THE RELATIONSHIP BETWEEN PAJA AND THE LABOUR RELATIONS ACT WITH SPECIFIC REFERENCE TO *CHIRWA V TRANSNET LTD & OTHERS* [2008] 2 BLLR 97 (CC)

Mini-dissertation submitted in partial fulfilment of the requirements for the degree Magister Legum in Labour Law at the North-West University (Potchefstroom Campus)

by

Mariska van Zweel
12596825

Supervisor: Adv PH Myburgh

November 2008

TABLE OF CONTENTS

Acknowledgements

I would like to express my gratitude to everyone who has played a significant role in making this dissertation possible, whether directly or indirectly.

First and foremost I would like to thank my Creator who not only granted me this opportunity to study, but also gave me the strength, insight and knowledge to complete it.

Secondly, my parents [Pieter and Lenette van Zweel] for their upbringing and many sacrifices to give me the best education, without them I would definitely not have achieved this success. Thank you for your love, support and words of encouragement.

A special word of acknowledgement to my supervisor, Advocate Piet Myburgh, for his support, patience, guidance and important input during the completion of this dissertation. I would like to thank him for sharing his knowledge and experience with me. Dankie Oom Piet!

To the rest of my family, thank you for always showing interest in my studies and for motivating me when I needed it the most.

Lastly, I would like to give a special thanks to my sister [Yolandi] and to Freddie for their patience, support and suggestions.

Abstract

Prior to the adoption of the *Labour Relations Act* 66 of 1995 (LRA), the *Constitution of the Republic of South Africa*, 1996 (Constitution) and subsequently the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA), public sector employees were at an immense disadvantage since they did not enjoy the same benefits which accrued to private sector employees under the then *Labour Relations Act* 28 of 1956. Unfortunately an overlap was inadvertently created by these Acts, particularly with regard to employment related disputes in the public sector. As a result courts have long grappled with the question as to whether or not public sector employees could rely on administrative law principles in employment related disputes.

This dissertation examines the relationship between the LRA, PAJA and the Constitution and specific reference is made to the Constitutional Court's judgment in *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC). It notes the conflicting judicial decisions on the overlap between the LRA and PAJA and the subsequent applicability of PAJA in public sector employment disputes.

The dissertation notes the difficulties in excluding PAJA in its entirety and whether it will be feasible for the LRA to surpass the applicability of PAJA, given the role of both labour law and administrative law in South Africa's constitutional dispensation, with their constitutionally entrenched international obligations in mind. In this regard, the author advances some proposals in relation to the best way forward on dealing with this complex interplay by keeping the minority judgment handed down in *Chirwa* at the forefront.

Afrikaanse opsomming

Voordat die *Wet op Arbeidsverhoudinge* 66 van 1995 (WAV), die *Grondwet van die Republiek van Suid-Afrika,* 1996 (Grondwet) en gevolglik ook die *Wet op die Bevordering van Administratiewe Geregtigheid* 3 van 2000 (oftewel PAJA), gepromulgeer is, het publieke sektor-werknemers in 'n benadeelde posisie gestaan tot privaat sektor werknemers aangesien hul nie dieselfde voordele kon put uit die destydse *Wet op Arbeidsverhoudinge* 28 van 1956 nie. As gevolg hiervan het 'n onbewuste (oftewel ondeurdagte) oorvleueling tussen hierdie wette ontstaan, spesifiek met betrekking tot arbeidsregtelike geskille in die publieke sektor. Die onvermydelike gevolg hiervan was dat Suid-Afrikaanse howe 'n reeks uiteenlopende uitsprake gelewer het ten aansien van die vraag of publieke sektor werknemers kan steun op administratiefregtelike remedies in arbeidsregtelike geskille.

Hierdie skripsie ondersoek die verhouding tussen die WAV, die Grondwet en PAJA met spesifieke verwysing na die Grondwetlike Hof se uitspraak in *Chirwa v Transnet Ltd & Others* [2008] 2 97 (CC). Kennis word geneem van die uiteenlopende hofuitsprake wat tans in ons reg bestaan met betrekking tot die oorvleueling tussen die WAV en PAJA, asook die toepasbaarheid van PAJA in arbeidsregtelike geskille in die publieke sektor.

Die skripsie ondersoek ook die vraag of PAJA tesame met die WAV as gesamentlike regsraamwerk kan geld in die regulering van arbeidsregtelike geskille van publieke sektor-werknemers en ondersoek of dit die wetgewer se bedoeling was dat die WAV voorrang moet geniet bo PAJA. Hierdie ondersoek word gedoen met inagneming van die rol van beide die reg op arbeidsverhoudinge en reg op billike administratiewe optrede soos vervat in die Grondwet van Suid-Afrika. Die skrywer maak gevolglik aan die hand hiervan 'n paar voorstelle rakende die beste manier om met hierdie

komplekse situasie te werk te gaan met spesifieke verwysing na die minderheidsuitspraak van die Grondwetlike Hof in *Chirwa*.

List of Abbreviations

1956 LRA	:	Labour Relations Act 28 of 1956
BALR	:	Butterworths Arbitration Law Reports
BCLR	:	Butterworths Constitutional Law Reports
BLLR	:	Butterworths Labour Law Reports
CCMA	:	Commission for Conciliation, Mediation and Arbitration
CLL	:	Contemporary Labour Law
EL	:	Employment Law
ILJ	:	Industrial Law Journal
LRA	:	Labour Relations Act 66 of 1995
PAJA	:	Promotion of Administrative Justice Act 3 of 2000
SAPL	:	South African Public Law
SCA	:	Supreme Court of Appeal
THRHR	:	Tydskrif vir Hedendaagse Romeins Hollandse Reg
WAV	:	Wet op Arbeidsverhoudinge 66 van 1995

1. Introduction

Employees who were employed in the public service under the old administration were excluded from the ambit of the 1956 *Labour Relations Act*[1] which resulted in them not enjoying the same benefits that applied to private sector employees.[2]

In the wake of the new *Labour Relations Act*[3] (hereafter LRA) and the adoption of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution), the legislature departed from our pre-constitutional labour law dispensation and now affords substantive protection to both employers and private and public sector employees.[4] The 1995 LRA has a set of cagily crafted procedures and institutions for the effective resolution of employment disputes and the protection of employees from unfair labour

---

1 Act 28 of 1956. See section 2(2) of the *Labour Relations Act* 28 of 1956.

2 The *Labour Relations Act* 28 of 1956 applied in part to employees in the private sector and in part to those employees in the public sector. The *Public Service Labour Relations Act*, 1994 promulgated by Proclamation No. 105 of 1994, governed part of the public service employees, whereas the *Education Labour Relations Act* 146 of 1993 applied solely to educators and the *Agricultural Labour Act* 147 of 1993 governed employees within the agricultural sector. The *South African Police Service Labour Relations Regulations*, GG no 16702, No R 1489, 1995 governed the members of the South African Police Service. In this regard see *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 99.

