

**UNIVERSITY OF KWAZULU-NATAL  
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**JUDICIAL RECOURSE BY PUBLIC SECTOR EMPLOYEES: APPLYING  
ADMINISTRATIVE LAW TO LABOUR CASES**

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## ABSTRACT

Within a public employment setting, both administrative and labour law jurisprudence continue to advance the fundamental rights and protections afforded to individuals by the Constitution under section 23 and 33. Although the Constitutional Court (arguably) seems to favour the determination of one right over another, there exists no legal basis – other than a policy basis – for such a direction. In the context of the employment of public officials, the Constitutional Court side-lined administrative law jurisprudence. The purpose of this dissertation is to explore whether public sector employees are still able to bring an application in a court of law under administrative law even when such is to be applied to quintessential labour cases. This dissertation has analysed the meaning of administrative action under section 33 and PAJA in Chapter 2 and, in Chapter 3, how the courts have approached administrative law within labour cases, uncovering important judicial arguments and direction. This leads to Chapter 4 where since *Gcaba*, case law and academic arguments have shown that the extent to which section 33 and PAJA apply to public-sector employment depends primarily on how one pleads.

The research methodology used in advancing these objectives has comprised solely of desktop literature review of case law, statute, various text books and academic journal articles. In the absence of legislative intention to deny public sector employees their right to administrative justice, it is shown that it is not uncommon for more than one constitutional right to apply to one set of facts. It is argued that three causes of action exist under PAJA, the LRA and legality and that these causes of action are still available to litigants, even though the court in *Gcaba* provided the general rule that administrative law no longer applies. The Constitutional Court's explicit recognition on pleadings has resulted in lower courts providing protection to public sector employees by hearing matters pleaded under PAJA or the principle of legality as the chosen forum. A new direction of administrative law jurisprudence is being realised by lower courts in labour cases, which correctly balances the intention of the legislature and favourably adds to the notion that rights are cumulative and complimentary of each other. Chapter 5 concludes all the relevant literature as well as providing several recommendations. Although PAJA and legality are applicable, the LRA should be the first port of call. It would be beneficial for the Constitutional Court to re-look at this area of law with the aim of advancing fundamental rights.

## DECLARATION

I, **Sean Alan Jackson**, declare that

- (i) The research reported in this dissertation, except where otherwise indicated, is my original research.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain other person's writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
  - a) their words have been re-written but the general information attributed to them has been referenced;
  - b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

Signed:



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In all your ways acknowledge him, and he will direct your paths (Proverbs 36)

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## LIST OF ABBREVIATIONS

ARMSA: Association of Regional Magistrates of Southern Africa

CC: Constitutional Court

CCMA: Commission for Conciliation, Mediation and Arbitration

CGE: The Commission for Gender Equality

EEA: Employment of Educators Act

HC: High Court

LAC: Labour Appeal Court

LC: Labour Court

LRA: Labour Relations Act

NDPP: National Director of Public Prosecutions

PAJA: Promotion of Administrative Justice Act

PSA: Public Service Act

SAPS: South African Police Services

SCA: Supreme Court of Appeal

## KEYWORDS

Public Sector Employees, Public-Sector Employment, Concurrent Jurisdiction, Administrative Law, Labour Law, Employment, Promotion of Administrative Justice Act, Labour Relations Act, Administrative Action, Principle of Subsidiarity, Principle of Legality, Duality of Rights, Deemed Dismissals, Operation of Law, Exceptions, Pleadings, Constitutional Rights, Cause of Action, Interconnectedness of Rights, Invoking the Courts' Competence, Fairness, Lawfulness.

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## CHAPTER 1: INTRODUCTION

Cameron JA at the Supreme Court of Appeal (hereafter SCA) made a profound statement regarding administrative law and public-sector employment as follows:

‘No doctrine of constitutional law confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude. If the legislature sought to deprive dismissed public employees of their administrative justice cause of action in the ordinary courts, because they enjoy rights under the LRA, it could have said so when it enacted PAJA.’<sup>1</sup>

### 1.1 ESSENTIAL BACKGROUND INFORMATION

The purpose of this subsection is to provide an overview of judicial decisions, academic arguments and legislation in establishing the legal position of public sector employees. In achieving this purpose, specific legislation will be set out to show the legislature’s approach when dealing with the overlap between administrative and labour law. The application and interpretation of the various sections of legislation in several cases are also discussed with the aim of showing the conflicting view of our courts on the issue. Lastly, various views of academics on the courts’ approaches will also be analysed.

#### *Legislation on Administrative and Labour law*

Prior to the Labour Relations Act 66 of 1995 (hereafter LRA), the Labour Relations Act 28 of 1956 regulated employment relations. The 1956 Act only applied to privately employed individuals and expressly excluded state employees from its ambit. Therefore, in order to offer state employees some protection, decisions of the employers were subjected to the requirements of administrative law and natural justice. In *SA Police Union and Another v National Commissioner of the SA Police Service and Another*<sup>2</sup> (hereafter SAPU), Murphy AJ recognised the extended protection, holding that, historically, courts had to develop the common law to grant protection to state employees by regarding the conduct of state

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<sup>1</sup> *Transnet Ltd & Others v Chirwa* 2007 (2) SA 198 (SCA) at para 63.

<sup>2</sup> (2005) 26 ILJ 2403 (LC).

employers as administrative action in the aim of advancing labour rights where labour laws were inadequate.<sup>3</sup>

It seems that the position has dramatically changed since the legislature gave effect to section 23<sup>4</sup> of The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution)<sup>5</sup> in promulgating the LRA. An employee under section 213 of the LRA is defined as ‘any person, excluding an independent contractor, who works for another person or for the state, moreover public sector employees are not expressly excluded from the ambit of the LRA under section 2.’<sup>6</sup>

In 2000, the legislature, giving effect to section 33<sup>7</sup> of the Constitution, promulgated the Promotion of Administrative Justice Act 3 of 2000 (hereafter PAJA). It is significant that PAJA does not exclude public sector employees from its ambit and even though the Constitutional Court (hereafter CC) has argued for a ‘one stop shop’ in labour matters, the legislature has not followed suit and has not attended to the ambiguity created by the various acts.

Section 157(1) of the LRA provides that, although the Labour Court (hereafter LC) has exclusive jurisdiction in labour related matters, section 157(2) (b) of the LRA affords the High Court (hereafter HC) concurrent jurisdiction with the LC in matters arising out of any dispute over the constitutionality of any administrative act or conduct or any threatened administrative act or conduct by the state in its capacity as an employer. It is significant to recognise, that the Constitution guarantees ‘everyone’ the right to fair labour practices and administrative justice that is lawful, reasonable and procedurally fair. Therefore, the legislature recognised the need to provide public sector employees with a cause of action under the LRA by giving effect to their section 23 right to fair labour practices (previously not afforded). However, the legislature further recognises the need to control the exercise of public power and give effect to the right to administrative action that is lawful, reasonable

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<sup>3</sup> Ibid para 65.

<sup>4</sup> Section 23(1) provides that everyone has a right to fair labour practices.

<sup>5</sup> The Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 2 provides that the act will not apply to member of the National Defence force and members of the State Security Agency.

<sup>7</sup> Section 33(1) provides that ‘everyone has the right to administrative action that is lawful, reasonable and procedurally fair’.

and procedurally fair under section 33, even though exercising such powers arise out of an employment setting

It is important to highlight further key pieces of legislation. Section 169<sup>8</sup> of the Constitution affords the HC original jurisdiction over all matters not assigned to a court of similar status. Section 157(2)<sup>9</sup> of the LRA expressly acknowledges the HC's jurisdiction in labour matters, thus conferring concurrent jurisdiction of labour matters on both the LC and HC. Section 158(1)(h) of the LRA provides that the LC may review any decision taken or any act performed by the state in its capacity as employer on grounds that are permissible in law. The latter section is significant because as it will be shown in Chapter 4 that its inclusion has led the LCs to hold state employers accountable under PAJA and/or under the principle of legality.

It is arguable that the legislature's intention correctly balances these two constitutional rights under section 157(1) and (2) and section 158(1)(h) of the LRA, ensuring that public sector employees have a cause of action under the LRA, which provides specialised labour relations mechanisms protecting against unfair labour practices, as well as providing them with a choice in holding public officials accountable under administrative law.

### *Conflicting Judicial Interpretation of Legislation*

Recognition of the legislature's intention is not always acknowledged. Murphy AJ followed an approach which effectively denied the right to section 33 of the Constitution and PAJA where it was held in *SAPU* that:

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- <sup>8</sup> (1) The High Court of South Africa may decide-
- (a) any constitutional matter except a matter that-
    - (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
    - (ii) is assigned by an act of Parliament to another court of similar status to the High Court of South Africa; and
  - (b) any other matter not assigned to another court by an act of parliament
- <sup>9</sup> (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.

‘in extending the benefits of labour legislation protection to public sector employees, it arguably meant that there is no longer any reason to extend the protection of administrative law to public sector employees.’<sup>10</sup>

Skweyiya J writing for the majority in *Chirwa v Transnet Ltd and Others*<sup>11</sup> had to determine whether the dismissal of Chirwa amounted to administrative action under section 33 and PAJA and whether the HC had concurrent jurisdiction to hear the matter. It held that the HC did not have concurrent jurisdiction with the LC on labour related matters.<sup>12</sup> This approach had been informed by policy considerations, because the court held that the LRA provided a better route under a specialised forum to deal with labour matters, and thus Chirwa should have used this route.<sup>13</sup>

Ngcobo J writing a separate majority judgment concurred and regarded the claim as ‘essentially’ a labour dispute, endorsing the jurisdictional approach with the same policy considerations. Ngcobo J held that courts should interpret section 157(1) and (2) of the LRA purposively in light of section 23 of the Constitution and the LRA and, in doing so, it was held that the legislator’s use of the word ‘concurrent’ is unfortunate.<sup>14</sup> It is significant that the CC in an earlier decision concluded by O’Regan J in *Fredericks v MEC for Education and Training, Eastern Cape*<sup>15</sup> held that ‘whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the HC since it expressly provides for concurrent jurisdiction.’<sup>16</sup>

Although Skweyiya J did not deal with the administrative action question, Ngcobo J determined the question whether Transnet’s conduct in terminating the employment contract constituted administrative action. It was held that due to a lack of legislation being implemented, the source of the power to dismiss was found to be in contract and was therefore not administrative in nature.<sup>17</sup> Hoexter states that it was this line of reasoning which ultimately guided the court’s decision.<sup>18</sup> The significance of the reasoning on the

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<sup>10</sup> (2005) 26 *ILJ* 2403 (LC) para 66.

<sup>11</sup> 2008 (4) SA 367 (CC).

<sup>12</sup> *Chirwa* (note 11 above) para 73.

<sup>13</sup> *Ibid* paras 66-65.

<sup>14</sup> *Ibid* para 121.

<sup>15</sup> 2002 (2) SA 693 (CC).

<sup>16</sup> *Ibid* para 41.

<sup>17</sup> *Chirwa* (note 11 above) para 142.

<sup>18</sup> Hoexter C *Administrative Law in South Africa* 2ed (2012) 213.

administrative action question suggest that had there been correct implementation of legislation, the court would have come to a different outcome.

There are several other judgments recognising the legislature's intention. Cameron JA in *Transnet Ltd and others v Chirwa*<sup>19</sup> recognised that the existence of labour-law remedies does not exclude the respondent's remedies in administrative law.<sup>20</sup> Langa CJ writing for the minority in *Chirwa* held that 'litigants are entitled to the full protection of all and any applicable rights provided in the Constitution and courts should not presume to determine that the "essence" of a claim engages one right more than another.'<sup>21</sup> Langa CJ held that whatever we think of the wisdom of Chirwa's election to avoid the specialist provisions of the LRA, the court should evaluate Chirwa's claim as it was presented to the court.<sup>22</sup> Langa CJ further held that while the majority may question what the intention of the legislature was in enacting section 157 of the LRA, 'courts must respect that path chosen and in doing so must be mindful not to substitute preferred policy choices for those of the legislature.'<sup>23</sup>

Plasket J further recognised in *Police and Prisons Civil Rights Union v Minister of Correctional Services (No1)*<sup>24</sup>:

'There is nothing incongruous about litigants 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.'<sup>25</sup>

Conflicting views as to whether public sector employees have the right to both causes of action has led to uncertainty and needs to be addressed by the CC. The court had the opportunity to do so in *Gcaba v Minister for Safety and Security and Others*.<sup>26</sup>

Van der Westhuizen J writing for an unanimous majority in *Gcaba* dealt with two questions: whether the decision not to appoint the applicant was administrative action thus subjected to

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<sup>19</sup> 2007 (2) SA 198 (SCA).

<sup>20</sup> *Ibid* para 58.

<sup>21</sup> *Ibid* para 175.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* para 173.

<sup>24</sup> 2008 (3) SA 91 (E).

<sup>25</sup> *Ibid* para 61.

<sup>26</sup> 2010 (1) SA 238 (CC).

administrative review; and whether an applicant whose claim is based on a labour matter may approach a HC or should follow the channels provided for by the LRA.

The court held correctly that ‘legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.’<sup>27</sup> Van der Westhuizen J held that ‘where litigants are at liberty to relegate the finely-tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissals.’<sup>28</sup> The court’s view is arguably disagreeable on the basis found in Langa CJ’s minority judgment in *Chirwa* because ‘like *Chirwa*, *Gcaba* is not asking a non-labour court to decide a purely “labour issue”, instead what is being asked is that a High Court decide an administrative law issue.’<sup>29</sup>

Van der Westhuizen J held that a court is bound by the previous decision of a higher court and by its own previous decisions in similar matters.<sup>30</sup> However, notwithstanding the conclusion reached on the administrative action issue by Ncgobo J in *Chirwa*, Van der Westhuizen J concluded that ‘generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA.’<sup>31</sup> Hoexter argues that the court seems to indicate that controlling the exercise of public power through the role of section 33 of the Constitution cannot simply be denied as it was ruled out in *Chirwa*.<sup>32</sup>

Van der Westhuizen J further held that the failure to promote and appoint *Gcaba* appears to be a quintessential labour-related issue.<sup>33</sup> Van der Westhuizen J correctly held that jurisdiction is determined on the basis of the pleadings and not the merits of the case; however, the court then proceeded to hold that, because *Gcaba* had not pleaded a case adequately on administrative actions grounds, the HC had no jurisdiction.<sup>34</sup> When dealing with the administrative action question, the court is silent as to why the decision did not fall into section 33 and PAJA, rather holding that the impact of *Gcaba*’s dismissal was mainly felt by *Gcaba* and had little or no direct consequence for any other citizens.<sup>35</sup> Under PAJA, one of

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<sup>27</sup> *Ibid* para 44.

<sup>28</sup> *Ibid* para 56.

<sup>29</sup> *Chirwa* (note 11 above) para 173.

<sup>30</sup> *Gcaba* (note 26 above) para 58.

<sup>31</sup> *Ibid* para 64.

<sup>32</sup> Hoexter C ‘*From Chirwa to Gcaba: An Administrative Lawyer’s View*’ in M Kidd & S Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* 2010 47 at 54.

<sup>33</sup> *Ibid* para 66.

<sup>34</sup> *Ibid* para 74.

<sup>35</sup> *Ibid*.

the factors to take into account to determine whether action qualifies as administrative is that it must have direct, external legal effect.

Since station commanders are appointed to serve the interest of the public, it is then arguable that the decision to appoint a new station commander who met only the minimum standards required over someone who had years of experience would have a public impact. The approach taken by Van der Westhuizen J seems to contradict the overall theme of Ngcobo J's judgment as there is clearly legislation which deals with the appointments and dismissals of police officials in the South African Police Services Act<sup>36</sup>. Yet, the court in *Gcaba*'s case was silent on this issue. The approach taken in not applying the elements effectively under PAJA not only violated the principle of subsidiarity (see heading 4.2 below) but also shows that the court selectively ignored settled jurisprudence on the administrative action enquiry.

#### *Various Brief Views on the Constitutional Court's Approach*

In providing guidance as to the meaning of 'external effect' under PAJA, Pfaff and Schneider argue the phrase is 'aimed at excluding administrative measures that are taken within the sphere of public administration.'<sup>37</sup> They argue that in cases dealing with public-sector employment it is often difficult to distinguish between internal and external measures; however, they argue correctly that, for example, 'internal measures would be setting working hours as these decisions only affect persons as part of public administration.'<sup>38</sup>

This reasoning is similar and can be seen in the *ratio* of the *SAPU* case where it was held that the setting of working hours was within the administration and had no public element attached to the decision.<sup>39</sup> The authors argue that 'external measures involve a decision which affects a person's rights as an individual, therefore such decisions qualifies as administrative action',<sup>40</sup> and that, moreover, 'a decision about whether a civil servant should be promoted or not, affects that persons individual rights and is reviewable.'<sup>41</sup> The court's addition of the

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<sup>36</sup> 68 of 1995.

<sup>37</sup> Pfaff, R & Schneider, H 'The Promotion of Administrative Justice Act from a German Perspective' (2001) 17 *South African Journal on Human Rights* 59 at 70ff 73.

<sup>38</sup> *Ibid* 74.

<sup>39</sup> 26 *ILJ* 2403 (LC) para 57.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

‘public impact’ factor seems to have similar meaning to that of ‘external effect’; however its inclusion and placement within the PAJA enquiry is confusing.

Hoexter argues that reliance on the public impact enquiry without determining the list of factors in *SARFU* or determining which of the elements under PAJA are lacking shows that the court fudges the enquiry.’<sup>42</sup> Hoexter argues consequently that:

‘...the court’s reasoning in *Gcaba* raises more questions about administrative action than it answers, arguably causing just the sort of “complexity and confusion” that the court accuses others of having created after *Chirwa*.’<sup>43</sup>

Brassey maintains that *Gcaba*’s conclusion on the administrative action question is correct because there is no longer any need for administrative review to apply at all as *Gcaba* has been placed within the ‘protective umbrella’ of the labour practice regimes.<sup>44</sup> Furthermore, Brassey states that since the decision to grant or refuse a promotion is now governed under the labour regimes, there will not have been any few or direct consequences or implications for other citizens as administrative law no longer applied.<sup>45</sup>

Respectfully, the argument proposed by Brassey is incorrect, as Ngcukaitobi correctly argues that the court’s reasoning that ‘the decision is not administrative action because it is a labour issue, conflates the nature of the decision with the constitutional standard against which the decision must be measured for validity.’<sup>46</sup> Van der Westhuizen J does seem to indicate that administrative action would have applied if *Gcaba* sustained a cause of action under PAJA; however, Ngcukaitobi rightly points out that the court, in approaching the question as to whether the decision was administrative action, ‘appeared to believe, wrongly, that the validity of a decision should be measured against the right to fair labour practices, consequently, this is why the decision was not administrative action.’<sup>47</sup> Ngcukaitobi rightly argues that *Gcaba* was a departure from precedent on the administrative action issue set by O’Regan J in *Fredericks* and by Ngcobo J in *Chirwa*.

<sup>42</sup> Hoexter (note 18 above) 216.

<sup>43</sup> Ibid 217.

<sup>44</sup> Brassey, M ‘Back off But Back Up! Administrative Law Rightly Yields to Labour Law’ (2009) 2 *Constitutional Court Review* 232-233.

<sup>45</sup> Ibid 221.

<sup>46</sup> Ngcukaitobi, T ‘Unbound by Precedent: Critical Reflections on the Decision of the Constitutional Court in *Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC)*’.

<sup>47</sup> Ibid 12.



According to Grogan, ‘the fact that South Africa has a ‘one stop shop’ for resolving labour disputes is all very well but whether this should deprive litigants of their right to shop elsewhere remains debatable.’<sup>48</sup> However, the ‘one stop shop’ approach has not been entirely effective. O’Regan J correctly argued in *Fredericks* that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case.<sup>49</sup> The *Gcaba* judgment did not follow this approach and, had the court correctly determined the case under PAJA, section 157(2) of the LRA would have been given effect, and the use of a purposive approach was the result in contradiction to the wording of section 157(2).<sup>50</sup>

Hoexter states that:

‘[P]olicy argument cannot alter the express terms of section 157 of the LRA- however unfortunate those terms may seem...the majority’s interpretation of the provision is in conflict not only with the wording of section 157 but also with the Court’s own previous interpretation of that wording in *Fredericks*...’<sup>51</sup>

In *Fredericks*, ‘the applicant expressly disavowed any reliance to section 23(1) of the Constitution, which entrenches the right to fair labour practices, therefore the case was decided on the administrative action basis as pleaded.’<sup>52</sup>

Van der Westhuizen J in *Gcaba* underscored the holding in *Fredericks* that ‘the applicant’s pleadings are the determining factor as they contain the legal basis of the claim which the applicant has chosen to invoke the court’s competence.’<sup>53</sup> This approach to pleadings seems to elucidate the position on public sector employees. However, the position where an employee makes application in the HC both under the LRA and PAJA has not been established. Moreover, it is a route that does not follow the ‘one stop shop’ general policy direction in which our CC in *Chirwa* and *Gcaba* have chosen to approach matters of public sector employment. Unusually, it is only in labour and administrative law where a litigant has only one cause of action under the LRA.

<sup>48</sup> Grogan J ‘*Pandora’s Box: The Con Court’s take on Chirwa*’ (2009) *ELJ* 8.

<sup>49</sup> *Fredericks* (note 15 above) para 38-40.

<sup>50</sup> Hoexter (note 32 above) 48.

<sup>51</sup> Hoexter C ‘*Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court.*’ (2008) 1 *Constitutional Court Review* 219.

<sup>52</sup> *Fredericks* (note 15 above) para 34.

<sup>53</sup> *Gcaba* (note 26 above) para 75.

In general, where two or more violations of constitutional rights arise out of a single set of facts, they are actionable before a court of law. An example of this scenario is when an employee is subjected to an unfair disciplinary proceeding conducted in a manner which violates their section 23 right to fair labour practices, the LRA and its specialised forums governs the labour dispute. However, where disciplinary proceedings are conducted in a manner which violates an employee's right not to be unfairly discriminated against based on sexual orientation, the employee would simultaneously have cause of action in the Equality Court. It is unclear why the CC has persistently preferred the LRA route over the PAJA route.

The Constitution guarantees rights to those within its jurisdiction; yet those rights are not absolute and may be lawfully limited. In the absence of any express legislative intention to do so, it is necessary to analyse the *Chirwa* and *Gcaba* judgments in detail in Chapter 3 to ascertain on what legal basis the courts have chosen to rely on achieving this movement. The effect of achieving a 'one stop shop' without any legal basis denies a right guaranteed under section 33 of the Constitution. It has been briefly mentioned above that where your right to fair labour practices as well as your right not to be unfairly discriminated against has been violated, both rights would be available even though your right not to be unfairly discriminated against happens to arise out of an employment setting.

It is important to recognise that *Chirwa* and *Gcaba* are infamous cases within this area of law because the CC sought to limit the right to administrative justice in favour of the right to fair labour practices and followed an approach contrary to settled administrative law jurisprudence. Although infamous, the CC does pronounce on important issues regarding the interconnectivity of rights and the various courts' jurisdictions based on pleadings. The effect of *Gcaba's* recognition of those issues have resulted in cases since *Gcaba* proceeding to determine administrative law within labour cases. Chapter 4 aims to set out those post-*Gcaba* cases along with identifying concepts such as the principle of legality, subsidiarity, duality of rights, dismissals via operation of law, pleadings and the exceptions to the general rule applied by post-*Gcaba* cases, to establish the extent to which public sector employees' constitutional rights are afforded to them.

Only the CC's judgments will be discussed below. Chapter 4 deals with the *Chirwa* and *Gcaba* in depth with the respective HC, and SCA judgments. Chapter 4 subsequently

includes discussions on the *SAPU* and the *Police and Prisons Civil Rights Union v Minister of Correctional Services and Others* (hereafter POPCRU) judgments in detail because the decisions in those cases on administrative and labour law adds favourably to the developing jurisprudence leading up to the decisions of the CC.

## 1.2 PROBLEM STATEMENT

Hoexter recognises two schools of thought emerging out of this debate: the first assumes that ‘any type of employment relationship should be governed by section 23 of the Constitution and its associated legislation [giving effect to section 23] to the complete exclusion of section 33 of the Constitution and PAJA.’<sup>54</sup> The second argues that:

‘the exercise of public powers inevitably attracts the protection of administrative law as well as labour law, irrespective of context, so that remedies are simultaneously available in both branches of law in cases of public sector-employment.’<sup>55</sup>

## 1.3 RESEARCH STATEMENT AND OBJECTIVES

Since *Chirwa* and *Gcaba*, the position as to whether public sector employees have two causes of action remains unclear. The CC in *Gcaba* had the opportunity to clarify the position as to whether an applicant can approach the HC on administrative action grounds in circumstances arising out of an employment relationship. The addition of the ‘public impact’ factor along with the courts silence as to which elements in the PAJA enquiry remains unsatisfied thus contributes to further uncertainty as to the extent to which PAJA is applicable to public sector employees. The court seemed to indicate that if there were public impact, PAJA would have succeeded as a cause of action. The CC’s addition of a general rule is not absolute and does not discourage litigation in its entirety. There are circumstances where administrative law principles still find application to employment situations through pleadings. Consequently,

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<sup>54</sup> Hoexter (note 18 above) 210.

<sup>55</sup> Ibid 210-211.

there is insufficient finality pertaining to the extent to which administrative law applies to public-sector employment and is left open by *Gcaba*.

### 1.3.1 RESEARCH PURPOSE

The purpose of this dissertation is to explore whether public sector employees are presently able to bring an application in a court of law under administrative law applied to labour cases and under what circumstances could this possibly be achieved.

### 1.3.2 QUESTIONS AND OBJECTIVES

In achieving the main research question under 1.3.1, several secondary questions and objectives must be ascertained:

- I. To what extent does section 33 of the Constitution and PAJA apply to public sector employment?
- II. To what extent can the HC and LC possibly exercise concurrent jurisdiction?
- III. Under what basis does the court in *Chirwa* and *Gcaba* seek to deny constitutional rights?
- IV. Does an infringement of dual rights exist arising out of a single set of facts within employment setting?
- V. Considering the *Gcaba* judgment's recognition on pleadings, under which possible cause of actions could public sector employees 'choose' to invoke the courts competence?

This dissertation does not seek to deal with the provisions of the LRA in detail nor advocate that the LRA is the only route which must be pursued. It merely seeks to determine the extent to which rights are afforded to public sector employees by examining an array of causes of actions which are applicable under certain circumstances.

### 1.4 RESEARCH METHODOLOGY

This dissertation has been researched using only desktop, literature review. Relevant literature consisting of case law, statute, academic arguments and text books have been relied on in seeking to provide understanding and knowledge surrounding the research problem.

## 1.5 CHAPTER BREAKDOWN

### 1.5.1 CHAPTER 1: INTRODUCTION AND BACKGROUND

This chapter comprises an introduction and background as well as highlighting the purpose and rationale behind the research based on various arguments surrounding public sector employment. *Chirwa* and *Gcaba* have been dealt with briefly in this chapter to establish some context, these cases, amongst others, being analysed in greater depth in Chapter 3.

### 1.5.2 CHAPTER 2: DEFINING ADMINISTRATIVE ACTION WITHIN PUBLIC SECTOR EMPLOYMENT

This chapter seeks to define what constitutes administrative action under section 33 of the Constitution and, by unpacking PAJA's definition in the aim, to establish what each element under PAJA requires for a decision or conduct to fall under PAJA's ambit. This chapter also discusses the principle of legality and the circumstances in which the principle is applied.

### 1.5.3 CHAPTER 3: ANALYSING ADMINISTRATIVE LAW APPLIED IN LABOUR CASES

This chapter seeks to provide an in-depth analysis of the *Chirwa* and *Gcaba* judgments with the aim of establishing an understanding in the court's reasoning. Since *Chirwa* and *Gcaba*'s approach seems to prefer one constitutional right over another, it is necessary to discuss cases such as *SAPU*, *Fredericks*, *POPCRU* and the *Chirwa* HC and SCA leading up to *Gcaba*. The aim of establishing the views of the judges in this area of research is vital because ultimately their views have significant impact on the public-sector employees' legal position and the development of administrative and labour law jurisprudence.

### 1.5.4 CHAPTER 4: POST GCABA, APPLYING ADMINISTRATIVE LAW TO LABOUR CASES

Chapter 3 seeks to determine the legal basis for the CC decision to effectively deny public sector employees of their section 33 right. Based on how *Gcaba* reasoned, among other

important cases, Chapter 4 is aimed at determining the effectiveness of the *Gcaba* outcome by exploring concepts such as the Principle of Subsidiarity, the Principle of Legality, Duality of Rights, Dismissals via Operation of Law, Invoking the Courts Competence through Pleadings and Exceptions identified by *Gcaba*. The crux of Chapter 4 leads on from Chapter 3 in that effectively, public sector employees are still able to pursue other causes of action other than the LRA within certain circumstances.

### 1.5.5 CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS

Chapter 5 aims to summarise the findings of the research in the furtherance of contributing to knowledge and understanding as well as answering the research questions identified in Chapter 1.

## 1.6 CONCLUSION

In conclusion, under our current constitutional dispensation, the constitution expressly provides two fundamental rights under section 23 and 33. It is problematic that, in the past, public sector employees were not afforded the benefit of labour protection. Thus, administrative law and the law of natural justice had to be extended in order to provide some protection. Administrative justice is presently a constitutional right along with the right to fair labour practices. It is arguable that both rights apply to a single set of facts arising out of an employment setting. It is simply undeniable that the existence of one right should not sideline the existence of another because a court through policy considerations feels as though the former is preferable. When public sector employees approach a court seeking protection under section 33 and PAJA, an enquiry as to whether the decision is of an administrative nature should be dealt with on a case- by-case basis. Without such an enquiry, it is incorrect to conclude that the decision is not administrative in nature simply because the matter arose out of an employment setting.

Although the *Chirwa* and *Gcaba* judgments have been mentioned above as infamous, this dissertation does not advocate that the justices' wisdom and reasoning on the debate should be simply ignored because the direction taken by the court is not in line with the particular legal regime. On the contrary, within a healthy constitutional democracy, courts are to

develop the law in such a way as to advance and protect individual rights. Jurisprudence within our law system develops on a daily basis. It is important for there to be conflicting views by other courts in order for a particular area of law to be improved so that all grey areas are covered. The direction taken by the CC has resulted in lower courts following a different approach. This dissertation in Chapter 4 identifies those cases which have followed a contrary approach to that of the CC by determining the legal position of public sector employees and the extent to which constitutional rights are afforded to them.

To provide an understanding of administrative law, this dissertation now turns to setting out an in-depth analysis of the meaning of administrative action under section 33 and PAJA in Chapter 2 with the aim of determining whether administrative action can be said to apply to public sector employees?

## CHAPTER 2: DEFINING ADMINISTRATIVE ACTION WITHIN PUBLIC SECTOR EMPLOYMENT

### 2.1 INTRODUCTION

Administrative law principles over the past decade or two have strengthened within our constitutional democracy where courts, academic arguments and the legislature have added to the provision of favourable protection to individuals dealing with the administration the advancement of administrative law jurisprudence. Chapter 1 sought briefly to identify administrative law principles to provide some context. Chapter 3 provides an in-depth analysis of key cases, specifically on administrative law principles within labour cases. To fully comprehend how the case law discussed in Chapter 3 applied administrative law principles, a well-informed analysis of current administrative law jurisprudence is necessary.

The purpose of this chapter is to identify what constitutes administrative action under the common law, under section 33 of the Constitution and under PAJA. This chapter also identifies the constitutional standard of legality and its development as a general aspect of administrative law. It must be made clear that this chapter does not identify the development of administrative law as a whole. The focus is confined to establishing what administrative action is under section 33 and PAJA as defined and whether decisions made under employment related circumstance fall within the ambit of section 33 and PAJA.

### 2.2 ADMINISTRATIVE ACTION UNDER THE COMMON LAW

Reviewing administrative action under the common-law principles of natural justice protected against the abuse of powers ensured that decisions were not *ultra vires*<sup>56</sup> as well as conforming to the *audi alteram partem*<sup>57</sup> rule.<sup>58</sup> The purpose of the rules of natural justice was to constrain public powers from acting arbitrarily, capriciously or *mala fide*.<sup>59</sup> As mentioned above in Chapter 1, prior to the 1995 LRA and PAJA, public sector employees were afforded review protection from dismissals involving the exercise of public power which adversely affected their rights, especially in instances where the principles of natural

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<sup>56</sup> Beyond one's powers or legal authority.

<sup>57</sup> To hear the other side or let the other side be heard as well.

<sup>58</sup> Ngcukaitobi T & Brickhill J 'A Difficult Boundary: Public Sector Employment and Administrative Law' 2007(28)(4) *ILJ* 771.

<sup>59</sup> *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd. and Another* [1988] 2 All SA 308 (A).



justice were not adhered to.<sup>60</sup> Due to the change in South Africa's dispensation, the common law principles of natural justice and *ultra vires*, although useful in providing substance and context, no longer provide direct force in such matters.

### 2.3 ADMINISTRATIVE ACTION UNDER SECTION 33 OF THE CONSTITUTION

Section 33 of the Constitution provides for just administrative action, more particularly:

‘(1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’

Importantly, section 33 further provides:

‘(3) National Legislation must be enacted to give effect to these rights, and must-

- (a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) Promote an efficient administration.’

The concept of ‘administrative action’ is not defined under the administrative justice clause (section 33), therefore it was primarily up to the courts to give it meaning and distinguish it from legislative, executive and judicial action.<sup>61</sup> Thus as outlined below, three CC judgments informed by the doctrine of separation of powers, provided constitutional meaning of ‘administrative action’ under section 33.<sup>62</sup>

In the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,<sup>63</sup> the CC held that ‘The enactment of legislation by an elected local council acting in accordance with the Constitution is legislative and not an administrative act.’<sup>64</sup> In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union*

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<sup>60</sup> *Administrator of Natal and Another v Sibiyi and Another* [1992] 2 All SA 442 (A); see *Administrator, Transvaal, and Others v Zenzile and Others* [1991] (1) SA 21 (A) where the court affirms certain legal principles of general application to the dismissal of an employee by a public authority; see also *South African Roads Board v Johannesburg City Council* 1991(4) SA 1 at 13B – C.

<sup>61</sup> Hoexter C *Administrative Law in South Africa* 2 ed (2012) at 172.

<sup>62</sup> *Ibid* 175.

<sup>63</sup> 1999 (1) SA 374 (CC).

<sup>64</sup> *Ibid* para 42.

*and Others*<sup>65</sup> (SARFU) the CC held that the ‘appointment by the president of a commission of enquiry does not constitute administrative action as the power is akin to a prerogative power conferred by the Constitution onto the Head of State.’<sup>66</sup> It would have amounted to administrative action; however it was an exercise of direct constitutional power.<sup>67</sup> In the case of *Nel v Le Roux NO and Others*<sup>68</sup> the CC held that the summary sentence procedure of persons who refused to give evidence was judicial rather than administrative in nature.<sup>69</sup>

The significance of the cases mentioned above seemingly influenced the legislature in excluding, inter alia, executive, legislative and judicial action within the ambit of PAJA.

The SCA in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>70</sup> held that from a construction of section 33, conduct of ‘an administrative nature’ does not extend to:

‘...the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor the exercise of original powers conferred upon the President as head of state.’<sup>71</sup>

*SARFU* provides significant meaning to section 33 and held that its principal function is:

‘...to regulate conduct of the public administration and in particular ensuring if action has taken place by the administration, which affects or threatens individuals, the procedure to be followed must comply with the constitutional standards of administrative justice.’<sup>72</sup>

Section 33 of the Constitution serves as a guardian against the abuse of public power and gives effect to our system of constitutional law based on the separation of powers doctrine.<sup>73</sup> Although section 33 provides important protection, the CC is mindful of the difficulty of

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<sup>65</sup> 1999 (10) BCLR 1059 (CC).

<sup>66</sup> Ibid paras 144-147; See also Hoexter (note 61 above) 177.

<sup>67</sup> Ngcukaitobi (note 58 above).

<sup>68</sup> 1996 (3) SA 562 (CC).

<sup>69</sup> Ibid para 24.

<sup>70</sup> 2005 (6) SA 313 (SCA).

<sup>71</sup> Ibid para 24.

<sup>72</sup> *SARFU* (note 65 above) para 136.

<sup>73</sup> Ngcukaitobi T ‘*Life after Chirwa: Is there Scope for Harmony between Public Sector Labour Law and Administrative Law?*’ 2008(2) ILJ 847.

determining the nature of administrative action. Therefore, it must be done on a case by case basis.<sup>74</sup> In *Fedsure*, the CC underscored that it is necessary to consider on a case by case basis whether the particular action of the organ of state is of its nature an administrative action for the purpose of section 33 of the Constitution.<sup>75</sup>

This approach is important because, while an act may qualify as administrative action broadly, when considering the nature of the power exercised and its context, a difficult outcome could appear. In determining what to take into account when faced with this difficulty, the *SARFU* judgement laid down certain factors to be taken into account in considering the nature of the action being exercised when determining whether an action fell within the meaning of section 33. The factors include the following:

‘The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.’<sup>76</sup>

*SARFU* further determined that

‘What matters is not so much the functionary as the function... The focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’<sup>77</sup>

The SCA in *Greys Marine* endorsed this approach, holding that ‘whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.’<sup>78</sup>

The purpose of determining the nature of the power exercised rather than a broad determination of exercises of public powers gives effect to the meaning and purpose of section 33. *Greys Marine* rightly stated that:

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<sup>74</sup> *SARFU* (note 65 above) para 143.

<sup>75</sup> *Fedsure* (note 63 above) para 26.

<sup>76</sup> *SARFU* (note 65 above) para 143.

<sup>77</sup> *Ibid* para 141.

<sup>78</sup> *Greys Marine* (note 70 above) para 24; See Hoexter (note 61 above) at 175-176 where Hoexter states that the purpose of confining the enquiry to the function being performed rather than the functionary indicates that it is possible for other branches of the State performing administrative action.

‘Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.’<sup>79</sup>

The development of administrative law jurisprudence by the CC in *SARFU*, *Fedsure and Nel* led to clarity as to the principle function of section 33 of the Constitution, which is to regulate the public administration ensuring that any action taken does not affect or threaten individuals if adherence to procedural requirements comply with the constitutional standard of administrative justice.<sup>80</sup> The legislature in the year 2000, as per its constitutional duty, promulgated legislation giving effect to the meaning of section 33. Having discussed the meaning of section 33 prior to legislation being enacted, the next subsection discusses the meaning of section 33 under legislation.

## 2.4 ADMINISTRATIVE ACTION UNDER PAJA

Section 33 of the Constitution required legislation to be enacted to give effect to the right to administrative justice that is lawful, reasonable and procedurally fair as well as the right to be given written reasons. In promulgating PAJA, the legislature aimed to satisfy its constitutional obligation. The long title of PAJA states its purpose in giving effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33... However, the objective stated within the preamble is equally important, namely, that it strives to ‘promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function (my emphasis), by giving effect to the right to just administrative action.’

Prior to the introduction of the interim constitution, the basis for judicial review of administrative action was the common-law principles mentioned above, and therefore the question as to whether the common-law principles could be used as a separate and distinct

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<sup>79</sup> *Greys Marine* (note 70 above) para 24.

