly criticised the law-ousting-law thesis on the strength of which the majority withheld the protections of administrative law, and preferred reasoning identical to that of Plasket J in *POPCRU*.¹¹⁶ The absurdity of the majority's decision will continue to stymie lower courts and perpetuate confusion until the impossible situation that the majority decision has created is acknowledged and corrected.

¹¹⁴ *Chirwa (CC)* supra note 10 para 194.

¹¹⁵ [2008] 2 All SA 559 (Ck).

¹¹⁶ Supra notes 90 and 91.