3 Act 66 of 1995.

4 The impact of the *Constitution of the Republic of South Africa*, 1996 on employment law in South Africa has been significant. 27 April 1994, the day on which the Interim Constitution came into force, marked the birth of constitutionalism in South Africa. There has been much debate, especially during the adoption of the interim and subsequently the final Constitution, regarding the applicability of the Constitution and the constitutional jurisdiction of courts on labour law. Many argue that labour law is a specialised field that should be separated from constitutional interpretation. See Laubscher 2004(4) *De Rebus* 12 in this regard. The Interim Constitution and the first draft of the final Constitution excluded labour law from constitutional scrutiny by declaring that the provisions of the *Labour Relations Act* 66 of 1995 will remain in force and valid until such time as it is amended or repealed. See section 33(5)(a) of the Interim Constitution and Clause 24(1) of the *Constitution of the Republic of South Africa*, 1996. Fortunately, the Constitutional Court in *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 149 held that to exclude certain branches of our law from constitutional investigation will compromise the supremacy thereof, as guaranteed in section 2 of the *Constitution of the Republic of South Africa,* 1996. See Olivier 2006 (20) *Speculum Juris* 222.

practices.[5] At the same time the Constitution entrenches both labour rights[6] and the right to administrative action that is "lawful, reasonable and procedurally fair".[7] One of the main focus areas of these two Acts is to provide support to those employees who were previously susceptible to both employers' powers and public power.

Unfortunately, an overlap was inadvertently created by the 1995 LRA, the *Promotion of Administrative Justice Act*[8] (hereafter PAJA) and the Constitution, particularly with regard to employment related decisions in the public sector. Courts have long grappled with the issue of whether employees, in particular public sector employees,[9] could rely on administrative law principles to enforce their constitutional rights to both fair administrative action and, specifically, fair labour practices following actions of public sector employers exercising public power. The overlap, furthermore, raises both procedural and substantive questions.[10] The procedural questions relates to, *inter alia,* the forum in which such decisions will be challenged, and as for the substantive questions, one will need to have regard to the grounds and standards of review as well as the remedies to which parties would be entitled to. This dissertation, however, only investigates the administrative law aspect of the debate. The jurisdiction of

---

5 The multiple pieces of legislation as referred to in footnote 2 above clearly indicates the vast and arguably unnecessary duplication of resources that was created. The *Labour Relations Act* 66 of 1995 was enacted to harmonise these divergent pieces of legislation and to create a form of order and consistency in the employment sphere, especially in the area of dismissals and unfair labour practices. See *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 100.

6 Section 23 of the *Constitution of the Republic of South Africa*, 1996.

7 Section 33 of the *Constitution of the Republic of South Africa*, 1996.

8 Act 3 of 2000.

9 The public sector comprises a range of employment regimes. Public sector employees or civil servants can be defined as those employees who are employed by Government and are paid Government Funds – see Martin *A Dictionary of Law* 83. Section 8 of the *Public Service Act*, 1994 defines the public service as:

"(1) The public service shall consist of persons who are employed—

(*a*)in posts on the establishment of departments; and

(*b*) additional to the establishment of departments."

10 Ngcukaitobi and Brickhill 2007 28(4) *ILJ* 769.

the courts on labour matters will thus fall outside the ambit of the present enquiry.

Until recently there were many conflicting judicial decisions on the overlap between the LRA and PAJA and the subsequent applicability of PAJA in public sector employment disputes.[11] Earlier court decisions expressed the view that public sector employees can use PAJA to challenge disciplinary actions against them, but the Constitutional Court has put an end to this debate in *Chirwa v Transnet Ltd & Others*[12] (hereafter the *Chirwa*-judgment) by deciding that public sector employees cannot be in a preferential position by having access to multiple forums and, therefore, they could not rely on PAJA. It further held that the legislature should revisit the extent to which PAJA and the LRA overlap.

Given the abovementioned context, the legal question posed in this dissertation is: what is the relationship between PAJA and the LRA with specific reference to *Chirwa v Transnet Ltd & Others*[13]? The primary objective will thus be to investigate the complex interplay between labour law, administrative law and the Constitution and the focus will also be on the number of discrepancies and divergent judgments which arose from conflicting approaches. In addition, this dissertation will investigate whether PAJA should be excluded in its entirety or whether it could be applicable to at least some decisions taken by public sector employers, especially where the decision relates to the exercise of public power. In this context one will also need to answer whether the LRA will now surpass all common-law and

---

11 See in this regard *Phenithi v Minister of Education and Others* [2006] 1 All SA 601 (SCA); [2006] 4 BLLR 385 (E); *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E); *Nell v Ministers of Justice & Constitutional Development & Another* [2006] 7 BLLR 716 (T); *Transnet Ltd v Chirwa* [2007] 1 BLLR 10 (SCA); *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A); *Fredericks & Others v MEC for Education & Training, Eastern Cape & Others* [2002] 2 BCLR 113 (CC). A discussion of these cases will follow later in this dissertation.

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

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

contractual considerations in labour disputes, given the role of both labour law and administrative law in our constitutional dispensation.[14]

This research falls within the focus area of paradigm shifts in South Africa. The research primarily focuses on the relationship between PAJA and the LRA and the subsequent impact of the *Chirwa*-judgment on the constitutional right to fair labour practices and just administrative action. In this paper the writer will accordingly look closely at the *Chirwa*-judgment by initially setting out the background to the decision in order to finally propose a possible different outcome in an attempt to find a solution to the uncertainty which existed before the decision in *Chirwa*.

This dissertation mainly consists of a literature study. Where applicable, legislation and case law are investigated.