<sup>80</sup> *SARFU* (note 65 above) para 136.

cause of action for judicial review has now been settled. In *Pharmaceutical Manufacturers Association of SA v President of the RSA*,<sup>81</sup> the court held that:

‘the control of public power by the courts through judicial review is and has always been a constitutional matter...The common-law principles have been subsumed under the Constitution, and insofar as they might continue to be relevant to judicial review of public power, the two are intertwined and do not constitute separate concepts.’<sup>82</sup>

This was later stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>83</sup> where the CC held that the court’s power to ‘review no longer flows from the common law but from PAJA and the Constitution, therefore the ground norm of administrative law is to be found in the principles of our Constitution.’<sup>84</sup>

In *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others*<sup>85</sup> Wallis J provided the correct approach to administrative action claims where a ‘court is required to make a positive decision (my emphasis) whether a particular exercise of public power or performance of a public function is of an administrative character in order for the power of judicial review under PAJA to be engaged.’<sup>86</sup> Therefore, ‘administrative action does not occur by default on the basis that it does not fit into some other juristic pigeonhole.’<sup>87</sup> Wallis J further found that the ‘requirement that the decision be of an administrative nature demands a detailed analysis of the nature of the public power or public function being exercised to determine its true character.’<sup>88</sup>

It is aphoristic that the gateway to judicial review of administrative action flows not from the common law, or directly from section 33 of the Constitution, but from PAJA which was constitutionally mandated to give effect to section 33. Thus, PAJA is the first port of call in administrative law matters.

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<sup>81</sup> 2000 (2) SA 674 (CC).

<sup>82</sup> *Ibid* para 33.

<sup>83</sup> 2004 (4) SA 490 (CC).

<sup>84</sup> *Ibid* para 22; see also *Fedsure* (note 63 above) para 59.

<sup>85</sup> 2010 (5) SA 574 (KZP).

<sup>86</sup> *Ibid* para 61.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

### *The Principle of Legality*

Although PAJA is the first port of call in holding the administration accountable when exercising public power of an administrative nature, another possible means of holding the administration accountable is through the principle of legality. An in-depth discussion on the principle of legality will follow in section 2.5. Chapter 4 will deal with the significant development of the principle in holding the administration accountable in labour cases.

It is important to lay down below the requirements as to what constitutes administrative action for the purposes of section 33 under PAJA, Thereafter a closer look at employment related cases as provided in Chapter 3 is necessary to ascertain the jurisprudential direction taken by the courts.

#### 2.4.1 DEFINITION OF ADMINISTRATIVE ACTION UNDER PAJA

Section 1 of PAJA defines administrative action as follows:

‘Administrative action’ is defined as ‘any decision taken, or failure to take a decision by (a) an organ of state when (i) exercising a power in terms of the Constitution or provincial Constitution or (ii) exercising a public power or performing a public function in terms of any legislation or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect...’

‘Decision’ under section 1 is defined as ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be under an empowering provision.’

Section 1(i)(b)(aa)-(ii) of PAJA provides for nine specific exclusions of decisions from the definition of administrative action and from the application of PAJA. It is significant to state that those exclusions make no reference to specifically excluding employment decisions taken by public bodies.<sup>89</sup> It is important to note that, although a decision may not specifically be excluded from within PAJA’s ambit, through proper analysis of legal principles by our courts, a decision could very well not be administrative in nature.

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<sup>89</sup> Ngcukaitobi (note 73 above) 850.

The CC reiterated this settled position where Mogoeng J held in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*<sup>90</sup> that ‘whether administrative action has been taken, which would make PAJA apply, or not, it cannot be determined in the abstract, therefore regard must be had to the facts of each case.’<sup>91</sup>

To ensure that decisions are not determined in the abstract, the SCA in *Greys Marine* held that the definition as to what constitutes administrative action for the purposes of PAJA can be conveniently divided into seven main elements in a ‘consolidated and abbreviated form which will suffice to convey its principal elements.’<sup>92</sup> The principal elements are:

- (a) a decision;
- (b) by an organ of state (or natural or juristic person);
- (c) exercising a public power or performing a public function;
- (d) in terms of any legislation (or in terms of an empowering provision);
- (e) that adversely affects rights;
- (f) that has direct, external legal effect;
- (g) and that does not fall under any of the listed exclusions.

Each of these elements will now be discussed in turn.

## 2.4.2 EXPANDING PAJA’S DEFINITION

### (a) Decision

A ‘decision’ for the purposes of section 1 of PAJA has been defined above. Importantly, the act not only provides for decisions made or proposed to be made, but also makes provision for situations where the decision maker fails<sup>93</sup> to take a decision as well as situations of refusal to take a decision.<sup>94</sup> In *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd*,<sup>95</sup> the SCA recognised that there are instances where a decision not to do something may constitute administrative action, as in the case of a failure

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<sup>90</sup> 2011 (1) SA 372 (CC).

<sup>91</sup> *Ibid* para 37.

<sup>92</sup> *Greys Marine* (note 70 above) para 21.

<sup>93</sup> See *Sibiya v Director-General: Home Affairs* 2009 (5) SA 145 (KZP) at paras 13-15.

<sup>94</sup> Hoexter (note 61 above) 198.

<sup>95</sup> 2016 (2) SA 494 (SCA).

to issue a passport or identity document; however, for the SCA, inaction is not ordinarily to be equated with action and even less so to being administrative in nature.<sup>96</sup>

Hoexter states that, notwithstanding the lengthy definition of a decision from (a)-(g) under section 1 of PAJA, it should not be assumed that every official act will qualify as a 'decision'.<sup>97</sup> This ties in with the overall approach mentioned above, that the question of what is and what is not administrative action must be determined positively and not in the abstract.

In *City of Cape Town v Hendricks and Another*,<sup>98</sup> the SCA held that notices served on the respondents did not amount to a 'decision' for the purposes of PAJA. In reaching this conclusion it held that the City had taken no decision in issuing and serving the notices:

'The notices simply informed the respondents that they must comply with the law (i.e. remove the structures which contravene the by-laws and the Ordinance) and informed them of the consequences should they fail to do so'.<sup>99</sup>

The definition of 'decision' includes that it must be 'of an administrative nature' and 'made under an empowering provision'. Each of these will be dealt with under their respective headings below.

(b) By an organ of state (natural or juristic)

In terms of section 1 of PAJA, 'organ of state' has been defined to bear the meaning assigned to it in section 239 of the Constitution. Therefore, in terms of section 239, 'organ of state' is defined as 'any state department or other institution or functionary exercising a power or providing a public function in terms of the Constitution or in terms of any legislation.' Based on the interpretation of this definition of 'organ of state' any power exercised will suffice. PAJA does provide for who an administrator is for the purposes of PAJA: a natural or juristic person, not an organ of state exercising a public power or performing a public function.

(c) Administrative in Nature:

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<sup>96</sup> Ibid para 31.

<sup>97</sup> Hoexter (note 61 above) 199; see also 198-203 for a detailed analysis of what constitutes a decision for the purposes of PAJA.

<sup>98</sup> 2012 (6) SA 492 (SCA).

<sup>99</sup> Ibid para 10.



Where a decision is administrative in nature, the exclusions section in PAJA suggests that the decision does not include executive, legislative or judicial action within its meaning. In *SARFU*, the court held that a decision is administrative in nature when it is directed at implementing legislation rather than at the formulation of policy.<sup>100</sup> Although implementing legislation implies that a decision is administrative in nature, it is not decisive on its own and all factors need to be considered within the circumstances in each case. *SARFU* further held that in determining ‘administrative in nature’ one looks at the function being performed rather than the functionary and therefore the question to be determined is whether the task itself is administrative or not.<sup>101</sup> The purpose of seeking the true nature of the power exercised qualifies the action as administrative for the purposes of section 33. A series of factors may be relevant in deciding on which side of the line a particular action falls.<sup>102</sup> A decision made by the executive could at first glance be excluded from PAJA for being an executive action, however one looks not at the functionary performing the action, but rather the function being performed in establishing the true nature of the decision.

Wallis J in *Sokhela*<sup>103</sup> provided reasoning as to why it is important to determine whether an action is ‘administrative in nature’ as the enquiry serves two purposes. The first purpose ‘focusses the court’s attention on determining whether the exercise of public power of performance of a public function under consideration is properly classified as administrative action’, and therefore, as noted above, courts are required to make a positive finding.<sup>104</sup> The second is closely related to the first. This is to make it clear that the mere fact that an exercise of public power of the performance of a public function does not fall within one of the exclusions in sub-paragraphs (aa) to (ii) of the definition of ‘administrative action’, which does not necessarily mean that the exercise of public power or the performance of a public function in question constitutes administrative action.<sup>105</sup>

Although the legislature has not excluded public-sector employment within the ambit of e PAJA, as per the reasoning of Wallis J, a positive finding as to whether the exercising of a public power or the performing of a public function within an employment context is administrative in nature conforms with the standard imposed in ensuring constitutional validity on a case-by-case basis. Determining whether conduct amounts to being

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<sup>100</sup> *SARFU* (note 65 above) para 141.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid* 143.

<sup>103</sup> *Sokhela* (note 85 above) para 61.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

administrative in nature, Wallis J distinguished the facts before him and the action in *Chirwa* and regarded the termination of board members as not of an administrative nature. In coming to this conclusion, Wallis J held that, firstly, there was an absence of an employment relationship and, secondly, unlike *Chirwa*, the board members did not have to resort to any other constitutionally protected rights.<sup>106</sup>

In *Greys Marine*, the court held that ‘whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.’<sup>107</sup> Therefore, where the requirements under PAJA have been established, it arguably does not matter whether the decision maker is an employer in determining the nature of the power exercised. *Greys Marine* indicates that ‘administrative action is action that has the capacity to affect legal rights... administrative action impacts directly and immediately on individuals.’<sup>108</sup>

Determining whether conduct is administrative action is not always easy as one must look at a variety of factors. The question of how to decide whether conduct constitutes administrative action has recently been applied by the CC below.

In *Minister of Defence and Military Veterans v Motau*,<sup>109</sup> the majority of the CC disagreed with the decision of the HC where it concluded that the Minister’s decision to terminate board members of Armaments Corporation of South Africa (SOC) Limited (Armscor) met the positive requirements of the administrative action definition and was not expressly excluded from PAJA’s ambit. In arriving at the conclusion, the court noted that the executive power to implement legislation in terms of section 85(2)(a) of the Constitution was not expressly excluded under PAJA’s definition of what constitutes administrative action.<sup>110</sup> The court also noted that the implementation of legislation by a senior member of the executive would ordinarily amount to administrative action for the purposes of PAJA.<sup>111</sup> The court, however, noted that the power under section 85(2)(e) to perform any executive function other than implementing national legislation was excluded from PAJA’s ambit.<sup>112</sup> The court then turned to examine the nature of the Minister’s power giving guidance as how to go about this enquiry:

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<sup>106</sup> *Sokhela* (note 85 above) para 70.

<sup>107</sup> *Greys Marine* (note 70 above) para 24.

<sup>108</sup> *Ibid* para 23.

<sup>109</sup> 2014 (5) SA 69 (CC).

<sup>110</sup> *Ibid* para 31.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* para 32.

‘In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers – the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.’<sup>113</sup>

The significance of the majority description of the basic question as to whether it is appropriate to subject conduct to a more rigorous standard of review imposed by PAJA is argued by Brand and Murcott as being as close a formulation as one gets to the idea that, if it is possible to apply PAJA, courts should determine whether it would be desirable to do so, given that PAJA imposes a higher level of scrutiny and less scope to exhibit deference than legality.<sup>114</sup>

(d) Exercising a public power or performing a public function

Quinot and Maree state that establishing what is a public power or a public function is not an easy task.<sup>115</sup> This was acknowledged by Langa CJ in the minority judgment in *Chirwa v Transnet*<sup>116</sup> where it was held that ‘determining whether a power or function is “public” is a notoriously difficult exercise as there is no simple definition or clear test to be applied.’<sup>117</sup>

Furthermore, Quinot and Maree state that administrative action is action of a public nature.<sup>118</sup> In establishing what is public in nature, Langa CJ listed several factors, that are not exhaustive, which provides some indication of whether the power or function is public: 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 whether there is a need for the decision to be exercised in the public interest.<sup>119</sup> However, Quinot and Maree rightly state that no single one of these factors will determine on its own the public nature of the decision but may point in that direction where a combination of these factors are present.<sup>120</sup> The

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<sup>113</sup> Ibid para 44.

<sup>114</sup> Brand D and Murcott M ‘*Administrative Law*’ 2014 AS 51.

<sup>115</sup> Quinot G (ed) *Administrative Justice in South Africa: An Introduction* (2015) 83.

<sup>116</sup> 2008 (4) SA 367 (CC).

<sup>117</sup> Ibid para 186.

<sup>118</sup> Quinot (note 115 above) 83.

<sup>119</sup> *Chirwa* (note 116 above) para 186.

<sup>120</sup> Quinot (note 115 above) 83-84.

authors also list other factors that are indicative of public power being exercised in order for one to identify the true nature of the decision.<sup>121</sup>

An important question is whether administrative action affects the rights of the public or an individual. In answering this question, Burns and Beukes state that ‘public’ does not refer to the public as a whole but rather includes a portion, section or class within the community.<sup>122</sup>

Van Rensburg states that although administrative action affects the public where there is general impact and it is impersonal in nature, the rights of an individual are also affected where there is particular impact on the individual that is personal in nature.<sup>123</sup> Van Rensburg states that decisions relating to ‘granting of licences or permits as well as dismissals, promotions and changing of working conditions all have individual impact on public servants.’<sup>124</sup>

Plasket J held in *Police and Prisons Civil Rights Union v Minister of Correctional Services (No 1)*<sup>125</sup> that ‘public power is not limited to exercises of power that impact on the public at large and that many administrative acts do not.’<sup>126</sup> For Plasket J, in these instances, ‘what makes a power involved public is the fact 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 private interest.’<sup>127</sup> The public interest element must be viewed together with other relevant factors. Nugent JA, in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another*,<sup>128</sup> however, ‘cautioned that a decision will not necessarily be public in nature merely because the public has an interest in it.’<sup>129</sup>

Plasket J does provide an important argument that ‘a statutory source of power is significant because it places the existence of public power largely, if not completely, beyond contention.’<sup>130</sup> However, Ngcukaitobi and Brickhil argue that ‘it is now accepted the source of the power is not decisive, moreover the power itself cannot be characterised simply by reference to its source.’<sup>131</sup> Murphy AJ held in *SAPU*<sup>132</sup> that, although the source of the power

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<sup>121</sup> Ibid 85.

<sup>122</sup> Burns Y & Beukes M *Administrative Law under the 1996 Constitution* 3 ed (2007) 137.

<sup>123</sup> Van Rensburg J ‘Don’t belabour the new administrative justice legislation’ (2001) *JBL* 64.

<sup>124</sup> Ibid.

<sup>125</sup> 2008 (3) SA 129 (E).

<sup>126</sup> Ibid para 53.

<sup>127</sup> Ibid.

<sup>128</sup> 2010 (5) SA 457 (SCA).

<sup>129</sup> Ibid para 36; see Quinot (note 115 above) 85.

<sup>130</sup> *POPCRU* (note 125 above) para 54.

<sup>131</sup> Ngcukaitobi & Brickhil (note 58 above) 782.

to change the shift system fell within the South African Police Services (hereafter SAPS) Act, the decision was not administrative action as the source of the power is not decisive and, moreover, when one looks at the nature of the decision one comes to the conclusion that there is nothing inherently public about setting working hours; therefore, the decision falls on the labour and employment relations side of the line.<sup>133</sup>

(e) Under an empowering provision

Section 1 of PAJA defines ‘empowering provision’ as ‘a law, rule of common law, customary law, or agreement, instrument or other document in terms of which an administrative action was purportedly taken.’ Therefore, PAJA requires a decision maker to act under an empowering provision for the particular action to constitute administrative action.

For example, Section 17(3)(b) of the Public Service Act (hereafter PSA) provides the relevant executive authority with the discretion, considering good cause shown, to reinstate an employee to the public service following a deemed dismissal. The empowering provision affords a discretion to overturn the consequences of a deemed dismissal via operation of law and approve a reinstatement. Another similar empowering provision in the Employment of Educators Act is section 14(2) which affords the same discretion, considering good cause shown whether to reinstate an educator, thus reversing the consequence of the deemed dismissal.

Hoexter states that the definition of ‘empowering provision’ is quite broad, yet organs of state are subjected to a more stringent requirement where they must act either in terms of the Constitution, provincial constitution or, significantly for our purposes here, legislation<sup>134</sup>. APS, for example, is an organ of state which acts under legislation. The fact that SAPS acts under national legislation does not necessarily entail that all decisions are administrative action as one needs to determine all factors holistically in determining the true nature of decisions.

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<sup>132</sup> (2005) *ILJ* 2403 (LC).

<sup>133</sup> *Ibid* paras 49, 51 and 57.

<sup>134</sup> Hoexter (note 61 above) 205.

(f) That adversely affects rights

Burns and Beukes state that ‘adversely affects’ means the same as an onerous effect; in other words, ‘for administrative action to adversely affect rights, it must place or impose a burden on individuals for example receiving a traffic fine.’<sup>135</sup> However, where the administration grants an individual a driving permit, the authors state that the administrative action benefits the individual and therefore does not impose a burden; nevertheless, an action which is beneficial to one may well have an onerous effect on third parties.<sup>136</sup> For example, an individual granted a liquor licence benefits, whereas third parties residing near the liquor establishment may be adversely affected. The authors state that a person’s rights may be affected in two ways: the decision may deprive a person of their rights or a person’s rights may be affected where rights are determined.<sup>137</sup>

When one interprets the phrase literally, Quinot and Maree argue that it would then ‘imply that only those decisions which have a negative effect on rights can ever qualify as administrative action.’<sup>138</sup> Yet, the position has been settled by Nugent JA in *Greys Marine* where the literal interpretation method was correctly rejected, with the court holding that it would be inconsistent with section 3(1) of PAJA, which envisages that administrative action might or might not affect rights adversely.<sup>139</sup> For Nugent JA, the requirement was ‘probably intended to convey that administrative action is action that has the capacity to affect legal rights.’<sup>140</sup> The authors argue that Nugent JA in this case does not explain what is meant by ‘adverse’ in the elemental requirements; however, almost a decade later, Nugent JA, in *Minister of Home Affairs and Others v Scalabrini Centre and Others*,<sup>141</sup> held that ‘it is true that only a person who is refused a licence will have reason to complain, but that goes to the enforceability of the decision, and not to its nature.’<sup>142</sup> The authors argue that it is clear that from the generous interpretation adopted by Nugent JA, a decision could affect an individual negatively or positively but would still qualify as administrative action.<sup>143</sup> The only thing that would be affected would be whether the decision is actionable.

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<sup>135</sup> Burns & Beukes (note 122 above) 144.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Quinot and Maree (note 115 above) 86-87.

<sup>139</sup> *Greys Marine* (note 70 above) para 23.

<sup>140</sup> Ibid.

<sup>141</sup> 2013 (6) SA 421 (SCA).

<sup>142</sup> Ibid para 49.

<sup>143</sup> Quinot and Maree (note 115 above) 88.

It is important to recognise that the impact requirement (adversely affects rights) has been adopted in several cases involving employment and labour relations. In *Kiva v Minister of Correctional Services*,<sup>144</sup> Plasket J agreed with Nugent JA before finding that the decision not to promote the applicant ‘certainly had the potential to affect his rights to fair labour practices and equality, therefore the decision amounted to administrative action.’<sup>145</sup> Lewis AJ held in *Minister of Defence and Others v Dunn*<sup>146</sup> that the decision not to appoint a person to a public service position had the capacity to affect legal rights even though there was no right to be appointed it nevertheless amounted to administrative action.<sup>147</sup> In *Wessels v Minister for Justice and Constitutional Development and Others*,<sup>148</sup> the court relied on *Greys Marine and Dunn* to hold that the decision to appoint a person to the public service amounted to administrative action.<sup>149</sup>

The impact requirement in PAJA’s definition used to be potentially restrictive when a narrow interpretation had been adopted. However, in *Joseph and Others v City of Johannesburg and Others*,<sup>150</sup> the CC expanded the traditional understanding of legal rights to include their public law rights holding that ‘when the applicants received electricity, they did so by virtue of their corresponding public-law right to receive this basic municipal service.’<sup>151</sup> Quinot and Maree state that the effect of this judgment entails that the definition of administrative action should no longer be interpreted to refer only to private law, common law and fundamental rights in the Bill of Rights, but also to refer to public law rights, which emanate from broad constitutional and statutory obligations placed on organs of state.<sup>152</sup>

In *JDJ Properties CC and Another v Umngeni Local Municipality and Another*<sup>153</sup> the SCA followed the same broad approach as in *Greys Marine*. The SCA held the decision to approve the building plans of a shopping development which has the capacity to affect the rights of the appellants and others living and doing business in the area concerned and which would impact directly on them.<sup>154</sup> In coming to this conclusion, the SCA held that the consequence of such a decision would lead to an increase in traffic and congestion, which would inevitably

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<sup>144</sup> (2007) 28 *ILJ* 597.

<sup>145</sup> *Ibid* para 28.

<sup>146</sup> 2007 (6) SA 52 (SCA).

<sup>147</sup> *Ibid* para 4.

<sup>148</sup> 2010 (1) SA 128 (GNP).

<sup>149</sup> *Ibid* 22.

<sup>150</sup> 2010 (4) SA 55 (CC).

<sup>151</sup> *Ibid* para 47.

<sup>152</sup> Quinot and Maree (note 115 above) 89.

<sup>153</sup> 2013 (2) SA 395 (SCA).

<sup>154</sup> *Ibid* para 20.

follow that the free parking provided nearby for customers of the smaller business would be used by customers of the development.<sup>155</sup>

The requirement that rights must be adversely affected is broad enough to include any recognised legal right. If a decision impacts directly and immediately on a person, it would satisfy this requirement. As will be discussed in the next subsection, a decision within an employment setting may very well affect one's legal rights and amount to administrative action. However the difficulty lies in determining whether a decision is internal or external to the administrator.

(g) Direct, external legal effect

The phrase 'direct, external legal effect' was borrowed by the legislature from German administrative law. It is important here to first determine the meaning of the phrase within the German context and then to move on to establishing how South African courts have interpreted it. 'Direct' indicates that 'decisions must be final and immediate for the decision to be subjected to review.'<sup>156</sup> Pfaff and Schneider state that preliminary decisions are not open for judicial review because it may be unnecessary to delay a series of steps within an administrative procedure where it is unknown whether the individual will be affected by the final decision or not, because it is only the last decision which is directed at the citizen.<sup>157</sup> The SCA in *Greys Marine* held that the phrase 'direct, external legal effect' serves to emphasise that when administrative action is taken, it impacts directly and immediately on individuals.<sup>158</sup> Fabricius AJ in *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga*<sup>159</sup> held that a decision to recommend suspension amounted to administrative action for the purposes of section 1 of PAJA.<sup>160</sup> In coming to this conclusion, Fabricius AJ agreed with the proposition made in *Greys Marine* that administrative action merely needs to have the capacity to affect legal rights.<sup>161</sup> The CC in *Viking Pony* underscores the *Greys Marine* proposition.<sup>162</sup> Fabricius AJ in *Viking Pony* held that the view expressed by Nugent J in *Greys Marine* is in line with the German definition that the

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<sup>155</sup> Ibid para 18.

<sup>156</sup> Hoexter (note 61 above) 228.

<sup>157</sup> Pfaff R & Schneider H 'The Promotion of Administrative Justice Act from a German Perspective' (2001) 17 *South African Journal on Human Rights* 59 at 72-73.

<sup>158</sup> *Greys Marine* (note 70 above) para 23.

<sup>159</sup> 2008 (2) SA 570 (T).

<sup>160</sup> Ibid para 30.

<sup>161</sup> Ibid para 28.

<sup>162</sup> *Viking Pony* (note 90 above) para 37.



administrative act need not have direct legal consequences but that it is sufficient to note where such an act is ‘aimed at’ rather than maintaining that it ‘will’ have such consequences.<sup>163</sup> Interestingly, Fabricius AJ supported the view that a decision does not necessarily have to be final, as a preliminary decision ‘can have serious consequences especially where it lays “the necessary foundation for a possible decision” which may have grave results.’<sup>164</sup> Further expanding on this area is not significant for this dissertation.

The ‘external effect’ part of the phrase is aimed at excluding administrative measures that are taken within the public administration. Moreover, Pfaff and Schneider argue that what this means is that administrative action only affects a person who is different from the authority.<sup>165</sup> Pfaff and Schneider state that only in certain cases of a ‘special relationship’ is it often difficult to distinguish between internal and external measures taken.<sup>166</sup>

The authors provide insight into the meaning of ‘external effect’ with reference to those ‘special relationships’ comprising ‘for example the relationship between a civil servant and his or her employer (my emphasis), the national, provincial or local government between students and schools or universities.’<sup>167</sup> The authors provide for two types of relationships; basic relationship (external) and operational relationship (internal).<sup>168</sup> The authors provide that a person will be adversely and individually affected within a basic relationship, thus amounting to administrative action, where, for example, the decision amounts to ‘denial of annual leave, failing matric, dismissal from school or university or the appointment or dismissal of a civil servant.’<sup>169</sup> However, where the person is affected within the operational relationship (internal) pertaining to his/her ‘specific role or function, individual rights are not infringed and those decisions do not amount to administrative action.’<sup>170</sup> Examples of such decisions are ‘internal orders, procedures between different public authorities, homework for students or a normal test at school...most cases deal with decisions taken by some higher public official towards subordinate civil servants such as setting working hours or ordering him/her to move to another office room or building or to complete certain tasks.’<sup>171</sup>

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<sup>163</sup> Ibid para 29.

<sup>164</sup> Ibid para 25.

<sup>165</sup> Pfaff & Schneider (note 157 above) 73.

<sup>166</sup> Ibid para 74.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

According to Burns and Beukes, the purpose of establishing whether the decision of the administration is internal or external balances the rights of the individual between the rights of the State<sup>172</sup>. The ‘right of the individual should be protected within an administrative law relationship, also ensuring that the business of the State is not unnecessarily hampered in performing its functions or duties.’<sup>173</sup>

Pfaff and Schneider argue that to ‘avoid misunderstanding: it is important to see that ‘external’ does not have a physical connotation, whether a person is physically working or acting within or outside an organ of state is not decisive. It merely depends on whether rights are affected.’<sup>174</sup> Burns and Beukes argue that because this part of the PAJA enquiry has been copied and pasted from foreign law jurisdictions, PAJA must be interpreted within the context of our legal system<sup>175</sup> and, therefore, the views expressed by Pfaff and Schneider that ‘external’ should not be seen as a physical connotation has been endorsed in *Greys Marine*.<sup>176</sup> Freund AJ, in *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services*,<sup>177</sup> agreed with the approach taken by the SCA in *Greys Marine* that ‘external effect’ should not be ‘literally interpreted to exclude actions which affect members of or within the public body itself.’<sup>178</sup> The *Nxele* judgment endorsed this view, following the disapproval by the approach taken in *SAPU*, which held that ‘in order to have ‘external effect’, a decision must effect ‘outsiders’ and that decisions only affecting employees within a departmental administration do not have this affect.’<sup>179</sup>

It is difficult to ascertain whether a decision has an internal or external effect. However the SCA in *Greys Marine* have provided clarity, holding that ‘external’ does not literally mean physically outside the decision maker’s parameters, but is rather a decision taken by the administrator which not only has the possibility of affecting members of the public outside the decision maker, but also members within the state department. Determining whether a decision is an administrative action provides for a holistic enquiry into all relevant factors

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<sup>172</sup> Burns & Beukes (note 122 above) 147.

<sup>173</sup> Ibid.

<sup>174</sup> Pfaff & Schneider (note 157 above) 73.

<sup>175</sup> Burns & Beukes (note 122 above) 147.

<sup>176</sup> *Greys Marine* (note 70 above) para 23.

<sup>177</sup> (2006) 27 *ILJ* 2127 (LC).

<sup>178</sup> Ibid paras 74-75.

<sup>179</sup> Ibid para 74.

with the aim of determining the true nature of the decision which allows the court, on a case by case basis, to consider the requirements ensuring constitutional validity.<sup>180</sup>

### The Meaning of ‘legal effect’

The phrase ‘legal effect’ has been interpreted in *Greys Marine* to mean that administrative action, along with ‘direct and external effect’, was ‘probably intended to convey that administrative action has the capacity to affect legal rights...emphasising that administrative action impacts directly and immediately on individuals.’<sup>181</sup> Wallis J held in *Sokhela* that the decision to ‘suspend the board members was external to the MEC, who is the decision-maker, and its legal effect impacts upon the rights of the board members in a manner which affects their right to dignity, reputation, standing as well as preventing them from performing their lawful functions as board members in the future.’<sup>182</sup>

Hoexter states, from a jurisprudential point of view, that the CC suggests the easiest way to satisfy the element of ‘legal effect’ within the phrase ‘direct, external legal effect’ is to acknowledge that there is an overlap and that it may be restated that legal effect means that rights are adversely affected.<sup>183</sup>

In *Joseph*,<sup>184</sup> Skweyiya J rejected the respondents’ argument that the ‘ambit of “legal effect” should not be interpreted too broadly as it would lead to administrative paralysis’; moreover, the respondents’ in the case argued that, because there was ‘no contractual nexus between the applicants and City Power, in terminating the electricity supply by City Power there was no direct ‘legal effect’ therefore the harm was through the landlord defaulting with City Power.’<sup>185</sup> However, the court, in rejecting the movement to narrow the interpretation of ‘legal effect’, held that ‘administrative efficiency primarily informs the duties imposed under administrative law, therefore administrative law is determined by the relationship that already exist between the state and its citizens<sup>186</sup> and should not be too strictly delaminated.’<sup>187</sup> For

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<sup>180</sup> *Greys Marine* (note 70 above) para 22.

<sup>181</sup> *Greys Marine* (note 70 above) para 23.

<sup>182</sup> *Sokhela* (note 85 above) paras 65-66.

<sup>183</sup> Hoexter (note 61 above) 234.

<sup>184</sup> *Joseph* (note 150 above).

<sup>185</sup> *Ibid* para 27.

<sup>186</sup> Skweyiya J held at paras 34-35 that ‘local government is required to provide basic municipal services. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. Therefore, basic municipal services and has become virtually indispensable considering that section 152(1) of the Constitution sets out the objects of local government in general terms and creates a set of overarching set of constitutional obligations that are to be achieved in accordance with section 152(2).’

the purposes of section 3 of PAJA, the applicants were materially and adversely affected and should have been notified of the pending administrative action in order for the affected parties to arrange their affairs accordingly.

In *City of Cape Town v Hendricks and Another*,<sup>188</sup> Southwood AJA held that the serving of notices had no immediate and direct effect on the respondents and did not adversely affect their rights as the notice was simply a warning putting the respondents on notice.<sup>189</sup>

Having discussed what constitutes administrative action under section 33 and PAJA, it is necessary to deal with another means of controlling the exercise of public power that exists under the constitutional rule of law. The principle of legality, which is known as a more general aspect of administrative law, will now be discussed.

## 2.5 THE PRINCIPLE OF LEGALITY

### 2.5.1 DEFINING THE PRINCIPLE OF LEGALITY

An important place to start is the Constitution<sup>190</sup> – more specifically section 1(c) of the Constitution, which provides that ‘the Republic of South Africa is one, sovereign, democratic, state founded on the following values...(c) Supremacy of the Constitution and the rule of law.’

The CC, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,<sup>191</sup> identified the principle of legality as a fundamental principle and an aspect of the rule of law, therefore holding in that case that local government may only act within the powers lawfully conferred upon it and that the exercise of public power is only legitimate where it is lawful.<sup>192</sup> The principle demands that the state may exercise no power or perform no function beyond that conferred upon them by law.<sup>193</sup>

The CC has recently recognised the principle of legality in *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department,*

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<sup>187</sup> Ibid para 29.

<sup>188</sup> *City of Cape Town* (note 98 above).

<sup>189</sup> Ibid para 11.

<sup>190</sup> The Constitution of the Republic of South Africa, 1996.

<sup>191</sup> *Fedsure* (note 63 above).

<sup>192</sup> Ibid para 56.

<sup>193</sup> Ibid para 58.

*Department of Education, Free State Province v Harmony High School and Another*<sup>194</sup> where Khampepe J in the main judgment of the court held that ‘State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.’<sup>195</sup>

In *SARFU*<sup>196</sup> the CC agreed with its earlier decision in *Fedsure*, holding that the exercise of powers is clearly constrained by the principle of legality. The court, moreover, held that, as implicit in the Constitution, the president must act in good faith and must not misconstrue those powers. The court further held that the constraints mentioned above on public power arise from the provisions of the Constitution other than the administrative justice clause.<sup>197</sup> The legality principle is significant because, as Hoexter states, it is a broad constitutional principle that governs the use of all public power rather than the narrower administrative action clause under section 33 and PAJA.<sup>198</sup>

The principle of legality includes not only lawfulness but also rationality. Chaskalson P held in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*<sup>199</sup> that rationality requires that exercises of public powers must not be arbitrary or irrational, and that, moreover, rationality ‘is a requirement of the rule of law where decisions must be rationally related to the purpose for which the power was given, otherwise those decisions are in effect arbitrary and inconsistent with the rationality requirement.’<sup>200</sup>

The CC in *Albutt v Centre for the Study of Violence and Reconciliation*<sup>201</sup> expanded on the legality requirement, adding procedural fairness to the rationality enquiry. The court importantly held that, where the president exercises his pardoning powers, it would be irrational for not to allow for the victims of the offences to be heard.<sup>202</sup> The decision was, however, limited to the facts of the case. This was because Ngcobo J added the consultation

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<sup>194</sup> 2014 (2) SA 228 (CC).

<sup>195</sup> Ibid para 1; see further *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 68.

<sup>196</sup> *SARFU* (note 65 above).

<sup>197</sup> Ibid para 148.

<sup>198</sup> Hoexter (note 61 above) 122.

<sup>199</sup> *Pharmaceutical Manufacturers* (note 81 above).

<sup>200</sup> Ibid para 85.

<sup>201</sup> 2010 (3) SA 293 (CC).

<sup>202</sup> Ibid para 69.

requirement to legality through rationality, and therefore consultation within legality would only be required if the purpose of the decision required it.<sup>203</sup>

The SCA in *Scalabrini*<sup>204</sup> proceeded to broaden the rationality requirement by reading the requirement of consultation into legality. For Nugent JA, the broadening of rationality to include consultation under legality did not mean that there now exists a general duty on decision makers to consult organisations or individuals having an interest in their decisions. The duty only arises ‘in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware.’<sup>205</sup> The duty to consult is not triggered under legality because someone’s interests are adversely affected, but rather, when the decision maker is aware that parties have knowledge or information about the decision, such parties must be consulted because it is in the public’s interest that they make a contribution to the decision.<sup>206</sup>

In *Association of Regional Magistrates of Southern Africa (ARMSA) v President of South Africa*,<sup>207</sup> the president decided to determine publicly which of the ARMSA members would receive an annual salary increase. It was argued that the decision made by the president amounted to administrative action and was subject to the procedural requirements of fairness because they were not considered for representations.

The question before the CC was whether the decision constituted administrative action and was subject for review in terms of PAJA. In answering this question, Nkabinde J held that it did not constitute administrative action but rather executive action and that the decision would be subjected to review under the principle of legality.<sup>208</sup> Nkabinde J recognised that review on the basis of legality can only be done against a limited set of requirements, including lawfulness and rationality, and concluded that ‘procedural fairness is not a requirement for the exercise of executive powers and... executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing was required by the enabling statute.’<sup>209</sup>

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<sup>203</sup> Brand D & Murcott M ‘*Administrative Law*’ 2013 AS 73.

<sup>204</sup> *Scalabrini* (note 141 above).

<sup>205</sup> *Ibid* para 72.

<sup>206</sup> Brand & Murcott (note 203 above) 75.

<sup>207</sup> 2013 (7) BCLR 762 (CC).

<sup>208</sup> *Ibid* para 59.

<sup>209</sup> *Ibid*.

When faced with arguments that ARMSA and its members should have been given the opportunity to make representations to the president about their salaries, Nkabinde J followed a different approach to that of *Scalabrini* and *Albutt*. It was held that adequate remuneration by judicial officers is an aspect of judicial independence and it would not be prudent to subject the president in circumstances where the members of the judiciary should negotiate their salaries with the executive.<sup>210</sup>

Brand and Murcott argue that Nkabinde J's reliance on *Masetlha v President of the Republic of South Africa and Another*<sup>211</sup> is worrying because it may have limited the possibility of relying on the proposition made in *Albutt* that, despite the majority judgment in *Masetlha*, under certain circumstance procedural fairness could be read into legality as an essential part of the requirement of rationality.<sup>212</sup>

Brand and Murcott argue that *ARMSA's* decision could equally apply to *Masetlha*. The reasoning is not authority for the general proposition that legality embraces no duty to consult.<sup>213</sup> It serves as authority that legality does not require procedural fairness of the president.<sup>214</sup> Brand and Murcott are of the view that the development of the relationship between PAJA and legality should be seen as a positive advancement where legality is being applied in circumstances where it previously would have been impossible.<sup>215</sup>

The recent case before the SCA *e.tv (Pty) Ltd v Minister of Communications*<sup>216</sup> concerned a challenge to an amendment to the Broadcasting Digital Migration Policy - published in terms of the Electronic Communications Act 36 of 2005 (ECA). Lewis JA held 'where a policy or policy amendment impacts on rights . . . it is only fair that those affected be consulted' since '[f]airness in procedure, and rationality, are at the heart of the principle of legality'.<sup>217</sup> In contrast to *ARMSA*, Lewis JA held that regardless of whether the Minister was explicitly required to consult interested parties in terms of statute, the failure to consult was inconsistent with the rationality requirement.<sup>218</sup>

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<sup>210</sup> Ibid para 43.

<sup>211</sup> 2008 (1) BCLR 1 (CC) at para 77.

<sup>212</sup> Brand D & Murcott M 'Administrative Law' 2013 (2) *JQR* 5.

<sup>213</sup> Brand & Murcott (note 203 above) 76.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid 69.

<sup>216</sup> [2016] 3 All SA 362 (SCA).

<sup>217</sup> Ibid para 38.

<sup>218</sup> Ibid para 45.

Van Der Merwe J in *Wessels v Minister for Justice and Constitutional Development*<sup>219</sup> also added to the enquiry on legality, holding that the principle of legality includes rationality and accountability, where there is a duty imposed upon the functionary exercising a public power to provide reasons for decision. Brand JA has recently underscored this duty in *Judicial Service Commission and Another v Cape Bar Council and Another*<sup>220</sup> where it was held that

‘As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: ‘Trust me, I have good reasons, but I am not prepared to provide them?’<sup>221</sup>

From a labour law perspective, the Labour Appeal Court (hereafter LAC) in *Carephone (Pty) Ltd v Marcus NO and others*<sup>222</sup> provided a well-known formulation of the test for rationality referred to as the *Carephone* test:

‘Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?’<sup>223</sup>

The significance of the cases mentioned above is that, as Hoexter states, within constitutional dispensations around the world and in South Africa, the legality review is ‘capable of referring to the same requirements applicable to administrative action under PAJA, moreover the content of legality is also written down in the form of a list of grounds of review under section 6 of PAJA.’<sup>224</sup> Hoexter states that it is therefore ‘not surprising that the principle of legality and its parent, the rule of law, has been described as administrative law under another name.’<sup>225</sup>

The difference between administrative action and legality review is that the latter applies to all exercises of public power whereas, for section 33 and PAJA to apply, the said action must be administrative in nature as well as confined to the very narrow statutory definition. Chaskalson CJ held in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd*

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<sup>219</sup> *Wessels* (note 148 above).