2. Public sector employment framework

2.1 Employment rights of public sector employees

Given that there have been many comprehensive statutory and constitutional changes to the South African labour law dispensation, and in order to place the debate in context, it is apposite to first examine the history preceding the post-constitutional position of public sector employees. It is furthermore critical to understand the role of both the current labour law administration under the LRA and the fundamental administrative- and labour rights under the Constitution.[15]

---

14 See Ngcukaitobi 2008 (29) *ILJ* 841.

15 In this regard this dissertation will investigate the role of both the *Promotion of Administrative* Justice *Act* 3 of 2000 and section 33 of the *Constitution of the Republic of South Africa*, 1996 together with the fundamentally sound right to fair labour practices as guaranteed by section 23 of the Constitution.

2.1.1 Difference between public and private sector employees

From the outset, one is confronted with the distinction between public- and private sector employees. If such a distinction were to be made, would it be substantial enough to warrant either similar or dissimilar treatment, particularly when administrative law steps in? There are some differences between public- and private sector employees which will be discussed briefly. The relationship that exists between an employee and its employer is by tradition one of deference and subordination. In public sector employment the relationship between capital ("market powers") and labour is lacking and the bureaucratic nature in the relationship is apparent.[16] According to Stewart[17] the rationale in the decision making process of public sector employment is different than those in the private sector, in that public sector employers make their decisions through political process as opposed to the market process. In other words, public sector employers are mainly subject and directed by legislation whilst their private sector counterparts are economically and/or profit driven. It is also quite clear that the public opinion certainly plays a large role in public sector employment and the general responsibilities of public sector institutions.[18] One thus deals with public power as opposed to mere contractual power of private sector employers.[19] However, through the years there has been a noticeable tendency towards the privatisation of certain public services and

16 Stewart 1995 (16) *ILJ* 16. According to Parker and Bradley the bureaucratic nature of the public sector can be recognised by it being rule enforcing, impersonal in the application of laws and constituted by members who have specialist knowledge of rules and procedures. See Parker and Bradley *The Asia Pacific Journal of Public Administration* 26 (2) 197 and Fredman and Morris *The State as Employer* 9.

17 *Ibid* at 17.

18 Decisions taken by public sector employees need to be in accordance with social, political, economical and ideological factors with the public interest and opinion at its core. Public interest can be very powerful – even in the private sector - whereas decisions in the private sector leans more towards contractual power and capital ownership. Furthermore, sources of income and expenditure, the provision of service and bargaining power (especially in strike action – public sector employers can in many instances afford to withstand the demands during strike action for longer periods) between these two sectors differ substantially. See Stewart 1995 (16) *ILJ* 17.

19 Stewart 1995 (16) *ILJ* 21 and Cockrell 1993 *Acta Juridica* 233.

a marked overlap between the functions of the private and public sectors.[20] The Constitution, on the other hand, provides legislative content to the fundamental rights which apply to employees in both the public and the private sectors which contribute to the diminution of the dividing line between these sectors even though the public sector still remains subject to legislation and the exercise of "regulatory power".

2.2 Employment rights under the Common Law

The *Labour Relations Act*[21] (hereafter the 1956 LRA), which preceded the LRA, did not apply to public sector employees – these employees were subject to the common law.[22] Nevertheless, the 1956 LRA did change the common law position of private sector employees in that dismissal of these employees had to be both for a fair reason and in accordance with a fair procedure, as discussed later in this dissertation.[23] A dismissal, therefore, needs to be substantially and procedurally fair.

Under common law, employees under public sector employment contracts were viewed in the same light as lessees under contracts of lease, since the employee would agree to render service to the employer in return for

---

20 Stewart 1995 (16) *ILJ* 18 and Treu *Labour Relations in the Public Service* 1-2.

21 Act 28 of 1956.

22 For the sake of completeness this includes employees who were employed by the state as well as educators who were employed by institutions maintained by public funds, such as teachers in public schools, teachers at universities, technicons and colleges. Also see footnote 4 above and section 2(2) of the *Labour Relations Act* 28 of 1956 and Ngcukaitobi 2008 (29) *ILJ* 842. The fact that the *Labour Relations Act* 28 of 1956 did not apply to public sector employees resulted in them not being protected against unfair dismissals and other unfair labour practices. The only protection these employees had was the application of the principles of administrative law – Mischke 2006 (15)(9) *CLL* 86. However, with the enactment of the *Labour Relations Act* 66 of 1995, public sector employees were afforded protection and came to enjoy the same rights and protection against unfair dismissals and unfair labour practices than those employees employed in the private sector.

23 *Labour Relations* Act 66 of 1995 Schedule 8: Code of Good Practice: Dismissal. The Code of Good Practice passed in the *Labour Relations Act* 66 of 1995 sets out all the guidelines for determining whether any dismissal was in accordance with a fair reason.

payment for such services rendered.[24] The common law contract of employment did not give due regard to the collective relationship which exists between employers and employees and did not cater for the unequal relationship between employees and their employers, which in effect gave employees no legal right to demand better working conditions.[25] Public sector employees were thus placed at an immense disadvantage, since the contract of employment of public sector employees could subsequently either be terminated abruptly or on notice with no right to a hearing and no requirements for a fair reason or a fair procedure prior to termination.[26] Dismissals had to comply with whichever statutory requirements applied to their contracts of employment.[27] The consequence of not being recognised by the 1956 LRA was that public sector employees were left to the fate of the statutory terms and conditions upon which they were appointed and had to enforce or protect whatever rights they had through the administrative law, also known as the common law review process. Common law review entails that the rules of natural justice will apply. Therefore, prior to the Constitution, the LRA and PAJA, judicial review could only be done on the basis of the common-law principles of *ultra vires* and the *audi alteram partem rule*.[28]

---

24 *Boyd v Stuttaford & Co* 1910 AD 141 – the contract is thus one of servant and master. Also see *Ngcukaitobi* 2008 (29) *ILJ* 844. The contract can also be compared to an ordinary commercial contract such as a lease.

25 Grogan *Workplace Law* 4.

26 Ngcukaitobi 2008 (29) *ILJ* 844. Employees were normally summarily dismissed, if they, in the opinion of the employer, made themselves guilty of misconduct, insubordination or absence from work without leave. See *Administrator, Transvaal v Zenzile* 1991 (12) ILJ 259 at 265C-E.

27 See footnote 22 above. In plainer language, a dismissal could only be fair or valid if it complied with the applicable statutory requirements. If the dismissal thus complied with the statutory requirements, it could not be set aside on grounds relating to substantive unfairness, nor could it be set aside due to the fact that the employee was not afforded the opportunity to fair hearing – *Schierhout v Union of Government (Minister of Justice)* 1991 AD 30. The lack of a common law right to be heard continued up until about 1991.