<sup>220</sup> 2013 (1) SA 170 (SCA).

<sup>221</sup> *Ibid* para 44.

<sup>222</sup> (1998) 19 *ILJ* 1425 (LAC).

<sup>223</sup> *Ibid* para 37.

<sup>224</sup> Hoexter (note 61 above) 122.

<sup>225</sup> Hoexter C ‘*From Chirwa to Gcaba: An Administrative Lawyer’s View*’ in M Kidd & S Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* 2010 47 at 59.



*and Others*<sup>226</sup> that ‘what the principle of legality does is act as a safety net’ as it provides the courts with some degree of control over action that is not yet administrative action for the purposes of PAJA or section 33 of the Constitution but still involves the use of public power. This research can do no more than repeat the dictum of Ngcobo J in *Affordable Medicines Trust and others v Minister of Health and others*<sup>227</sup> where the CC held that:

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.’<sup>228</sup>

The principle of legality is an alternative means whereby courts are still capable of exercising a supervisory role where Section 33 and PAJA do not apply. Henrico argues that the principle restrains the functions of the courts to do what they are required to do, namely, being the guardian of the Constitution and ensuring that the rights to human dignity, equality and freedom are not compromised by undue exercise of power.<sup>229</sup> Moreover, for Hoexter, the principle has its advantages as it is ‘simple, general and inclusive instead of being complicated, specific and exclusive.’<sup>230</sup> Henrico agrees with Hoexter that section 33 and PAJA are restrictive.<sup>231</sup> For Henrico, whether the act in question is administrative action is not always the question because not all exercises of power are formally designated under PAJA’s definition of administrative action.<sup>232</sup> The extent to which the said act violates rights in terms of the Bill of Rights must be determined; therefore, applying the principle of legality is instrumental in addressing this lacuna.<sup>233</sup> Nevertheless, any individual affected by an abuse of public power is constitutionally entitled to decisions being lawful and rational; in other words, where there is an exercise of public power, individuals are constitutionally protected where there is an abuse of that power.

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<sup>226</sup> 2006 (2) SA 311 (CC).

<sup>227</sup> 2006 (3) SA 247 (CC).

<sup>228</sup> *Ibid* para 49.

<sup>229</sup> Henrico R ‘*Re-visiting the rule of law and the principle of legality: Judicial nuisance or Licence?*’ (2014) *Tydskrif vir die Suid Afrikaanse Reg* 754.

<sup>230</sup> Hoexter (note 61 above) 125.

<sup>231</sup> Henrico (note 61 above) 754.

<sup>232</sup> *Ibid*.

<sup>233</sup> *Ibid*.

Although the principle of legality has been regarded as a ‘safety net’ by providing courts with a means of exercising a supervisory role over all exercises of public power, the principle has developed over the years to include most of the requirements under PAJA, which arguably threatens the use of PAJA. This dissertation now examines the various reservations on the scope of the principle and where it should fit into administrative law.

## 2.5.2 RESERVATIONS CONCERNING THE LEGALITY PRINCIPLE

Hoexter, Quinot and Maree express concern that the danger of the principle of legality is that it would encourage parallel systems of law, one under the legality principle and another under section 33 of the Constitution;<sup>234</sup> moreover, it would not necessarily be a positive development as far as PAJA and Section 33 is concerned.<sup>235</sup>

Chaskalson CJ in *New Clicks*<sup>236</sup> warned against what Hoexter refers to as the ‘free alternative’<sup>237</sup> approach, holding that PAJA is national legislation which gives effect to the rights in section 33.<sup>238</sup> A litigant cannot avoid the provisions of PAJA by going behind it.<sup>239</sup> Ngcobo J agreed with Chaskalson CJ and held that there are not two systems of law regulating administrative action but only one system under our Constitution and one cannot rely directly under section 33(1) of the Constitution.<sup>240</sup>

Hoexter states that PAJA must not be bypassed but must be applied where it is applicable. Thus, the correct approach to any administrative law enquiry is to ask the question whether there is a more specific norm (PAJA) that is applicable and not whether the matter could be reviewed under the more general norm of the rule of law.<sup>241</sup> Arguably, litigants relying on legality will not necessarily conflict with the principle of subsidiarity (discussed above). In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*,<sup>242</sup> Bosielo JA (minority) held a different view that the principle of subsidiarity is not inflexible and that

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<sup>234</sup> Quinot and Maree (note 115 above) 93; Hoexter (note 61 above) 124.

<sup>235</sup> Ibid Hoexter.

<sup>236</sup> *New Clicks* (note 226 above).

<sup>237</sup> Hoexter (note 61 above) 132.

<sup>238</sup> Ibid para 95.

<sup>239</sup> Ibid para 96.

<sup>240</sup> Ibid para 436.

<sup>241</sup> Hoexter (note 61 above) 134.

<sup>242</sup> [2016] 4 All SA 842 (SCA).

failure to bring an application under PAJA could never be a good reason to deny relief sought under the principle of legality when raised fairly and unequivocally.<sup>243</sup>

Nugent JA in *Greys Marine*<sup>244</sup> held that the Constitution is the repository of all state power. Power is distributed directly and indirectly amongst various institutions of state and other bodies and functionaries and its exercise is subject to constitutional constraint. Nonetheless, Nugent JA held that, the extent to which the legality principle applies varies depending on the nature of the power being exercised.<sup>245</sup>

Hoexter underscores the position that review proceedings are directly subject to PAJA and less directly to section 33; however, it is only in the latter instance where the principle of legality under the ‘abstract principle of the rule of law under our Constitution would be applied.’<sup>246</sup>

For Ngcobo J in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,<sup>247</sup> the question as to whether the decision of the president to grant amnesty was administrative action was an unnecessary determination, even though the issue had been raised in the papers. For Ngcobo J the decision was already subject to the constitutional principle of legality.<sup>248</sup> Brand and Murcott argue that Ngcobo J’s approach remained ‘conceptually incoherent with the constitutional principle of subsidiarity.’<sup>249</sup> The approach taken by Ngcobo J is also at odds with *New Clicks*<sup>250</sup> where the court recognised that there are not two systems of law and that PAJA is thus the first port of call.<sup>251</sup>

The SCA followed a different approach to *Albutt* in *National Director of Public Prosecutions (NDPP) v Freedom under Law*<sup>252</sup> where the court had been called to consider whether the decision to withdraw criminal charges amounted to administrative action under PAJA. For Brand JA, even though it had been conceded by the NDPP that the decision is reviewable under the principle of legality, found that the administrative action question under PAJA must be determined from the outset where PAJA has been invoked as a ground of review and legality should only be considered where PAJA is not applicable; more specifically, for

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<sup>243</sup> Ibid paras 64-65.

<sup>244</sup> *Greys Marine* (note 70 above).

<sup>245</sup> Ibid para 20.

<sup>246</sup> Ibid 121.

<sup>247</sup> *Albutt* (note 201 above).

<sup>248</sup> Ibid paras 49-51 and 79-83.

<sup>249</sup> Brand D & Murcott M ‘*Administrative Law*’ 2014 (2) *JQR* 4.

<sup>250</sup> *New Clicks* (note 226 above).

<sup>251</sup> Ibid paras 436-8.

<sup>252</sup> 2014 (4) SA 298 (SCA).

Brand JA ‘a court may only rely on such channels of review once it has found that the PAJA does not apply and it may not side-step this question.’<sup>253</sup> Recently the SCA in *Gijima*<sup>254</sup> endorsed Hoexter's view that, if litigants could elect to rely upon legality even when PAJA is applicable, PAJA would invariably become redundant.<sup>255</sup>

Brand and Murcott argue that the approach taken by Brand JA is a welcome one.<sup>256</sup> Hoexter states that there will certainly be further development of the principle of legality within administrative law under non-administrative action cases. Hoexter’s argument becomes increasingly relevant to the non-administrative action cases where the principle of legality has been developing and where PAJA finds no application within the context of labour cases.

## 2.6 CONCLUSION

It is abundantly clear that the pathway to judicial review in administrative cases starts from the PAJA enquiry that ensures that the decision is positively determined as administrative action. Potentially based on the definition of administrative action mentioned above, PAJA could apply to dismissals, appointments and promotions, as was determined in *Kiva, Dunn and Wessels*. It also cannot be said that those decisions relating to dismissals, appointments and promotions do not to have ‘direct, external legal effect’, as legal authorities have stated above that the decision merely has to affects rights and must be final to be reviewable under PAJA. Therefore, the argument is that PAJA potentially applies to public sector employees. Decisions must be positively determined to be administrative in nature under section 33 and PAJA. Having discussed what constitutes administrative action under section 33 and PAJA, this dissertation now examines how the above-mentioned principles of administrative law in Chapter 3 have been applied to labour cases, showing the development of administrative law jurisprudence within the labour sphere. Having explored the principle of legality and its significant development, the principle is discussed further within specific labour cases where it has been applied as another means of holding public sector employers accountable where there has been an exercise of public power.

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<sup>253</sup> Ibid para 19.

<sup>254</sup> *Gijima* (note 242 above).

<sup>255</sup> Ibid paras 36-37.

<sup>256</sup> Brand and Murcott (note 249 above).

## CHAPTER 3: ANALYSING ADMINISTRATIVE LAW APPLIED IN LABOUR CASES

### 3.1 INTRODUCTION

Chapter 2 analysed what administrative action is under section 33 and PAJA. Having concluded that the elements of PAJA potentially applies to decisions made by employers exercising a public power, the objective of this chapter is to first set out five cases, in the order in which they were handed down, showing the development of administrative action within a public employment setting. These five cases are important in establishing the context within this area of law. An in-depth analysis of how the various judges reasoned in coming to their conclusions will also be provided. The second part of this chapter will examine the final CC judgment in *Gcaba* with the aim of determining in which direction the court proceeded. With regard to each case two issues will be discussed: firstly, whether the decision amounts to administrative action for the purposes of section 33 of the Constitution and PAJA; and, secondly, whether the HC has jurisdiction to review a decision arising out of an employment context.

### 3.2 PUBLIC-SECTOR EMPLOYMENT AND ADMINISTRATIVE ACTION CASES

#### 3.2.1 *Fredericks and others v MEC for Education and Training, Eastern Cape and others*<sup>257</sup>

O'Regan J, writing for a unanimous majority,<sup>258</sup> handed down judgment concerning the scope of the jurisdiction of the HC to determine certain complaints arising out of an employment relationship. The applicants were teachers employed by the Department of Education in the Eastern Cape. They had applied to be voluntarily retrenched by the department. However their applications were refused. The applicants sought to challenge the refusal in the Eastern Cape HC, arguing that the refusal constituted a breach of their right to equality in terms of

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<sup>257</sup> 2002 (2) SA 693 (CC).

<sup>258</sup> Chaskalson CJ, Langa DCJ, Ackermann J, Kriegler J, Madala J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgement of O'Regan J.

section 9 of the Constitution as well as a breach of their right to administrative justice in terms of section 33. A full bench of the HC held that it did not have jurisdiction because the LRA had ousted their jurisdiction.

### *The Constitutional Court*

The two questions identified by the CC were, firstly, whether the applicants' claim raised a constitutional matter as contemplated by section 167 and 169 of the Constitution. If the answer was in the affirmative, the second question to be answered was whether it was a matter that fell within the jurisdiction of the HC.

O'Regan J held that applicants' claim raised a constitutional matter as they alleged that the conduct of the respondents was in conflict with the Constitution and invalid as it infringed on the Bill of Rights.<sup>259</sup> Moreover, the judge stated that 'the question as to whether the LRA has by virtue of section 169 restricted the HC's jurisdiction to determine a constitutional matter is therefore a constitutional question that falls within the jurisdiction of this constitutional court.'<sup>260</sup> In essence, 'given the express constitutional provision conferring jurisdiction to determine constitutional matters on the High court...the question restricting the HC's jurisdiction in terms of section 169 in constitutional matters is therefore also a constitutional matter.'<sup>261</sup> O'Regan J established that the issue before the court was a constitutional matter, and therefore the next question is whether the matter now fell within the ambit of the HC's jurisdiction.

#### a) Jurisdiction

In answering the second question, O'Regan J held that in terms of section 24 of the LRA, the jurisdiction of the HC was not ousted as section 24 only confers on the LC the power to review Commission for Conciliation, Mediation and Arbitration (hereafter CCMA) decisions and not the power to determine a dispute; therefore the CCMA is not a court of similar status to the HC.<sup>262</sup> In coming to this conclusion, O'Regan J focussed on section 169 of the Constitution, which provides that the HC 'may decide any constitutional matter' other than a matter that falls within the exclusive jurisdiction of the constitutional court or a matter 'assigned by an Act of Parliament to another court of a status similar to a HC.'<sup>263</sup> O'Regan J

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<sup>259</sup> *Fredericks* (note 257 above) para 11.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid* para 31; para 35.

<sup>263</sup> *Ibid* para 31.

held that, as indicated above, the CCMA is not a court of similar status to that of the HC, and that therefore section 24 of the LRA does not assign to another court of similar status to a HC a constitutional matter that the HC would otherwise have the power to decide.<sup>264</sup>

O'Regan J held that the preamble to the LRA makes it plain and clear that the purpose of the Act is to give statutory effect to the right to fair labour practices entrenched in section 23(1) of the Constitution, however O'Regan J correctly points out that the case before it was not based on contract or their right to fair labour practices as the applicants expressly disavowed any reliance on section 23(1).<sup>265</sup> The matter before the court was based on their constitutional right to administrative justice and equal treatment as pleaded. It is important to observe at this point that jurisdiction is determined based on pleadings. Although the applicants had disavowed any reliance on the right to fair labour practices and opted to proceed based on administrative justice and equality, O'Regan J found it necessary to consider whether the HC had the jurisdiction to determine a dispute arising out of an employment relationship.

#### Legislature's intention on Jurisdiction

In terms of section 157(1) of the LRA, the legislature provided that the LC shall have exclusive jurisdiction over all matters that 'are to be determined' by it in terms of the LRA or other legislation.<sup>266</sup> O'Regan J held that section 157(1) therefore 'has the effect of depriving the HC of jurisdiction in matters that the LC is required to decide except where the LRA provides otherwise.'<sup>267</sup> O'Regan J relied on the sentiment expressed by Nugent JA in *Fedlife* that

'...section 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees.'<sup>268</sup>

The legislature's intention under section 157(1) was not to 'afford general jurisdiction to the LC in employment matters, moreover the jurisdiction of the HC is not ousted by section 157(1) simply because a dispute falls within<sup>269</sup> the overall sphere of employment relations.'

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<sup>264</sup> Ibid; at para 33 O'Regan J held the 'effect of the conclusions, that section 24 of the LRA does not oust the High court's jurisdiction, is not however that a person who has a constitutional complaint arising out of the interpretation or application of a collective agreement may not take the matter to the CCMA. Nor does it mean that the CCMA should not consider the provisions of the Constitution in the exercise of its powers. Indeed like all organs of state it is obliged to seek to give effect to constitutional commitments'.

<sup>265</sup> Ibid paras 32 and 34.

<sup>266</sup> Ibid para 36; see para 39 where O'Regan J outlines briefly those circumstances where the LRA provides generally that disputes must first be referred to conciliation or mediation or arbitration before the labour court can review.

<sup>267</sup> Ibid para 38.

<sup>268</sup> Ibid.

In terms of section 157(2), O'Regan J held that 'where a challenge based on constitutional rights arises based on the states conduct in its capacity as employer, the labour court has jurisdiction concurrent with the High court.'<sup>270</sup> Significantly it was held that 'whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for concurrent jurisdiction.'<sup>271</sup> As for section 158(1)(h), O'Regan J held that it does not expressly confer upon the LC constitutional jurisdiction to determine disputes already provided for under section 157(2).<sup>272</sup>

#### b) Administrative Action

The finding as to whether the HC had jurisdiction is informative, however the question as to whether dismissals of public sector employees constitute reviewable administrative action remained open and unanswered. One possible reason for this is the effect of disavowing any reliance to section 23(1) of the Constitution and its associated legislation so that answering this question is superfluous given that the finding of this matter is to be adjudicated as pleaded.

After *Fredericks*, the *SAPU* judgment handed down by the LC dealt with whether a decision made by the Minister in changing the shift system amounted to administrative action. The *SAPU* judgment becomes relevant because the court applied section 33 and the PAJA enquiry in determining the nature of the decision. In doing so, the court also provided clarity as to the meaning of 'external legal effect'.

### *3.2.2 South African Police Union (SAPU) and another v National Commissioner of the South African Police Service (SAPS) and another*<sup>273</sup>

#### (a) Administrative action

Murphy AJ came to a decision established by a power-based approach, namely, that, although the commissioner exercised a public power sourced in statute, the nature of the decision within the circumstances amounted to nothing more than an internal organisational decision

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<sup>269</sup> Ibid para 40.

<sup>270</sup> Ibid para 41.

<sup>271</sup> Ibid.

<sup>272</sup> Ibid paras 42-43.

<sup>273</sup> (2005) 26 *ILJ* 2403 (LC).



within the administration itself. Therefore, the commissioner's decision to adopt a revised shift system did not amount to administrative action for the purposes of PAJA.

In arriving at this conclusion, the primary question before Murphy AJ was whether the decision of the National Commissioner to introduce an adapted 8-hour shift system constituted administrative action. The applicants submitted that the 'Commissioner's decision amounted to "exercising a public power or performing a public function" in terms of regulations enacted under section 24(1) of the South African Police Service Act<sup>274</sup> and hence fell within the ambit of section 1(a)(ii) of the definition of administrative action.<sup>275</sup> The respondents were of the view that the Commissioner's decision did not amount to an exercising of public power or performance of a public function because Regulation 31 has a dual purpose. While 31(a) empowers the Commissioner to determine the work week and daily hours of employees, 31(b) empowers the Commissioner to determine the opening and closing times of the places of work under his control.<sup>276</sup> It was further submitted that determining opening and closing times of police stations would amount to an exercise of public power or the performance of a public power, but determining hours of work or shift times would not. The reasoning provided by the respondents related to the managerial prerogative in the conduct of labour relations to do so and the source of the power vested within the collective agreement.<sup>277</sup>

Murphy AJ held that it is common cause that SAPS are an organ of state for the purposes of section 237 of the Constitution. Furthermore, Murphy AJ agreed with the respondents that 'there is nothing inherently public about setting the working hours of police officers nor is there any public law concern.'<sup>278</sup> Moreover, 'switching the shift system is not public in nature but rather resides within the commercial or private domain of labour relations'.<sup>279</sup>

Interestingly, Murphy AJ disagreed with the respondents' argument that the source of the Commissioner's power vested within the collective agreement and held that the Commissioner's power are vested within statute, and therefore the powers are derived from a public source.<sup>280</sup> Murphy AJ acknowledged the direction taken by the CC and held that 'the source of the power, while relevant, is not necessarily decisive. Equally, if not more,

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<sup>274</sup> Act 68 of 1995.

<sup>275</sup> *SAPU* (note 273 above) para 49.

<sup>276</sup> *Ibid* para 50.

<sup>277</sup> *Ibid*.

<sup>278</sup> *Ibid* para 51.

<sup>279</sup> *Ibid* para 56.

<sup>280</sup> *Ibid* para 51.

important are the nature of the power, its subject matter and whether it involves the exercise of public duty.<sup>281</sup>

Turning to the administrative action issue, the court held that, before a decision can fall within the definition of administrative action, it has to be one ‘which adversely affects rights of any person and which has direct, external legal effect.’<sup>282</sup> The court does not elaborate as to what ‘adversely affects rights’. It does, however, propose that an argument could be made that at the very least the employees had an expectation to procedural fairness and had no right to work a 12-hour shift system; they were therefore not adversely affected.<sup>283</sup> This argument is too narrow for the purposes of providing extensive interpretation to the meaning of ‘rights’.

In determining whether the decision has ‘direct, external legal effect’, Murphy AJ held that ‘a decision has direct effect when it has a legally binding determination of someone’s rights possessed with the quality of finality.’<sup>284</sup> Relying on the court *a quo* in *Greys Marine*,<sup>285</sup> Murphy AJ held that ‘external effect’ meant that it must affect outsiders and should not be a purely internal matter of departmental administration or organisation. The court also held that the person affected must be someone other than a person in government.<sup>286</sup>

In coming to this conclusion, Murphy AJ followed the court *a quo*’s decision in *Greys Marine* and held that ‘persons outside the organ of state do not include the SAPS, therefore they are insiders and the Commissioner’s decision is an internal matter of departmental organisation.’<sup>287</sup> The court’s conclusion arguably is not the correct interpretation of ‘external effect’ to the extent that it excludes all persons within the state department.

The reliance on the court *a quo*’s decision in *Greys Marine* was subsequently changed by the SCA (see note 70 above) where Nugent J held that ‘external effect’ should not literally be interpreted to exclude action which affects members of or within the public body itself. Conversely, the LC in the *Nxele* followed the SCA’s decision and subsequently expressed its disapproval of *SAPU*. Although the findings of the SCA on the interpretation of ‘external’ does not wholly exclude members within the organisation, the conclusion reached by Murphy AJ is arguably correct based on the facts of the case.

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<sup>281</sup> Ibid.

<sup>282</sup> Ibid para 57.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> 2004 (3) All SA 446 (C) at 458.

<sup>286</sup> *SAPU* (note 273 above) para 57.

<sup>287</sup> Ibid

The reasoning adopted by Murphy AJ seems to be in line with the arguments made by Pfaff and Schneider that decisions relating to the daily operational relationship does not affect individual rights, and therefore do not amount to administrative action. Where a decision has an internal effect, the employees are in the same position as in the private sphere; however, in ensuring that Murphy AJ's concerns are met, decisions must be external in effect and therefore not every act will unduly burden the functioning of the state,<sup>288</sup> only the ones that have a direct, external legal effect.

#### (b) Jurisdiction

Murphy AJ, analysing section 157(2)(a) and (b) as well as section 158(1)(h) of the LRA, was of the view that 'the progressive decisions of our courts, extending labour rights to public sector employees by categorising employers conduct as administrative action, have lost their force following the codification of our administrative law and labour law, and the extension to full labour rights to public sector employees by the LRA.'<sup>289</sup>

Murphy AJ also considered two previously decided cases of equal status handed down subsequent to the adoption of the Constitution and the codification of administrative law and labour law. In the first case, *Mbayeka and Another v MEC for Welfare, Eastern Cape*,<sup>290</sup> it was held that the HC had jurisdiction in respect of any alleged violation of the constitutional right to fair labour practices, and that the decision made by the MEC to suspend the applicants by virtue of section 22(7) of the PSA amounted to an exercise of public power, therefore constituting administrative action. In the second case, *Simela and Others v MEC for Education Eastern Cape and another*,<sup>291</sup> it was held that the decision without prior consultation to transfer an employee amounted to both unjust administrative action and an unfair labour practice.

Considering the judgments in *Mbayeka* and *Simela*, Murphy AJ found the court not to be bound because to be bound by the doctrine of precedent those cases must have been correctly decided. However, the judge concluded these cases did not consider the definition of administrative action in PAJA under the new constitutional dispensation but preferred to interpret section 157(2) in a manner categorising the conduct of all public-sector employers

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<sup>288</sup> Ibid para 51 where the court held 'to render every contractual act of an organ of state a species of administrative action carries the risk of imposing burdens upon the State not normally encountered by other actors in the private sphere.'

<sup>289</sup> Ibid para 66.

<sup>290</sup> (2001) 1 All SA 567 (Tk).

<sup>291</sup> [2001] 9 BLLR 1685 9 (LC).

conduct as administrative action. Both cases were premised upon the doctrinal underpinnings of the *Zenzile* line of cases now no longer relevant or authoritative.

In reaching this view, Murphy AJ relied on the sentiment expressed by Pillay J in *Public Servants Association obo Haschke v MEC for Agriculture and Others*<sup>292</sup> as well as the CC view in *Bato Star* that the grundnorm of administrative law is now to be found in the principles of our constitution, and that the relevance of the previous doctrine must therefore be reconsidered, applying the new constitutional and statutory framework on a case by case basis.<sup>293</sup>

*SAPU* provided an important application of the administrative action enquiry within an employment setting which positively determined that PAJA did not apply because the nature of the power, although sourced in statute, related to the internal operations of the department and lacked ‘external effect’. On the issue of jurisdiction, the court was silent on *Fredericks* recognising the primacy of section 23 of the Constitution and the LRA over administrative law.

*POPCRU*, discussed below, is another important judgment where it was possible for public sector employees to approach a court under section 33 of the Constitution and PAJA.

### 3.2.3 *Police and Prisons Civil Rights Union (POPCRU) and others v Minister of Correctional Services and Others*<sup>294</sup>

#### (a) Administrative Action

In considering whether the provisions of PAJA applied to dismissals of government employees, Plasket J found that the provisions under PAJA applied. Therefore the court proceeded to review and set aside the decision made by the Department of Correctional Services in dismissing its employees. The court held that the decision amounted to administrative action as it is defined in PAJA.

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<sup>292</sup> (2004) 25 *ILJ* 1750 (LC) @1775 D-H where Pillay J observed that ‘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. Historically, resource has been had to administrative law to advance labour rights where labour laws were inadequate... However, pursuant to the affirmation of the interim Constitution and the final Constitution that everyone has a right to fair labour practices, the LRA, the EEA (Employment Equity Act) and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) codified labour and employment rights’.

<sup>293</sup> *SAPU* (note 273 above) paras 65-66.

<sup>294</sup> (2006) 27 *ILJ* 555 (E).

In conclusion, Plasket J acknowledged that it was not argued by the respondents that the decision was not administrative in nature, that they did not adversely affect rights or that the decision did not have direct, external legal effect. The respondents did however argue that the decision was not an administrative action as defined because it did not constitute the exercise of public power due to a lack of public effect.<sup>295</sup>

Plasket J disagreed with the respondents by acknowledging that the ‘concept of ”public power” is an elusive concept; therefore not all exercises of public power impact on the public at large.’<sup>296</sup> Many administrative actions do not impact on the public, for example, an arrest of an individual would only have a significant impact on the arrestee and perhaps the complainant.<sup>297</sup> Thus decisions can alternatively impact the public at large or personal individuals.

In determining what makes the power involved a ‘public power’, Plasket J held ‘that it has been vested in a public functionary who is required to exercise it in the public interest.’<sup>298</sup>

Plasket J held that

‘...the statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the Constitution generally and s 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in s 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA.’<sup>299</sup>

Although the court focusses on specific factors, Plasket J concluded that ‘the court is in any event bound by the more general proposition for which the Appellate Division (AD) in *Zenzile*<sup>300</sup> is authority, namely that the decision of a public authority to dismiss an employee is an exercise of public power.’<sup>301</sup> The court held that *Zenzile* is ‘not an artificial extension of administrative law and an aberration—albeit a welcome one—created by the circumstances of

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<sup>295</sup> Ibid para 52.

<sup>296</sup> Ibid para 53.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> *POPCRU* (note 294 above) para 54.

<sup>300</sup> 1991 (1) SA 21 (A).

<sup>301</sup> *POPCRU* (note 294 above) para 55.

the time which should now be consigned to the scrap-heap of history.’<sup>302</sup> Therefore, the court correctly held that *Zenzile* was a case upholding the general recognised principle that

‘...one of the important roles that courts play in our society and in our legal tradition, is to ensure that when statutory powers (and other powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner.’<sup>303</sup>

Plasket J held that, based on *Zenzile*, the power to dismiss was a public power and that the question as to whether the decision to dismiss amounted to administrative action was in the affirmative as the elements under PAJA were present.

Plasket J takes into consideration that, if the decision does not constitute administrative action under PAJA, the decision would remain an exercise of public power and thus be reviewable for compliance under the principle of legality which is the founding constitutional value of the rule of law entrenched in section 1(c) of the Constitution.

#### (b) Jurisdiction

Although it was not argued by the respondents that the HC lacked jurisdiction, it was argued that the jurisdiction of the HC is limited in labour matters to the unfair labour practice jurisdiction of the LC. The respondents argued that section 157 of the LRA ousted the jurisdiction of the HC in labour related matters. Plasket J concluded that the HC had jurisdiction to hear the matter.<sup>304</sup>

In conclusion, Plasket J relied on section 19(1) of the Supreme Court Act 59 of 1959 (now the Superior Court Act) and section 173 of the Constitution providing for inherent jurisdiction.<sup>305</sup> Plasket J held that the relevance of section 19(1) and section 173 mean that ‘whereas inferior courts may do nothing that the law does not permit, superior courts may do anything that the law does not forbid.’<sup>306</sup> Plasket J, in addition, relied on section 169 of the

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<sup>302</sup> Ibid para 56.

<sup>303</sup> Ibid para 56.

<sup>304</sup> Ibid para 44.

<sup>305</sup> Ibid para 36.

<sup>306</sup> Ibid.

Constitution, which provides that a ‘High Court may decide any constitutional matter except matters that are reserved for the exclusive jurisdiction of the constitutional court.’<sup>307</sup>

Plasket J turned to section 157(1) and (2) specifically and concluded that those sections:

‘...do not purport to oust the jurisdiction of the High courts to determine the constitutionality of the conduct of organs of state in the field of employment. They do not, in other words, limit the jurisdiction of the High Courts that section 169 of the Constitution vest in them. Instead, they vest jurisdiction concurrent with that of the High Courts in Labour Courts in respect of employment- related alleged or threatened violations of fundamental rights, including disputes about the constitutionality of executive or administrative conduct of the State as employer.’

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The interpretation adopted by Plasket J was based on settled law in the judgment of Nugent AJA in *Fedlife Assurance Ltd v Wolfaard*<sup>309</sup> where the SCA held that

‘...s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee...its exclusive jurisdiction arises only in respect of “matters that elsewhere in terms of this act or in terms of any law are to be determined by the Labour Court.”’<sup>310</sup>

Plasket J further relied on the CC’s judgement in *Fredericks*. Writing for the majority in *Fredericks*, O’Regan J held that the matter, as to whether the HC’s jurisdiction is ousted, turned on the interpretation of section 169 of the Constitution and section 157 of the LRA, concluding that the HCs jurisdiction had not been ousted.<sup>311</sup> Section 157(2) provides that where there are ‘challenges based on constitutional rights which arise out of the state’s

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<sup>307</sup> Ibid.

<sup>308</sup> Ibid para 39.

<sup>309</sup> 2002 (1) SA 49 (SCA).

<sup>310</sup> Ibid para 25.

<sup>311</sup> Ibid paras 40 and 41.

conduct in its capacity as employer is a matter that may be determined by the Labour Court concurrently with the High Court.<sup>312</sup>

Plasket J found the court to be bound by *Fredericks* and *Fedlife* and held that the issues before the court included allegations that fundamental rights had been violated, and that therefore ‘this court and the Labour Court have concurrent jurisdiction in terms of section 157(2) of the LRA.’<sup>313</sup>

*Fredericks*, *SAPU* and *POPCRU* were important judgments in the development of administrative law applied to labour cases. Before the *POPCRU* judgment was handed down, the *Chirwa* matter had started in the HC. In the same month after the *POPCRU* judgment was handed down, the further development of administrative and labour law in the SCA judgment in *Chirwa* followed.

#### 3.2.4 *Transnet Ltd and others v Chirwa*<sup>314</sup> at the Supreme Court of Appeal

The applicant (Chirwa) was employed as Human Resources Executive Manager within the business unit of Transnet. Chirwa refused to participate in a disciplinary enquiry because she objected to her supervisor being the complainant, witness and presiding officer at the same time. The enquiry subsequently continued and Chirwa was dismissed. Following her dismissal, Chirwa referred her dispute to the CCMA<sup>315</sup> alleging an unfair dismissal. The CCMA were unable to resolve her dispute which led to Chirwa approaching the HC on the grounds that the disciplinary proceedings amounted to administrative action which was procedurally unfair and violated her right to a fair administrative action.

It is important to focus on how the courts dealt with the issues relating to public-sector employment and administrative law, starting with the court *a quo*, the SCA and lastly the CC.

In the HC,<sup>316</sup> Brassey AJ delivered judgment, holding that the decision of Transnet in dismissing Chirwa amounted to administrative action and that it was therefore reviewable by administrative law principles. The court did not reach this conclusion based on the alleged

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<sup>312</sup> Ibid para 41.

<sup>313</sup> *POPCRU* (note 220 above) para 44.

<sup>314</sup> (2006) 27 *ILJ* 2294 (SCA).

<sup>315</sup> Commission for Conciliation, Mediation and Arbitration.

<sup>316</sup> *Chirwa v Transnet Ltd & Others*, unreported judgment in application for leave to appeal under case number 03/01052 delivered 16 May 2005.



provisions of PAJA as pleaded by Chirwa. Brassey AJ concluded that the rules of natural justice had been breached and relied on the decision in *Zenzile*, holding that a dismissal of a public-sector employee was not simply the termination of a contractual relationship but the exercise of a public power which required the employer to apply the rules of natural justice. Although *Zenzile* was an important decision at the time, the approach taken by Brassey AJ in not applying PAJA was not the correct approach, based on the reasoning in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>317</sup> that an administrative act now arises from PAJA and not the common law.<sup>318</sup>

Transnet appealed to the SCA,<sup>319</sup> raising two issues. Firstly, whether Chirwa's dismissal was a matter which fell within the exclusive jurisdiction of the LC in terms of section 157(1) of the LRA and, secondly, whether the dismissal constituted administrative action as defined in PAJA. The SCA produced a split decision where three judgments were delivered; the first by Mthiyane JA with Jafta JA concurring, the second by Conradie AJ and the third by Cameron AJ with Mpati DP concurring.

### **Mthiyane JA with Jafta JA concurring**

#### **a) Jurisdiction**

Mthiyane JA and Jafta JA held that the HC had jurisdiction in the matter<sup>320</sup> because the appellant alleged that the termination of her services constituted a violation of her right to administrative action as it is enshrined in section 33 of the Constitution. Thus, Chirwa raised a constitutional issue which the HC had the power to hear based on section 169 of the Constitution.<sup>321</sup> Mthiyane JA's reasoning is in line with *Fredericks*, *Fedlife* and in *United National Public Service Association of South Africa v Digomo NO and others*<sup>322</sup> where it was held that 'if an employment dispute raised an alleged violation of a constitutional right a litigant is not confined to the remedy provided under the LRA and the jurisdiction of the High Court is not ousted.'<sup>323</sup>

#### **b) Administrative Action**

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<sup>317</sup> 2004 (4) SA 490 (CC).

<sup>318</sup> *Chirwa* HC (note 319 above) 25.

<sup>319</sup> Mpati DP, Cameron JA, Mthiyane JA, Conradie JA and Jafta JA

<sup>320</sup> *Chirwa* (note 317 above) para 10.

<sup>321</sup> *Ibid* para 6.

<sup>322</sup> (2005) 26 *ILJ* 1957 (SCA) at para 4.

<sup>323</sup> *Ibid* para 7.

Turning to the second question, Mthiyane AJ held that, for the appellant to succeed, not only must the challenge be framed or pleaded in terms of section 33 of the Constitution and PAJA but the appellant must establish that the dismissal constituted administrative action as defined in section 1 of PAJA. Mthinyane AJ held that Brassey AJ, in relying solely on *Zenzile*, had erred in not submitting the decision to dismiss to scrutiny under PAJA. In arriving at this conclusion, the authority in *Minister of Health v New Clicks SA (Pty) Ltd*<sup>324</sup> was relied on, the judge holding that the cause of action for judicial review of administrative action ordinarily arose from PAJA and not from the common law as in the past.

It was held that the termination of Chirwa's employment was not administrative action as defined in PAJA. In coming to this conclusion, the judge held that Transnet was not exercising a public power, or performing a public function in terms of any legislation.<sup>325</sup> It was further held that, although Transnet was an organ of state and derives its powers to enter contracts from statute, it did not necessarily mean that its right to terminate also derived from public power.<sup>326</sup>

The court held that Transnet was exercising a public power and performing a public function. Nevertheless, it relied on the fact that, because there was no implementing legislation at the time, the source of the power was not of a public nature but rather based on the employment contract. This is in line with Conradie AJ's reasoning that, because of a lack of implementing legislation, the nature of the decision along with the source of the power leaned on the side of the LRA.

Mthinyane AJ held that the nature of the power or function is paramount, the identity of the functionary exercising the power or function is secondary. In determining the nature of the conduct, it was held 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 some legislation. Ordinarily the employment contract has no public law element to it and it is not governed by administrative law. The mere fact that Transnet is an organ of state does not impart a public law character to its employment contract... The power to

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<sup>324</sup> 2006 (1) BCLR 1 (CC) at para 431.

<sup>325</sup> *Chirwa* (note 317 above) para 14.

<sup>326</sup> *Ibid.*

dismiss is found, not in legislation, but in the employment contract between Transnet and the applicant.<sup>327</sup>

It was further held that when Chirwa was dismissed, Transnet was acting in its capacity as employer and not in its capacity of a public authority.<sup>328</sup> Therefore, Chirwa had not shown that the dismissal by Transnet was administrative action as defined in PAJA or that any of her rights under section 33 of the Constitution were violated. This line of reasoning ensures that when an application is brought before a court under PAJA, its determination must be ascertained in a manner that ensures constitutional validity.

Mthinyane AJ's reasoning as to why the claim was not administrative action is clear as the conduct did not meet the standard invoking the provisions of PAJA to apply. However the court does arguably hold that at the time of Chirwa's dismissal, public sector employees enjoyed protection under the LRA, giving effect to their section 23(1) constitutional right to fair labour. The court does not hold that the PAJA claim failed because Chirwa also had a claim under the LRA. The court simply proceeded correctly as the case was pleaded and held that Chirwa failed to sustain a cause of action under PAJA, however it was further held that Chirwa also had the option under the LRA.<sup>329</sup>

## **Conradie JA**

### **a) Administrative Action**

Conradie JA delivered a separate judgment agreeing with Mthiyane JA in so far as that the appeal should be granted, yet did not decide on the question whether the decision amounted to administrative action. Rather Conradie JA proceeded to approach the question as to whether PAJA applied or not holistically.<sup>330</sup> For Conradie JA, the real question was not whether the decision to dismiss the respondent amounted to administrative action, even though the judge was prepared to accept that it did as 'any proper dismissal enquiry in the public domain necessarily has the procedural attributes of administrative action.'<sup>331</sup> The real

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<sup>327</sup> Ibid para 15.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid para 26.

<sup>331</sup> Ibid.

question for Conradie JA was whether, since the advent of the LRA, the structure of legislation entails that dismissals in the public domain be dealt with as administrative acts.

In answering this question, Conradie JA agreed with Murphy AJ in *SAPU* and held that to allow every dismissal of an employee to be litigated either in the HC or the LC at the option of the employee would not fit into the desired scheme of labour regulations.<sup>332</sup> The legislature's intention was clear that 'behind the LRA structures is to subject disputes regarding unfair dismissals, to its schemes.'<sup>333</sup> Conradie JA was of the view that, since the LRA extended the benefits of the LRA to public sector employment, it would seem perverse that PAJA in respect of matters specially assigned to the LC, without expressly saying so, effectively repealed the exclusive jurisdiction provision of section 157(1) of the LRA.<sup>334</sup> It is obvious that the LC as per section 157(1) of the LRA has exclusive jurisdiction to hear certain matters before it. However, to reason that, because the LC has exclusive jurisdiction to hear matters notwithstanding section 157(2), the HC has no jurisdiction is not in line with the interpretation provided by the CC in *Fredericks*.

Moreover, Conradie JA's judgment seems to touch on policy considerations. It seems to suggest that, because the LRA now effectively protects public sector employees, one should be mindful of the purpose of the LRA even though the legislatures' intention has been expressly provided under section 157(2) of the LRA to create concurrent jurisdiction between the LC and the HC.

Conradie JA does state that, if the conclusions reached are wrong and Chirwa did have a cause of action under PAJA, Chirwa should not be entitled to pursue the claim in the HC. In reaching this approach, Conradie JA looked at section 158(1)(h) of the LRA and held that, in terms of that section, the LC has exclusive jurisdiction to review the decision to dismiss the respondent. Although her cause of action is under PAJA, the HC is not the forum for it and the LC can hear the matter as section 158(1) (h) confers jurisdiction on the LC to review an administrative act performed by the state as an employer.<sup>335</sup> Conradie JA's approach seems to suggest that, if one were to look at the purpose and object of the LRA holistically, the power

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<sup>332</sup> Ibid.

<sup>333</sup> Ibid para 27.

<sup>334</sup> Ibid para 29.

<sup>335</sup> Ibid para 36.

of the LC to review conduct on grounds ‘permissible in law’ means that the LC has exclusive jurisdiction to review decisions under PAJA and not the HC.<sup>336</sup>

Conradie JA’s reasoning stands alone and does not follow the approach in *Fredericks* where O’Regan J held that section 158(1)(h) cannot be sufficiently interpreted in conferring jurisdiction to determine constitutional matters upon the LC when read with section 157(1) to exclude the jurisdiction of the HC. In conclusion, O’Regan J held:

‘Whatever the precise ambit of section 158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the state acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by section 157(2), it would be a strange reading of the Act to interpret section 158(1)(h) read with section 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by section 157(2).’<sup>337</sup>

### **Cameron JA with Mpati DP concurring**

Cameron JA wrote a dissenting judgment with Mpati DP concurring. The reasoning behind the dissent for Cameron JA were the views expressed by Plasket J in *POPCRU*, which were endorsed as correct, and therefore it was held that ‘the Constitution permits an employee of a public body to be able to seek relief in the ordinary courts for dismissal-related process injustices that constitute administrative action.’<sup>338</sup>

For Cameron JA, the difference between his colleagues is that Mthiyane JA denies the employee a remedy without relying on the provision of the LRA because he found that the dismissal process was not administrative action, whereas Conradie JA finds that the legislative intention behind the enactment of the LRA was to get rid of the employee’s administrative action-related cause of action in the ordinary courts. The approach taken by Mthiyane JA is in line with *Fredericks* and, although the LRA route was open to Chirwa, this was not the route chosen. The court’s competence to hear the matter had been invoked by pleading under section 33 of the Constitution and PAJA.

<sup>336</sup> *Fredericks* (note 257 above) para 43.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Chirwa* (note 317 above) para 47.

### *Duality of rights*

Cameron JA argued for the proposition that Chirwa had dual rights and therefore, when Transnet dismissed Chirwa, that decision violated two constitutional rights: her right to fair labour practices under section 23(1) and her right to just administrative action under section 33.<sup>339</sup> The question for Cameron JA was whether the fact that an employee has remedies under the LRA precluded her from asking the ordinary courts to vindicate her PAJA rights. The answer to this was in the negative because, as stated in *Fedlife*, the LRA does not confer exclusive jurisdiction on the LC in matters arising from employee/employer relationships, according to *Fredericks*, and since the LRA affords no general jurisdiction in employment matters, ordinary courts cannot be ousted simply because a dispute falls within the sphere of employment relations.<sup>340</sup>

Cameron JA rightly held that there is no doctrine of constitutional law which confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude. If the legislature sought to deprive dismissed public sector employees of their administrative justice rights in the ordinary courts because they now enjoy rights under the LRA, the legislature would have said so when PAJA was enacted some five years after the LRA was enacted, moreover Cameron JA reasons that because PAJA's list of exclusions make no mention of any deprivation, a cause of action under PAJA survives.<sup>341</sup>

No doctrine of constitutional law confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude. If the legislature sought to deprive dismissed public employees of their administrative justice cause of action in the ordinary courts, because they enjoy rights under the LRA, it could have said so when it enacted PAJA.

Arguably, the fact that an employee approaches an ordinary court under PAJA and fails because the claim is lawfully unsound in that it is unable to sustain a cause of action does not detract from the reasoning provided by Cameron JA. The fact that an employee failed to sustain a cause of action under PAJA does not imply that the right to approach an ordinary court was not open to an employee under PAJA in the first place.

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<sup>339</sup> Ibid para 57.

<sup>340</sup> Ibid paras 58-59.

<sup>341</sup> Ibid para 63.

Cameron JA held that Chirwa was ‘free to frame her cause of action under PAJA as there is no suggestion under the Constitution that where one or more rights may be at issue, its beneficiaries should be confined to a single legislatively created scheme of rights.’<sup>342</sup> Therefore Cameron JA upheld the jurisdiction of the HC in matters like that of Chirwa.

#### a) Administrative Action

On the question as to whether public sector dismissals constitute administrative action, Cameron JA held that they could be classified as such. Relying on the doctrine propounded in *Zenzile*, it was held that ‘employment with a public body attracts the protections of natural justice because the employer is a public authority who’s employment-related decision involves an exercise of public power, therefore its exercise constitutes administrative action.’<sup>343</sup> In the case of Chirwa, Cameron JA held that, even if her employment relationship with Transnet was not regulated by a statutory provision, it was a fact that Transnet is a public entity, created by statute, and that therefore ‘its every act derives from its public, statutory character, including the dismissal at issue here.’<sup>344</sup>

#### *The effect of the SCA Judgment*

The abovementioned judgment of the SCA produced a split decision. Therefore the judgment makes no definitive finding as to whether the conduct by the state and its organs as employer should be reviewable under PAJA. Mthiyane JA argued that Transnet’s termination of Chirwa’s contract of employment did not amount to an exercise of public power, which in turn did not amount to administrative action under PAJA. Cameron JA held that Chirwa was at liberty to frame her cause of action under PAJA and should be entitled to relief in terms of its provisions. Cameron JA further held that, even if Chirwa’s contract of employment was not regulated under statute, the fact that Transnet is an organ of state created by statute, it is a public entity, and thus every act including dismissals would have a public statutory character; therefore the decision to terminate the employment contract amounted to an exercise of public power.

Conradie JA stood alone in his judgment holding that, when looking at the purpose of the LRA holistically, where there is a complaint arising from a procedurally unfair dismissal for poor work performance, it is a quintessential LRA matter and that therefore relief under

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<sup>342</sup> Ibid para 65.

<sup>343</sup> Ibid para 52.

<sup>344</sup> Ibid.

PAJA is not intended to be available. Nevertheless, Conradie JA does go as far as stating that, if he is wrong that PAJA does not apply, relief cannot be sought in the ordinary courts and thus PAJA would apply in the LC.

Examining the reasoning of the judges, it appears that Conradie JA held that the HC did not have jurisdiction and therefore the question as to whether the dismissal constituted administrative action was immaterial. However Mthinyane and Jafta JJA found that the HC had jurisdiction, but further found that the decision did not constitute an administrative act. The minority judgment of Cameron JA and Mpati DJP disagreed with Judges Mthinyane and Jafta JJA and held that the decision to dismiss did amount to an administrative act. Cameron JA also disagreed with the jurisdictional point raised by Conradie JA. The court's conflicting views have consequently left the question as to whether Chirwa's dismissal constituted administrative action unanswered as it was left open in *Fredericks*. It was this burning question which arrived before the CC.

### 3.2.5 *Chirwa v Transnet Ltd and others*<sup>345</sup> at the Constitutional Court

The CC delivered two majority judgments by (a) Skweyiya J<sup>346</sup> and (b) Ngcobo J<sup>347</sup> along with a minority judgment by (c) Langa CJ.<sup>348</sup> In Chapter 1, the *Chirwa* judgment has been dealt with in the literature review to establish the general direction which courts have taken in matters concerning public sector employment. One of the research objectives set out in Chapter 1 was to establish why the courts have chosen to take a policy direction as opposed to respecting express legislative provisions. In considering this question, we now turn to how the *Chirwa* judgment was reasoned and why the judgment has not settled the debate and provided definitive findings in this area of law. The CC in *Chirwa* had the opportunity to pronounce on the issues facing the courts under this area of law. However, on closer inspection, it seems that to provide certainty the CC opted to blanket all public-sector employee under the LRA, thus closing the PAJA route completely.

#### (a) Skweyiya J

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<sup>345</sup> 2008 (4) SA 367 (CC).

<sup>346</sup> Moseneke DCJ, Madala J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J and Van der Westhuizen J concur in the judgment of Skweyiya J.

<sup>347</sup> Moseneke DCJ, Madala J, Navsa AJ, Nkabinde J, Sachs J and Van der Westhuizen J concur in the judgment of Ngcobo J.

<sup>348</sup> Mokgoro J and O'Regan J concur in the judgment of Langa CJ.



Skweyiya J, based on a policy-driven approach, as seen in *SAPU* as well as the judgment of Conradie JA, held that the HC does not have concurrent jurisdiction with the LC, and, moreover, that the question as to whether the dismissal amounted to administrative action was unnecessary due to the negative finding on jurisdiction.<sup>349</sup> Skweyiya J goes so far as to hold that had he been called to make a finding on the administrative action question, he would have come to the same conclusion as Ngcobo J (which will be dealt with in his judgment below).

For Skweyiya J, the LRA should always be seen as a more appropriate route because

‘...the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters.’<sup>350</sup>

However, Skweyiya J recognises that state employees not only have the benefit of protection under the LRA, but also have the right to approach ordinary courts for relief under PAJA, and that, moreover, ‘courts should be hesitant in depriving litigants of existing rights where one or more rights are provided by the Constitution or any other enabling legislation.’<sup>351</sup> It was further held that:

‘Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.’<sup>352</sup>

Where a litigant alleges an unfair labour practice or an unfair dismissal, the LRA should be the first port of call. It is this line of reasoning which led Skweyiya J to the *Fredericks* judgment below.

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<sup>349</sup> *Chirwa* (note 348 above) paras 63 and 73.

<sup>350</sup> *Ibid* para 41.

<sup>351</sup> *Ibid* para 40.

<sup>352</sup> *Ibid* para 41.

*Whether the High Court has Concurrent Jurisdiction with the Labour Court in this matter*

In answering this question, Skweyiya J considered the *Fredericks* judgment and held that it was distinguishable from Chirwa's circumstances. The court notes that in *Fredericks* the applicants expressly disavowed any reliance on section 23(1) of the Constitution and that, furthermore, the applicants had not relied on any of the fair labour practice provisions of the LRA. Thus Skweyiya J held that, unlike in *Fredericks*, Chirwa expressly relied upon the LRA provisions dealing with unfair dismissals. Skweyiya J, relying on those provisions, asserted that Chirwa's claim was based on a violation of the provision of the LRA including items 8 and 9 of schedule 8 of the LRA.<sup>353</sup> It was further held that, although her claim was based on the LRA, 'Chirwa elected to vindicate her rights not under the provisions of the LRA, but instead under the provisions of PAJA.'<sup>354</sup> In distinguishing *Fredericks*, Skweyiya J does not expressly state but rather implies that, had Chirwa pleaded unequivocally under PAJA in the HC, the court would have had jurisdiction.

Skweyiya J held that the 'effect of section 157(1) is therefore to divest the High court of jurisdiction in matters that the Labour court is required to decide except where the LRA provides otherwise.'<sup>355</sup> In other words, 'where the Labour court has exclusive jurisdiction to determine a dispute over matters conferred upon the Labour court by the LRA or other legislation, the jurisdiction of the High Court is therefore ousted.'<sup>356</sup> Since Chirwa's claim fell under section 191 of the LRA concerning a 'dismissal for poor work performance which is covered by the LRA and for which specific dispute resolution procedures have been created, [it] is therefore a matter that must, under the LRA be determined exclusively by the Labour court.'<sup>357</sup> The reasoning as to why the HC did not have jurisdiction makes sense. However, Skweyiya J then turns to strong policy considerations.

It is important to note that Chirwa was held not to have been able to approach the HC. Therefore the court did not have jurisdiction because Chirwa alleges an unfair dismissal in her application to the HC. Furthermore, another reasoning as to why Chirwa was unsuccessful was to reaffirm that forum shopping is not desirable as Chirwa 'chose to abandon the process she had started in the CCMA, and approached the HC where she contended that her right to administrative justice, protected by section 33 of the Constitution

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<sup>353</sup> Ibid paras 58 and 61.

<sup>354</sup> Ibid para 61.

<sup>355</sup> Ibid para 59.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid para 63.

had been breached.’ For Skweyiya J, Chirwa is not afforded with an election and is therefore not at liberty to relegate the finely-tuned dispute resolution structures.<sup>358</sup> Based on the reasoning of Skweyiya J, had Chirwa followed the same route as in *Fredericks*, a different conclusion may well have been reached.

**(b) Ngcobo J**

Ngcobo J concurred with the order proposed by Skweyiya J, but is at odds with two issues that Skweyiya J does not address: the first is the scope of the operation of the provisions of section 157(1) and (2) and the second, which flows from the first, is the characterisation of a dismissal as an administrative action.<sup>359</sup>

In dealing with the first issue, Ngcobo J starts by following the approach taken by Skweyiya J that one must follow the route chosen to the very end,<sup>360</sup> therefore holding that ‘where two courts have concurrent jurisdiction, it means that the party initiating the proceedings must make an election before doing so, moreover that the party is bound to complete this process under the system that he or she has elected.’<sup>361</sup> Ngcobo J was prepared to consider this narrow approach, but opted not to because the issues raised before the court dealt with several important constitutional problems in reconciling the provisions of section 157(1) and (2).<sup>362</sup> Instead of dealing with the approach taken by O’Regan J in *Fredericks* that jurisdiction is determined on how one pleads, Ngcobo J argued for the use of a purposive interpretation of section 157(1) and (2) in light of the primary object of the LRA and its purpose would settle the matter.<sup>363</sup>

Ngcobo J holds that the LRA trumps every other right where the LRA is capable of more than one plausible interpretation.<sup>364</sup> Arguably Ngcobo J seems to ignore settled precedent set by the same court in *Fredericks*<sup>365</sup> by opting for an interpretation of the LRA that goes

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<sup>358</sup> Ibid 65-66.

<sup>359</sup> Ibid para 80.

<sup>360</sup> Ibid para 67.

<sup>361</sup> Ibid para 85.

<sup>362</sup> Ibid para 91.

<sup>363</sup> Ibid para 96.

<sup>364</sup> Ibid para 110.

<sup>365</sup> O’Regan J states in para 41:

‘There is no express provision of the Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as employer, other than section 157(2). That section provides that challenges based on constitutional rights arising from the state’s conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with

against express wording set by the legislature. Ngcobo J holds that when looking at the ‘interpretative injunction in section 3 of the LRA, it requires anyone applying the LRA to give effect to its primary object and the Constitution.’<sup>366</sup> Therefore, this approach informs the position taken by Skweyiya J and O’Regan J that, where one relies on the provisions of the LRA by alleging that one’s cause of action is to be determined under that forum, the LRA would trump any other plausible interpretation and this would be the forum which the litigant has chosen to invoke the court’s competence.

This approach is why Chirwa was unable to invoke the HC’s competence to hear the matter as the nature of the claim was labour related for two reasons as mentioned above: first, that Chirwa initially chose the LRA route but then subsequently abandoned it, and, second, Chirwa alleged that she was subjected to an unfair dismissal according to Ngcobo J and Skweyiya J. This is the nature of her dispute and not the unlawfulness of a decision under a litigant’s right to administrative action under section 33 of the Constitution. What seems to be certain in the majority’s ruling is that Chirwa should not have approached the HC when she had already commenced proceedings in the CCMA for a claim based on an alleged unfair dismissal. However uncertainty looms in the air regarding the jurisdictional interpretation amongst the judges.<sup>367</sup>

Notwithstanding the conclusions reached, Ngcobo J decided to use a purposive interpretation, stating that ‘given the manifest purpose of section 157(2) the use of the word “concurrent” is unfortunate which may well give rise to forum-shopping.’<sup>368</sup> Ngcobo J states that, ‘while section 157(2) remains in the statute book, it must be construed in light of the primary objectives of the LRA.’<sup>369</sup> In light of the ‘one stop shop’ principle, for Ngcobo J ‘section 157(2) must be narrowly interpreted to those instances where a party relies directly on the provisions of the Bill of Rights.’<sup>370</sup>

This approach had the effect of going against the judgment in *Fredericks* by applying a method of interpretation against the express wording of section 157(2). In arriving at this conclusion, Ngcobo J reasoned that:

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the High Court. Whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction.’

<sup>366</sup> Ibid.

<sup>367</sup> Grogan J ‘*Schizophrenic Courts Does Fredericks Hold, or Chirwa?*’ 2008(24) (4) *Employment Law Journal* 11-19.

<sup>368</sup> *Chirwa* (note 348 above) para 121.

<sup>369</sup> Ibid para 122.

<sup>370</sup> Ibid para 123.

‘It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case ‘for practical considerations. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.’<sup>371</sup>

For Ngcobo J, the matter must be determined exclusively by the LC because the applicant alleged that the conduct of Transnet violated the provisions of the LRA.<sup>372</sup>

The second issue considered by Ngcobo J was whether the applicant had one or more causes of action; one flowing from the LRA and the other flowing from the constitutional right to just administrative action. It is clear that an applicant has a right in terms of the LRA, however the issue now is whether an applicant also has a right in the latter.

Turning to whether the decision to dismiss Chirwa amounted to administrative action, Ngcobo J did not agree with the view by Langa CJ in the minority judgment that in dismissing the applicant Transnet did not exercise public power.<sup>373</sup> Consequently, Ngcobo J agreed with Cameron JA that Transnet is a creature of statute and held:

‘...what makes the power a public power is the fact that it has been vested in the public functionary, who is required to exercise the power in the public interest... as a public authority, its decision to dismiss necessarily involves the exercise of public power, and that power is always sourced in statutory provision, whether general or specific, and behind it, in the Constitution.’<sup>374</sup>

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<sup>371</sup> Ibid para 124.

<sup>372</sup> Ibid para 125.

<sup>373</sup> Ibid para 138.

<sup>374</sup> Ibid.

In conclusion, Ngcobo J relied on *Hoffman v South African Airways*<sup>375</sup> where the CC 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.’<sup>376</sup>

The fact that the conduct of Transnet in terminating the applicant’s employment contract involved the exercise of public power was not decisive on its own. Following an approach in conflict with the principle of subsidiarity, Ngcobo J held that the question whether conduct constitutes administrative action must be determined by reference to section 33 of the Constitution. For Ngcobo J, PAJA only comes into the picture once the conduct in question fell within the meaning of section 33. Ngcobo J concluded that Transnet’s terminating the employment contract was not administrative action under section 33 of the Constitution and that it was therefore unnecessary to decide whether PAJA applied.<sup>377</sup> In coming to this conclusion, Ngcobo J relied on the factors provided in *SARFU*, where it was held that:

‘The subject matter of the power here is the termination of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant’s contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action.’<sup>378</sup>

Ngcobo J stated that section 33 is not concerned with every act of administration performed by an organ of state, and that therefore the conduct of Transnet did not constitute administrative action under section 33.<sup>379</sup> It is significant to recognise that, if there was an implementation of legislation, it is implied in the reasoning by Ngcobo J that a conclusion that administrative action had taken place would have been the outcome as the source of the power would have been statutory and the nature of that power would have been administrative. Hoexter states that Ngcobo J focussed on the absence of one of the pointers laid down in *SARFU*, which effectively resulted in PAJA not being engaged at all. For

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<sup>375</sup> 2001(1) SA 1 (CC).

<sup>376</sup> Ibid para 23.

<sup>377</sup> *Chirwa* (note 348 above) paras 142 and 150.

<sup>378</sup> Ibid para 143.

<sup>379</sup> Ibid.

Hoexter, PAJA does not insist that legislation must be implemented as a general characteristic of administrative action,<sup>380</sup> and that, moreover, ‘finding that the dismissal was contractual and at the same time an exercise of public power seems to be perverse.’<sup>381</sup>

Notwithstanding the conclusion reached on the administrative action question, the notion as to whether administrative law principles applied or not was rejected outright by Ngcobo J as it was held that public sector employees do not have dual rights and thus it is ‘no longer necessary to treat public sector employee differently and subject them to the protection of administrative law, moreover there is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees.’<sup>382</sup>

### **(c) Langa CJ: Minority Judgment**

Langa CJ provided a strong minority judgment where for him the primary question to consider is whether the applicant’s dismissal constitutes administrative action in terms of PAJA. Langa CJ concurs with the outcome reached by Skweyiya J, yet does not necessarily agree with how the issue of jurisdiction was reasoned and concluded.

#### *The correct approach for determining jurisdiction*

For Langa CJ, the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it, and therefore, although the question in the CC for determining jurisdiction is whether the case raises a constitutional matter, the question in Chirwa’s case is whether a claim before the court is a claim that has been assigned to the LC.<sup>383</sup> In answering this question, Langa CJ, in terms of the nature of the claim, held that the bulk of the submissions made were devoted to arguments based squarely on PAJA therefore Chirwa was contending that the dismissal was administrative action as understood by PAJA. Langa CJ held that, while reference to items 8 and 9 were used, it only formed a small part of the argument to bolster further that her dismissal also violated certain sections in PAJA.<sup>384</sup> Langa CJ held that, ‘whatever we think of the wisdom of her election to avoid the specialised

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<sup>380</sup> Hoexter *C Administrative Law in South Africa* 2ed (2012) 219.

<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid* paras 148-149.

<sup>383</sup> *Ibid* paras 155-156.

<sup>384</sup> *Ibid* para 157;

provisions of the LRA, we must evaluate the claim as it was presented to us',<sup>385</sup> and that therefore the claim constitutes a constitutional matter as it concerns her right to administrative justice under section 33 of the Constitution, as given effect to by PAJA.<sup>386</sup> The reasons for the disagreement of Skweyiya J flow from a mischaracterisation<sup>387</sup> of the claim. Therefore as a whole the applicant's complaint is that her dismissal should be evaluated in terms of PAJA and not the LRA.

*Whether Chirwa's claim has been assigned solely to the Labour Court*

For Langa CJ, section 157(1) and (2) has been the subject of considerable debate in which two schools of thought have emerged. The first approach adopts a purposive reading of the section, giving effect to the purpose of the LRA to have labour disputes adjudicated solely within the structure.<sup>388</sup> This was the approach followed by Conradie JA and Ngcobo J as noted above. The second approach adopts a literal meaning for the section, whereby only those matters assigned explicitly to the LC by the LRA are excluded from the HC's jurisdiction. In essence it was the second approach that was followed by Mthiyane JA and Cameron JA in the SCA.<sup>389</sup> Langa CJ correctly stated that, although this debate is difficult and has plagued the courts in one jurisprudential direction, it has already been settled by the CC judgment in *Fredericks* where O'Regan J endorsed the literal approach, holding that 'section 157(1) had to be interpreted in light of section 169 of the Constitution.'<sup>390</sup>

Langa CJ rejects the approach taken by Skweyiya J in distinguishing *Fredericks* narrowly because the effect of *Fredericks* meant that the question was no longer whether a claim is in 'essence' a labour matter but rather whether the LRA contains a provision referring a particular constitutional matter to the jurisdiction of the LCs.<sup>391</sup> Section 157(1) when read with section 191(5) of the LRA gives the LC exclusive jurisdiction within its terms to address questions of unfair dismissals. However for Langa CJ, Chirwa's claim was not an unfair dismissals for two reasons. The first reason is that the claim must be approached as it was pleaded as understood by the SCA and the HC and therefore:

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<sup>385</sup> Ibid para 159.

<sup>386</sup> Ibid.

<sup>387</sup> Langa CJ held at para 158 that 'it was not a characterisation urged upon us by the applicant's counsel in argument; nor one adopted in any of the three judgments in the Supreme Courts of Appeal, nor in the High Court judgments.'

<sup>388</sup> Ibid para 161.

<sup>389</sup> Ibid para 162.

<sup>390</sup> Ibid para 163.

<sup>391</sup> Ibid para 165.



‘The claim concerns whether an action is an administrative act . . . by the State in its capacity as an employer, and if so, whether that act should be set aside. This is exactly what section 157(2)(b) of the LRA places in the concurrent jurisdiction of both the High Court and the Labour Court.’<sup>392</sup>

Determining whether a dismissal does constitute administrative action forms part of the merits of the claim and is not a jurisdictional requirement. Moreover, Chirwa formulated her case on the basis of PAJA, and a court must assess its jurisdiction in light of the pleadings.<sup>393</sup> The second reason flows from what is mentioned above under section 191(5) (a) (i), which requires disputes about unfair dismissals for conduct or capacity to be decided by the CCMA and not the LC. Therefore Langa CJ held that, under the LRA in most cases of unfair dismissals, these claims will not be decided at first instance by the LC, but by the CCMA.<sup>394</sup> Therefore, Langa CJ relies on what was held in *Fredericks* and holds that Chirwa’s case is the same in *Fredericks* and that ‘section 169 of the Constitution requires that the LRA be interpreted so as not to exclude the jurisdiction of the HC in constitutional matters that are referred to bodies that are not of similar status.’<sup>395</sup> In conclusion, Chirwa’s claim needed to be adjudicated at first instance by the CCMA; therefore exclusive jurisdiction to determine the claim cannot be conferred upon the LC, and the HC must have had jurisdiction to consider the case.<sup>396</sup>

### *Policy Considerations*

Langa CJ showed concern for the judgments of Skweyiya J and Ngcobo J as there are several policy issues that were raised<sup>397</sup>. Langa CJ accepts that there is no doubt that it is advantageous for specialist issues to be decided by specialist tribunals; however this principle is not applicable in Chirwa’s matter because for Langa CJ there is a difference between a claim that a dismissal is unfair and a claim that administrative action is unfair. Although the claim may refer to the same facts and raise similar substantive concerns, they are different

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<sup>392</sup> Ibid para 168.

<sup>393</sup> Ibid para 169.

<sup>394</sup> Ibid para 170.

<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> Langa CJ briefly describes these concerns at para 171 as: ‘(i) specialised tribunals should address specialised issues; (ii) there is no reason to afford public employees greater protection than private employees; (iii) we should not permit litigants to forum-shop; and (vi) there is a danger of legal incoherence, uncertainty or possible unfairness to individuals flowing from allowing two different sets of courts to decide substantially the same set of facts on different legal grounds (LRA-unfair dismissal; PAJA-procedural unfairness).’

and not identical, and therefore the ‘mere fact that her claims arose from the employment context cannot rob them of their administrative nature as section 157(2)(b) of the LRA makes it clear that it was the legislature’s intention for this to be the case’;<sup>398</sup> therefore, as it was noted in Chapter 1, Chirwa ‘is not asking a “non-labour” court to decide a purely “labour issue”’; instead Chirwa had approached the HC to decide an administrative law issue.’<sup>399</sup>

The use of a purposive interpretation adopted by the majority was inconsistent with not only the interpretation adopted by previous jurisprudence of the CC in *Fredericks*, but was also inconsistent with the clear language of the provisions adopted by the legislature. Therefore, Langa CJ rightly held that:

‘While we may question that intention and may have preferred a legislative scheme that more neatly divided responsibilities between the different courts that is not the path that the legislature has chosen. We must be careful as a court not to substitute our preferred policy choices for those of the legislature. The legislature is the democratically elected body entrusted with legislative powers and this court must respect the legislation it enacts, as long as the legislation does not offend the Constitution...it is not for this court to adopt an interpretation of section 157 at odds with the language of the section to achieve such a purpose.’<sup>400</sup>

Langa CJ agreed with Cameron JA’s judgment in the SCA and held that, ‘while it may be possible for the legislature to prefer one right over another, the legislature must do so more explicitly than it has in the LRA and PAJA.’<sup>401</sup> Langa CJ held that:

‘Both PAJA and the LRA protect constitutional rights and we should not presume that one should be protected before another or presume to determine that the essence of one claim engages one right more than another.’<sup>402</sup>

It is for this reason that Langa CJ was of the view that, even though two rights happen to cover the same ground, this is not uncommon in our law and a litigant should be entitled to the full protection of both rights.<sup>403</sup>

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<sup>398</sup> Ibid para 173.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid para 174.

<sup>401</sup> Ibid para 175.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

Langa CJ held that the policy concern raised by Skweyiya J, that public employees should not be given greater protection than private employees, was rejected outright for its irrelevancy to the question of jurisdiction for two reasons. The first reason is that ‘even if the HC had jurisdiction, people in the position of Chirwa would still be able to assert claims under both the LRA or PAJA in the Labour court.’<sup>404</sup> This approach not only was taken by Conradie JA in the SCA but also, under section 158(1)(h) of the LRA, LCs are deciding administrative action in terms of PAJA and legality under its jurisdiction, which will be dealt with in Chapter 4. The second reason for Langa CJ is that there is an overlap to the right to fair labour practices and administrative justice; therefore without a clear legislative provision to the contrary, there is no reason to sacrifice one right to the other.<sup>405</sup>

Concerning the issue that forum shopping is undesirable, Langa CJ agrees ‘that it is undesirable for litigants to pick and choose where they institute action in the hope for a better outcome, although forum-shopping may not be ideal, Langa CJ held that in terms of *Fredericks* interpreting section 157(2) in providing concurrent jurisdiction, unless the call is heeded where the legislature intervenes, the meaning is set thus the possibility of forum shopping is an unavoidable consequence of that legislative decision which must be respected by the courts.’<sup>406</sup> Langa CJ held that the concern that there would be possible incoherence in law which may lead to having two courts adjudicating the same issue is not a problem, holding that ‘our law often develops with conflicting opinions from different divisions of the HC, therefore there is no intractable problems which cannot be settled on appeal which is also what section 157(2) ultimately envisaged.’<sup>407</sup>

### *Administrative Action*

The real question for Langa CJ was whether the dismissal of Ms Chirwa by Transnet constituted administrative action within the meaning of section 33 of the Constitution and PAJA. It was held by the minority that the dismissal did not constitute the exercise of a public power or the performance of a public function and was therefore not administrative action under PAJA.<sup>408</sup> In arriving at this conclusion, Langa CJ correctly held that, in terms of section 1 of PAJA, the dismissal clearly constituted a decision by an organ of state that

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<sup>404</sup> Ibid para 176.

<sup>405</sup> Ibid.

<sup>406</sup> Ibid para 177.

<sup>407</sup> Ibid para 178.

<sup>408</sup> Ibid para 194.

adversely and directly affected someone's rights, which did not fall under any of the enumerated exclusions.<sup>409</sup>

Turning to whether the decision was taken in terms of any legislation, the conclusion reached was the same as that of Ngcobo J, namely, that because the South African Transport Services Condition of Service Act<sup>410</sup> which used to govern Transnet employees lapsed after 1991 and there was no successor enacted in its place, there was no legislative provision in other legislation providing for the appointments and dismissals of persons previously occupied by persons in the position of the applicant.<sup>411</sup> Langa CJ held that the dismissal of the applicant did not take place in terms of any statutory authority but rather of the contract itself. However, Langa CJ held that, even if there was legislation, this alone would not have rendered the decision as administrative action as it was argued by Ngcobo J.

In determining whether the decision amounted to an exercise of public power or the performing of a public function, Langa CJ held that in exercising its contractual rights, Transnet had no specific authority over its employees. The power flows merely from its position as employer and would have been identical if it had been a private company. The dismissal did not have sufficient impact, if any, on the public even though Transnet conducted work that had constant and significant public impact. The reasoning was that the role of Chirwa's position only affected the proper functioning of the body that ensures the future of Transnet employees after they retire.<sup>412</sup>

Langa CJ held that determining the source of the power is not decisive on its own however because the source of the power is contractual, Langa CJ maintains that this factor which strongly points in the direction that the power is not a public one.<sup>413</sup> For Langa CJ, the final factor to consider was whether those powers exercised were exercised for the public rather than private interest. Langa CJ held, in distinguishing *POPCRU*, that:

‘Transnet Pension Fund does not however have the same public character that the Correctional Services Department has...whilst there is a clear pre-eminence of public interest in the proper administration of correctional services under section 195

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<sup>409</sup> Ibid para 181.

<sup>410</sup> Act 41 of 1988.

<sup>411</sup> *Chirwa* (note 348 above) paras 182-184.

<sup>412</sup> Ibid paras 187-188.

<sup>413</sup> Ibid para 189.

of the Constitution, the same cannot be said for the Human Resources Department of Transnet Pension Fund, therefore.<sup>414</sup>

The decision of Transnet was arguably within the administration and more internal in dismissing Chirwa; therefore it ‘amounted to nothing more than acting in the best interest of Transnet Pension Fund and Transnet’s employees by ensuring the smooth running of their pension fund.’<sup>415</sup>

Ultimately, Langa CJ and O’Regan J agreed with the majority, for different reasons, that Chirwa’s dismissal did not constitute administrative action. However, they drew the line at accepting Ngcobo J’s approach that dismissals in the public sector can never constitute administrative action, holding that:

‘Where, for example, the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed, the requirements of the definition of administrative action may be fulfilled.’<sup>416</sup>

Clarity on whether the dismissal of *Chirwa* amounted to administrative action was not adequately answered. Skweyiya J held, only on jurisdictional grounds, that it was not administrative action because it was a labour issue. Ngcobo J agreed with Skweyiya J that Chirwa’s matter was a quintessential labour dispute and that the LRA should have been approached from the outset. However, Ngcobo J found that, had the decision to dismiss Chirwa been sourced in statute, the CC would have been prepared to conclude that the decision was administrative action under section 33 and PAJA. Langa CJ, with O’Regan J concurring, agreed with *Fredericks* that jurisdiction is determined on the pleadings and followed that, since *Chirwa* had pleaded under section 33 and PAJA, that is what needed to be determined. On the question of administrative action, Langa CJ agreed with Ngcobo J that the

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<sup>414</sup> Ibid para 192.

<sup>415</sup> Ibid para 193.

<sup>416</sup> Ibid para 194.

decision was not administrative action but disagreed on the reasoning. For Langa CJ, the decision was more internal and lacked external legal effect.

As a result of the conflicting views by the CC, the question as to whether a dismissal amounts to administrative action remains unanswered as it did in the SCA.

### 3.2.6 *Gcaba v Minister for Safety and Security and others*<sup>417</sup> at the Constitutional Court

In Chapter 1, the *Gcaba* judgment has been discussed briefly as part of the general context to the debate. It does, however, require re-examination. The *Gcaba* judgment is the latest CC finding on this issue, and therefore it is vital that it be discussed further to gain a clear understanding as to how the court reasoned.

Van der Westhuizen J<sup>418</sup> wrote for a unanimous majority. It is important to recognise how the court proceeded from the very beginning of the judgment because it would seem that public sector employee rights would be determined by the court. The court starts by recognising that as the highest court in all constitutional matters, an opportunity had arisen to provide some clarity and guidance, based on a proper interpretation of the relevant provisions of the Constitution, the LRA and PAJA.<sup>419</sup>

Before the issues are dealt with, it is important to briefly set out the facts leading up to the CC. *Gcaba* was not a case concerning a dismissal but one of non-appointment as SAPS Station Commissioner. Gcaba (the applicant) was appointed as station commissioner for a period of about three years. When the position was upgraded, the applicant applied, was shortlisted and went through the interview process, not, however, being appointed. The applicant initially proceeded to lodge a grievance with the South African Police Service SAPS, later abandoning this process and proceeding to refer the dispute to the Safety and Security Sectoral Bargaining Council. The applicant later withdrew the dispute shortly after the representative of SAPS failed to attend the pre-arbitration meeting. The applicant then

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<sup>417</sup> 2010 (1) SA 238 (CC).

<sup>418</sup> Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J and Yacoob J concur in the judgment of Van Westhuizen J.

<sup>419</sup> *Gcaba* (note 420 above) para 3.

approached the HC with an application to review the decision not to appoint him as station commissioner under section 33 and PAJA.<sup>420</sup>

In the Eastern Cape HC, Erasmus J held that the HC lacked jurisdiction to entertain the application as it related to an employment matter. In coming to this conclusion, Erasmus J considered himself bound by the full bench of the Bisho HC in *Nonzamo Cleaning Services Cooperative v Appie and Others*<sup>421</sup> where it was held ,at to the extent that *Chirwa* and *Fredericks* were mutually irreconcilable, *Chirwa* should be seen to have overruled *Fredericks* and therefore in the result Erasmus J dismissed the application.

Gcaba approached the CC in an application contending that the decision not to appoint him was subject to administrative review and should be set aside. However, the respondents argued that, on the basis of principle confirmed in *Chirwa*, the applicant was not entitled to pursue additional causes of action or remedies under PAJA.<sup>422</sup> The respondents further contended that, although it was accepted that the power to appoint was exercised by an organ or state in terms of the enabling provision of statute and regulations (implementing legislation), it was the view of the respondents that such a power was private and not public as a decision to appoint was no different to a decision to dismiss or to change the shift arrangements.<sup>423</sup> The respondents finally argued that, as it was held in *Chirwa*, it ‘could never have been the intention of the legislature to engage in forum shopping, particularly in light of the objects of the LRA, and on a proper reading of section 157(2) of the LRA.’<sup>424</sup>

The main question before Van der Westhuizen J was whether the HC was correct in holding that it lacked jurisdiction to entertain the application to review and set aside the decision of the SAPS not to appoint Mr Gcaba as station commissioner, consequently dismissing the application. For Van der Westhuizen J, in order to determine this question, answers to the questions such as the following would inform the main question: whether the decision not to appoint the applicant was administrative action and thus subject to administrative review; whether an applicant whose claim is based on a labour matter may approach a HC or has to follow the Channels provided for by the LRA; and whether the court’s decision in *Fredericks* and *Chirwa* can be reconciled.<sup>425</sup> As to the question whether Gcaba’s application raises a

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<sup>420</sup> Ibid paras 6-7.

<sup>421</sup> 2009 (3) SA 276 (Ck).

<sup>422</sup> *Gcaba* (note 420 above) paras 47 and 49.

<sup>423</sup> Ibid para 50.

<sup>424</sup> Ibid para 51.

<sup>425</sup> Ibid paras 4-5.

constitutional matter, the courts held that it does as it involves the interpretation of the LRA and PAJA which are firmly rooted in the Constitution, and, furthermore, that the matter revolves around the interpretation of previous decision of the CC.<sup>426</sup>

*General Principles and Policy Considerations*

Van der Westhuizen J correctly clarifies and retreats from the categorical approach which informed the majority judgments in *Chirwa* by correctly holding that ‘rigid compartmentalisation should be avoided.’<sup>427</sup> In conclusion, he holds that it is not uncommon and is ‘undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora.’<sup>428</sup>

Van der Westhuizen J furthermore recognises that each of the ‘areas of law is named and labelled for the purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation.’<sup>429</sup> For Van der Westhuizen J, the constitutional and legal order is made up of a coherent system for the protection of resolutions disputes and rights, and, therefore, as ‘a related principle legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.’<sup>430</sup> The court reasons that human rights are intrinsically independent, indivisible and inseparable,<sup>431</sup> and therefore the court rightly underscores this principle by holding that section 157 of the LRA should not be interpreted to destroy causes of action; moreover, where a remedy lies in the HC, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much.<sup>432</sup>

Van der Westhuizen J correctly held that a general principle or policy consideration which the Constitution recognises is the need for specificity and specialisation in a modern and complex society under the rule of law.<sup>433</sup> As a result, the legislature is specifically mandated to create detailed legislation for a particular area such as equality and just administrative action under PAJA and labour relations under the LRA.<sup>434</sup> It is these specific structures or

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<sup>426</sup> Ibid para 17.