28 *Ultra vires* meaning "beyond the scope of (its) powers" – see Hiemstra and Gonin. *Trilingual Legal Dictionary* 300. The doctrine of *ultra vires* thus served as a justification for interfering in administrative decisions taken. Should a decision be viewed as *ultra vires*, it may be challenged on review and set aside by our courts. The courts are thus given the duty to see to it that the intention of the legislature and the

2.2.2 Case law under common law contracts of employment

There are two important judgments worth mentioning in order to explain how the administrative law and its principles came into play in the employment sphere of public sector employees. The first is the *Administrator, Transvaal & Others v Zenzile & Others*[29] *(Zenzile)* in which the court had to decide whether the decision of a public sector employer to summarily dismiss its employees was reviewable on the basis that the employer failed to afford its employees a fair hearing preceding their dismissal. The court held that the employees, through their contracts of employment, are entitled to protection, and held that it would be "logically unsound and wrong in principle" to find that administrative law has no application in contractual relationships.[30] It was furthermore unanimously held, per Hoexter JA, that the employer, being a public authority and exercising public functions, should afford its employees the right to a fair hearing prior to dismissal.[31] This case thus introduced the *audi alteram partem* principle as a means through which the conduct of public sector

---

executive is carried out and that public bodies act within the boundaries of their given powers. See Tshiki 2004 *De Rebus* 48. Furthermore, "*audi alteram partem*" literally means to hear the other side – see Hiemstra and Gonin *Trilingual Legal Dictionary* 159. Other important principles of the rules of natural justices are, amongst others, the right to adequate notice of a disciplinary action, full notice and understanding of the charge and reasons for a decision taken on disciplinary matters.

29 1991 1 SA 21 (A). The facts are, briefly, that the respondents in this matter were all employed as cleaners at a provincial hospital and their employment was regulated by the *Public Service Act* 111 of 1984. These employees were employed temporarily in a full-time capacity. The respondents were involved in a work stoppage and were subsequently dismissed on 24 hours notice and without a hearing. In the Witwatersrand Local Division, the respondents obtained an order setting aside their dismissal. The appellants then applied for leave to appeal to the Appellate Division on the grounds that the matter falls "beyond the reach of administrative law" because of the contractual relationship of master and servant. They further contended that the intention of the legislature with the enactment of the *Public Service Act* 111 of 1984 was to exclude the operation of the *audi alteram partem* principle. The *Zenzile*-judgment confirmed various earlier cases in which our courts have held that public sector dismissals do in fact constitute administrative action – see *Langeni & others v Minister of Health & Welfare & others* 1988 4 SA 93 (W) and *Mokoena & Others v Administrator, Transvaal* 1988 4 SA 912 (W).

30 *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A) 35I-J; 1991 (12) ILJ 259.

31 *Administrator, Transvaal v Zenzile* 1991 (12) ILJ 259 at 270 G-H. The court relied on *Administrator, Transvaal & Others v Traub & Others* 1989 4 SA 731 (A) at 748 G.

employers, exercising their powers to dismiss, could be regulated.[32] The outcome of *Zenzile* is accordingly that a contract of employment could not be fairly terminated firstly, without the dismissal complying with the requirements of statute, and secondly, without the dismissal complying with the requirements of a fair hearing.[33] In effect this means that the common law contract of employment had to comply with the common law principles of administrative justice. In short, the judgment in *Zenzile* was based on the finding that public sector dismissal was not purely the exercise of a contractual right, but that it involves the exercise of public power which in turn is subject to the rules of natural justice.[34]

The principles laid down by the *Zenzile*-judgment were followed in many cases to come, which essentially involved the same question of law. In *Administrator, Natal & Another v Sibiya & Another*[35] *(Sibiya)* the court had to consider whether the *audi alteram partem* rule would be applicable to a situation where employees were retrenched due to operational reasons of the public sector employer.[36] The court held that the dismissal in question involved the exercise of public power and that the public sector employer should have had regard to the *audi alteram partem* rule prior to terminating their contracts of employment.[37]

---

32 Ngcukaitobi 2008(29) *ILJ* 843. *Administrator, Transvaal v Zenzile* 1991 (12) ILJ 259 at 273 C-E. If the dismissal was held to be unlawful and in breach of the *audi alteram partem* principle, the employees were reinstated.

33 Ngcukaitobi 2008 (29) *ILJ* 844. Only if the two requirements mentioned in the text are complied with, a dismissal would be regarded as "fair". Public sector employees had a right to a fair hearing and their contracts could no longer be terminated merely by giving contractual notice.

34 Grogan 2008 (24)(1) *EL* 4.

35 1992 4 SA 532 (A).

36 The facts are, briefly, that the employees became redundant due to a hostel building project being abandoned due to lack of funds. The employees were retrenched after letters terminating their employment were handed over to them. There was no hearing prior to the termination of services. It was argued by the employer that since the employees' contracts were terminable on notice, they had no legal right to a hearing or to stay in service.

37 *Administrator, Natal & Another v Sibiya & Another* 1992 4 SA 532 (A) last paragraph.

There is no doubt that the judgments handed down in *Zenzile* and *Sibiya*, each being carefully considered and argued, were the first to give some recognition and acceptance to the rights of public sector employees during employment disputes. These decisions were first and foremost taken for the reason that these employees had no rights and hardly any adequate protection, which called for judicial interference by applying the rules of natural justice. It might be argued that the situation has changed with the subsequent developments in the area of labour law, the LRA and the enactment of the Constitution. Each of the foregoing are discussed below in order to explain the role of both these Acts (LRA and PAJA) in the contentious debates that followed the *Zenzile* and *Sibiya* decisions. *Zenzile* and *Sibiya* might be distinguishable from the cases and judgments that followed them in that a different set of rights now applies to public sector employees; however, this notion is to be debated elsewhere in this dissertation.

2.3 The Labour Relations Act 66 of 1995

The LRA established a new, single and specialised regime for the resolution of labour disputes of all employees, and disposed of the traditional divide between public- and private sector employees.[38] The LRA repealed the separate legislation applicable to employees in the agricultural, educational and public service and brought the previously unprotected public sector employees within its scope.[39] The rationale behind the enactment of the LRA was to provide for a system which guarantees dispute resolution mechanisms, forums and remedies, tailored to deal with all employment

---

38 There are, however, exclusions from the application of this Act. The exclusions are listed in section 2 of the *Labour Relations Act* 66 of 1995. The following are excluded: the National Defence Force; the National Intelligence Agency; the South African Secret Service; the South African National Academy of Intelligence and Comsec. The Labour Relations Act 55 of 1996 thus aligns South Africa's labour relations framework with that which exists in the rest of the developed world – see Patel *Developments in public sector labour relations* 180.