<sup>427</sup> Ibid para 53.

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid paras 54-55.

<sup>431</sup> Ibid para 54.

<sup>432</sup> Ibid para 73.

<sup>433</sup> Ibid para 56.

<sup>434</sup> Ibid.



remedies that are ‘preferable’ and must be followed in order to effectively resolve disputes and protect rights within that specific area of law.<sup>435</sup> As forum shopping is not ‘desirable’, Van der Westhuizen J hinted at the possibility of a litigant choosing a forum from the start, stating that:

‘Once a litigant has chosen a particular cause of action and system of remedies (for example, the structure provided by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered.’<sup>436</sup>

For Van der Westhuizen J, the structures of the LRA were created specifically for the purpose of dealing with labour matters as was stated by the majority judgments in *Chirwa*.<sup>437</sup> The facts of *Chirwa* are distinguishable to that of *Gcaba*, as the LRA route had been chosen initially and subsequently abandoned, and therefore in these instances, once *Gcaba* initially chose the LRA route, he should have completed that forum to the very end. However, the use of language used by our CC, with words such as it is ‘desirable’ or ‘preferred’ to use the LRA route, does not provide sufficient finality in the debate. PAJA, like the LRA, is a constitutionally mandated piece of legislation, which gives effect to section 33 of the Constitution. Like the LRA, if a litigant chooses to bring an application much like *Gcaba* under section 33 and PAJA, is it not then ‘desirable’ or ‘preferable’ to use that system as its structures specifically deal with PAJA disputes? At this stage, it is not certain whether public sector employees can enforce the right which they have chosen to litigate as will be shown under the next issue.

*Whether the failure to promote and appoint Gcaba amounted to administrative action*

Hoexter noted that, while the reader up to this point in the judgment would have welcomed the court’s position in re-addressing *Chirwa*’s alarming tendencies,<sup>438</sup> this feeling was short-lived as Van der Westhuizen J was keen in redirecting employment-related traffic away from administrative law and the HC by providing that, generally speaking, employment and labour relationships issues do not amount to administrative action within the meaning of PAJA.<sup>439</sup> Accordingly it was held that the failure to promote and appoint *Gcaba* was not administrative

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<sup>435</sup> Ibid.

<sup>436</sup> Ibid para 57.

<sup>437</sup> Ibid.

<sup>438</sup> Hoexter C ‘*From Chirwa to Gcaba: An Administrative Lawyer’s View*’ in M Kidd & S Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* 2010 47 at 54.

<sup>439</sup> Ibid 54; *Gcaba* (note 420 above) para 64.

action.<sup>440</sup> In coming to this conclusion, Van der Westhuizen J held that, where an employee raises a grievance relating to the conduct of the state as employer, it has few or no direct implications or consequences for other citizens and it therefore does not constitute administrative action<sup>441</sup> as the impact of the decision was felt mainly by Gcaba only.<sup>442</sup>

The approach taken by Van der Westhuizen J on the administrative action question raises further questions about administrative law as the judgment does not elaborate on which elements of PAJA remains unsatisfactory.<sup>443</sup> Moreover, the SCA in *Greys Marine* recognised that the definition of PAJA can neatly be divided into seven elements which convey the principal elements in determining PAJA's applicability. For Ngcobo J, one of the elements in PAJA that went against Chirwa was the lack of implementing legislation. Therefore, had there been legislation, the outcome would arguably have been different for the majority. Van der Westhuizen J remained silent on this element even though it was submitted by the respondents' that the power to appoint was exercised by an organ of state in terms of the enabling provisions and regulation.<sup>444</sup> Hoexter states that it is not clear why the court relies on the diagnoses of Ngcobo J in *Chirwa* in support of its own analysis as there was no suggestion that the non-appointment was governed by contract rather than legislation.<sup>445</sup> Hoexter further states that the decision in *Gcaba* must 'surely be an instance of implementing legislation as it can hardly be anything else.'<sup>446</sup>

Van der Westhuizen J ignores this element among the others, notwithstanding the CC judgment in *Bato Star*<sup>447</sup> where it was held that the grundnorm of administrative law is to be found in the principles of the Constitution and, therefore, since PAJA is legislation, giving effect to section 33 of the Constitution, PAJA is the first port of call. The effect of Van der Westhuizen J's approach confuses the reader as to which factor in *SARFU* is lacking, and. Moreover, which elements in PAJA are lacking.

Wallis J in *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others*<sup>448</sup> correctly states that when approaching the question as to whether a decision amounts to administrative action, one is required to make a positive finding;

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<sup>440</sup> Ibid para 68.

<sup>441</sup> Ibid para 68.

<sup>442</sup> Ibid para 66.

<sup>443</sup> Hoexter (note 383 above) 216-217.

<sup>444</sup> *Gcaba* (note 420 above) para 50.

<sup>445</sup> Hoexter (note 441 above) 56.

<sup>446</sup> Ibid.

<sup>447</sup> *Bato Star* (note 320 above).

<sup>448</sup> 2010 (5) SA 574 (KZP).

therefore the question cannot be determined by default because it does not somehow fit into some other juristic pigeonhole. Determining whether a decision is administrative in nature demands a detailed analysis of the nature of the public power or public function being exercised as this would determine its true character. It would seem that the CC's aim in achieving certainty has been driven by strong policy considerations which have the effect of deviating from previously settled precedent. Conversely, the CC seems to take a rather different and unclear approach since *Gcaba in Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*,<sup>449</sup> where Mogoeng J held Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract.

Van der Westhuizen J arguably reasons that the failure to promote and appoint Gcaba 'appears' to be a quintessential labour-related issue, and notes, moreover, that the 'decision was almost as clear as an unfair dismissal.'<sup>450</sup> It is arguable that in coming to this conclusion, the use of the word 'appears' suggest that the court determines the essence of the claim rather than assesses the claim as it was pleaded. It is uncertain as to how the court comes to this conclusion based on how Gcaba pleaded as Van der Westhuizen J agreed with *Fredericks* and Langa CJ in *Chirwa* that 'jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case.'<sup>451</sup> Van der Westhuizen J further recognises that in determining the pleadings it must be interpreted to establish the legal basis of the applicant's claim, and therefore it is not for the court to say that the facts asserted by the applicant would also sustain another claim only within the jurisdiction of another court.<sup>452</sup>

Van der Westhuizen J holds that because Gcaba was unable to plead facts to sustain a cause of action of administrative action that is cognisable by the HC, Gcaba should approach the LC. Although the elements of PAJA were not dealt with in the judgment, the court does, however, provide an arguable eighth factor to consider.

Gcaba was unable to sustain a cause of action because the decision did not have sufficient public impact. Had this been the case, the court implies that the decision may have been decided under PAJA as almost all the elements are arguably present. It is unclear what public impact means as the definition of PAJA provides for external legal effect. The meaning of this element has been settled by the SCA in *Greys Marine* as being that when administrative

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<sup>449</sup> 2011 (1) SA 372 (CC).

<sup>450</sup> Ibid para 66.

<sup>451</sup> *Gcaba* (note 420 above) para 75.

<sup>452</sup> Ibid.

action has been taken, it impacts directly and immediately on individuals, and that therefore the decision merely needs to have the capacity to effect legal rights.<sup>453</sup> It is trite that the decision not to promote and appoint Gcaba necessarily affected his legal rights as an individual, and, moreover, ‘external effect’ should not be literally interpreted to mean that the action taken cannot affect those within the administration. What seems to be clear from *Greys Marine* and *Nxele* is that administrative action could very well effect individuals such as Gcaba, as well as members outside the administration.

The addition of the ‘public impact’ factor seemed to suggest that, although administration action had been taken against Gcaba and thus affected his rights, the decision must also have public impact, which the court found lacking *Gcaba*.

The cCourt held in *Van Zyl v New National Party*<sup>454</sup> that the ordinary dictionary meaning of the phrase ‘exercising a public power’ amounted to acting ‘in a manner that affects or concerns the public.’<sup>455</sup> The addition of a ‘public impact’ factor is strange considering that the decision to appoint involved an exercise of public power and given the subsequent approval of Ngcobo J in *Chirwa* and the respondent’s submissions in *Gcaba* that the decision amounted to an exercise of public power by implementing legislation. Hoexter states that for *Gcaba* to conclude that, because there was an absence of impact, the decision was not administrative action ‘seems to be like jurisprudential sleight of hand.’<sup>456</sup> Plasket J in *POPCRU* restated the position that very often administrative action affects only the individual concerned, the person whose benefit has been withdrawn, or whose application for a permit has been refused.<sup>457</sup>

Since the requirement of ‘external effect’ does actually appear in PAJA, Hoexter states that it seems odd that the court in *Gcaba* did not bother to explore this concept since the court in *SAPU* had provided a meaning that was similar to that of ‘public impact’.<sup>458</sup> Murphy AJ held in *SAPU* that the introduction of a new shift system affected only those within the administration (internal) and thus lacked external effect.<sup>459</sup> For Hoexter, while the requirement of ‘external effect’ may not be as easily applied as it was in *SAPU*, the complete

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<sup>453</sup> *Greys Marine* (note 70 above).

<sup>454</sup> 2003 (10) BCLR 1167 (C).

<sup>455</sup> *Ibid* para 75.

<sup>456</sup> Hoexter (note 441 above) 57.

<sup>457</sup> *POPCRU* (note 294 above) para 53.

<sup>458</sup> Hoexter (note 441 above) 58.

<sup>459</sup> *SAPU* (note 273 above) para 57.

silence on this topic by the CC not only seems baffling<sup>460</sup> but also contradictory as the court seems to blame ‘the legislature, courts, legal representatives and academics’ for creating ‘confusion and complexity rather than clarity and guidance.’<sup>461</sup> Van der Westhuizen J’s disappointingly thin substantiation on the administrative action question has the effect of detracting from settled coherent administrative action principles; moreover, the court does not make clear whether it is relying on the statutory definition in PAJA or the more general meaning under section 33 of the Constitution.<sup>462</sup>

The strategy in providing a general rule seems to suggest two important things: first, that there would no longer be any prospect of success in taking matters on review to the HC unless the action has direct implications or consequences for other citizens,<sup>463</sup> and, second, that there is an indication that the purpose of section 33 of the Constitution and its role in controlling the exercise of public power cannot simply be denied and ruled out as it was done in *Chirwa*.<sup>464</sup>

Cohen states that, when one reads the *Gcaba* judgment widely, ‘labour matters which in their essence may be regulated and remedied by the LRA, should fall within the exclusive jurisdiction of the labour forums.’<sup>465</sup> Cheadle argues that, if something is a labour related matter, it cannot also be an administrative matter, even where all the elements of PAJA are met.<sup>466</sup> This approach has already been criticised by Langa CJ and there is value in repeating his words:

‘Both PAJA and the LRA protect important constitutional rights and we should not presume that one should be protected before another or presume to determine that the ‘essence’ of a claim engages one right more than another. A litigant is entitled to the full protection of both rights, even when they seem to cover the same ground.’<sup>467</sup>

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<sup>460</sup> Hoexter (note 441 above) 58.

<sup>461</sup> *Gcaba* (note 420 above) para 2.

<sup>462</sup> Hoexter (note 441 above) 55-56.

<sup>463</sup> *Ibid* at 54.

<sup>464</sup> *Ibid* at 52.

<sup>465</sup> Cohen T ‘*Jurisdiction over employment disputes- light at the end of the tunnel?*’ (2010) SA *MERC LJ* 417, at 422.

<sup>466</sup> Cheadle H ‘*Deconstructing Chirwa v Transnet*’ (2009) 30 *Industrial Law Journal* 741, at 748.

<sup>467</sup> *Chirwa* (note 348 above) para 175.

Notwithstanding the sentiment expressed by Langa CJ and the remarks made in *Gcaba* regarding rights being enforceable in different forums, Hoexter states that administrative law ‘is ultimately side-lined just as ruthlessly as it was in *Chirwa*.’<sup>468</sup> For Cohen, the matter remains unresolved and although the court in *Gcaba* was ambitious in attempting to resolve the jurisdictional uncertainty, finding that ‘it is ‘preferable’ to use the statutory framework under the LRA and ‘desirable’ not to forum-shop, along with the finding that the HC is not divested of jurisdiction in employment matters where a cause of action and remedy lies within its jurisdiction, the court does not provide convincing finality on the issue.’<sup>469</sup> Brassey follows the same line of argument as Cohen that, although there exists specific legislation to resolve labour related problems, unless there is express intention by the legislature to abolish or limit other causes of action, i.e. PAJA, a court cannot turn away a potential claimant simply because it considers another forum to be ‘preferable’.<sup>470</sup> Apart from policy-driven reasoning, Brassey criticises Van der Westhuizen J for not dealing with the most important question, namely:

‘...if public servants have an established right to invoke the principles of administrative law in order to challenge a decision inimical to their interest as employees, by what authority, statute aside, can a court deprive... [employees of their constitutional rights].’<sup>471</sup>

Ngcukaitobi and Brickhill follow the opinion that it is difficult legally to sustain an argument that PAJA, as presently formulated, does not apply to all employment related decision.<sup>472</sup> It is worth repeating the sentiment expressed by Cameron JA and Mpati JA in the SCA judgment in *Chirwa*:

‘We must end where we began: with the Constitution. I can find in it no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to

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<sup>468</sup> Hoexter (note 441 above) 56.

<sup>469</sup> Cohen (note 468 above) at 422.

<sup>470</sup> Brassey M ‘*Back off But Back Up! Administrative Law Rightly Yields to Labour Law*’ (2009) 2 *Constitutional Court Review* 216.

<sup>471</sup> *Ibid* 218.

<sup>472</sup> Ngcukaitobi T and Brickhill J ‘*A Difficult Boundary: Public Sector Employment and Administrative Law*’ 2007(28) (4) *ILJ* 792.

prefer one legislative embodiment of a protected right over another; nor any preferred entrenchment of rights or of the legislation springing from them.<sup>473</sup>

Ngcukaitobi and Brickhill's argument may have been written prior to *Gcaba*. However, it seems that Van der Westhuizen J indirectly follows this approach that the exercise of public power within employment setting cannot simply be ignored or denied, but the court does not provide guidance as to those instances which would fall within the exceptions to the general rule. It is this uncertainty, which Hoexter argues 'that by diverting traffic away in *Chirwa* and *Gcaba*, ... has come at a considerable cost and may not prove effective in any event in future cases.'<sup>474</sup> The CC's constant reliance on policy based reasoning with the aim of excluding PAJA from employment and labour related matters has not been effective, and, until the legislature steps in, 'administrative law will continue to exert its influence in relations between public sector employers and their employees.'<sup>475</sup> Quinot and Maree have similar reservations of the effectiveness of the CC judgments in this area of law, stating that the overlap between administrative and labour law has not been resolved and that the HC continues to review public-sector employment issues under administrative principles.<sup>476</sup> Ngcukaitobi and Brickhill argue that to resolve this area of law, a unique approach to such cases would be for a court to 'recognise the various decisions which may be taken by public sector employers and to analyse on a case-by-case basis determining the nature and impact of those decisions would thus provide the direction which the court may review.'<sup>477</sup>

### 3.3 CONCLUSION

The purpose of this chapter has been to show the development of administrative action within the context of public-sector employment by discussing five cases.

In *Fredericks* the court left the question open as to whether administrative action applies. However, it was recognised that the legislature expressly intended to provide the HC and LC

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<sup>473</sup> *Chirwa* SCA (note 317 above) para 65.

<sup>474</sup> Hoexter (note 441 above) 60.

<sup>475</sup> Ngcukaitobi and Brickhill (note 475 above) 792.

<sup>476</sup> Quinot G (ed) *Administrative Justice in South Africa: An Introduction* (2015) 92.

<sup>477</sup> Ngcukaitobi and Brickhill (note 475 above) 792.

with concurrent jurisdiction. *Fredericks* further recognised the court's competence to hear a matter which is invoked through the pleadings.

In *SAPU*, the decision was accepted as an exercise of public power; because the decision was internal and not external in effect, the nature of the power fell more towards the employment side of the line and was not administrative in nature for the purposes of section 33 and PAJA. *SAPU* further argued that it is no longer relevant to advance labour rights under administrative law and regard must be placed on the current constitutional dispensation.

*POPCRU* held that the decision to dismiss was sourced in statute and amounted to an exercise of public power. *POPCRU* further held that based on *Fredericks* and *Fedlife* the HC and LC had concurrent jurisdiction to hear disputes arising out of an employment setting.

The SCA in *Chirwa* provided a split decision and left the question unanswered as to whether the decision to dismiss was administrative action. For Mthiyane JA with Jafta JA concurring, the court had jurisdiction based on *Fredericks* but PAJA did not apply due to a lack of implementing legislation; therefore source of the power was not of a public nature but rather based in the employment contract. For Conradie JA, since the LRA now effectively protects public sector employees, based on the reasoning in *SAPU*, HC did not have jurisdiction and, therefore, the question as to whether the dismissal constituted administrative action was immaterial. For Cameron JA with Mpati DP concurring, the decision was administrative action because Transnet is a public entity, created by statute and every act, including dismissals, derives from its public, statutory character. Cameron JA further disagreed with Conradie JA, holding that the legislature had not expressly intended to limit rights, and, therefore, that no doctrine of constitutional law deprives one right over the other when one of the rights has greater amplitude than the other.

It was hoped that the majority in *Chirwa* would have provided clarity. However, strong policy guided reform was at play. In the majority judgment, Skweyiya J dealt only with jurisdictional grounds that the LRA provided a better route and that it was no longer necessary for administrative law to apply to labour cases in the HC. Ngcobo J, writing a separate majority, agreed with Skweyiya J on the jurisdictional issue, but then proceeded to follow the view of Mthiyane JA with Jafta JA in the SCA, suggesting that had there been implementing legislation, the decision would have amounted to administrative action.

For Langa CJ with O'Regan J concurring, the HC had jurisdiction under PAJA as pleaded and the judges disagreed with the policy-guided approach. Determining the dismissal as not



being administrative action, Langa CJ followed the approach in *SAPU*, finding the decision to be more internal and within the administration and thus lacking external legal effect.

*The outcome in Gcaba*

Van der Westhuizen J opted to provide a blanket approach to directing administrative law traffic away from the labour sphere. This has come at a cost to administrative law because it is not entirely clear how the court came to its conclusion on the administrative action question. It is not clear whether the court was applying the general meaning under section 33 or the specific statutory meaning under PAJA. The approach taken by the CC seems to be a deliberate avoidance of making a positive determination as to the nature of the decision qualifying the action as administrative for the purposes of section 33 and PAJA. It has been made clear by the same court in *Bato Star* that PAJA is to be applied directly as the default pathway to judicial review. The court's avoidance does not accord with the settled principle of subsidiarity. Interestingly, the general rule makes no mention of the principle of legality, and, therefore, where there has been an exercise of public power, review legality would still be open.

Further uncertainty can be found where Van der Westhuizen J reasoned that it would have amounted to administrative action if the decision impacted on the public and had consequences for other citizens. The consequence of such a determination leaves administrative lawyers with uncertainty as to how the public impact factor fits in with the current element of 'external effect' under PAJA. At the same time when *Gcaba* was handed down, the same court applied the 'direct, external legal effect' element in *Joseph*. The court's silence on the *SAPU* judgment providing similar meaning to 'public impact' and Langa CJ's judgment in *Chirwa* on administrative action resulted in a baffling conclusion.

The issue of jurisdiction was put to rest where Van der Westhuizen J recognised the approach taken in *Fredericks* and by Langa CJ in *Chirwa* and held that jurisdiction is to be found on the basis of pleadings. This acknowledgment is important because it guides the courts to determine the nature of the claim as pleaded. Van der Westhuizen J's conclusion that *Gcaba* failed to sustain a cause of action under PAJA remains unsatisfactory as he does not elaborate on the missing requirements in PAJA when coming to this conclusion.

However, Van der Westhuizen J recognised the interconnectedness of rights and that it was not uncommon for two or more rights to arise out of a single set of facts, an approach followed by Cameron JA in the *Chirwa* SCA. Van der Westhuizen J further disagreed with

the approach taken by the *Chirwa* majority that courts should not adopt a method of interpretation which has the effect of limiting rights.

In light of the court's position on the above-mentioned views, the adoption of a general rule limiting the right to administrative justice seems odd and indicates that the same strong policy-guided reform that was present in *Chirwa* was at play in *Gcaba*. The effectiveness of the general rule is correctly expressed by Hoexter, Ngcukaitobi and Brickhill, namely, that administrative law will continue to apply in labour cases where an exercise of public power has been performed. Chapter 4 now turns to discussing various instances where administrative law still finds application in labour cases, providing public sector employees with the remedies and protections which they are constitutionally entitled to.

## CHAPTER 4: POST GCABA, APPLYING ADMINISTRATIVE LAW TO LABOUR CASES

### 4.1 INTRODUCTION

Chapter 3 provided in-depth analysis of arguments made by the judiciary surrounding public sector employment. Although the CC in *Gcaba* had the intention of settling the debate by providing clarity and guidance, the court opted to continue following a route without any clear legal reasoning for denying public sector employees their constitutional right to administrative justice. The crux of this research can be found in the quote at the beginning of Chapter 1 by Cameron JA. Unless there exists a clear intention by the legislature to deny public sector employees the right to administrative justice, policy considerations relied on by the CC would seem to be unconstitutional.

This chapter identifies circumstances where the adoption of the general rule in *Gcaba* and the remarks made in *Gcaba* have not prevented administrative law applying to labour cases. Examples of various scenarios are discussed in detail under their respective headings below. For the sake of clarity, however, the various scenarios are briefly noted below:

- (a) The principle of subsidiarity is discussed in subsection 4.2 below. Where the CC failed to adhere to the principle which demands that constitutionally mandated legislation, such as PAJA, giving effect to a constitutional right under section 33 must be the first port of call when determining whether any decision and/or conduct is administrative action.
- (b) The principle of legality, which is a more general aspect of administrative law, has developed over the years as a protective umbrella over all exercises of public power. The general rule adopted by *Gcaba* is confined only to provisions under section 33 and PAJA. In subsection 4.3 below, it is discussed that the general rule does not apply to the legality principle, leaving public sector employees with a means of holding the administration accountable. It is further discussed whether the LC may review decisions made by public employers under legality.
- (c) The concept of duality of rights is not uncommon in law. In subsection 4.4 below, it is noted that it is not uncommon that the same conduct may threaten or violate different constitutional rights. Although the CC in *Gcaba* acknowledged the interconnectivity of

rights, it seems odd that the same acknowledgment was not extended to rights under section 23 and 33 of the Constitution. Considering the CC's acknowledgment of the interconnectivity of rights, this subsection discusses in detail the position on public sector employees' dual rights.

(d) The general rule in *Gcaba* effectively tries to prevent administrative law from applying to all labour cases. A possible exception to the general rule lies in circumstances where the consequence of a dismissal comes about via operation of law. In these circumstances, the LRA would not apply because the dismissal does not occur through any decision by the employer but rather through statute. In order to ensure that public sector employees are not left without protection, there is a detailed discussion in subsection 4.5 below of the circumstances for administrative law under section 33 and PAJA to apply the area of deemed dismissals.

(e) When individuals approach, a court seeking protection, the courts competence to hear the matter must be invoked through the pleadings, something that is not uncommon in law. The CC in *Gcaba* importantly underscored the position on pleadings. In subsection 4.6 below the circumstances surrounding whether public sector employees can plead under section 23 or section 33 of the Constitution are discussed in detail.

(f) Lastly, the only notable exception to the general rule by the court in *Gcaba* relating to 'public impact' and 'direct consequences for other citizens' will be discussed in detail in subsection 4.7 below with the aim of determining through case law the meaning and placement of the exception within current administrative law principles.

## 4.2 THE CONSTITUTIONAL PRINCIPLE OF SUBSIDIARITY

Where the Constitution guarantees rights, it is important to determine the extent to which those rights are afforded to individuals, particularly when those constitutional rights have been given effect by legislation. The CC in *My Vote Counts NPC v Speaker of the National Assembly and Others*<sup>478</sup> held that the principle of subsidiarity represents a 'hierarchical ordering or institutions, of norms of principle, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or

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<sup>478</sup> 2016 (1) SA 132 (CC).

concrete, or detailed principle or remedy, does not avail.<sup>479</sup> Furthermore, the court held that the ‘Constitution is the primary source, however its influence is mostly indirect, therefore it is perceived through its effects on legislation and the common law which must be looked at first.’<sup>480</sup>

Hoexter states that the principle of subsidiarity is a norm most common in democratic legal systems; in this instance, since PAJA is constitutionally mandated legislation, it is the most immediate source of review and no longer section 33 of the Constitution.<sup>481</sup>

The CC in *My Vote Counts* rightly underscored this principle holding that ‘a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of legislation enacted to give effect to that right;’<sup>482</sup> therefore the court held:

‘Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.’<sup>483</sup>

It is important to restate, considering the *My Vote Counts* case, that section 33 of the Constitution provides for administrative action to be lawful, reasonable and procedurally fair. However, the Constitution demands legislation to give effect to its object and purpose. PAJA is the primary mechanism and the Constitution under section 33 is subsidiary. The CC held in *My Vote Counts* that ‘the principle of subsidiarity allows for a litigant to choose; either relying on a legislation that has been enacted to give effect to a right or challenge legislation for being inconsistent with the Constitution.’<sup>484</sup>

The constitutional principle of subsidiarity has consistently been applied by the CC for over a decade.<sup>485</sup> The CC held in *Mazibuko and Others v City of Johannesburg and Others*<sup>486</sup> ‘where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being

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<sup>479</sup> Ibid para 46.

<sup>480</sup> Ibid para 52.

<sup>481</sup> Hoexter *C Administrative Law in South Africa* 2ed (2012) 119.

<sup>482</sup> Ibid para 53.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid para 70.

<sup>485</sup> See *Sali v National Commissioner of the South African Police Service and Others* 2014 (9) BCLR 997 (CC) at para 53 and footnote 100 where the constitutional court traces the principle of subsidiarity through its earlier decisions.

<sup>486</sup> 2010 (4) SA 1 (CC).

inconsistent with the Constitution.<sup>487</sup> In *Sali v National Commissioner of the South African Police Service and Others*,<sup>488</sup> Jafta J writing for the minority judgment held ‘where there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution.’<sup>489</sup> Jafta J further held that an ‘applicant is not permitted to reply directly on the Constitution because section 6(1) of the Employment Equity Act 55 of 1998 gives effect to section 9(3) of the Bill of Rights.’<sup>490</sup>

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>491</sup> was the first decision by the CC to give recognition to the doctrine of subsidiarity.<sup>492</sup> Although the court did not explicitly state the principle, O’Regan J does state that, because PAJA was enacted to give effect to section 33 of the Constitution, ‘the judicial review of administrative action now ordinarily arises from PAJA, therefore matters relating to the interpretation and application of PAJA will be constitutional matters and a case cannot be decided without reference to its provisions.’<sup>493</sup>

Significantly in two earlier CC cases prior to *Chirwa*, it was held in *South African National Defence Union v Minister of Defence and Others*<sup>494</sup> that by allowing a litigant to ignore the legislature and rely directly on the constitutional provisions would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>495</sup> The CC held in *MEC for Education, KwaZulu Natal and Others v Pillay*<sup>496</sup> ‘in the context of both administrative and labour law a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to reply directly on the constitutional right.’<sup>497</sup>

Recently the CC in *Minister of Defence and Military Veterans v Motau and Others*<sup>498</sup> stated that ‘PAJA gives content to the right to just administrative action in section 33 of the Constitution...the role of section 33 is therefore secondary in determining whether action

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<sup>487</sup> Ibid para 73.

<sup>488</sup> 2014 (9) BCLR 997 (CC).

<sup>489</sup> Ibid para 4.

<sup>490</sup> Ibid.

<sup>491</sup> 2004 (4) SA 490 (CC).

<sup>492</sup> Ibid paras 21-26.

<sup>493</sup> Ibid.

<sup>494</sup> 2007 (8) BCLR 863 (CC).

<sup>495</sup> Ibid para 52.

<sup>496</sup> 2008 (1) SA 474 (CC).

<sup>497</sup> Ibid para 40.

<sup>498</sup> 2014 (5) SA 69 (CC).

amounts to administrative action.<sup>499</sup> Quinot and Maree argue that, based on the court's reasoning above, 'section 1 of PAJA is the starting point, and moreover section 33 is turned to only if the definition of PAJA needs clarification.'<sup>500</sup> Quinot and Maree correctly argue that 'reliance must therefore be placed on PAJA first in identifying administrative action rather than going behind it to section 33.'<sup>501</sup>

Ngcobo J in *Chirwa* opted not to follow this approach and found that, since section 33 does not apply, there was no need to apply PAJA from the outset. Hoexter argues that Ngcobo J's approach seems strange considering his earlier judgment in *Minister of Health v New Clicks SA (Pty) Ltd*<sup>502</sup> where it was held that:

'Our Constitution contemplates a single system of law which is shaped by our Constitution. To rely directly on section 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33 is applicable, is in my view inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under section 33 and the common law.'<sup>503</sup>

Ngcobo J in *Chirwa* acknowledges the principle of subsidiarity as it was held in an earlier CC case in *South African National Defence Union v Minister of Defence and Others* (mentioned above). However, the judge seems to have 'selectively' applied the principle to the LRA, holding that the LRA gives effect to section 23 of the Constitution, and therefore it is the LRA which must be followed, notwithstanding that PAJA is also a piece of constitutionally mandated legislation and its provisions should also be followed

Nevertheless, the principle of subsidiarity plays an important and well recognised role within our constitutional legal system. The CC's constant upholding of the principle acknowledges the separation of powers doctrine. Moreover, legislation giving effect to constitutional rights provides greater clarity, meaning and context to those aforementioned rights.

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<sup>499</sup> Ibid para 35.

<sup>500</sup> Quinot G (ed) *Administrative Justice in South Africa: An Introduction* (2015) 77.

<sup>501</sup> Ibid.

<sup>502</sup> 2006 (2) SA 311 (CC); and see Hoexter C 'From *Chirwa* to *Gcaba*: An Administrative Lawyer's View' in M Kidd & S Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* 2010 47 at 56.

<sup>503</sup> Ibid *New Clicks* at para 436.

It is baffling in *Gcaba*<sup>504</sup> where the CC decided not to apply the principle of subsidiarity, especially considering settled principles that PAJA is the default pathway to judicial review and more importantly the court's recognition of its importance. It seems odd that the court in *Gcaba* chose otherwise and this again seems to suggest selective application of the principle. The court does this by determining that PAJA only comes into effect once it is determined that section 33 applies. Thus, the court concluded that the decision not to appoint Gcaba as station commissioner did not fall into the meaning of section 33 of the Constitution, and therefore the court deemed it unnecessary to identify administration action under PAJA.

An argument could be made that since PAJA's elemental requirements are potentially met, the court is aware of this. Therefore the only way to not deal with the administrative action question is to sweep the PAJA enquiry under the rug by relying solely on policy considerations, a route that has been warned against by Langa CJ.

It is unfortunate that *Gcaba's* direction by not applying the principle has gained a following in *Botha v Matjhabeng Municipality*<sup>505</sup> where Lekale AJ held that determining whether conduct amounts to administrative action and subject to PAJA, the enquiry is twofold: first, one determines whether the conduct constitutes administrative action under section 33 and only if the questions is in the affirmative does the second stage of the enquiry become available, namely, whether the conduct amounts to administrative action under PAJA.<sup>506</sup>

Hoexter states that the approach taken by *Botha* seems to be in line with Chaskalson CJ's approach in *New Clicks*<sup>507</sup> where PAJA is to be construed consistently with section 33.<sup>508</sup> Yet for Hoexter this approach does not imply that PAJA only becomes relevant once action qualifies under section 33.<sup>509</sup> Even if the approach taken by *Gcaba* was correct, the court does not enlighten the reader as to which factors in *SAFRU* remain incomplete. Furthermore, the court does not elaborate on which element in PAJA remains unsatisfactory. Hoexter argues that the court covers up and deals with the administrative action question vaguely, which does not eliminate problems surrounding this area of law entirely.<sup>510</sup>

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<sup>504</sup> 2010 (1) SA 238 (CC).

<sup>505</sup> [2010] ZAFSHC 18 (18 February 2010 Unreported available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAFSHC/2010/18.html&query=botha%20v%20matjhabeng>).

<sup>506</sup> *Ibid* para 24.

<sup>507</sup> *New Clicks* (note 505 above); see also Hoexter (note 484 above) 215-216.

<sup>508</sup> *Ibid* *New Clicks* para 100.

<sup>509</sup> Hoexter (note 484 above) 216.

<sup>510</sup> *Ibid* 216-217.



To conclude, it is obvious that the principle of subsidiarity plays an important role by allowing the courts to develop the elemental standard required under PAJA when determining whether action is qualified as administrative in nature under its terms. Determining whether the action is administrative cannot be done by directly relying on section 33 of the Constitution because PAJA is constitutionally mandated legislation which gives effect to the meaning of section 33. Nevertheless, the effect of *Gcaba* has seemingly influenced the further development of the principle of legality as another means of providing protection to public sector employees where the exercise of public power is unlawful and irrational.

Having defined and discussed the development of the principle of legality in Chapter 2 as well as reservations on the principle being applied over and above PAJA, this dissertation plans to identify below how certain case law have applied the principle within labour cases.

### 4.3 LEGALITY APPLIED TO LABOUR CASES

It is a well-established principle that the principle of legality is a general norm and should only be resorted to once specific norms have run out. This approach is in line with the principle of subsidiarity as well as the principle of avoidance,<sup>511</sup> which requires legislation or the common law to be sought before constitutional remedies.<sup>512</sup>

Ngcukaitobi and Brickhill correctly argue that, even in cases where PAJA does not apply, it does not mean that the principle of legality cannot found the basis for judicial review, but for legality to apply, decisions must amount to the exercise of public power.<sup>513</sup> Hoexter follows the same argument as the authors above and states that, in cases addressed by the LRA, there is nothing preventing a litigant from approaching the HC on the basis of legality.<sup>514</sup> The reasoning can be found in the general rule provided by Van der Westhuizen J in *Gcaba* that PAJA does not generally apply to employment and labour related cases. It is arguable that within employment and labour related cases, the specific norm under PAJA, because of the general rule (above), is no longer applicable, and therefore the general norm under legality

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<sup>511</sup> See footnote 38 in Hoexter (note 484 above) 116 for cases dealing with the principle of avoidance.

<sup>512</sup> Hoexter (note 484 above) 119-120.

<sup>513</sup> Ngcukaitobi T and Brickhill J 'A Difficult Boundary: Public Sector Employment and Administrative Law' 2007(28) (4) *ILJ* 790-791.

<sup>514</sup> Hoexter (note 505 above) 59.

would now become available to public sector employees in the first instance. Hoexter states that it is unlikely that the CC's strong policy-driven stratagem on administrative action will prove effective in diverting public sector employees away from the HC.<sup>515</sup> The principle of legality will therefore always be needed where decisions or acts do not qualify as administrative action.<sup>516</sup> Brand JA restated in *National Director of Public Prosecutions v Freedom under Law*<sup>517</sup> that the 'legality principle has now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application.'

Cachalia JA, in agreeing with the decision taken by Brand JA, recently stated the position on the applicability of the legality principle in *Gijima*<sup>518</sup> where it was held that:

'...the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies.'<sup>519</sup>

Khampepe J writing for the majority of the CC confirmed the correct approach relating to the legality principle in *Motau*<sup>520</sup> where it was held that 'the correct order of enquiry is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law.'<sup>521</sup> Because of the general rule barring section 33 of the Constitution and PAJA from applying to public sector employees, it is argued that litigants can pursue claims in the HC under the principle of legality.

The HC is not the only court available to public sector employees. An interesting and growing line of cases in the LC have been applying section 158(1)(h) of the LRA as a generic provision in establishing the LC's jurisdiction to decide or review applications dealing with exercises of public power that fall short of being administrative action under PAJA. Section 158(1)(h) of the LRA states that the LC may '(h) review any decision taken or any act

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<sup>515</sup> Ibid.

<sup>516</sup> Hoexter (note 484 above) 134.

<sup>517</sup> 2014 (4) SA 298 (SCA).

<sup>518</sup> [2016] 4 All SA 842 (SCA).

<sup>519</sup> Ibid para 38.

<sup>520</sup> *Motau* (note 501 above).

<sup>521</sup> Ibid para 27 at footnote 28.

performed by the state in its capacity as employer, on such grounds as are permissible in law.’

It must be stated from the outset that section 158(1)(h) of the LRA does not establish a ground of review but allows the LCs flexibility in deciding on any ground of review permissible in law. The approach taken by our LCs seems to be like the approach adopted by Conradie JA in the SCA judgment in *Chirwa* that, even though a matter may be reviewable under PAJA, it should nevertheless be reviewed by our LCs and not the HC.

In discussing the development of the principle of legality in labour cases, three judgments on separate cases by the LAC, SCA and CC are identified below starting with the SCA judgment and ending with LAC judgment.

#### 4.3.1 *Ntshangase v MEC for Finance, KwaZulu-Natal*<sup>522</sup>

Bosielo AJA did not follow the *Chirwa* and *Gcaba* judgments in *Ntshangase* and held for a unanimous SCA that a disciplinary decision resulting in a final written warning not only qualified as a public power or a public function being performed in terms of resolution 2 (which has statutory authority under section 23 of the LRA) but in exercising such a power it was in the public interest and thus had direct, external legal effect on at least the appellant’s relationship with the second respondent. Therefore, the decision amounted to administrative action.<sup>523</sup>

For Bosielo AJA, the next legal question remained as to whether the decision is reviewable under PAJA or section 158(1)(h) of the LRA. It was held that, based on the wording under the said section, the decision could be taken on review under section 158(1)(h) of the LRA.<sup>524</sup> Bosielo AJA held that there is no doubt that this section provides in explicit terms that the decision taken can be reviewed, and, moreover, the ground of review relied upon by the second respondent was the basis of rationality.<sup>525</sup> It seems that, although Bosielo AJA held that the decision amounted to administrative action under PAJA, the court found that the decision was open to be reviewed in the LC under section 158(1) (h) of the LRA.<sup>526</sup>

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<sup>522</sup> 2010 (3) SA 201 (SCA).

<sup>523</sup> Ibid para 14.

<sup>524</sup> Ibid para 15.

<sup>525</sup> Ibid.

<sup>526</sup> Ibid paras 15 and 20.

### 4.3.2 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*<sup>527</sup>

Mr Khumalo, and Mr Ritchie were employees at the Department of Education in KwaZulu-Natal. Following an advertisement in the Sunday Tribune newspaper which specifically required, inter alia ‘supervisory experience at level 6 or 7 within human resources’, Mr Khumalo, who was employed at salary level five at the time, applied and was shortlisted. Mr Ritchie, who was at salary level seven, similarly applied for the post but was not shortlisted. Mr Khumalo was subsequently interviewed and promoted to the post. Mr Ritchie lodged a grievance with the Department complaining that he had not been shortlisted. When the grievance could not be resolved, that dispute was referred to the bargaining council where it was set down for arbitration. Before the proceedings commenced a settlement, agreement was reached granting Mr Ritchie a protected promotion.

The MEC became aware of the irregularities in the two promotions and launched an application in the LC seeking that the promotions be declared unlawful and to set them aside. The LC granted the application. Mr Khumalo and Mr Ritchie appealed unsuccessfully to the LAC. Leave to appeal was subsequently granted to the CC.

Skweyiya J writing for the majority held that Mr Khumalo’s promotion was argued to have been unlawful because of an alleged failure to comply with section 11 of the Public Services Act. For Skweyiya J, the true nature of the application was one for judicial review under the principle of legality, sought in terms of section 158(1)(h) of the LRA.<sup>528</sup> Furthermore, Skweyiya J restated the principle of legality as being applicable to all exercises of public power and not only to ‘administrative action’ as defined under PAJA, legality, moreover, requiring that all exercises of public power are, at a minimum, lawful and rational.<sup>529</sup>

Skweyiya J echoes the policy arguments made in *Chirwa*, holding that the ‘constitutional and legislative framework must inform an approach which does not undermine the hard-won protections afforded to public-sector employees whilst understanding the uniqueness of public sector employment.’<sup>530</sup> Although the MEC had made application under section 33 of the Constitution and PAJA, for Skweyiya J, the application was ambiguous as council had also deliberately framed the dispute in terms of the LRA in an effort to avoid the 180 day

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<sup>527</sup> (2014) 35 *ILJ* 613 (CC).

<sup>528</sup> *Ibid* para 28.

<sup>529</sup> *Ibid*.

<sup>530</sup> *Ibid* para 32.

time frames set by PAJA.<sup>531</sup> Skweyiya J held that reference to section 33 and to PAJA was not meant to found the legal basis of her challenge but to motivate her standing to correct the impugned decision. Skweyiya J does continue and holds that direct reliance to section 33 and PAJA would nevertheless have been misplaced considering the court's jurisprudence.<sup>532</sup>

The reasoning as to why the matter was not administrative action was with respect an incorrect determination. The reasoning for this disagreement can be found by the remarks made in *Gcaba* where the court recognised the sentiment expressed by O' Regan J in *Fredericks* that the pleadings invoke the court's competence to hear a dispute.

Zondo J writing for the minority judgment, did not agree with the approach taken by Skweyiya J, holding that the MEC's challenge was based on the decision to promote Mr Khumalo and that it amounted to administrative action. In addition, the MEC did not bring the application under section 158(1) (h) of the LRA; therefore the MEC must stand or fall on the pleaded cause of action.<sup>533</sup> Zondo J held that it is evident that the MEC deliberately chose to institute a claim under administrative justice. In addition, Zondo J refers to the MEC's replying affidavit holding that the MEC disavowed any reliance on the LRA; therefore even if the facts pleaded were capable of sustaining a claim under the LRA, the courts are precluded from doing so.<sup>534</sup> Zondo J held that the only reason why Skweyiya J should have found that PAJA did not apply was because the application was brought after the 180 day time frame.<sup>535</sup>

Although the application had been brought in terms section 33 and PAJA, the conclusion made by Skweyiya J does confirm that where PAJA finds no application, the LC has the power to review decisions under the principle of legality. Skweyiya J recognised that bringing a challenge based on legality through section 158(1) (h) of the LRA has been established in several cases; moreover, the court supported the *Ntshangase* case as correct.<sup>536</sup> Where PAJA does not apply, either because of policy considerations or the facts pleaded failed to sustain a cause of action, the principle of legality remains open to a litigant.

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<sup>531</sup> Ibid para 27.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid para 89.

<sup>534</sup> Ibid para 90.

<sup>535</sup> Ibid para 95.

<sup>536</sup> Ibid para 32.

### 4.3.3 *Hendricks v Overstrand Municipality and Another*<sup>537</sup> at the Labour Appeal Court

The appellant, Mr Hendricks was the Chief of Law Enforcement and Security at the first respondent, Overstrand Municipality. Mr Hendricks was served with a notice to attend a disciplinary hearing to answer to various charges relating to inappropriate behaviour to a fellow employee, including fraudulent misrepresentation and breaching the code of conduct. A disciplinary hearing was held and Mr Hendricks was found guilty on the first two charges. A sanction had been imposed in the form of a final written warning valid for 12 months on the first charge relating to inappropriate behaviour and a suspension without pay for 10 days, coupled with a final written warning valid for 12 months on the second charge.

The first respondent made application to the LC, seeking a review on the sanctions imposed and replacing the determination on the sanction with a sanction of dismissal. The application was brought before the LC in terms of section 158(1)(h) of the LRA on the grounds that the determination was irrational and unreasonable. The LC set aside the determination and substituted the determination with a sanction of dismissal.

In the LAC, the appellant argued that the court *a quo* erred in finding that the first respondent was entitled to approach the court on review in terms of section 158(1)(h) of the LRA. Predicated on the findings by the CC in *Chirwa* and *Gcaba*, the appellant argued that LC did not have the power to review decision made at disciplinary hearings or at the instance of the employer.

Murphy AJA concluded that the first respondent had the standing right to seek review of the second respondent's decision on administrative law grounds by way of the LC in terms of section 158(1)(h) of the LRA.

In coming to this conclusion, Murphy AJA reconsidered the interpretation of section 158(1)(h) of the LRA made by the SCA in *Ntshangase*, holding that where one looks at the language of section 158(1)(h), the essential enquiry is whether those grounds of review are 'permissible in law'. The appellant's objection was that the SCA and LAC in *Ntshangase* erred in holding the decision to be administrative action and maintained that the review under PAJA in the present case was not permissible in law. The appellants relied on *Chirwa* and *Gcaba*, holding that the decision was contractual rather than administrative. Murphy AJA

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<sup>537</sup> (2015) 36 *ILJ* 163 (LAC).

held that the appellant's submissions rested on too narrow an interpretation of the decisions of the CC in *Gcaba*. Murphy AJA held that the court 'expressly qualified its pronouncement that employment issues do not amount to administrative action "within the meaning of PAJA" by adding that such would "generally" be the case.'<sup>538</sup>

For Murphy AJA, it was unnecessary to determine whether the decision was administrative action within the meaning of PAJA. Although the court was prepared to determine that the decision was within the realm of PAJA, Murphy AJA importantly held that there was no need to go that far as 'there is strictly speaking no need to classify the decision as administrative action in terms of PAJA before a review will be competent under section 158(1)(h)'<sup>539</sup>.

Furthermore, Murphy AJA recognised that review under PAJA is only one kind of administrative law review and that other exercises of public powers are reviewable on constitutional grounds of legality. Murphy AJA held that the findings made in the LAC and SCA in *Ntshangase* are not inconsistent with the findings of the CC in *Gcaba* and *Chirwa*. Murphy AJA reasons that the findings restricted their conclusions to instances where unfair labour practices and dismissals would not normally constitute administrative action as there are adequate alternative remedies existing under the LRA.<sup>540</sup> The CC in *Khumalo* mentioned above cited *Ntshangase* with approval that the court saw no inconsistency in the approach taken in that case with its earlier decision, and therefore legality has now been confirmed as an alternative form of review in employment matters where there are administrative acts.

Murphy AJA agreed with the court in *Chirwa* and *Gcaba* and recognised that the underlying rationale behind the *ratio decidendi*<sup>541</sup> was for practical purposes and that remedies for unfair dismissals and unfair labour practices contained in the LRA should be used by aggrieved employees, rather than seeking review under PAJA. Murphy AJA interestingly held that the *ratio* cannot justifiably be extended to deny employers without a remedy as section 191(1)(a) of the LRA expressly restricts these remedies to 'employees'.<sup>542</sup> Murphy AJA arguably recognises the implied reasoning in *Gcaba* that administrative law cannot simply be denied, as to deny the employer any remedy at all against an abuse of power would result in exercises of public power being unchecked.<sup>543</sup> The only remedy available to the employer aggrieved by

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<sup>538</sup> Ibid para 18.

<sup>539</sup> Ibid para 21.

<sup>540</sup> Ibid para 29.

<sup>541</sup> Latin term meaning the reason for the decision.

<sup>542</sup> Ibid para 27.

<sup>543</sup> Ibid.

the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review through section 158(1) (h) of the LRA empowering the LC to hear and determine the review.<sup>544</sup>

Although the courts mentioned above seem to suggest that the legality route is only available as an alternative option, the possibility seems to be open to a litigant from the outset to approach the LC under section 158(1)(h) of the LRA or the HC which has original jurisdiction under section 169 of the Constitution to hear constitutional matters.

It has been stated above that the legality principle should only be applied where PAJA finds no application. This would be in line with the principle of subsidiarity where more specific norms should apply before more general norms. However, *Hendericks* follows that, even where PAJA does apply, the legality route would still be open to the LC to review in terms of section 158(1)(h) of the LRA.

Considering *Gcaba* and the court's recognition on the sentiment in *Fredericks*, where PAJA or the LRA apply, there is arguably nothing stopping a litigant from making application in the HC or in the LC and pleading under the principle of legality. Where there is confusion about the nature of the dispute being administrative action or an unfair labour practice, a growing line of cases are emerging since *Gcaba*, following the *Fredericks* position. Under *Fredericks*, all that a litigant would have to do is plead under the principle of legality but also disavow any reliance to section 33 of the Constitution and PAJA as well as section 23 of the Constitution and the LRA. This approach to the pleadings would allow legality to apply because, since PAJA no longer applies generally, or where one disavows reliance to PAJA, the decision taken would become a non-administrative action issue.

To conclude, Bosielo AJA in *Ntshangase* seemed to have followed the approach taken by Conradie JA in the *Chirwa* SCA judgment. However, for Bosielo AJA, the approach was not as restrictive as for Conradie JA as section 158(1)(h) of the LRA was another means of reviewing the decision; since rationality as a ground of review was relied on, review under the LC would have been open.

Skweyiya J in *Khumalo* followed the same policy considerations in denying the applicability of PAJA, even though the facts pleaded were solely under PAJA. Nevertheless, the court recognised *Ntshangase* as correct and held that all exercises of public power must be at

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<sup>544</sup> Ibid.



minimum lawful and rational. Where PAJA find no application, Skweyiya J confirmed that review under the principle of legality would be competent under section 158(1)(h) of the LRA.

Murphy AJA in *Hendricks* confirmed the views in *Ntshangase* and *Khumalo* as correct. Murphy AJA recognised that there is no need to classify a decision as administrative action in terms of PAJA before a review will be competent under section 158(1)(h) of the LRA.

Having discussed the principle of legality as another means of review within labour cases, the next subsection seeks to determine whether public sector employees have dual rights in light of the court in *Gcaba* recognising the interconnectedness of rights and further recognising that it is not uncommon for more than one right to apply to a single set of facts.

#### 4.4. DUALITY OF PUBLIC SECTOR EMPLOYEES' RIGHTS

The purpose of this subsection is to determine whether public sector employees have dual rights under section 23 and 33 of the Constitution which are actionable simultaneously., If not, then it is important to determine the extent to which those fundamental rights are afforded to public sector employees.

##### 4.4.1 THE EXTENT OF RIGHTS AFFORDED TO PUBLIC SECTOR EMPLOYEES.

It is relevant to state the words of Plasket J from the outset in *POPCRU*<sup>545</sup> and although this judgment had been dealt with in Chapter 3, the view expressed based on fundamental rights is of importance for the purposes of this subsection. *Plasket J* held that:

‘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.’<sup>546</sup>

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<sup>545</sup> 2006 (8) BCLR (E).

<sup>546</sup> *Ibid* para 60.

In Chapter 1, two schools of thought were examined. The first assumes that all employment relationships should be governed by section 23 of the Constitution and its associated legislation and not by section 33 of the Constitution and its associated legislation. The second argues that exercises of public power attracts the protection under both administrative and labour law.

If the first school of thought were to be expanded, there are two further lines of reasoning: first, section 23 of the Constitution and the LRA have been enacted to extend to virtually all employment relationships. Therefore, it would no longer be necessary for administrative law to be applied in the field of employment relationships in the public sector. Second, it is impermissible for one act to involve both labour law and administrative law.

Plasket J disagreed with this reasoning because it represents a ‘parsimonious approach to fundamental rights: they fail to give individuals the full measure of their fundamental rights.’<sup>547</sup> The effect of the CC ‘attempting to place administrative law and labour law into neat pigeonholes runs the risk of elevating what may be no more than a convenient classification into a source of legal rules.’<sup>548</sup> Moreover, there is no conflict between PAJA and the LRA. The LRA does not trump PAJA in terms of section 210 of the LRA because, for Plasket J, the protections afforded by labour law and administrative law are complementary and cumulative and are not destructive simply because those areas of law are different.<sup>549</sup>

It is arguable that in advocating for the pre-eminence argument, because the Constitution has entrenched the right to labour practices, this right trumps every other right, such as the right to just administrative action. Plasket J held that the consequence of the pre-eminence argument seems to lose sight of the intention of the legislature.<sup>550</sup> Plasket J accordingly disagrees with the pre-eminence approach and recognises that, if one were to look at section 157(2) of the LRA, the wording of the section itself envisages that certain employment related acts will also be administrative action, thus investing jurisdiction in the LC concurrently to that of the HC. Plasket J further states that section 157(2) extends the jurisdiction of the LC to determine employment-related cases in which, inter alia, fundamental rights to just administrative action is infringed or threatened by the state as

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<sup>547</sup> Ibid.

<sup>548</sup> Ibid para 61.

<sup>549</sup> Ibid para 60.

<sup>550</sup> Ibid para 62.

employer.<sup>551</sup> Moreover, the section does not vest in the HC unfair labour practice jurisdiction but rather concurrent constitutional review jurisdiction in the LC<sup>552</sup> However, Skweyiya J did not follow this approach in *Chirwa*<sup>553</sup> and opted for the pre-eminence argument that the section 23 rights in the Constitution essentially trumps the section 33 rights in the Constitution.<sup>554</sup>

Plasket J further relies on certain case law (discussed below) which recognise that one employment-related act may give rise to more than one cause of action.<sup>555</sup> Nugent AJA held in *Fedlife Assurance Limited v Wolfaardt*<sup>556</sup> that the LRA should not be construed to the effect that the legislature intended to deprive existing rights and remedies unless the legislature expressly intended to do so.<sup>557</sup>

Nugent JA held in *Denel (Pty) Ltd v Vorster*<sup>558</sup> that it is not correct to submit that:

‘the relationship between employer and employee is governed only by a reciprocal duty upon the parties to act fairly towards another, with the result that contractual terms requiring anything more must necessarily give way.’<sup>559</sup>

Nugent JA, agreeing with *Fedlife*, held that ‘if the new constitutional dispensation did have the effect of introducing into employment relationships a reciprocal duty to act fairly then it does not follow that it deprives contractual terms of their effect.’<sup>560</sup>

In the *Fredericks*<sup>561</sup> case, the CC had to determine the scope of the jurisdiction of the HC to determine certain complaints arising out of an employment relationship. The applicants applied for voluntary retrenchment but were refused. The applicants submitted that the refusal constituted a breach of their right to equality in terms of section 9 of the Constitution and a breach of their right to administrative justice in terms of section 33. Although the circumstances emanate out of an employment relationship, the CC importantly recognised that the claim was not based on contract, but rather was based on their constitutional rights to

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<sup>551</sup> Ibid.

<sup>552</sup> Ibid.

<sup>553</sup> 2008 (4) SA 367 (CC).

<sup>554</sup> Ibid para 50.

<sup>555</sup> Ibid.

<sup>556</sup> 2002 (1) SA 49 (SCA).

<sup>557</sup> Ibid para 16.

<sup>558</sup> 2004 (4) SA 481 (SCA).

<sup>559</sup> Ibid para 16.

<sup>560</sup> Ibid; see also *Fedlife* (note 559 above) para 15.

<sup>561</sup> 2002 (2) SA 693 (CC).

administrative justice and equal treatment as pleaded.<sup>562</sup> The CC further implies that although the applicants also had a right to section 23(1) of the Constitution, it was not open for the court to decide as the applicants had disavowed any reliance on their right to fair labour practices.<sup>563</sup>

Plasket J held that, if any doubt existed as to whether employees have more than one actionable right, that doubt was put to rest<sup>564</sup> by Nugent JA in *United National Public Service Association of South Africa v Digomo NO and others*.<sup>565</sup> Nugent JA correctly stated:

‘The remedies that the Labour Relations Act provides against conduct that constitutes an ‘unfair labour practice’ are not exhaustive of the remedies that might be available to employees in the course of the employment relationship. Particular conduct by an employer might constitute both an ‘unfair labour practice’ (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant’s claim in the present case was not that the conduct complained of constituted an ‘unfair labour practice’ giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in the Constitution and that is protected by section 33 – which is clearly cognisable in the ordinary courts.’<sup>566</sup>

The CC in *Chirwa*,<sup>567</sup> however, was arguably not prepared to recognise the interconnectivity of rights, nor did the court follow the approach of Cameron JA in the SCA judgment in *Chirwa*,<sup>568</sup> where fundamental rights were recognised and given their full effect to public sector employees. Cameron JA rightly underscores the view expressed by Plasket J as he importantly states:

‘We must end where we began: with the Constitution. I can find in it no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to

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<sup>562</sup> Ibid para 32.

<sup>563</sup> Ibid para 34.

<sup>564</sup> *POPCRU* (note 548 above) para 63.

<sup>565</sup> (2005) 26 *ILJ* 1957 (SCA).

<sup>566</sup> Ibid para 4.

<sup>567</sup> 2008 (4) SA 367 (CC).

<sup>568</sup> 2007 (2) SA 198 (SCA).

prefer one legislatively embodiment of a protected right over another; nor any preferential entrenchment of rights or of the legislation springing from them.<sup>569</sup>

For Ngcobo J in *Chirwa*, administrative action is different to employment and labour relations, although they may share some characteristics, and the Constitution contemplates separate and different forms of regulations, review and enforcement.<sup>570</sup> Skweyiya J followed the same approach holding that the LRA envisages a ‘one stop shop’ for all labour related matters and even where a labour dispute implicates other rights, a litigant should approach the LRA structures.<sup>571</sup> It is clear that in both judgments, the ‘essentialist’ approach by the courts facilitated the view that section 23 and 33 of the Constitution are separate and in sealed compartments.<sup>572</sup>

Langa CJ, in the minority judgment in *Chirwa*, recognises the views expressed by Cameron JA in the SCA judgment in *Chirwa* and importantly held that a litigant is entitled to the full protection of both rights, even where they seem to cover the same ground, and therefore it may be possible for the legislature to prefer one right over the other; however, the legislature has yet to do so and, when the legislature decides this is the route that is needed, it must do so much more explicitly than it has in the LRA and PAJA.<sup>573</sup> It was further held that, while rights to fair labour practices and just administrative action may overlap in cases of public sector employees, this is not a legitimate reason to sacrifice one right over another without a clear legislative provision to the contrary.<sup>574</sup> Langa CJ further underscores the views of Cameron JA, holding that the implication is that there is no constitutional reason to prefer adjudication of a claim that may simultaneously constitute both a dismissal and administrative action.<sup>575</sup>

Recently in *Sewsunker v Durban University of Technology*,<sup>576</sup> application to review and set aside the decision of the respondent to deny the applicant ‘post-retirement medical aid benefits’ in terms of PAJA was brought before the HC. The applicant had been in the employment of the respondent and his services were terminated after a disciplinary hearing

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<sup>569</sup> Ibid para 65.

<sup>570</sup> *Chirwa* (note 570 above) para 143.

<sup>571</sup> Ibid para 47.

<sup>572</sup> Hoexter (note 505 above) at 51.

<sup>573</sup> *Chirwa* (note 570 above) para 175.

<sup>574</sup> Ibid para 176.

<sup>575</sup> Ibid para 175.

<sup>576</sup> [2013] ZAKZDHC 47 unreported (16 September 2013) available at <http://www.saflii.org.za/za/cases/ZAKZDHC/2013/47.html>.

found him guilty of misconduct. The policy adopted by the university subsidised the medical aid contributions to its staff members who retire and the policy had continued to apply to retirees and not to those employees whose services are terminated due to dismissal.

Van Zyl J found that, in considering whether the University's decision amounted to administrative action for the purposes of PAJA, the court relied on the views adopted by *Chirwa* that the source of the power was contractual and does not constitute reviewable administrative action in terms of PAJA.

Van Zyl J then proceeded to hold that 'even if the respondent's refusal of benefits were correctly classifiable as administrative action, then not all administrative acts are reviewable in terms of the provisions of PAJA.'<sup>577</sup> The view expressed by Van Zyl J is arguably incorrect as it seems to suggest that the court recognises that, even if administrative action had taken place, PAJA would invariably have been invoked. The court nevertheless followed the CC's policy-driven approach, which effectively and with no legal basis, denies a right under section 33 of the Constitution by proceeding to prefer section 23 of the Constitution. The views expressed by Van Zyl J seem to overlook the CC view in *New Clicks*<sup>578</sup> where Ngcobo J importantly held:

'Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant finds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'<sup>579</sup>

In contrasting *Sewsunker*, the LC in *Public Servants Association of South Africa and Another v Minister of Labour and Another*<sup>580</sup> recently recognised the views expressed by the court in *Gcaba* as being conclusive that 'the same conduct on the part of an employer may give rise to different causes of action and remedies in law.'<sup>581</sup> Therefore, the fact that the second applicant could have constructed his case as an unfair labour practice, but chose not to, has no bearing on the jurisdiction of the LC to entertain an administrative law or legality review.

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<sup>577</sup> Ibid para 51.

<sup>578</sup> *New Clicks* (note 505 above).

<sup>579</sup> Ibid para 437.

<sup>580</sup> (2016) 37 *ILJ* 185 (LC).

<sup>581</sup> Ibid para 44.

Myburgh AJ importantly recognised that the LC has jurisdiction to review the claim as it was pleaded under section 158(1) (h) of the LRA.<sup>582</sup>

The HC in *Nakin v MEC, Department of Education, Eastern Cape*<sup>583</sup> correctly recognised that *Chirwa* seems to have ‘resurrected [what] *Fedlife* had laid to rest a number of years ago based on sound jurisprudential grounds.’<sup>584</sup> For Froneman J, the development of a jurisprudence of labour related disputes in different courts has been advanced and not restricted by its wider application in courts other than the LC.<sup>585</sup> Ensuring a coherent and emerging labour and employment jurisprudence is not primarily determined by its development in one exclusive forum.<sup>586</sup> Therefore, for Froneman J, ‘fundamental constitutional rights do not operate in tightly fitted compartments. In many, perhaps even most instances, they overlap and are interconnected.’<sup>587</sup> Froneman J held that ‘the substance coherence and development of employment law can only gain insights derived initially from administrative concerns.’<sup>588</sup>

Nugent JA in *Makhanya v University of Zululand*<sup>589</sup> criticises the majority in *Chirwa*, holding importantly that:

‘The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings that is for convenience of academic study and treatment, and should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields.’<sup>590</sup>

Hoexter makes the point that it seems startling and odd that a few weeks before the *Chirwa* judgment was handed down, the CC in *Sidumo v Rustenburg platinum Mines Ltd*<sup>591</sup> rejected the approach that section 23 and 33 of the Constitution should be dealt with separately and in

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<sup>582</sup> Ibid.

<sup>583</sup> (2008) 29 *ILJ* 1426 (E).

<sup>584</sup> Ibid para 29.

<sup>585</sup> Ibid para 30.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid para 31.

<sup>588</sup> Ibid para 35; Froneman J held that the content within the public sector comprises of constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service. It is within this perspective that Froneman J argues that employment law would only gain from administrative law insights.

<sup>589</sup> 2010 (1) SA 62 (SCA).

<sup>590</sup> Ibid para 8.

<sup>591</sup> 2008 (2) SA 24 (CC)

sealed compartments.<sup>592</sup> Navsa AJ, writing for the majority, held that it is a ‘misconception that the right to section 23 and 33 are exclusive’<sup>593</sup> of each other. For Navsa AJ, ‘the right to fair labour practices is consonant with the right to administrative action that is lawful, reasonable and procedurally fair, therefore these rights overlap and are interconnected.’<sup>594</sup>

In the concurring judgment of Sachs J, it was importantly held that ‘courts should not feel obliged to obliterate one right through establishing the categorical or classificatory pre-eminence of another.’<sup>595</sup> For Sachs J, the Bill of Rights does specifically identify a number of rights for special constitutional protection; each are independently delineated, reflecting historical experience pointing to the need to be on guard in the area of special potential vulnerability and abuse.<sup>596</sup> However, Sachs J held that ‘the Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other’. While he recognised that most constitutional issues fall within the parameters of one or other specifically protected right,<sup>597</sup> an important point is made by Sachs J:

‘...[T]here are many cases where rights will not just touch at the margins but overlap in substance. I believe that in these matters undue preoccupation with a quest to establish the primacy of one or other right could defeat the constitutional objectives to be realised.’<sup>598</sup>

Navsa AJ with Sachs J concurring goes further and gives proper understanding of the relationship between section 23 and 33 of the Constitution by pronouncing on the purpose of section 145 of the LRA. In doing so Navsa AJ held that:

‘Section 33(3) of the Constitution<sup>95</sup> provides that national legislation must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. Section 145 of the LRA constitutes national legislation in respect of ‘administrative action’ within the specialised labour law sphere. Of course, section 145 has to meet the requirements of section 33(1) of the Constitution

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<sup>592</sup> Hoexter (note 505 above) 51.

<sup>593</sup> Ibid para 112.

<sup>594</sup> Ibid.

<sup>595</sup> Ibid para 148.

<sup>596</sup> Ibid para 150.

<sup>597</sup> Ibid para 157.

<sup>598</sup> Ibid.



ie it has to provide for administrative action that is lawful, reasonable and procedurally fair.’<sup>599</sup>

Navsa AJ goes further to state there is nothing in section 33 of the Constitution which precludes specialised legislation regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA.<sup>600</sup> Hoexter states that in essence what the CC does is ‘characterise section 145 of the LRA as specialist legislation which gives effect to section 33 within the labour sphere’.<sup>601</sup> Therefore, the effect of the majorities’ characterisation is that it is ‘the strongest possible affirmation that one would have thought of the close relationship between the two rights and the bodies of law governed by them.’<sup>602</sup>

The crux of the argument proposed by Ngcukaitobi underscores the approach mentioned above. For Ngcukaitobi the right to fair labour practices and fair administrative action, at the very core, is concerned with the constraint of the exercise of public power.<sup>603</sup> These rights do not stand disjunctively or in opposition to each other. For Ngcukaitobi, ‘section 33 seeks to regulate the exercise of public power by confining the exercise in being lawful, rational and procedurally fair’<sup>604</sup>, and ‘section 23 is concerned with substantive and procedural fairness; however, substantive fairness is not concerned with lawfulness.’<sup>605</sup> The views expressed by Froneman J in *Nakin*, as noted above, are underscored by Ngcukaitobi, who stated that a piquant approach exists where labour law could be used to ‘supplant the rights to administrative justice of public sector employees.’<sup>606</sup> The reasoning is that ‘administrative law is not concerned with substantive fairness whereas labour is, moreover labour law does not incorporate lawfulness.’<sup>607</sup> Although this approach seems to be beneficial to administrative law issues emanating within an employment setting, our courts have not followed it as there is a growing jurisprudence that both rights regulate different things and therefore they are dealt with separately. The question remains as to whether both rights under section 23 and 33 of the Constitution could be applied together in one application or whether one right must be chosen from the outset.

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<sup>599</sup> *Sidumo* (note 594 above) para 89.

<sup>600</sup> *Ibid* para 91.

<sup>601</sup> Hoexter (note 505 above) 51.

<sup>602</sup> *Ibid*.

<sup>603</sup> Ngcukaitobi T ‘*Life after Chirwa: Is there Scope for Harmony between Public Sector Labour Law and Administrative Law?*’ 2008(2) *ILJ* 853.

<sup>604</sup> *Ibid*.

<sup>605</sup> *Ibid*.

<sup>606</sup> *Ibid*.

<sup>607</sup> *Ibid*.

#### 4.4.2 CONSOLIDATION OF RIGHTS

In *Fredericks* and *Fedlife*, Cheadle recognises that the HC retains jurisdiction to determine violations of fundamental rights arising from employment or labour relations, only if those rights are based on rights other than those rights contained under section 23 of the Constitution.<sup>608</sup>

The CC in *Gcaba*<sup>609</sup> recognised without any doubt that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora.<sup>610</sup> The court then proceeded to provide examples where overlaps existed:

‘...aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, and give rise to the *action iniuriarum* in the law of delict and amount to an unfair labour practice.’<sup>611</sup>

The court then correctly recognised that ‘areas of law are labelled or named for the purpose of systematic understanding and not necessarily on the basis of fundamental reasons for a separation.’<sup>612</sup> The court then proceeded to follow the view expressed in *Fredericks* and Cameron JA in the SCA in *Chirwa* that ‘rigid compartmentalisation should be avoided.’<sup>613</sup>

The CC significantly proceeded to follow the views expressed by *Sidumo* that ‘human rights are intrinsically interdependent, indivisible and inseparable. The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.’<sup>614</sup> To protect fundamental rights afforded to individuals, Van der Westhuizen J proceeded to hold that ‘a related principle is that legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.’<sup>615</sup>

Van der Westhuizen J further underscored the interpretation argument mentioned above that ‘the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so’.<sup>616</sup> The judge, moreover, held that ‘where a remedy lies in the High

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<sup>608</sup> Cheadle H ‘*Deconstructing Chirwa v Transnet*’ (2009) 30 *Industrial Law Journal* 745.

<sup>609</sup> *Gcaba* (note 507 above).

<sup>610</sup> *Ibid* para 52.

<sup>611</sup> *Ibid*.

<sup>612</sup> *Ibid*.

<sup>613</sup> *Ibid*.

<sup>614</sup> *Ibid* para 54.

<sup>615</sup> *Ibid* para 55.

<sup>616</sup> *Ibid* para 73.

Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much.<sup>617</sup> Van der Westhuizen J importantly held that, although the LC deals with ‘labour and employment related dispute for which the LRA created specific remedies, it does not mean however that all other remedies which might lie in other courts like the High Court or the Equality Court, can no longer be adjudicated by those courts.’<sup>618</sup>

In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*,<sup>619</sup> Moseneke DCJ held in the circumstances within that case that ‘arbitration is the appropriate forum for the applicant and respondent to seek where the balance between dogma and tolerance should be struck.’<sup>620</sup> The court reasoned, based on the Doctrine of Entanglement, that it would be inappropriate for the court to interfere pre-arbitration, especially considering that the line is close to the church’s doctrines and values.<sup>621</sup> However, distinguishable to *Fredericks*, De Lange expressly disavowed her claim to unfair discrimination in order to escape the jurisdictional challenges.<sup>622</sup>

Moseneke DCJ, relying on the authority in *Minister of Environmental Affairs and Tourism v George and Others*<sup>623</sup> held that:

‘the Equality Court proceedings based on her claim of unfair discrimination on the basis of sexual orientation as well as the arbitration agreement between the parties should have been consolidated before a single judge sitting as Equality Court and as High Court.’<sup>624</sup>

For Moseneke DCJ, the reasoning as to why the consolidation route would have been appropriate was because it serves the procedural requirements of Unfair Discrimination Act that discrimination matters must proceed to the Equality Court, as well as avoiding piecemeal litigation and cost.<sup>625</sup>

Arguably similar to the Equality Court, the LC is a specialised court giving effect to a constitutional right. Based on the authority of *De Lange* and *George*, it would be a stimulating approach to persons in future cases like *Chirwa* or *Gcaba* to consolidate their

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<sup>617</sup> Ibid.

<sup>618</sup> Ibid.

<sup>619</sup> 2016 (2) SA 1 (CC).

<sup>620</sup> Ibid para 43.

<sup>621</sup> Ibid para 45.

<sup>622</sup> Ibid para 52.

<sup>623</sup> [2006] SCA 57 (RSA).

<sup>624</sup> *De Lange* (note 622 above) para 58.

<sup>625</sup> *George* (note 626 above) para 58.

claims to fair labour practices and administration action in the LC before a single judge sitting as LC and as HC. Consolidating claims of unfair labour practices and administrative action in the LC would not only be in line with Conradie JA's approach in the SCA judgment in *Chirwa* but would also arguably be in line with section 158(1) (h) of the LRA. Consolidation would also arguably balance the two rights, thus providing the fullest extent to constitutional rights.

However, this is not the approach that our CC has chosen as Van der Westhuizen J recognised that employment and labour relationship issues do not amount to administrative action within the meaning of PAJA because they are disparate claims,<sup>626</sup> much like Moseneke DCJ recognised in *De Lange*.<sup>627</sup> Since a litigant's section 33 right is different to a section 23 right in substance, there is no legal reason as to why both rights should not be applicable. Obviously, it is not uncommon in our law to have more than one cause of action arise out of a single set of facts and there is nothing in the Constitution which restricts or denies one right over the other when more than one right is applicable.

Hoexter states that when reading the *Gcaba* judgment initially, one would give a sigh of relief as the court started to fix up the alarming tendencies left in *Chirwa*.<sup>628</sup> The relief was short lived, however, as *Gcaba* opted to:

‘...direct employment related traffic away from administrative law and the High Court. This is evident from the court's brief canvassing of the main policy considerations that its jurisdictional reasoning in *Chirwa*: the need for specialist regimes, the undesirability of forum-shopping and the dangers of encouraging a dual system of law.’<sup>629</sup>

Cheadle argues that ‘administrative justice depends on the existence of more specific rights such as equality and the right to fair labour practices.’<sup>630</sup> Hoexter argues that Cheadle suggests that ‘because labour disputes are governed by a more specific right or ‘primary right’, section 33 of the Constitution has no work at all to do in relation to such disputes.’<sup>631</sup> Cheadle further argues that, since section 33 has no relevance in the face of a more specific

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<sup>626</sup> *Gcaba* (note 507 above) para 64.

<sup>627</sup> *De Lange* (note 622 above) para 59.

<sup>628</sup> Hoexter (Note 505 above) 54.

<sup>629</sup> *Ibid* 54; See *Gcaba* (note 507 above) paras 56-57.

<sup>630</sup> Cheadle (note 611 above) 746-747.

<sup>631</sup> Hoexter (note 505 above) 52-53.

right, ‘section 33 would have nothing to say to expropriation because section 25 of the Constitution specifically governs property rights.’<sup>632</sup> Hoexter reasons, based on Cheadle’s argument, that section 33 would also have nothing to say in the ‘context of environmental matters, citizenship or trade as all of which are governed by a more specific or primary constitutional rights.’<sup>633</sup> Hoexter criticises Cheadle in that ‘such reasoning misses the point about administrative law, which is that it is a general, overarching system that addressed the abuse of public power whenever it may be found, irrespective of the subject matter of the dispute.’<sup>634</sup>

Nugent JA *Makhanya*<sup>635</sup> criticises Cheadle’s holding that, if the LRA trumps all other rights in all instances involving public sector employments, then it seems odd as to ‘why the legislature should have allowed a claimant his or her ordinary right to approach a High Court to consider such a claim to only then dismiss the claim for being bad in law.’<sup>636</sup> For Nugent JA, when a claimant approaches a court to enforce a particular right derived from the Constitution, then that is a matter of fact. That the claim may be bad in law for not being able to make out a cause of action, however, is beside the point.<sup>637</sup> Nugent JA goes further to state that, when a court denies a claimant the right to assert a claim, which is what the court in *Chirwa* had done, then for Nugent JA that approach would not be permissible as the court denies a legally recognised right which would factually not be correct.<sup>638</sup>

It is not unusual for two rights to be asserted arising from the same facts. For Nugent JA, much like in *Chirwa* and in *Gcaba* where there happens to be a termination of a contract of employment, it is trite that a claimant has the potential to found a claim for relief for infringement of the LRA right, which is enforceable only in a labour forum;<sup>639</sup> however, Nugent JA does not suggest that this is the only potential claim in seeking enforcement because claimants also have a potential claim for the enforcement of a right that falls outside the LRA which are enforceable either in the HC or the LC.<sup>640</sup>

Nugent JA arguably recognises the possibility of consolidating both rights, holding that ‘it is the natural consequence of a claimant asserting two claims, each of which is capable of being

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<sup>632</sup> Ibid 53.

<sup>633</sup> Ibid.

<sup>634</sup> Ibid.

<sup>635</sup> *Makhanya* (note 592 above).

<sup>636</sup> Ibid para 69.

<sup>637</sup> Ibid para 72.

<sup>638</sup> Ibid para 73.

<sup>639</sup> Ibid para 37.

<sup>640</sup> Ibid.

brought in a different forum'.<sup>641</sup> Moreover, even where two claims arise from a set of common facts and might be asserted, it should not evoke surprise or be unusual whether they are dealt with separately or in the alternative.<sup>642</sup> A potential claimant is capable of pursuing both claims in the LC either simultaneously or in succession<sup>643</sup> because, for Nugent JA, they are different claims. However, the judge does provide further clarity as to how one would go about asserting ones rights by holding that:

‘In one claim the Labour Court (as one of the Labour Forums) would be asked to enforce an LRA right (falling within the exclusive power of the Labour Forums). And in the other claim it would be asked to enforce a right falling outside the LRA (but within the concurrent jurisdiction of the Labour Court). Similarly the claimant would have been capable of brining one claim ( the claim to enforce an LRA right) in a Labour Forum and to bring the other claim (for enforcement of the right arising outside the LRA) simultaneously, or sequentially, in the high court.’<sup>644</sup>

For Nugent JA, it is intelligible that where a litigant has only a single claim that is enforceable in two courts which have concurrent jurisdiction, an election must be made as to which court to use, and therefore ‘forum-shopping’ is specifically allowable in those instances.<sup>645</sup> However, for Nugent JA, the position is entirely different when a litigant has two distinct claims where one is enforceable in one court and the other may be enforced in another.<sup>646</sup> Therefore, denying a litigant as a matter of judicial policy appears to be unconstitutional.<sup>647</sup> For Nugent JA, the law has designated the HC as a forum for pursuit of claims, and therefore a litigant may not be denied access to a court that the law allows.<sup>648</sup> Nugent JA further recognised that, where a litigant approaches a court to advance their constitutional rights that are ultimately available to them, ‘a court cannot shy away from exercising its power to consider a claim before it simply because it considers the claim may lead to undesirable consequences.’<sup>649</sup>

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<sup>641</sup> Ibid para 39.

<sup>642</sup> Ibid.

<sup>643</sup> Ibid.

<sup>644</sup> Ibid para 38.

<sup>645</sup> Ibid para 61.

<sup>646</sup> Ibid.

<sup>647</sup> Ibid para 62.

<sup>648</sup> Ibid para 64.

<sup>649</sup> Ibid para 57.

The CC has opted to sticking to stronger policy reasoning as opposed to any legal reasoning as to why section 33 and PAJA no longer applies to employment and labour disputes. This approach is strange considering the remarks mentioned above by Van der Westhuizen J on advancing and protecting constitutional rights holistically. It is apparent that a litigant's right to section 33 of the Constitution is the only right which the CC denies where the right to section 23 is also applicable under the same single set of facts. It does not necessarily mean that one is left without a remedy where, for instance, the LRA or PAJA does not apply in certain circumstances. The principle of legality, as mentioned above, has been gaining momentum in providing an alternative route in controlling decisions made by the administration within employment related circumstances. However, there are further instances where exceptions to the general rule provided by *Gcaba* have been identified, making the rule not entirely discouraging in cases where, for example, the LRA is not applicable to cases following a dismissal via operation of law.

Since *Gcaba* recognises that pleadings invoke the court's competence to hear a particular dispute, there are cases where administrative law has been advanced in cases arising out of an employment setting. *Gcaba* does not definitively state that the LRA 'must' be applied first; rather the court states that it is 'preferable' that the LRA is dealt with first. There are instances where litigants since *Gcaba* plead their cases under section 33 and PAJA and disavow any reliance on section 23 of the Constitution. The issue of pleadings will be dealt with in subsection 4.6 below.

There are circumstances where the LRA does not apply to cases dealing with dismissals via operation of law. The next subsection aims to determine those employees' legal position and whether their circumstance fits into the exception to the general rule.