39 Du Toit *et al Labour Relations Law* 28.

aspects in a manner that would provide for a "one-stop shop for all labour-related disputes".[40] The LRA, amongst others, provides for the substantive right not to be unfairly dismissed,[41] and it also provides for procedural rights to be followed prior to dismissal. The LRA also sets out procedural rights to challenge unfair dismissals and subsequent remedies available to aggrieved employees.[42] The LRA furthermore provides legislative effect to the provisions of section 23 of the Constitution. Thus, public sector employees, through the LRA, now enjoy the same rights and protection that private sector employees benefited from in the past.[43] This, in effect, denotes that dismissals and other employment related acts, such as disciplinary hearings, of public sector employees should be in accordance with a fair procedure and based on fair reasons.[44] Public sector employees nevertheless retained their administrative law rights, as guaranteed by the Constitution, and in practice they still rely on administrative law in order to

---

40 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 47-49. The Explanatory Memorandum 1995 (16) *ILJ* 278, which was prepared by the Ministerial Legal Task Team, explained that one of the express aims of the *Labour Relations Act* 66 of 1995 was to provide for an overall and integrated legislative framework which could regulate labour relations. This was important since South Africa had so many divergent laws which governed the different employment sectors, especially if one has regard to the position in the public- and private sectors. It was argued that an integrated system will eradicate the 'inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion.' Explanatory Memorandum 1995 (16) *ILJ* 281-282.

41 Section 185 of the *Labour Relations Act* 66 of 1995 provides for the right not to be unfairly dismissed, and section 188 states that a dismissal would be unfair if there is no fair reason or no fair procedure. A dismissal would be unfair if it is not in accordance with a fair reason and a fair procedure. Once an unfair dismissal is before the CCMA the onus rests on the employer to show that a fair reason exists and a fair procedure was followed. The employee merely needs to show that there had indeed been a dismissal.

42 See section 191 of the *Labour Relations Act* 66 of 1995 which requires an unfair dismissal dispute to be referred to a bargaining council or CCMA – awards of the bargaining council is final and binding and there is a limited right to appeal. Sections 193 and 194 set out the appropriate remedies of reinstatement, re-employment or compensation after rehearing all the facts as they occurred in a disciplinary enquiry.

43 Public sector employees had to rely on their contractual and administrative law remedies.

44 See in this regard section 188 of the *Labour Relations Act* 55 of 1996, which requires an employer to prove that an employee was dismissed for 'a fair reason related to the employee's conduct' and 'that the dismissal was effected in accordance with a fair procedure'. Also see Code of Good Practice: Dismissals in terms of the *Labour Relations Act* 55 of 1996.

resolve employment disputes.[45] In actual fact this means that the rights of public sector employees were extended, or so it is argued by many authors and by our courts. This belief became to be a conflict-ridden matter, particularly after the enactment of PAJA in 2000.[46]

2.4 The Impact of the 1996 Constitution

The Constitution, upon its adoption on 8 May 1996, brought about far reaching and important changes within South Africa's political, judicial and employment spheres.[47] The Constitution irrefutably brought about a fresh view on labour law, in that Section 23 provides "everyone" with the right to fair labour practices. The Constitution also guarantees the right to "[j]ust administrative action" in section 33.[48] The LRA has been enacted to give legislative effect to the constitutional right to fair labour practices, and it is furthermore fashioned by judicial interpretation, contracts of employment and public policy.[49]

It is worth mentioning that the fundamental labour rights, as contained in section 23 of the Constitution, should be interpreted in terms of section 39[50]

---

45 Mischke 2006 (15)(9) *Contemporary Labour Law* 86. Abrahams 2008 HYPERLINK www.problemsolved.co.za 20 July 2008.

46 The Constitutional Court had to decide whether public sector employees have separate causes of action or more than one cause of action under the labour legislation and PAJA, *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 127.

47 Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 125.

48 This section was preceded by section 27 of the Interim Constitution. The right to fair labour practice, as guaranteed by section 23 of the *Constitution of the Republic of South Africa*, 1996, is an unencumbered right and it is important to note that it is a right guaranteed to "everyone". Section 23 guarantees the right to collective bargaining and extended employees right to strike.

49 Ngcukaitobi 2008(29) *ILJ* 848. Also see Cohen 2008 (29) *ILJ* 863.

50 Section 39 of the *Constitution of the Republic of South Africa*, 1996 reads:
(1) When interpreting the Bill of Rights, a court, tribunal or forum
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) **must** consider international law; and
(c) **may** consider foreign law.

of the Constitution and by having due regard to "the spirit, purport and objects" of the Bill of Rights.[51]

2.4.1 The Constitution and the right to fair labour practices

Section 23 of the Constitution provides an open-ended fundamental right to fair labour practices.[52] This section extended employees' rights to not only fair labour practices, but also the right to strike, collective bargaining and the right to form and join trade unions. The Constitution and the Bill of Rights have incontestably improved the quality of life and greater job security to the workforce in many ways in that the Constitution not only protects the rights to fair labour practices, but also the right to equality[53], freedom of association[54], freedom of expression;[55] and privacy[56], all of which are relevant in the employment sphere through enabling legislation.[57] In *Old Mutual life Assurance CO SA v Gumbi Ltd*[58] the court had regard to the development of the common law, with reference to the constitutional law and particularly the fundamental rights framework. It is argued that it is necessary to subject labour law to constitutional scrutiny, since the right to

---

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. [own emphasis added].

51 Basson 1994 (57) *THRHR* 507.

52 The precise meaning and scope of the right to 'fair labour practices' is, however, not defined in the *Constitution of the Republic of South Africa*, 1996. In *National Education Health & Allied Workers Union v University of Cape Town & others* 2003 (24) ILJ 95 (CC) at para 33, Ngcobo J held that, although the Constitution constitutionalised the right to fair labour practices, it did not define it and held, for a unanimous court, that the concept is 'incapable of precise definition'. The court went on to say that the fairness will depend on the circumstances of each case and that it will involve a 'value judgment'.