## 4.5. 'DISMISSALS' VIA OPERATION OF LAW

### 4.5.1 INTRODUCTION

Langa CJ importantly held in the minority judgment in *Chirwa*<sup>650</sup> that the requirements of the definition of 'administrative action' may be fulfilled in terms of dismissals where for example 'the person in question is dismissed in terms of a specific legislative provision (my

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<sup>650</sup> *Chirwa* (note 570 above).

emphasis) or where the decision is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed.’<sup>651</sup>

Van der Westhuizen J in *Gcaba*<sup>652</sup> recognised the views expressed by the majority in *Chirwa* and held that essentially the first port of call in labour and employment related disputes for public sector employees is to use the LRA as the appropriate route.<sup>653</sup> It has been stated in Chapter 3 that, although the CC resorted to the same policy considerations which drove its earlier decision in *Chirwa*, the adoption of a general rule, that employment and labour related matters do not amount to administration action under PAJA, arguably always comes with exceptions.

Where public sector employees are to follow the courts ‘preferred’ route in all cases relating to labour and employment relationships, then there are some circumstances where the LRA route may not be open to a litigant. The first circumstance is where the ‘dismissal’ does not meet the definition requirements invoking the applicability of the LRA as the first port of call. The second circumstance, which will be discussed below, deals with a growing trend of cases following the *Fredericks* side of reasoning, that, if a litigant pleads in terms of PAJA and disavows reliance to the LRA, the LRA would not be open to the litigant and to the court to decide, and therefore the court’s competence to review is invoked in the way the litigant pleads.

In dealing with the first instance, Cheadle argues that, in order for a particular claim to fall within the LRA, there are ‘normal incidents of employment relationships constituting the core elements of fair labour practices such as hiring, promoting, transferring, disciplining and dismissal.’<sup>654</sup> Arguably, where PAJA is not applicable generally and where a decision does not amount to those ‘normal incidents’, such as a dismissal, the LRA would also not be open to a litigant. As a consequence, litigants are left without a remedy. It is important to recognise the emphasised portion of Langa CJ’s reasoning above as there are instances where public sector employees are deemed to have been dismissed from service via operation of law.

The subsection below will now define what is meant by dismissals via operation of law by providing similar pieces of legislation. Thereafter, four cases will be discussed, one of which

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<sup>651</sup> Ibid para 194.

<sup>652</sup> *Gcaba* (note 507 above).

<sup>653</sup> Ibid para 56.

<sup>654</sup> Cheadle (note 611 above) 754.



has three judgments, with the aim of showing how the courts have extended protection to employees in this area of law.

#### 4.5.2 DEFINING ‘DISMISSALS’ VIA OPERATION OF LAW

Cohen importantly recognises that, although the provisions relating to deemed dismissals are draconian in nature, there are still judicial decisions which continue to enforce these seemingly harsh statutory provisions.<sup>655</sup> Essentially, public sector employees whom have ‘absconded from their place of employment for a certain period of time have been denied access to those ‘protective’ labour related provisions relating to unfair dismissals.’<sup>656</sup> However, relief in the form of administrative review, or review in terms of section 158(1)(h) of the LRA, continue to play an important role in ensuring public sector employees are not left without a remedy. It is important now to turn to a statute regarding ‘deemed dismissals’ and subsequently case law will be set out with the purpose of determining the extent to which protection is afforded to public sector employees who have been deemed dismissible and under what circumstances PAJA or the principle of legality would apply.

##### (a) PUBLIC SERVICE ACT 103 of 1994

The PSA is an important piece of legislation and its purpose is to provide for the organisation and administration of the public service, regulation of the conditions of employment, terms of office, discipline, retirement and, significantly for our purposes here, discharge of members from the public service. Section 17 of the PSA deals with termination of employment, and in particular sub-section 3 provides for circumstance where employment is deemed to have been terminated.

Section 17(3) states:

‘(a)(i) An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her

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<sup>655</sup> Cohen T *Legality and Fairness: The interplay between the role of contract and the law of employment in South Africa* (Unpublished LLD thesis, University of Kwa-Zulu Natal, 2011) 173.

<sup>656</sup> Ibid 173.

official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.’ (a)(ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not.’

Section 17(3)(b) provides:

‘If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.’

## (b) THE EMPLOYMENT OF EDUCATORS ACT 76 of 1998

The Employment of Educators Act (hereafter EEA) is also an important piece of enacted legislation. The purpose of the act is to provide for employment of educators by the state, regulation of the conditions of service, discipline, retirement as well as discharge of educators. Section 14 of the act deals specifically with deemed dismissals and the provisions are very similar to that of section 17 of the PSA.

Section 14(1) ‘states that an educator appointed in a permanent capacity who:

- (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
- (b) While the educator is absent from work without permission of the employer, assumes employment in another position;
- (c) While suspended from duty, resigns or without permission of the employer assumes employment in another position; or

(d) While disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer

Shall, unless the employer directs otherwise, be deemed to have been discharged from the service on account of misconduct, in the circumstances where-

(i) Paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or

(ii) Paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.’

Section 14(2) further provides that:

‘If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.’

#### 4.5.3 CASE LAW

##### (a) *De Villiers v Head of Department: Education Western Cape*<sup>657</sup>

The *De Villiers* case concerned a decision by the respondent made under section 14(2) of the EEA by refusing to reinstate the applicant after his deemed discharge in terms of section 14(1) of the EEA. Van Niekerk J had to determine three questions. The first question was whether the respondent's decision to refuse to reinstate the applicant constituted a ‘dismissal’ for the purposes of the LRA. It was held that, if the answer to this question was in the affirmative, then the applicant would have a range of alternative remedies<sup>658</sup> available to him.

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<sup>657</sup> (2010) 31 *ILJ* 1377 (LC).

<sup>658</sup> Van Niekerk J states at para 6 that the applicant has a referral to an unfair dismissal dispute to the relevant bargaining council, and a right ultimately of review to the Labour court under section 145 of the LRA.

The second question before the LC, which stands independently from the first, was whether the respondent's conduct in failing to reinstate the applicant constituted administrative action, and whether it stands to be reviewed on that basis.

Turning to the first question, Van Niekerk J held that the 'respondent's decision not to reinstate the applicant did not constitute a 'dismissal' for the purposes of the LRA.'<sup>659</sup> In arriving at this conclusion, Van Niekerk J found support in an earlier SCA decision in *Phentini v Minister of Education and others*<sup>660</sup> and held that:

'The *ratio* of that judgment is that s14 of the EEA is constitutionally valid and that the discharge effected in terms of the section is not the consequence of any discretionary decision rather than a statutory result; hence it is not a "dismissal" for the purposes of the LRA...'<sup>661</sup>

Van Niekerk J stated that the effect of section 14(2) is that 'an employee's contract of employment is terminated by operation of law independently of any act or decision on the part of the employer, therefore the employer does not terminate the employment contract when electing not to reinstate the contract as at that point the contract has ceased to exist.'<sup>662</sup>

In turning to the second question, Van Niekerk J concluded that the respondent's conduct in deciding in terms of section 14(2) of the EEA to refuse to reinstate the applicant constituted administrative action, and therefore the LC is entitled to exercise its review jurisdiction on that basis.<sup>663</sup> In arriving at this conclusion, Van Niekerk J held that, although it is tempting to read the *Gcaba* judgment to suggest that all public sector employees may pursue their employment-related grievances only through the process established under the LRA and other labour legislation and that, in this respect, the door to administrative review has finally and irrevocably been closed to them, nevertheless, one cannot read the *Gcaba* judgment to suggest that the conduct of a state employer can never be categorised as administrative action. The reasoning adopted by Van Niekerk J can be found in paragraph 65 of the *Gcaba* judgment, where the wording of 'the dictum regarding the relationship between section 23

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<sup>659</sup> Ibid para 8.

<sup>660</sup> (2006) 27 ILJ 477 (SCA).

<sup>661</sup> *De Villiers* (Note 660 above) para 7; See *MEC, Public Works, Northern Province v CCMA and Others* (2003) 10 BLLR 10 27 (LC) where the Labour Court earlier stated the same position on the effect of a deemed dismissal.

<sup>662</sup> Ibid.

<sup>663</sup> Ibid para 21.

and 33 of the Constitution clearly acknowledges the existence of the exceptions to the general rule, however limited those might be.’<sup>664</sup>

Van Niekerk J recognised that in terms of section 14 of the EEA:

‘No other employer is legislatively immunised from an unfair dismissal referral in circumstances where an employee fails to report for work for a continuous period of 14 days. No other employer enjoys the right to consider reinstatement of its employees within its sole discretion.’<sup>665</sup>

Unlike in *Chirwa* and *Gcaba*, the applicant had no alternative right of recourse as there was an absence of a dismissal as defined in the LRA, and therefore the option to refer a dispute constituting an unfair dismissal to the bargaining council was not open to him. Van Niekerk J held that, because the LRA does not cover these types of dismissals ‘a “hands-off” approach to its oversight function over the exercise of a discretion under section 14(2) would remain unchecked, therefore leaving the applicant without a remedy.’<sup>666</sup>

Van Niekerk J recognised that, if PAJA is not open to the applicant, the respondent’s action remains open to review under the LRA under Section 158(1) (h) on the ground of legality.<sup>667</sup> Functionaries exercising public power in a manner that is irrational or arbitrary must be accountable for the manner in which that power is exercised.

Davis JA in *MEC For The Department Of Health, Western Cape v Weder, In Re: MEC For The Department Of Health, Western Cape v Democratic Nursing Organization Of South Africa obo Mangena*<sup>668</sup> underscored the views expressed by Van Niekerk J, and held that the effect of those deemed dismissal provisions legislatively immunises an employee from an unfair dismissal referral.<sup>669</sup> In cases where PAJA does not apply, Davis J held that ‘the requirements of legality prevent an employee from being helpless in the face of an employer’s arbitrary conduct.’<sup>670</sup>

McGregor and Budeli are of the view that the decision taken by Van Niekerk J was incorrect in finding the department’s decision constituted administrative action.<sup>671</sup> Public sector

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<sup>664</sup> Ibid para 15.

<sup>665</sup> Ibid para 20.

<sup>666</sup> Ibid.

<sup>667</sup> Ibid para 22.

<sup>668</sup> [2014] 7 BLLR 687 (LAC).

<sup>669</sup> Ibid para 36.

<sup>670</sup> Ibid para 37.

<sup>671</sup> McGregor M & Budeli M ‘Labour law’ 2010 AS 797.

employees who are absent from employment are not afforded the protections under the LRA where there is a termination by operation of law. Since the jurisdictional standard as to what constitutes a dismissal under section 192 of the LRA is absent, as per the general rule in *Gcaba*, it is established that administrative action in terms of PAJA applies along with legality review in the alternative. On the reasoning above, McGregor and Budeli are incorrect.

It is important to recognise that an employee who has been dismissed via operation of law cannot approach a court on review under the LRA or PAJA as there is no ‘decision’ by the functionary nor any active ‘decision’ to terminate the contract of employment by the employer. In *Phenithi*,<sup>672</sup> the SCA held that the deeming provisions do not depend upon any decision and accordingly do not constitute administrative action. It has been stated in *De Villiers* above that the power of discretion afforded to the employer is thus reviewable under PAJA or legality. Until the power of discretion is exercised by the employer, Francis J held in *Public Servants Association of SA obo Van der Walt v Minister of Public Enterprises and Another*<sup>673</sup> that the employee is not without a remedy and must report for duty and make representations and show good cause (it is up to this point in Francis J’s reasoning that is in line with De Villiers J’s). Francis J further held that ‘should the department refuse to consider the representations made or find that there exist no good cause shown, the employee could then declare a dispute and refer it to the relevant bargaining council and after that, if need be, on review.’<sup>674</sup>

#### (b) *Grootboom v NPA and another*<sup>675</sup> at the Labour Court

Molahlehi J held that the refusal to reinstate an employee in terms of section 17(5)(b)<sup>676</sup> (now section 17(3)(a) and (b)) of the PSA was an exercise of power given to the employer by statute.<sup>677</sup> Molahlehi J accordingly agreed with the *De Villiers* decision and held that:

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<sup>672</sup> *Phenithi* (note 663 above).

<sup>673</sup> (2010) 31 *ILJ* 420 (LC).

<sup>674</sup> *Ibid* para 18.

<sup>675</sup> (2010) 9 *BLLR* 949 (LC).

<sup>676</sup> In terms of section 25 of Act 30 of 2007, section 17(5) of the PSA is now sub-section 17(3) (a) and (b). The only difference between the two sections are that the word ‘officer’ has been substituted with the word ‘employee’.

<sup>677</sup> *Grootboom* (note 678 above) para 47.

‘Refusal by an employee whose employment has been deemed to have been terminated by operation of law constitute administrative action which can be challenged before the Labour Court in terms of section 158(1)(h) of the LRA. The decision can also be challenged on the basis of legality.’<sup>678</sup>

On arriving at this conclusion, Molahlehi J emphasised that when an employer is considering whether to reinstate, the employer is not considering terminating the contract of employment because at the stage of exercising the discretion, termination of the contract would have already taken place by virtue of automatic operation of law.<sup>679</sup> It was further held that the only power which statute provides after the termination has taken place is for the employer to consider whether there are good reasons for the employee’s absence and to exercise this discretion.<sup>680</sup> Molahlehi J argues that the answer as to why the termination via operation of law does not amount to an unfair labour practice can be found under section 186(2)(c) of the LRA which reads as follows: ‘(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement.’ For Molahlehi J this section refers to a failure to reinstate in terms of an agreement and not in terms of the legislation, which is what section 17(5) of the PSA provides for.<sup>681</sup>

Turning to the facts of the case, Molahlehi J arguably held that when the applicant went to the United Kingdom on a 12-month scholarship without the NPA’s permission, the applicant had accordingly absented himself as envisaged by section 17 of the PSA. For Molahlehi J, an employee who has been suspended still has a duty to inform the employer of his or her whereabouts during the period of suspension and to seek permission to be away, because if the employer requested the employee to resume duties, the employee would not have been able to do so; therefore the fact that the employer has knowledge of the whereabouts through email communication is irrelevant as what is key is whether or not the absence was authorised.<sup>682</sup> The court found that the absence was not authorised and that therefore section 17(5)(a) of the PSA had correctly come into operation.

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<sup>678</sup> Ibid para 47.

<sup>679</sup> Ibid paras 45 and 46.

<sup>680</sup> Ibid.

<sup>681</sup> Ibid para 55.

<sup>682</sup> Ibid para 50.

Molahlehi J in *Mogola and Another v Head of Department: Education N. O*<sup>683</sup> followed the approach in the same court's earlier judgment in *Grootboom* above. Molahlehi J held that it is obvious that the termination of employment in terms of section 14(1) of the EEA does not amount to a dismissal as envisaged under section 186 read with section 191 of the LRA.<sup>684</sup> The issue before Molahlehi J was whether the LC has jurisdiction to entertain a claim under section 14(2) of the EEA. In determining this issue, Molahlehi J relied on *De Villiers* and its earlier decision in *Grootboom*, where it was held that the statutory provision providing discretion not to reinstate amounts to administrative action. For Molahlehi J, exercises of public power must be checked because:

‘In this respect it could never have been the intention of the legislature that those employees whose services were terminated under section 14(1) of the EEA should not have a remedy in case they were to report for work after the expiry of the 14 (fourteen) days of absence. In granting the discretion under section 14(2) the legislature recognised that there would be cases where there is legitimate and reasonable explanation for absence from duty and those where there would be none. It is for this reason that the Court is duty bound to intervene where the discretion has not been properly exercised.’<sup>685</sup>

Molahlehi J correctly stated the position as trite that in the event where section 33 and PAJA are incorrectly approached, the alternative basis where the LC has jurisdiction in matters involving the provisions of section 14(2) of the EEA can be found under the provision of section 158(1) (h) of the LRA read with the provisions of section 1 of the Constitution, in other words, under the basis of legality.

(c) *Grootboom v NPA and another*<sup>686</sup> at the Labour Appeal Court.

On appeal, Tlaletsi JA agreed with the LC that the applicant's services were terminated by operation of law and that the respondents had not taken any decision or action which could be

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<sup>683</sup> (2012) 6 BLLR 584 (LC).

<sup>684</sup> Ibid para 28.

<sup>685</sup> Ibid para 32.

<sup>686</sup> (2013) 34 ILJ 282 (LAC).



reviewed or set aside.<sup>687</sup> Tlaleti JA arrived at this conclusion by referring to *Minister van Onderwys en Kultuur en Andere v Louw*<sup>688</sup> and *Phenithi*. In *Louw*, the Appellate Division held that where the respondent notifies the employee that he had been dismissed, it did not flow from the discretionary decision, but was purely communication of the consequence of an operation of law.<sup>689</sup> The SCA in *Phenithi* endorsed *Louw* by holding that:

‘In my view, the *Louw* judgment is definitive of the first issue in the present matter, viz whether the appellant’s discharge constituted an administrative act...There was no suggestion that *Louw* was wrongly decided. There being no “decision” or “administrative act” capable of review and setting aside, the second part of the first prayer in *casu*, viz that the “decision be declared an unfair labour practice”, falls away.’<sup>690</sup>

(d) *Grootboom v NPA and another*<sup>691</sup> at the Constitutional Court

Bosielo AJ, writing for the majority, considered the matter only in so far as to the correct interpretation and application of section 17(5)(a)(i) of the PSA to the facts of that case. The CC set aside the orders made in the LC and the LAC and declared that section 17(5)(a)(i) had not come into force.<sup>692</sup>

In arriving at the conclusion that the deemed dismissal had not come into force, Bosielo AJ held that section 17(5) (a) (i) effectively countenances the dismissal of the state employee without a hearing and thus implicates the right to fair labour practices enshrined in section 23 of the Constitution; therefore section 17(5) has the potential to affect people employed in the public service.<sup>693</sup> Bosielo AJ underscores the concerns mentioned above by Cohen that dismissals via operation of law are draconian, stating that ‘there is adverse effect of terminating employment for misconduct without notice or a hearing.’<sup>694</sup> Bosielo AJ also agreed with the LC and LAC and could not fault the principles flowing out of the *Louw* and *Phenithi* decisions; furthermore, the court does not overturn the conclusions made by

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<sup>687</sup> Ibid para 38

<sup>688</sup> 1995 (4) SA 383 (A).

<sup>689</sup> Ibid at 388.

<sup>690</sup> *Phenithi* (note 663 above) para 10.

<sup>691</sup> (2014) 35 *ILJ* 121 (CC).

<sup>692</sup> Ibid para 48.

<sup>693</sup> Ibid paras 37-38.

<sup>694</sup> Ibid para 38.

Molahlehi J that the discretion exercised under section 17(5)(a)(i) is reviewable under PAJA or Legality.

Bosielo AJ does, however, disagree with the LC and LAC on their conclusions that the applicant was absent without permission. For Bosielo AJ, one of the essential requirements of section 17(5)(a)(i) had not been met as the applicant was absent from his employment because he was suspended by the respondent, and therefore section 17(5) does not come into force by operation of law as the applicant was essentially absent with the permission of his employer.<sup>695</sup> Bosielo AJ correctly holds that ‘the applicant was placed on suspension and prohibited from performing any official duties with clear instructions not to come to his place of employment or have any conduct with the NPA staff’.<sup>696</sup> Therefore, Bosielo AJ argues that it is perverse to reason that ‘the applicant absented himself from employment within the meaning of section 17(5) (a) (i) from when his employer expressly required his absence from the workplace.’<sup>697</sup>

*(e) Solidarity and another v The Public Health and Welfare Sectoral Bargaining Council and others*<sup>698</sup> at the Supreme Court of Appeal since Grootboom.

Ponnan JA dealt with similar circumstances to *Grootboom* that a suspension by the employer was effectively permission to be absent from employment, and therefore the employer could not rely on the ‘deemed dismissal’ provisions.<sup>699</sup> Had the employee been absent without permission, Ponnan JA correctly found that by operation of law a ‘deemed dismissal’ in terms of section 17(5)(a)(i) of the PSA would have occurred resulting in the employee being unable to sustain a cause of action under section 192 of the LRA.<sup>700</sup> In these circumstances, the employee had been unfairly dismissed; therefore the SCA ordered the matter back to the first respondent for arbitration.

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<sup>695</sup> Ibid para 42.

<sup>696</sup> Ibid para 41.

<sup>697</sup> Ibid.

<sup>698</sup> (2014) 35 *ILJ* 2105 (SCA).

<sup>699</sup> Ibid para 10.

<sup>700</sup> Ibid paras 8-10.

(f) *Khulong v Minister of Health and others*<sup>701</sup> at the North Gauteng High Court

The applicant approached the HC seeking for an order in setting aside her discharge from the public service, alternatively seeking an order declaring that the decision to discharge the applicant from the Public Service be declared invalid and unlawful as well as reinstatement of her position prior to discharge with full back pay without any loss of service history and benefits.

Mabena AJ recognised as significant that the deeming provisions does not include any discretionary decisions of the employer to end the employment relationship, and moreover ‘the PSA deals primarily with the organisation and administration of the public service and therefore cannot be classified as labour legislation’.<sup>702</sup> However, the court found that the applicant did not willingly nor intentionally elect to absent herself from her place of employment.<sup>703</sup> Mabena AJ found that it is inescapable to conclude that the HC does not have jurisdiction to hear the matter. Mabena AJ concluded that, as pleaded in the alternative, the applicant was correct in relying on administrative law rather than employment arguments and therefore the decision to discharge the applicant from the service under the provisions of the Act was invalid and unlawful. Mabena AJ further provided the applicant with the relief sought that she be reinstated with full back pay and benefits.

It has been established above that when a decision is taken not to reverse the consequence of a deemed dismissal, section 33 and PAJA apply as well as the principle of legality. This development is important as it clarifies the relevant employee’s legal position. Since *Gcaba* recognised the pleadings as founding jurisdiction, the next subsection identifies the significance of this recognition in cases since *Gcaba*.

## 4.6 INVOKING THE COURT’S COMPETENCE THROUGH PLEADINGS

### 4.6.1 THE CONSTITUTIONAL COURT’S STANCE ON PLEADINGS

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<sup>701</sup> (59211/2009) [2013] ZAGPPHC 97 (11 April 2013 Unreported available at: <http://www.saflii.org/za/cases/ZAGPPHC/2013/97.html>).

<sup>702</sup> Ibid paras 12-14.

<sup>703</sup> Ibid para 17.

Langa CJ handed down an important and strong minority judgment in *Chirwa*<sup>704</sup> which has had a positive outcome for administrative lawyers in future cases. It is vital in proceeding to recognise the sentiments expressed by Langa CJ on jurisdiction and pleadings.

For Langa CJ, where an applicant makes application before the court, the claim itself must be approached as it is pleaded,<sup>705</sup> Therefore, determining whether a dismissal constitutes administrative action is part of the substantive merits of the claim and is not a jurisdictional requirement.<sup>706</sup> Langa CJ importantly held that:

‘... a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this Court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.’<sup>707</sup>

In *Gcaba*<sup>708</sup> Van der Westhuizen J subsequently endorsed the views expressed by Langa CJ, holding that jurisdiction is determined based on the pleadings and not the substantive merits of the case. Van der Westhuizen J appositely stated:

‘In the event of the court’s jurisdiction being challenged at the outset (*in limine*), the applicants pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the courts competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicants would sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be

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<sup>704</sup> *Chirwa* (note 570 above).

<sup>705</sup> *Ibid* para 168.

<sup>706</sup> *Ibid* para 169.

<sup>707</sup> *Ibid*.

<sup>708</sup> *Gcaba* (note 507 above).

determined exclusively by the Labour Court, the High Court would lack jurisdiction.<sup>709</sup>

The views expressed by Langa CJ and Van der Westhuizen J have further been endorsed by the two recent CC judgments in *My Vote Counts NPC v Speaker of the National Assembly and Others*<sup>710</sup> and *Mbatha v University of Zululand*<sup>711</sup>. In the latter case, Zondo J, writing for a unanimous majority, held that ‘when a court determines whether it has jurisdiction, the pleadings must be examined with the view on finding the legal basis of the claim under which the applicant has chosen to invoke the courts’ competence.’<sup>712</sup> Zondo J importantly further states that: ‘whether the facts also support another cause of action is immaterial, it follows that the facts must be pleaded to sustain the pleaded cause of action, therefore the facts as pleaded are important in determining jurisdiction.’<sup>713</sup> The LC in the *Grootboom*<sup>714</sup> judgment appositely stated as obvious the position that a litigant must make out his or her case and relief sought in the pleadings and the court accordingly must approach the said matter as pleaded.<sup>715</sup>

It is trite that pleadings invoke the court’s competence to hear a dispute. In addition, the CC has recognised that, just because a litigant has chosen to plead a particular cause of action, it does not mean it is not reviewable because another cause of action existed. Zondo J underscored the position that Nugent AJA took over a decade ago in *Fedlife*.<sup>716</sup> Nugent AJA held that disputes fall within the terms of section 191 of the LRA, if the fairness of the dismissal is subject to the employee’s complaint. The fact that an unlawful dismissal might also be unfair is irrelevant to the enquiry.<sup>717</sup> If the ‘subject of the 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.’<sup>718</sup> It can be said that, if a public sector employee were to plead unlawfulness under section 33 and PAJA, the fact that a public sector employee could also have pleaded unfairness under section 23 and the LRA is immaterial.

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<sup>709</sup> Ibid para 75.

<sup>710</sup> *My Vote Counts* (note 481 above) para 131-134.

<sup>711</sup> (2014) *ILJ* 349 (CC).

<sup>712</sup> Ibid para 160.

<sup>713</sup> Ibid.

<sup>714</sup> *Grootboom* LC (note 678 above).

<sup>715</sup> Ibid para 55.

<sup>716</sup> *Fedlife* (note 559 above).

<sup>717</sup> Ibid para 27.

<sup>718</sup> Ibid.

In *Nakin*<sup>719</sup> the HC may have decided the matter before the *Gcaba* judgment was handed down; however Froneman J's recognition of *Fedlife* and *Fredericks* could not have been more relevant today since *Gcaba* because how you plead will determine the particular cause of action one seeks.<sup>720</sup> The applicant in *Nakin* chose to characterise the failure by the respondent to pay outstanding benefits as unlawful administrative action; moreover, the applicant chose not to formulate his claim in contract or under any empowering provision of the LRA or the common law contract of employment.<sup>721</sup>

Froneman J held that the applicant does not refer to any unfair labour practice under the LRA in his papers, and therefore when, in the founding papers, the applicant characterises the failure of the department as administrative action, it fails to be reviewed and set aside under the provisions of PAJA.<sup>722</sup> Froneman J continued to hold that based on the decision in the CC and SCA in *Fredericks* and *Old Mutual Life Assurance Co SA Ltd v Gumbi*<sup>723</sup> there is no doubt that the HC retains jurisdiction. In coming to this conclusion Froneman J held:

‘Under s.38 of the Constitution, the allegation of the infringement of a fundamental right would be sufficient to clothe the High Court with Jurisdiction to enquire whether the right to just administrative action has been infringed or not, and to grant appropriate relief depending on its findings. PAJA gives specific content to this competence in relation to the fundamental right to just administrative action.’<sup>724</sup>

Van der Westhuizen J in *Gcaba*<sup>725</sup> continued to recognise and cautioned that section 157 of the LRA should not be interpreted in a manner that effectively destroys causes of action or remedies, and therefore, where a remedy lies in the HC, section 157(2) of the LRA does not state that the remedy no longer lies there.<sup>726</sup> For Froneman, the *Chirwa* judgment may have disturbed a settled state of affairs, but it has not had the effect of overruling the existing state

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<sup>719</sup> *Nakin* (note 586 above).

<sup>720</sup> *Ibid* para 40.

<sup>721</sup> *Ibid* para 43.

<sup>722</sup> *Ibid* para 12.

<sup>723</sup> 2007 (5) SA 552 (SCA).

<sup>724</sup> *Ibid*.

<sup>725</sup> *Gcaba* (note 507 above).

<sup>726</sup> *Ibid* para 73.

of law.<sup>727</sup> It is arguable that Van der Westhuizen J sought to give effect to settled law rather than continue on the path of denying fundamental rights as was done in *Chirwa*.

The SCA in *Makambi v MEC, Department of Education, Eastern Cape Province*<sup>728</sup> recognised that the CC in *Chirwa* did not overrule *Fredericks* but were content with distinguishing it.<sup>729</sup> The appellant in *Makambi* sought to distinguish her case from *Chirwa* from the outset. The appellant did not base her case on it being a labour dispute but rather relied on an alleged violation of her constitutional right to just administrative action.<sup>730</sup> The appeal went against the appellant as Farlam JA held that the appellant's case does not fall on the *Fredericks* side of the line.<sup>731</sup> In coming to this conclusion, Farlam JA held that in *Fredericks*, the applicants disavowed any reliance to section 23 of the Constitution nor did they rely on any of the provision in the LRA. For Farlam JA, it was correct that the appellant did not rely on any of the provision of the LRA; she did, however, rely on section 23 of the Constitution in her founding affidavit where she submitted that the department's conduct in terminating her emoluments in the way it did constituted an unfair labour practice as contemplated by section 8 of the Constitution.<sup>732</sup> The appellant also contended that the department's conduct constituted administrative action which is unlawful, unreasonable and procedurally unfair as contemplated by section 33 of the Constitution.<sup>733</sup> Farlam JA held that, in *Chirwa*, the applicant approached the HC and made it clear that her claim was based on a violation of the provisions of the LRA,<sup>734</sup> For Farlam J, when one compares the complaints set out in the appellant's founding affidavit with those on which *Chirwa* relied, it is clear that it is not possible to hold that the appellant's case falls on the *Frederick's* side of the line.<sup>735</sup>

Quinot correctly recognises that 'despite the seemingly categorical views expressed by the constitutional court in *Gcaba*, the issue of jurisdiction of the HC to adjudicate on disputes arising within a labour context, but pleaded in administrative-law terms, is clearly not settled.'<sup>736</sup> *Fredericks* is arguably still good law and therefore *Gcaba* seemingly has settled the long debated application of administrative law rules to public employment decision; there is nothing holding future litigants from approaching the courts and pleadings unequivocally

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<sup>727</sup> *Nakin* (note 585 above) para 13.

<sup>728</sup> 2008 (5) SA 449 (SCA).

<sup>729</sup> *Ibid* para 15.

<sup>730</sup> *Ibid* para 13.

<sup>731</sup> *Ibid* para 17.

<sup>732</sup> *Ibid* paras 9 and 15.

<sup>733</sup> *Ibid* para 9.

<sup>734</sup> *Ibid* para 15.

<sup>735</sup> *Ibid* para 17.

<sup>736</sup> Quinot G '*Administrative Law*' 2010 AS 49.

under PAJA or in the alternative under legality. The appellant in *Makambi* should have approached the HC and pleaded solely on section 33 of the Constitution and PAJA and arguably would have succeeded. The *Aberdeen* case discussed below is an example of an unequivocal pleading approach.

In *Aberdeen Senior Secondary School v MEC for Department of Education, Eastern Cape Province and Others*,<sup>737</sup> the applicant sought to review the decision of the Head of Department to appoint the third respondent as deputy principal of Aberdeen Senior Secondary School. Nhlanguela J had two issues to decide: first, whether the court has jurisdiction to entertain the application, and, second whether the process undertaken by the Head of Department in appointing the third respondent complied with the provisions of section 6 of the EEA read with paragraph 3.2 (b) of the Personal Administration Measures (hereunder referred to as PAM) which were promulgated in terms of the EEA.

On deciding the first issue, Nhlanguela J concluded that the HC does have jurisdiction to entertain the application before it. In arriving at this conclusion, the court looked at an SCA judgment by Hurt AJA in *Head, Western Cape Education Department And Others v Governing Body, Point High School And Others*<sup>738</sup> as it was identical to the present case regarding the issue of jurisdiction. Hurt AJA in analysing the nature of the cause of action of the department, held: ‘[t]he appointments made by the HOD were plainly the result of administrative action as defined in s 1 of PAJA. The empowering provisions were those set out in s 6(3) of the EEA.’<sup>739</sup>

For Nhlanguela J, an analysis of those words meant that the issue before the SCA to adjudicate was compliant or otherwise with the provisions of the EEA and not a breach of the provisions of the LRA,<sup>740</sup> and therefore ‘the complaint made by the appellant was not based on the unfairness of a practice that related to an employment contract between the department and the candidates for appointment to a higher education post.’<sup>741</sup> Nhlanguela J continued to emphasise the importance of interrogating the applicant’s cause of action because ‘the Constitutional Court in *Gcaba* enjoins the court determining the issue of jurisdiction to interrogate the applicant’s cause of action.’<sup>742</sup> On the issue of jurisdiction, Nhlanguela J had

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<sup>737</sup> (2011) 32 *ILJ* 871 (ECB).

<sup>738</sup> 2008 (5) SA 18 (SCA).

<sup>739</sup> *Ibid* para 10.

<sup>740</sup> *Aberdeen* (note 740 above) para 4.

<sup>741</sup> *Ibid*.

<sup>742</sup> *Ibid* para 6.



to determine whether or not the facts as pleaded by the applicant sustain a cause of administrative action that is recognizable by the HC.<sup>743</sup> If the facts pleaded fall within the jurisdiction of the LC, the HC would not have jurisdiction.

Nhlanguela J held that within the founding affidavit of the applicant's pleadings as well as evidence of fact led to the conclusion that the claim pleaded is based on unlawful administrative action with regard to the manner in which the decision was made by the Head of Department to decline the recommendation of the School Governing Body.<sup>744</sup> The applicant claims that the decision was irregular, irrational, unreasonable and unsupportable to the extent that it does not comply with the provisions of section 6 and 7 of the EEA, read with paragraph 3.2(b) of PAM.<sup>745</sup> Therefore because of the alleged breaches, the court held that the applicant was fully entitled to approach the court for judicial reviewing under section 6(2) of PAJA.<sup>746</sup> Nhlanguela J appositely held that 'nowhere in the founding affidavit was the claim based on the breaches of the provisions of the LRA pleaded.'<sup>747</sup>

Brand and Murcott argue that *Gcaba* seems to have not settled the status of employment-related action as non-administrative action in the context of public-sector employment disputes.<sup>748</sup> As mentioned before in this dissertation, there appears to be a great deal of uncertainty persisting in this regard. Consequently, the authors recognise that in 2013 administrative law arguments in several employment-related decisions were brought before the courts so that issues relating to the relationship between administrative law and labour law had to be decided and particularly whether the HC is the appropriate forum in which to challenge employment related action.<sup>749</sup>

In *Provincial Commissioner, Gauteng South African Police Services v Mnguni*,<sup>750</sup> the respondent, who held the rank of inspector in the SAPS, was charged together with five of his colleagues with five counts of misconduct. It was alleged, in respect of each count, that they had contravened regulation 20(z) of the South African Police Service Discipline Regulations.

Although the disciplinary tribunal found him not guilty on counts 1, 4 and 5, he was found guilty on counts 2 and 3, where the respondent received money from members of the

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<sup>743</sup> Ibid para 7.

<sup>744</sup> Ibid.

<sup>745</sup> Ibid.

<sup>746</sup> Ibid.

<sup>747</sup> Ibid.

<sup>748</sup> Brand D & Murcott M 'Administrative Law' 2013 AS 77.

<sup>749</sup> Ibid.

<sup>750</sup> (2013) 34 ILJ 1107 (SCA).

community or prisoners in return for releasing prisoners unlawfully from police custody. The disciplinary tribunal imposed a sanction of dismissal from the police service for misconduct. The respondent subsequently appealed against his dismissal to the relevant appeals authority (The Provincial Commission, Gauteng SAPS) who dismissed the appeal. The respondent then approached the HC successfully for the review and setting aside of the decision to dismiss him. It was this decision which subsequently led to the appeal in the SCA on the grounds that the respondent approached the HC, invoking the court to decide on the wrong body of law.

Brand and Murcott argue that the respondent thought unsuccessfully that *Chirwa* and *Gcaba* had left a gap for him to exploit.<sup>751</sup> The respondent in his replying affidavit disowned any reliance on administrative action under PAJA because dismissals no longer constitute administrative action, and the fair labour practices provisions of the LRA were also disavowed.<sup>752</sup> The respondent approached the HC, arguing that the decision by the appeals authority to dismiss him was ‘quasi-judicial’ and thus subject to common law review.

Mpati P had to determine whether the respondent had a common law right of review. The court held that the respondent did not. In coming to this conclusion, Mpati P relied on the CC’s decision in *Bato Star* and *Pharmaceutical Manufactures*, holding essentially what was shown in Chapter 2, namely, that there is only one system of law which is shaped by our Constitution as the supreme law of the Republic, and that, moreover, the first port of call is now the constitutionally sourced administrative law which is given effect to under PAJA.<sup>753</sup> Therefore, for Mpati P, the respondent’s claim was destined to fail because ‘it follows that the respondent’s claim for a common law review, in the High Court, of the appeal tribunal’s confirmation of his dismissal was bad in law.’<sup>754</sup>

Mpati P significantly recognised that the effect of the dismissal was that the respondent’s contract of employment was terminated and, as a result, there were three bodies of law which were open to the respondent in which he could have founded the challenge to his dismissal.<sup>755</sup> First, the respondent could have approached the LC for an infringement of his right not to be unfairly dismissed or subjected to unfair labour practices; second was the common law right to insist upon performance of contract, which, however, was not raised at all; and since the

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<sup>751</sup> Brand & Murcott (note 751 above) 77.

<sup>752</sup> *Mnguni* (note 753 above) para 16.

<sup>753</sup> *Ibid* paras 17-18.

<sup>754</sup> *Ibid* para 25.

<sup>755</sup> *Ibid* para 21.

respondent was a member of the public service, the third was a claim for the infringement of his right to just administrative action.<sup>756</sup> For Mpati P, reliance on PAJA would have either been pursued in the HC or the LC. However, since the respondent disowned reliance on section 33 and PAJA, it was not open to the court to decide which. The court further recognised that the potential claim arising out of rights created by section 185 of the LRA, which are enforceable only in the LC, was also disavowed. Therefore the appeal was upheld as there was no other basis upon which the courts competence to review was invoked.<sup>757</sup>

In *Letele v The MEC, Free State Provincial Government, Department of Education*,<sup>758</sup> the applicant was employed by the Department of Education as a Chief Director for a period of at least 12 years. The applicant was subsequently charged with misconduct and the said charges were a contravention of treasury regulations. She was then exonerated from any wrongdoing by the Misconduct Presiding Officer and this then prompted the respondent to file an appeal. The appeal was never held nor did the respondent request the applicant to make representations. The respondent then furnished the applicant with a letter of dismissal, which led to the applicant approaching the relevant bargaining council where the commission found the respondent to have acted *ultra vires*. The applicant then subsequently approached the HC for an order declaring the dismissal *ultra vires* and *void ab initio*, as well as reinstatement and remuneration (ancillary relief) owing from the date of the dismissal letter to the date of her formal reinstatement.

The primary issue before Thamage AJ was whether the court has jurisdiction to entertain and adjudicate over the applicant's case.<sup>759</sup> Thamage AJ held that the question of jurisdiction and the formulation of a cause of action has already been decided by the CC in *Gcaba*.<sup>760</sup> Thamage AJ recognised that the pleadings together with the supporting affidavits should be scrutinised and be interpreted to determine the legal basis of the applicant's claim.<sup>761</sup> Therefore for Thamage AJ the legal basis of the applicant's claim is to get a declaratory order declaring that her dismissal by the respondent is *ultra vires* and *void ab initio*; the applicant also prayed for ancillary relief of re-instatement and for her salary from the date of dismissal

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<sup>756</sup> Ibid.