53 Section 9 of the *Constitution of the Republic of South Africa*, 1996.

54 Section 18 of the *Constitution of the Republic of South Africa*, 1996.

55 Section 16 of the *Constitution of the Republic of South Africa*, 1996.

56 Section 14 of the *Constitution of the Republic of South Africa*, 1996.

57 Such as the *Employment Equity Act* 55 of 1998 and the *Basic Conditions of Employment Act* 75 of 1997. See Beatty 1993 *ILJ* 2 and Van Niekerk *Law@work* 4.

58 [2007] 8 BLLR 699 (SCA). The focus in this case related to the employee's right to a pre-dismissal hearing under the common law.

fair labour practices, like administrative law, serves as a constitutional safeguard against the potential abuse of power by employers in all sectors.[59]

3. Administrative law in the context of public sector employment

3.1 Administrative action defined

3.1.1 Constitution of the Republic of South Africa, 1996

In order to comprehend the multifaceted and complex interplay between labour law, administrative law and the Constitution, the concept of "administrative action" should be defined prior to engaging in an analysis of its applicability on public sector labour dispute resolution.[60] According to Baxter,[61] administrative law can be defined as:

> The general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies to such action or inaction.

The Constitution, in section 33, affords a right to administrative action that is "lawful, reasonable and procedurally fair".[62] Section 33 gives a broad framework within which all organs of state should act, and provides that legislation should be enacted to give effect to these rights.[63] PAJA has

---

59 Ngcukaitobi 2008 (29) *ILJ* 849. It is in these circumstances that the *Labour Relations Act* 66 of 1995 and the *Promotion of Administrative Justice Act* 3 of 2000 will come into play in order to serve and give effect to both section 23 and section 33 of the *Constitution of the Republic of South Africa*, 1996.

60 Hoexter, Lyster and Currie (ed) *The New Constitutional & Administrative law* 2-3 describe administrative law as that part of our public law which regulates the activities of those bodies exercising public power or performing public functions. It has been submitted, that, at the very least, administrative action would include all actions of an administrative nature taken by bodies which exercise public power - see *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) at 4411.

61 Baxter *Administrative Law* (1984) 5.

62 Section 33 of the *Constitution of the Republic of South Africa*, 1996.

63 Section 33(3) of the *Constitution of the Republic of South Africa*, 1996.

been enacted to give effect to this constitutional right. The aim of the right to just administrative action is thus, firstly, to ensure that organs of state (public sector employers) do not abuse their power when dealing with individuals (public sector employees), and secondly, that all procedures have been applied in accordance with this constitutional guarantee.[64] The purpose of section 33 is to regulate the functions of the public administration (public sector employers) to guarantee that certain procedures are followed in accordance with the fundamental right to just administrative action.[65]

Section 33, read with section 23(2)(b) of the Constitution, stresses that administrative action is not necessarily constrained to the exercise of a power conferred by legislation, but that it can include any act relating to the management of the affairs of an organ of state.[66] Upon deciding whether particular conduct will amount to "administrative action" one has to have regard to the nature of the power exercised as well as the conduct which will most likely have a direct and immediate impact or consequence for individuals or groups of individuals.[67]

3.1.2 The Promotion of Administrative Justice Act 3 of 2000

PAJA was enacted to give effect to the right to fair administrative action and to provide for a procedure to challenge administrative decisions. It will be

---

64 Lange and Wessels *The Right to Know* 5-6.

65 Ngcukaitobi 2008 (29) *ILJ* 846. See *President of the Republic of South Africa v SA Rugby Football Union* 2000 1 SA 1 (CC) at para 136. The fundamental right to just administrative action thus controls the exercise of public power. It also gives effect to the doctrine of separation of powers where the legislature, executive and judiciary should function independently. This doctrine ensures appropriate checks and balances at all times.

66 See *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (8) BCLR 1024 (W). In *President of the RSA v SA Rugby Football Union* 1999 (10) BCLR 1059 (CC) the court held that the focus in each enquiry should be on the function rather than the functionary.

67 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at para 24.

applicable in cases where employers' actions fall within the ambit of the definition of "administrative action".[68] PAJA provides for the review of substantively unfair administrative action when such action materially and adversely affects the rights or legitimate expectation of any person. It is thus important to first determine whether a dismissal of a public sector employee constitutes administrative action in order to ascertain whether PAJA will be applicable. Section 1 of PAJA defines "administrative action" in detail as:

> – 'administrative action' means any decision taken, or any failure to take a decision, by –
>
> (a) an organ of State, when –
>
> (i) exercising a power in terms of the Constitution or a provincial constitution;
>
> or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision; which **adversely affects the rights of any person and which has a direct, external legal effect,**[69] . . .
>
> . . .
>
> 'decision' means **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 ...;[70]
>
> 'empowering provision' means a law, a rule of common law, customary law., or an agreement, instrument or other document in terms of which an administrative decision was purportedly taken; **[own emphasis added]**

---

68 *The Promotion of Administrative Justice Act* 3 of 2000 codified the common law grounds of review and in the public sector it might apply in the areas of transfers, dismissals and promotions.

69 An action of decision taken will have "direct legal effect" when "it is a legally binding determination of someone's rights possessed of the quality of finality". With regard to "external legal effect" it has to affect outsiders (preferably someone outside the public organisation or outside the public sector employers employ) and not only possess the qualities of internal matters or administration - see *SAPU & another v National Commissioner of the South African Police Service & another* [2006] 1 BLLR 42 (LC) at para 57. In *Grey's Marine Hout Bay (Pty) Ltd and Others v The Minister of Public Works and Others* 2005 6 SA 313 (SCA) at para 23 the court held that the administrative action should "impact(s) directly and immediately on individuals". When one needs to determine whether rights has been "adversely affected" there is no doubt that a dismissal will do just that – a person is deprived of a right upon dismissal. See Ngcukatiobi and Brickhill 2007(28)(4) *ILJ* 773.

70 An "empowering provision" is defined in section 1 of PAJA as to include a contract.

It is therefore clear that not all actions of public sector employers will necessarily amount to administrative action within the meaning of the relevant provisions of PAJA – it has to possess all the qualities as expressed in the definition of PAJA.[71] PAJA, in section 1(i)(b)(aa)-(ii), excludes certain types of decisions from the definition of "administrative action".[72] Of importance to this dissertation is that, upon reading the listed exclusions, it is clear that these categories do not include employment related decisions taken by public sector employers.[73] This in turn leads to the assumption that employment related decisions, made by public sector employers, might amount to administrative action as envisaged by PAJA.[74]

Plasket J, in the *POPCRU*-judgment,[75] had occasion to decide whether PAJA applied to the dismissal of employees employed in the Department of Correctional Services. The court held that the constitutional right to fair labour practices does not trump the right to just administrative action, and furthermore held that this is an issue that should be left to the legislature to decide and change, since the legislature could have inserted decisions taken by public sector employers in PAJA's list of exclusions, if it intended

---

71 Conradie J argued in *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) that dismissal enquiries in the public sector does have the "procedural attributes" of administrative action, but went on to say, referring to the listed exclusions, that not all administrative actions falls within the scope of the PAJA . Also not all employment issues will be governed by the LRA.

72 These exclusions include the executive powers of the National Executive, Provincial Executives, the executive powers of municipal councils, the legislative functions of Parliament, provincial legislature and municipal councils. It also excludes the judicial functions of judicial officers and decisions taken in term of the *Promotion of Access to Information Act* 2 of 2000 (PAIA).

73 Ngcukaitobi 2008 (29) *ILJ* 350.

74 Section 1(i)(b)(aa)-(ii) of the *Promotion of Administrative Justice Act* 3 of 2000, also Ngcukaitobi 2008 (29) *ILJ* 350.

75 *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E). The facts of this case: the applicants, who were correctional officers employed at the Middledrift Prison and who were members of POPCRU were dismissed for declining to work overtime. This was after there has been a dispute over the issue of over time work. After being dismissed, the applicants argued, amongst others, that their constitutional rights fair labour practices and to fair administrative action were breached. The respondents inter *alia* argued that the dismissals were not reviewable in terms of the *Promotion of Administrative Justice Act* 3 of 2000 since their actions did not constitute administrative action as defined in terms of this Act.

to do so.[76] Thus, if an employer's power to dismiss is a public power, and the decision falls within the meaning of administrative action, then an employee may, in terms of section 6(1) of PAJA, institute proceedings for judicial review.[77] If, on the other hand, an employment decision of a public sector employer cannot be qualified as administrative action,[78] PAJA will not be applicable and the employee will clearly have to rely on the provisions of the LRA exclusively.

3.1.2.2 Remedies under the Promotion of Administrative Justice Act 3 of 2000

Section 6 sets out the grounds for judicial review of administrative actions. It provides for a wide range of grounds upon which review proceedings can be instituted.[79] The remedies available under PAJA are listed in section 8 and these remedies should at all times be applied and granted in a "just and equitable" manner. Most of these remedies are also well-known under the common law.[80] Generally, the remedy for an administrative review will be to

---

76 See footnote 72 *ibid*. Also see *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E) at para 59.

77 Section 6 sets out a number of grounds upon which administrative action can be reviewed, which will be discussed later in this dissertation. The institution of an action should, furthermore, be in accordance with Section 7 of the *Promotion of Administrative Justice Act* 3 of 2000 in that review proceedings should commence within 180 days after an administrative action/decision has been taken and all internal remedies should first be exhausted.

78 In other words, if the decision does not fall within the ambit and meaning of an administrative action as defined in the *Promotion of Administrative Justice Act* 3 of 2000.

79 See section 6 of the *PAJA*. In terms of this section, review can, in summary, be instituted when the administrator was not authorised to do so, was biased or reasonably suspected thereof (section 6(2)(a)); no compliance with mandatory procedures (section 6(2)(b)); action was procedurally unfair or was influenced materially or by error of law (section 6(2)(c-d); the reason for the action was not authorised by the empowering provision, there was an ulterior motive or taken in bad faith (section 6(2)(e)) etc.

80 Hoexter *Administrative Law* 465. Remedies available under PAJA include reasons for an action; prohibiting the administrator to act in a certain way; setting aside of the administrative action; reconsideration of the matter; temporary interdicts or relief, declaration of rights and, in exceptional circumstances, a defect can be corrected, the action may be substituted or the administrator may be directed to pay compensation – see section 8(1) of the *PAJA*.

set aside the decision and remit the matter back to the decision maker to be considered afresh.[81] Section 8 also provides for statutory remedies for failure to give reasons and should a matter be reviewed on the ground of an unreasonable delay, section 8(2) provides for special remedies.[82] There is thus, without a doubt, a clear overlap between PAJA and the LRA in relation the remedies available to public sector employees.[83]

3.1.3 Labour Relations Act 66 of 1995

The LRA brought about a new system of dispute resolution through Chapter VII[84]. This system provides for the resolution of disputes by way of conciliation and subsequent arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) or a Bargaining Council having jurisdiction depending on the nature of the dispute.[85] Certain disputes are not subject to arbitration, but rather adjudication by the Labour Court in terms of section 191(5)(a) and (b) LRA. The LRA will thus ensure that employees are protected by the rules of natural justice and that all employment related disputes will be both substantively and procedurally fair whilst, in administrative law, substantive fairness is not a ground for review.[86] In *Fedlife Assurance Ltd v Wolfaardt*[87]

---

81 See *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at para 31.

82 Briefly, in terms of Section 8(2), a court may order that a specific decision be taken; may order a declaration of the parties rights; or to direct any of the parties to do or refrain from doing any act necessary in order to do justice between the parties.

83 See discussion in footnote 42 *ibid* for remedies available in terms of the LRA and footnote 80 *ibid* for a discussion of the remedies available under PAJA.

84 Sections 112 – 184 of the *Labour Relations Act* 66 of 1995 deal with dispute resolution and the Act furthermore sets out, in the Code of Good Practice: Dismissal Schedule 8, the requirements and guidelines which need to be met in disciplinary enquiries. Each bargaining council, including public sector bargaining councils, must further provide for a dispute resolution process and can exercise the dispute resolution functions if so accredited by the CCMA.

85 Quinot 2000 *Responsa Meridiana* 16. An employee can challenge a dismissal by referring a dispute to conciliation within 30 days, and, should that fail, to arbitration. See section 191 of the *Labour Relations Act* 66 of 1995

86 Ngcukaitobi 2008 (29) *ILJ* 852. This is also explained in *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) in para 86 where the court held that the unfairness of a decision has never been a ground for review and that the unfairness needs to be of such a degree that a conclusion can be reached that 'the

it was held that if a case relates to the unlawfulness rather than the fairness of an employment dispute, the dispute will not fall within the scope and ambit of section 191 of the LRA. Logically, an inference can be drawn that, since review in terms of administrative law does not require substantive fairness, the LRA can step in to ensure that fairness is observed when giving effect to the constitutional right to just administrative action in that labour law is concerned with substantive fairness.[88]

It is also worth noting that section 157(2) of the LRA seems to create even more confusion in this labyrinth in that it extends the jurisdiction of the Labour Court to adjudicate on employment cases in which the State, as an employer, has infringed upon or threatened an employee's fundamental right to just administrative action.[89] Section 157(2) does not alleviate the pressures created by these two Acts, nor does it clarify any of the jurisdictional challenges that it create.