<sup>757</sup> Ibid.

<sup>758</sup> [2013] ZAFSHC 144 (29 August 2013) Unreported available at <http://www.saflii.org.za/za/cases/ZAFSHC/2013/144.html>.

<sup>759</sup> Ibid para 4.

<sup>760</sup> Ibid para 9.

<sup>761</sup> Ibid para 10.

till the date of re-instatement.<sup>762</sup> The applicant's claim was not on the basis of the unfairness of the dismissal, nor was the claim on the basis of an unlawful dismissal as the applicant expressly disavowed any reliance to the LRA relating to unfair dismissals or unfair labour practices and specifically disavowed reliance to PAJA.<sup>763</sup> The applicant based her application on the constitutional principle of legality, alleging that the 'SMS handbook' issued in terms of the Public Service Regulations of 2001 did not make provision for an appeal by the respondent against a decision of a misconduct presiding officer, and that therefore the noting of the appeal and the subsequent dismissal was *ultra vires*.<sup>764</sup> The court held that the nature of the applicant's claim does not fall within the exclusive jurisdiction of the LC and thus the HC's jurisdiction is not ousted.<sup>765</sup> Thamage AJ held that the action of the respondent was contrary to the subordinate legislation; thus the respondent has acted *ultra vires*, and consequently the action was *void ab initio*.<sup>766</sup>

However, Thamage AJ held that the HC's jurisdiction sourced in legality only extends in so far as determining the validity of the conduct of public entities. For Thamage AJ, the HC does not have jurisdiction to entertain matters that are exclusively meant for the LC, and therefore it is the LC that is specifically placed to entertain ancillary relief claims.<sup>767</sup> Based on how the applicant had pleaded in invoking the court's competence, the matter was reverted back to the parties to act in a manner which corrects the situation.<sup>768</sup> Hoexter recognises the consequences of ultimately using the principle of legality as it is a limited route.<sup>769</sup> In this instance, the relief that the applicant sought should have corresponded with the appropriate forum. Obviously, the LRA route in the LC would have provided such relief.

Brand and Murcott argue that there still remains 'a great deal of uncertainty as to the circumstances in which administrative law may successfully be invoked in the context of the public-sector employment disputes'.<sup>770</sup> The authors state that a better approach for public sector employees would be to 'invoke the court's competence through the LRA rather than challenge both dismissals and unfair labour practices in the High Court'.<sup>771</sup> The court's competence to hear a matter depends primarily on how one pleads; therefore it is permissible

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<sup>762</sup> Ibid para 11.

<sup>763</sup> Ibid para 8.

<sup>764</sup> Ibid paras 12 and 17.

<sup>765</sup> Ibid para 13.

<sup>766</sup> Ibid para 18.

<sup>767</sup> Ibid paras 20 and 23.

<sup>768</sup> Ibid para 24.

<sup>769</sup> Hoexter (note 484 above) 124.

<sup>770</sup> Brand & Murcott (note 751 above) 83.

<sup>771</sup> Ibid.

that, if a public sector employee pleads that the dismissal is unfair and bases a claim under fair labour practices, then the authors' views are correct. In circumstances where only the LRA would be applicable, this would be the best route for the public-sector employee. However, the LRA route is not the only one that is available. Although it has been regarded as the 'preferred' route, it does not accordingly deny other available remedies.

For *Thamage AJ*, relief does not solely emanate out of the LRA as the HC could also have provided such relief if the applicant pleaded and based her claim on seeking enforcement of an employment contract. In those circumstances, the HC would have been inclined to provide such additional relief. *Thamage AJ* further recognised that the applicant may have also been able to base her cause of action explicitly under PAJA.<sup>772</sup> In contrast to the *Khulong*,<sup>773</sup> had the applicant sought to plead on the basis that the discharge be declared as invalid and/or unlawful, the relief sought may very well have been granted as *Thamage AJ* was prepared to do so.

It has been mentioned numerous times above that the pleadings invoke the court's competence to hear a particular dispute and how one pleads will determine the legal basis of one's claim. This will consequently establish whether the court may grant the particular relief sought or not. In *Tlali v Mantsopa Local Municipality*,<sup>774</sup> the case was similar to *Letele* in which the full bench of the HC was not called upon to decide the re-instatement and arrear remuneration, but rather the applicant sought the HC to decide on the lawfulness of the dismissal. Hancke J<sup>775</sup> relied on *Fedlife* in holding that the question whether a dispute fall within the terms of section 191 of the LRA depends on what is in dispute<sup>776</sup> For Hancke J, 'the fact that an unlawful dismissal might also be unfair appears to be irrelevant in this regard.'<sup>777</sup> Hancke J held that, as a result of the manner in which the applicant approached the court, the dismissal was unlawful.<sup>778</sup>

The LAC in *Ngutshane v Arivia Kom (Pty) Ltd t/a Arivia.Kom and Others*<sup>779</sup> confirmed the court *a quo*'s decision that the LC did not have jurisdiction to hear the matter. In coming to

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<sup>772</sup> *Letele* (note 761 above) paras 20-21.

<sup>773</sup> *Khulong* (note 704 above).

<sup>774</sup> unreported, referred to as [2011] ZAFSHC 195, 1 December 2011; available online at <http://www.saflii.org/za/cases/ZAFSHC/2011/195.html>.

<sup>775</sup> Van Zyl J and Naidoo AJ concurring.

<sup>776</sup> *Tlali* (note 777 above) para 15.

<sup>777</sup> *Ibid*.

<sup>778</sup> *Ibid* para 20.

<sup>779</sup> (JA 59/09) [2010] ZALAC 36 (26 November 2010 Unreported available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZALAC/2010/36.html&query=Ngutshane>).

this conclusion, Hendricks AJA held that, if one were to carefully read the appellant's founding affidavit attached to the notice of motion in the proceedings before the court *a quo*, it proves that the appellant did not make out a case that the court had the powers to deal with the matter on the basis of the law of contract, and therefore no breach of a contractual term was pleaded; moreover, the appellant expressly pleaded her case in terms of section 158(1)(a) of the LRA read with PAJA.<sup>780</sup>

Hendricks AJA importantly recognised a clear distinction between unfair dismissals and unlawful termination of contract that 'it is trite that unlawful termination of employment contracts are not adjudicated by the CCMA or bargaining councils.'<sup>781</sup> Such forums only have jurisdiction on disputes about unfair labour practices and unfair dismissals.<sup>782</sup> Hendricks AJA held that '...a further distinction between labour disputes involving the state as employer which falls under the LRA, and based on the same facts, whether the dispute may be considered to fall under PAJA.'<sup>783</sup>

Hendricks AJA recognised the views expressed by the CC in *Gcaba* on pleadings and arguably in doing so considered the administrative action route under PAJA as a possible consideration based on how one pleads.<sup>784</sup> Hendricks AJA held that the appellant's case was not a case pleaded under the PAJA route. In coming to this conclusion, it was held that the appellant's complaint was in essence about the fairness of her dismissal.<sup>785</sup> For Hendricks AJA, the pleadings demonstrate that there was no reliance on her contract of employment as founding the basis of her cause of action before the LC, and, since the LC is not a court of first instance,<sup>786</sup> the appellant was wrong to eschew her right to approach the CCMA which is precisely what Hendricks AJA recognised as the warning made by the CC in *Gcaba*.<sup>787</sup>

In *Hulane and Another v Msunduzi Municipality*,<sup>788</sup> the applicants were not as successful in the way the pleadings were conducted. Steyn J held that the applicants failed to establish jurisdiction through the infringement of a clear *prima facie* right and without establishing such a right on the basis of the pleadings, and therefore the court lacked jurisdiction.<sup>789</sup> Steyn

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<sup>780</sup> Ibid para 26.

<sup>781</sup> Ibid para 23.

<sup>782</sup> Ibid.

<sup>783</sup> Ibid para 24.

<sup>784</sup> Ibid para 25.

<sup>785</sup> Ibid para 28.

<sup>786</sup> Ibid para 27.

<sup>787</sup> Ibid.

<sup>788</sup> 2012 (3) SA 121 (KZP).

<sup>789</sup> Ibid para 15.

J importantly recognised that the applicants, placing reliance on *Makhanya*, did not allege that any administrative rights has been infringed,<sup>790</sup> and, moreover, the fact that the applicants merely stated that the cause of action was based on contract does not in general mean that it must be dealt with as a contractual dispute.<sup>791</sup> For Steyn J, the applicants approached the HC seeking a declaratory order relating to their employment with the respondent.<sup>792</sup> The basis of the claim remained a labour dispute, and thus it was in those circumstances where the essence of the claim remains an issue to be considered by the LC, by virtue of section 157 of the LRA.<sup>793</sup>

Dambuza JA, writing for the majority in *South African Municipal Workers' Union v Mokgatla*,<sup>794</sup> recognised the CC's judgment in *Gcaba* that jurisdiction is determined by the pleadings. The court, therefore held that the HC did not have jurisdiction to hear the matter and the respondents should have approached the LC. In arriving at this conclusion, Dambuza JA held that the basis of the respondents' claim from the very beginning was that they pleaded specifically in their application before the court *a quo* that the appellants should have complied with the relevant clauses of the union's constitution.<sup>795</sup> The court held that the basis for which the HC's jurisdiction was challenged was expressly provided under section 158(1)(e)(i)<sup>796</sup> of the LRA.<sup>797</sup> For Dambuza JA, the fact that the respondents had eschewed any reliance to the LRA was irrelevant because they were essentially bound by the substance of their cases as they had pleaded.<sup>798</sup>

The SCA in *Makhanya*<sup>799</sup> provides important criticism of the *Chirwa* judgment, holding that the majority seemed to be surprised that the plaintiff 'might formulate his or her claim in different ways and bring it in a forum of his or her choice'.<sup>800</sup> However, for Nugent AJ, the majority's surprise was misplaced because:

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<sup>790</sup> Ibid para 14.

<sup>791</sup> Ibid.

<sup>792</sup> Ibid para 1.

<sup>793</sup> Ibid para 14.

<sup>794</sup> 2016 (5) SA 89 (SCA).

<sup>795</sup> Ibid para 15.

<sup>796</sup> The section provides that:

' (1) The labour court may, (e) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged noncompliance, (i) the Constitution of that trade union or employers' organisation (as the case may be).'

with

<sup>797</sup> *Mokgatla* (note 797 above) para 15.

<sup>798</sup> Ibid.

<sup>799</sup> *Makhanya* (note 592 above).

<sup>800</sup> Ibid para 34.

‘...if a claim, as formulated by the claimant, is enforceable in a particular court, then plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.’<sup>801</sup>

The SCA in *SA Maritime Safety Authority v McKenzie*<sup>802</sup> further recognised that when a court is faced with a jurisdictional challenge raised, the correct approach is to determine whether the court has jurisdiction over the claim as pleaded and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the facts.<sup>803</sup>

A public-sector employee’s chances of success rest primarily on how the employee pleads their cause of action. Where there exists doubt as to the legal basis of the claim, Van der Westhuizen J in *Gcaba*<sup>804</sup> provided some guidance, holding that the pleadings can be established through motion proceedings, including the formal notice of motion as well as the contents of the supporting affidavits.<sup>805</sup> The court is required to interpret those documents to establish the basis of the applicant’s claim. Once the claim has been established, Van der Westhuizen J rightly states that it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.<sup>806</sup> From the outset, it would be beneficial for public-sector employees to plead the same way as was done in *Aberdeen*. In doing so, there would be no doubt as to the legal basis of the claim when pleaded unequivocally.

Having discussed the significant impact that *Gcaba*’s recognition on pleadings has had in future cases, until such time as the CC provides clarity as to meaning of public impact as an exception, the next subsection aims to provide clarity on this issue.

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<sup>801</sup> Ibid.

<sup>802</sup> [2010] 5 BLLR 488 (SCA).

<sup>803</sup> Ibid para 7.

<sup>804</sup> *Gcaba* (note 507 above).

<sup>805</sup> Ibid para 75.

<sup>806</sup> Ibid.



## 4.7 PUBLIC IMPACT AND PUBLIC INTEREST EXCEPTION

Van der Westhuizen J in *Gcaba*<sup>807</sup> provided the exception to the general rule that employment and labour relationships issues would amount to administrative action within the meaning of PAJA in circumstances where a grievance is raised by an employee relating to the conduct of the state as employer having direct implications or consequences for other citizens.<sup>808</sup> Van der Westhuizen J held that, although the failure to promote and appoint *Gcaba* was not administrative action, the situation might be different where a decision is taken by the president as head of the national executive in appointing a national police commissioner, which has huge public import.<sup>809</sup>

It has already been shown in Chapter 2 and 3 that not all administrative acts affect more than one person nor in these circumstances have public impact and there is judicial support for this argument. Nonetheless, *Gcaba's* general rule and the public impact exception has already been applied in case law. It is, therefore, important to discuss each case in turn below.

### 4.7.1 PUBLIC IMPACT

#### (a) *Majake v Commission for Gender Equality and Others*<sup>810</sup>

Quinot and Hoexter have identified that, although the *Majake* judgment had been handed down four months prior to the *Gcaba* judgment, the outcome is in line with the general rule and its public-impact loophole.<sup>811</sup>

In this case, the applicant approached the HC, seeking an order to be reinstated to her position as the Chief Executive Officer of The Commission for Gender Equality (hereafter referred to as CGE).<sup>812</sup> It is important to recognise that the CGE is a body created under Chapter 9 of the Constitution, with the mandate to advance gender equality. It was alleged before the HC that the decision made by the respondent in terminating the applicant's employment was

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<sup>807</sup> *Gcaba* (note 507 above).

<sup>808</sup> *Ibid* para 64.

<sup>809</sup> *Ibid* para 68 and footnote 104 of the judgment.

<sup>810</sup> 2010 (1) SA 87 (GSJ).

<sup>811</sup> Quinot (note 739 above) 49; Hoexter (note 484 above) 218.

<sup>812</sup> *Majake* (note 813 above) para 1.

unconstitutional, unlawful and invalid.<sup>813</sup> It was also alleged that the conduct constituted unlawful administrative action, a breach of the principle of legality, and a breach of the applicant's contract of employment.<sup>814</sup> It was further alleged that the applicant was adversely affected by the decision to dismiss without a hearing and thus the decision resulted in the applicant suffering reputational harm, financial prejudice and emotional stress.<sup>815</sup>

For Mokgoathheng J the question to be determined was whether the applicant's dismissal is premised on the exercise of statutory or contractual power by the first respondent to justify the inference that her dismissal constituted administrative action.<sup>816</sup> It was held that the dismissal constituted administrative action.<sup>817</sup> In coming to this conclusion, it was recognised that the cause of action was based on section 33 of the Constitution and PAJA; moreover, Mokgoathheng J recognised that the applicant expressly disavowed any reliance to section 23 of the Constitution and the LRA and specifically based her claim under section 33 and PAJA and therefore it was held that the HC has the necessary jurisdiction because *Fredericks*, *Fedlife* and *Chirwa* had settled the law in this regard.<sup>818</sup>

In applying the PAJA enquiry, it was held that the first respondent was a public entity created by statute and therefore operating under statutory authority and that the power to appoint the applicant corresponds with the power to dismiss, which is sourced in statute, and therefore the decision involved an exercise of public power.<sup>819</sup> Mokgoathheng J further held that, since the power to appoint is statutory and not an *incidental* arising from the contract of employment, the correlative power to dismiss is also sourced in statute; therefore, the dismissal amounts to administrative action as envisaged by section 33 of the Constitution, which consequently renders the decision susceptible to administrative review under PAJA.<sup>820</sup>

Mokgoathheng J further held that in exercising public power, the respondents must comply with the Constitution and the principle of legality; therefore the Chapter 9 institution is 'constrained by the principle that it may exercise no power and perform no function beyond that conferred upon it by law.'<sup>821</sup> The respondent's conduct, it was held, offends the notion of

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<sup>813</sup> Ibid para 3.

<sup>814</sup> Ibid.

<sup>815</sup> Ibid para 40.

<sup>816</sup> Ibid para 46.

<sup>817</sup> Ibid para 52.

<sup>818</sup> Ibid paras 20-27.

<sup>819</sup> Ibid para 51.

<sup>820</sup> Ibid para 52.

<sup>821</sup> Ibid para 57.

one's sense of justice and fairness and, in terminating the contract of employment, the decision was inconsistent with the Constitution and the principle of legality.<sup>822</sup>

While Mokgoathheng J recognised that the applicant is only entitled to reinstatement as a matter of contract, the court awarded the applicant reinstatement because there was a clear infringement of the applicant's section 10 constitutional right to dignity and section 33 right to lawful, reasonable and procedurally fair administrative action.<sup>823</sup>

It is important to recognise that the applicant is the chief executive officer of a Chapter 9 institution that is enjoined to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice,<sup>824</sup> Therefore Quinot correctly argues that the outcome in the *Majake* matter may be correct, in line with the *Gcaba's* exception, because a Chapter 9 institution has sufficient public interest.<sup>825</sup> Any decision to terminate its chief executive officer would have public import.

*(b) Public Servants Association of South Africa and Another v Minister of Labour and Another*<sup>826</sup>

Myburgh AJ, writing for the LC, recognised that the review application before him was brought in terms of section 158(1)(h) of the LRA which established the LC's jurisdictional footprint to review conduct by the state in its capacity of employer on recognised grounds in law.<sup>827</sup> Myburgh AJ recognised that the application was pleaded solely on administrative action under PAJA with legality being the alternative route. It was pleaded by the second applicant that the revocation of his designation as the registrar was unreasonable, irrational, disproportionate and procedurally unfair.<sup>828</sup> Myburgh AJ recognised the position mentioned above on the duality of rights in circumstances where the same conduct on the part of the employer may give rise to different courses of action and remedies in law,<sup>829</sup> and that the fact that the second applicant could have constructed his case as an unfair labour practice but

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<sup>822</sup> Ibid para 85.

<sup>823</sup> Ibid para 87.

<sup>824</sup> Ibid para 53.

<sup>825</sup> Quinot (note 739 above) 49.

<sup>826</sup> (2016) 37 *ILJ* 185 (LC).

<sup>827</sup> Ibid para 40.

<sup>828</sup> Ibid paras 41 and 42.

<sup>829</sup> Ibid para 44.

chose not to have no bearing on the LC's jurisdiction to entertain an administrative law or legality review.<sup>830</sup>

Myburgh AJ recently recognised that, although *Gcaba* established a general rule that employment issues in the public sector do not constitute administrative action, the general rule is not invariable.<sup>831</sup> For Myburgh AJ, 'one potential exception appears to be the dismissal of high-ranking public servants who hold statutory offices in the public interest.'<sup>832</sup> Myburgh AJ conceded that, like *De Villiers* and *Hendricks*, the present matter was also one of those exceptions to the general rule, and therefore it was held that the decision of the Minister of Labour in revoking the employee's designation as Registrar of Labour Relations in terms of a specific statutory provision amounted to administrative action.<sup>833</sup> As noted by Quinot, the decision to appoint and dismiss the chief executive officer of a Chapter 9 institution would also be regarded as an exception to the general rule.

In coming to this conclusion, Myburgh AJ held that the 'public impact' requirement was met because the registrar occupies an independent function, performing critically important functions under the LRA in the interest of hundreds and thousands of trade union members.<sup>834</sup> Within labour relations in general, the impact of a removal of the registrar is of huge public import.<sup>835</sup> In addition, Myburgh AJ held that even where an acting registrar has been appointed to replace the employee, the impugned decision does not then only have an impact on the employee and thus has no wide consequences.<sup>836</sup> For Myburgh AJ, it is clear that the broader constituency of members is affected by the decision.<sup>837</sup>

Turning to the administrative action enquiry, Myburgh AJ held that it was accepted between the parties as the minister is clearly an organ of state exercising a public power or performing a public function in terms of the section 208A of the LRA when revoking the employee's designation as registrar.<sup>838</sup> Myburgh AJ importantly held that it was clear that the impugned decision adversely affects the rights of the second applicant; moreover, in light of the CC's judgment in *Joseph* regarding the meaning of 'direct external legal effect', it was held that the

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<sup>830</sup> Ibid.

<sup>831</sup> Ibid para 49.

<sup>832</sup> Ibid.

<sup>833</sup> Ibid paras 51 and 52.

<sup>834</sup> Ibid para 51.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid.

<sup>837</sup> Ibid.

<sup>838</sup> Ibid.

decision impacted directly and immediately on individuals,<sup>839</sup> and therefore the impugned decision impacted directly and immediately on the second applicant and materially and adversely affected his rights under PAJA.<sup>840</sup> The minister's decision was set aside and the second applicant was reinstated, however Myburgh JA concluded that if the impugned decision does not amount to administrative action under PAJA, because it was clear that the minister exercises public powers, the legality principle could still be invoked.<sup>841</sup>

It is apparent, based on *Gcaba* and the cases mentioned above, that, where decisions are made within employment related circumstances that have great public impact and consequences for others, employees can approach a HC, seeking the decision to be reviewed under section 33 of the Constitution and PAJA as well as the constitutional standard of legality. There is, however, another exception identified below as the public interest exception which is not sought to benefit the employee directly but rather to hold the employer accountable when there has been an exercise of public power.

#### 4.7.2 PUBLIC INTEREST

Brand and Murcott argue that 'employers in the public sector will not be able to prevent administrative law challenges to their employment-related decisions in the HC where for instance those challenges are brought, not to enforce employment related right, but brought in the public interest in the aim of ensuring accountability.'<sup>842</sup>

In *Freedom under Law v National Director of Public Prosecutions*,<sup>843</sup> the second respondent argued that the challenge to the decision to lift Mdluli's suspension and to reinstate him on the basis of administrative law and legality before the HC was not the correct approach and thus the HC lacked jurisdiction.<sup>844</sup> However, Murphy J rejected this argument, holding that *Freedom under Law* brought this application before the HC in the interest of the public and not in the interest of employment.<sup>845</sup> For Murphy J, bringing the application under administrative law and legality was the appropriate route, as the decision was public in nature

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<sup>839</sup> Ibid.

<sup>840</sup> Ibid.

<sup>841</sup> Ibid para 54.

<sup>842</sup> Brand & Murcott (note 751 above) 83.

<sup>843</sup> 2014 (1) SA 254 (GNP) (*FUL HC*)

<sup>844</sup> Ibid para 223.

<sup>845</sup> Ibid para 230.

and therefore Freedom under Law were acting in the public interest.<sup>846</sup> The matter before Murphy J was not one where the complaint was pleaded about the unfairness of the suspension but rather to challenge the decision to withdrawal suspending Mdluli.<sup>847</sup> Moreover, a dispute about an unfair labour practice must be between an employee and employer and must arise between the employment relationships.<sup>848</sup> Murphy J recognised that, while the HC's jurisdiction is limited in relation to challenges to public-sector employment where the complaint is on the basis of an unfair labour practice, since the challenge was not brought by an employee to enforce employment related rights but rather by Freedom Under Law acting on behalf of the public interest, the HC had the necessary jurisdiction.<sup>849</sup>

On appeal in *National Director of Public Prosecutions and Others v Freedom Under Law*,<sup>850</sup> the SCA upheld the decision of the HC, where Brand JA held that the matter is one of public interest and national importance.<sup>851</sup> Brand JA recognised that:

‘The mere fact that the remedy sought may have an impact on the employment relationship between Mdluli and his employer does not make it a labour dispute. It remains an application for administrative law review in the public interest, which is patently subject to the jurisdiction of the high court.’<sup>852</sup>

The HC and the SCA underscore the position on pleadings and arguably recognised the interconnectedness of rights and that the matter could very well have an effect on an employment relationship; however, the matter was pleaded on behalf of the public's interest and not by the employee seeking enforcement of labour related rights.

## 4.8 CONCLUSION

In light of the adoption of a general rule and the various significant holdings in *Gcaba*, this chapter has sought to identify circumstances where administrative law principles were applied in labour cases since *Gcaba*. The principle of subsidiarity identified in subsection 4.2 is a constitutional principle which demands constitutionally mandated legislation to be

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<sup>846</sup> Ibid.

<sup>847</sup> Ibid.

<sup>848</sup> Ibid.

<sup>849</sup> Ibid.

<sup>850</sup> 2014 (4) SA 298 (SCA).

<sup>851</sup> Ibid para 18.

<sup>852</sup> Ibid para 46.

applied directly and the more general norm indirectly. The CC has been a strong proponent of the principle in various cases before and after *Gcaba*. Worryingly, the selective application of the principle in *Gcaba* impacted on the outcome and showed disregard for legislative reform and administrative law jurisprudence. The principle of legality identified in subsection 4.3 has become an important alternative means of review for public sector employee's in the LCs where there has been an exercise of public power.

In subsection 4.4, it was noted that *Gcaba's* recognition that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action is significant for it allows for the development of labour jurisprudence under administrative law in different courts. Dismissals via operation of law, discussed in subsection 4.5, have been identified by the CC as an exception to the general rule, attracting the protection of both PAJA and legality review.

One of the significant recognitions made by the court in *Gcaba* was that jurisdiction is determined on the basis of how one pleads and this was further recognised in a recent CC case in *Mbatha*. In subsection 4.5, a number of cases were identified and it was clear that the manner in which a litigant pleads will determine whether the HC or LC has jurisdiction. The SCA recently determined this approach in *Mnguni* by holding that if one pleads the right not to be unfairly dismissed or subjected to an unfair labour practice, the LC only has jurisdiction. However, if one pleads the right to administrative justice, the LC and the HC have concurrent jurisdiction under PAJA or the principle of legality. Lastly, in subsection 4.7, the meaning and placement of the notable exceptions identified by *Gcaba* are shown to be still in conflict with the meaning of 'external effect' in PAJA, which implies that the conclusion made by *Majake* could potentially apply to *Gcaba*.

## CHAPTER FIVE: CONCLUSION & RECOMMENDATIONS

### 5.1 CONCLUSION

#### *The effect of Gcaba*

Brand JA in *Mkumatela v Nelson Mandela Metropolitan Municipality and Another*<sup>853</sup> was of the view that since *Gcaba* ‘the train has moved on’<sup>854</sup> – therefore the debate as to whether administrative law applies to labour cases has (arguably) been settled. At the time of writing this dissertation, however, the reality is that *Gcaba* has not settled the law but has rather disturbed established affairs. The legal status quo has shifted and, although the CC seemed initially to have been ambitious in an attempt to settle the waters surrounding public sector employment, public sector employees are still faced with uncertainty pertaining to their legal position. *Gcaba*’s general rule has not halted or deterred administrative law from applying to all labour cases; consequently, lower courts have come to the forefront, ensuring that the full extent of employees’ constitutional rights are afforded to them instead of following the pre-eminence over another route, which arguably denies rights.

The basis under which the CC in *Chirwa* and *Gcaba* sought to deny public sector employees rights was based solely on policy considerations. Policy-driven reasoning has with respect robbed public sector employees from accessing the full extent of their constitutional rights. Chapter 3 and 4 provided extensive arguments indicating that *Chirwa* and *Gcaba* proceeded with no legal basis other than a policy basis in effectively side-lining public sector employees’ access to their section 33 right to administrative justice and PAJA. Chapter 2 provided extensive meaning to the definition of administrative action under section 33 and PAJA with the aim of establishing that, under administrative law jurisprudence, section 33 and PAJA potentially apply to decisions made by the public-sector employer where the said decisions adversely affect rights and thus have direct, external legal effect, in other words, where the decision impacts immediately and directly on an employee. The consequence for the CC opting for a policy-driven decision effectively drifts within the legislature’s territory, resulting in a violation of the separation of powers doctrine along with violating the right of individuals to approach a court of law seeking the protection that the Constitution promises.

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<sup>853</sup> 2010 (4) BCLR 347 (SCA).

<sup>854</sup> *Ibid* para 11.



Chapter 2 further provided extensive meaning to the principle of legality. The development of the principle as an alternative form of review over the years has resulted in meaningful constitutional protection against the abuse of exercises of public power.

#### *Principle of subsidiarity*

The further effect of the CC in *Gcaba* in applying a policy-driven decision as well as, respectfully, turning a blind eye to the settled constitutional standard in determining the nature of the power exercised under section 33 and PAJA, is that the principle of subsidiarity has been violated, a principle underscored many a time by the CC, as well as settled administrative law jurisprudence being contradicted. The crux of the CC's approach has effectively resulted in the constitutional right to administrative justice being denied outright without any legitimate legal reason. It is argued that the CC in these matters seemed to have selectively ignored settled jurisprudence and principles in order to make its findings easier, rather than opting for the much harder route which advances constitutional rights to their fullest extent and potential as well as developing jurisprudences for the benefit of all. Policy considerations, rather than respect for legislative intent, has unduly restricted rights where they happen to overlap, something that is not uncommon in law.

#### *Duality of Rights*

One of the objectives of this research was to explore whether an infringement of dual rights existed arising out of a single set of facts within an employment setting.

It is obvious that the same conduct may result in an array of applicable rights applying to a single set of facts. Plasket J along with many other judicial officers have underscored that there is nothing incongruous about this consequence. Both section 23 and 33 of the Constitution are fundamental rights guaranteed by our Constitution. Although the CC in *Chirwa* had been ruthless in its approach and was not prepared to recognise the interconnectivity of rights, thus opting to place one right over another, the court in *Gcaba*, however, significantly recognised otherwise by holding that the same conduct on the part of the employer may give rise to different causes of action and remedies in law. This recognition confirms that the law does not exist in discrete boxes.

*Gcaba* recognised this view by underscoring Langa CJ's judgment in *Chirwa* by holding that courts should be mindful not to approach cases by applying a method of interpretation which effectively denies rights that have been expressly provided for by the legislature. It is also

important to recognise that one right cannot trump another, unless the legislature has expressly opted for this consequence. In the absence of such an intention of the legislature, administrative law has been and will continue applying to labour cases in the future.

This dissertation does not advocate that the LRA should not be pursued by public sector employees simply because there are other possible causes of action available. On the contrary, the LRA is an important means of providing specialised protection to employees and it would be to their benefit to choose this route from the outset because, in reality, employees are not as well-resourced to commit to lengthy litigation. The LRA structures provide expedient, cost effective protection as well as unique remedies specifically designed to elevate employees to meaningful bargaining positions.

It is clear that, because the LRA is a unique cause of action, this seems to be what fuelled Skweyiya J, Ngcobo J and Van der Westhuizen J's policy-driven approach. However, the fact that the LRA is capable of holding an employer accountable for conduct infringing on the rights of employees does not necessarily mean that the LRA is the only route that is capable of resolving the situation. The fact that another route exists, which does not have such favourable remedies as that of the LRA, is not a valid reason to deny a route chosen by the applicant before a court. Therefore, where a decision or conduct amounts to administrative action under section 33 and PAJA, the fact that there exists another cause of action under the LRA is immaterial to the PAJA enquiry where conduct has been positively determined, as it was noted as being correctly recognised by Wallis J in Chapter 2, as being administrative in nature under section 33 of the Constitution and PAJA. Chapter 2 further recognised that PAJA is the first port of call giving effect to section 33 of the Constitution. It is in this regard that one argues that Van der Westhuizen J in *Gcaba* was aware that PAJA applied to the facts of the case before him; however, he swiftly opted to follow the policy-guided approach, resulting in confusion of settled precedent as well as denying the very constitutional rights which the court is mandated to protect.

Many labour lawyers would praise the court in *Gcaba* for providing a general rule that employment and labour related issues do not amount to administrative action. However, the rule has not redirected traffic to the LRA structures in its entirety.

The LRA and PAJA have different purposes and objectives. Section 23 of the Constitution and the LRA serve to protect employees from unfair labour practices, whereas section 33 and PAJA aim to ensure that, when individuals have contact with the administration, it is lawful,

reasonable and procedurally fair. Chapter 4 recognised that the LRA and PAJA could potentially apply to one set of facts but that alone should not be a reason to side-line one right over another. Public sector employees are therefore entitled to any and all applicable rights in the Bill of Rights and courts should refrain from determining that, because another right exists but has not been pleaded before it, this is a reason for the court to dismiss the application because the unchosen route is what the court ‘prefers’.

*Alternative causes of action identified*

The reasoning as to why the general rule has not been absolute has been discussed extensively in Chapter 4. *Gcaba* recognised that the pleadings invoke the court’s competence to hear a dispute, and consequently three possible causes of action are available to public sector employees based on how one seeks to invoke the court’s competence to hear that matter.

The significance of the CC’s recognition on pleadings has paved the way forward by providing lower courts with a means to advance fundamental rights to public sector employees which they are constitutionally entitled to. A pleadings-based approach as opposed to a purposive approach adequately balances public sector employees’ rights as well as reflecting the intention of the legislature when it provided for concurrent jurisdiction.

This research has shown that the extent to which the HC and LC exercises concurrent jurisdiction depends primarily on how the pleadings have been sought. Where a cause of action is pleaded about the unfairness of a dispute, the first port of call would be for the litigant to use the CCMA route and thereafter the LC. Where the litigant pleads unlawfulness under section 33 and PAJA, the HC has original jurisdiction to hear the dispute under section 169 of the Constitution. The LC also has concurrent jurisdiction with the HC under section 157(2) of the LRA to hear a dispute pleaded under PAJA, provided that the litigant establishes in the pleadings that a fundamental right has been violated and/ or threatened, thus invoking the court’s competence under section 157(2). It is trite that in order to ensure that public sector employees’ rights are advanced, litigants must plead unequivocally and clearly in order to allow courts to establish the extent to which their competence is invoked.

It is hackneyed that the LRA is one of such causes of action. It is, however, not the only cause of action available. For instance, where the LRA does not apply in cases dealing with deemed dismissals, PAJA and the principle of legality have been applied, ensuring that, where an employer exercises his or her statutory discretion to reverse the consequences of a

deemed dismissal, such a power cannot go unchecked and is thus reviewable either in the HC exercising original jurisdiction or in the LC through section 157(2) of the LRA or section 158(1) (h) of the LRA.

Notwithstanding the general rule, where the applicant has unequivocally pleaded under section 33 of the Constitution and PAJA, the HC and LC have proceeded to determine the issues presented before it. In order to ensure that there is no confusion as to what the legal claim is, following an approach advocated in *Fredericks*, disavowing ones reliance on section 23 of the Constitution and the LRA while pleading in terms of PAJA in the HC or LC effectively establishes what is being sought. The extent to which section 33 of the Constitution and PAJA applies to public sector employees therefore depends on not whether there exists another route with more favourable remedies, but rather whether the applicant has adequately pleaded the cause of action in invoking the court's competence to hear the matter.

It is not just PAJA and the LRA that are open to public sector employees. The principle of legality has also been advancing and developing by providing another means of keeping the public administration employers in check where decisions emanate from exercises of public power. The principle of legality remains an effective constitutional check. In addition, the HC under its original jurisdiction and LC under section 158(1)(h) of the LRA are able to apply the principle with the aim of reviewing conduct and ensuring that the rule of law is upheld. The principle of legality applied to labour cases does not afford the court the power to award remuneration and reinstatement but only to set the decision aside for lack of rationality and lawfulness. Therefore the principle of legality should arguably be pursued as an alternative to the LRA or PAJA. However, just because it has fewer favourable remedies than PAJA or the LRA, this does not mean that public sector employees cannot approach the LC or HC and plead under the legality principle.

It is significant that since *Gcaba*, the HC retains its jurisdiction to hear matters pleaded under section 33 of the Constitution and PAJA. What has become increasingly beneficial to public sector employees, however, is that the LCs have proceeded in advancing and applying administrative law within their jurisdiction, which has resulted in a unique position where administrative law jurisprudence is being developed within labour cases. This advancement is similar to the approach, discussed in Chapter 3, advocated by Conradie JA in the SCA judgment in *Chirwa*. However the former approach is not as restrictive because the HC retains its original jurisdiction.

### *Gcaba's approach to Administrative Action*

Although the CC in *Gcaba* was disappointingly silent on the PAJA enquiry as was set out in Chapter 2, it did add an eighth public impact factor. If *Gcaba's* exceptions to the general rule were to be followed strictly, notwithstanding the position on pleadings, administrative action under section 33 and PAJA would only be applicable, according to the CC, where the decision has great public import and consequences for other citizens. The *Majake* case although decided before *Gcaba*, remains an important judgment in reaffirming what is meant by 'public impact' as well as under which circumstances it would apply.

It is respectfully argued that the public impact requirement could have applied to *Gcaba's* circumstances. Not following proper procedure in appointing *Gcaba* as station commissioner, whose sole responsibility would be to run an effective police station within the surrounding community, would have public import and consequences for citizens. The effective running of a police station under the control of the station commissioner has great public interest and impact where the commissioner has been appointed under a procedurally unfair manner.

### *Research purpose answered*

The purpose of this research set out in Chapter 1 was to establish whether public sector employees are presently able to approach a court of law under administrative law applied to labour cases and if so, under what circumstances this could be achieved. The answer to the main research question has been adequately established along with supporting literature, affirming the objectives mentioned above to provide knowledge and understanding within this area of law. The crux of this research emanates from the views expressed by Cameron JA:

'No doctrine of constitutional law which confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude, therefore if the legislature sought to deprive dismissed public sector employees of their administrative justice rights in the ordinary courts because they now enjoy rights under the LRA, the legislature would have said so when PAJA was enacted some five years after the LRA was enacted'<sup>855</sup>

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<sup>855</sup> *Chirwa* SCA (note 571 above) para 63.

Cameron JA's views expressed along with those of other esteemed judges and the academic arguments set out throughout this research indicate that public sector employees may enjoy protection under the LRA structure, while also enjoying protection under section 33 and PAJA along with the principle of legality, which emanates out of section 1(c) of the Constitution.

Interestingly, it has further been established that decisions made by public employers do not necessarily have to be challenged solely by the employee. Where the decision is challenged on behalf of the public interest, rather than advancing employment rights by the employee, the exercise of public powers within labour cases could also be challenged under administrative law. The risk with this route is that employees' interest would arguably not be advanced but rather the public interests. Employers would further be unable to hide behind the general rule and by preventing administrative law being applied to employment decisions.

## 5.2 RECOMMENDATIONS AND FINAL COMMENTS

It is important for public sector employees to be aware of their legal position. One of the ways in which the public is made aware is through case law. Precedent in case law provides stability in knowing one's rights and being able to predict outcomes based on settled jurisprudence. The approach taken by the CC on the administrative action enquiry was disappointing. Consequently, it would be beneficial for the CC to clarify the 'public impact' loophole and how it should fit into the existing PAJA enquiry of 'direct, external legal effect'.

It is obvious that how one proceeds to plead determines whether that particular court has jurisdiction. If one pleads unfairness under section 23 of the Constitution and the LRA, the LC would have jurisdiction. If one pleads unlawfulness under section 33 of the Constitution and PAJA, the HC and LC would have concurrent jurisdiction under PAJA and legality. Pleading this way balances the right to fair labour practices and the right to administrative justice and should be approached on a case-by-case basis. The fact that a particular right has been sought to be advanced with less favourable relief merely boils down to a litigant's choice of forum and should be respected as the chosen forum and dealt with on its own merits. This would be in line with the particular legislature's intention.

Although PAJA and the principle of legality are open to a litigant, it is recommended that public sector employees should approach the route provided under the LRA because of its unique specialised structures providing favourable relief.

The purpose of this dissertation was not to identify possible legislative reform. If the legislature's intention should change in favour of only labour reform, it is recommended that the legislature amends PAJA by including the words 'public sector employee' under the exclusions section. The effect would be that decisions relating to public sector employees would no longer qualify as 'administrative' for the purposes of section 33 of the Constitution and PAJA.

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