One should be mindful of the fact that the LRA and PAJA both serve different purposes in different ways and this in itself demonstrate that these

---

person who made the decision had erred in a respect that would provide grounds for review.'

87 2001 (22) ILJ 2407 (SCA).

88 See the discussion in Ngcukaitobi 2008 (29) *ILJ* 853.

89 This section confers concurrent jurisdiction on the Labour Court and High Court when dealing with the State as employer. This dissertation will not, due to length constraints, deal with the complex jurisdictional issues in which the Constitutional Court, in the *Chirwa*-judgment, has shed some light on. For the sake of completion I will set out the relevant parts of these sections:
Section 157(1) and (2)(b) reads:

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

two acts should not stand in opposition to one another, where the one should frustrate the purpose and role of the other.

3.2. Relationship between the divergent laws governing public sector employment law

The Constitution is the highest law of the Republic of South Africa and any action or conduct inconsistent thereto, will be invalid.[90] The interpretation and application of employees' rights, as provided for in the LRA and PAJA must, therefore, be in accordance with the values guarded and guaranteed by the Constitution, which are human dignity, equality and freedom in an open and democratic society.[91] It is argued that when interpreting statutes one should consider the relevant statutes place/hierarchy and also have regard to the purpose for which a statute was enacted.[92] Even though this dissertation will not provide a comprehensive exposition with reference to the interpretation of statutes, it is important to note that where the meaning of any provision is clear and unambiguous, such meaning should be accepted.[93]

3.2.1 The relationship between the Labour Relations Act 66 of 1995 and Promotion of Administrative Justice Act 3 of 2000

It has been held by our courts that the LRA directs fairness and that PAJA codifies the administrative law, which in turn demands that due processes

---

90 Section 2 of the *Constitution of the Republic of South Africa*, 1996.

91 Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 125. Also see section 1(a) and section 39(2) of the *Constitution of the Republic of South Africa*, 1996.

92 From the discussion in para 1 and 2.4 *supra* it is clear that the *Labour Relations Act* 66 of 1995, for example, was enacted to provide one comprehensive system for the resolution of labour related disputes. The act demolished unnecessary duplication of resources and remedies available in these circumstances. See *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 48.

93 *R v Gorekwang* 1961 4 SA 40 (T) also Du Plessis 2008 HYPERLINK www.lexisnexis.com 4 September.

must be followed, specifically in public sector employment law.[94] However, upon interpreting the relationship between the LRA, PAJA, the common law and the Constitution, reference should be made to the Constitutional Court's judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs,*[95] where the court per O'Regan J, explained the relationship as follows:

> The Court's power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine neither of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution.

This case emphasises that one could only rely on the constitutional right to just administrative action when PAJA applies to a decision in accordance with the definition.[96] Pillay J, in the *Haschke*-case, held that labour law is not the same as administrative law, nor will it ever be, even though they share some common characteristics. This argument was based on the fact that the administrative law falls under public law only whereas elements of administrative law, private law and commercial law can be found in labour law.[97] Both these areas of law have their own sets of jurisprudence and both serve to enforce unique rights, being the right to fair labour practices (LRA) and the right to administrative justice (PAJA).

Furthermore, one needs to understand the difference between PAJA and the LRA in order to decide whether public sector employees could utilise PAJA in employment disputes. With regard to the differences between PAJA and the LRA, Pillay J, in the *Haschke*-case, pointed out that PAJA differs from the LRA firstly in relation to the procedures for review in that the

---

94 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 46 footnote 33.

95 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) at para 22. See *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E) para 22.

96 *Public Servants Association obo Haschke v MEC for Agriculture & Others* 2004 (25) ILJ 1750 (LC) at para 9.

97 *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC) at para 144. See also *Ibid* at para 11.

review grounds in terms of PAJA seems to be more protracted;[98] secondly, that PAJA does not make provision for any conciliation process as the LRA do and thirdly, the remedies that courts could give to disgruntled employees in terms of the LRA are mainly reinstatement and compensation whilst courts, in terms of PAJA, could act in (almost) any manner required.[99]

3.2.1.1 Supremacy of the Labour Relations Act 66 of 1995

When the right to just administrative action is in conflict with the right to fair labour practices, the LRA must, according to section 210 of the LRA, prevail. Section 210 reads:

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

When PAJA was enacted (seven years after the LRA and five years after the *Basic Conditions of Employment*[100]), it was promulgated without the legislature altering either section 210 or section 157(2) of the LRA. The Constitutional Court, in the *Chirwa*-judgment, argued that the legislature hereby intended that PAJA should not enjoy any precedence over the LRA, and that the LRA should thus take precedence or be the *superior law* in all employment matters.[101] In *Transnet Ltd v Chirwa,*[102] Conradie JA referred to the decision in *Barker v Edgar,*[103] in which it was held that:

---

98 See for example the time limits for filing in terms of section 9 of PAJA.

99 See Ngcukaitobi 2007(28)(4) *ILJ* at 774 and *Public Servants Association obo Haschke v MEC for Agriculture & Others* 2004 (25) ILJ 1750 (LC) at para 30-41 as well as the discussion in footnote 43 *ibid* and para 3.1.2.2 *supra*.

100 Act 75 of 1997.

101 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 50. Also see *Rex v Padsha* 1923 AD 281 at 312 where it was held that "Parliament is presumed to know the law", thus one can presumably not argue that this was an oversight or any other form of ignorance on part of the legislature – accordingly the next reasonable explanation will be that it was intended for the LRA to prevail over other legislation regulating employment matters such as PAJA.

102 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA).

103 [1898] AC 748 at 754.

> . . . [w]hen the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly.

The argument as set out above concludes that the LRA regulates a specific relationship and that PAJA, which has a much broader scope than the LRA, should not be applicable.

Evidently the question arises as to whether these two branches of law can co-exist, or whether the one be excluded from the other *in totu*? This dissertation argues that both the LRA and PAJA was consciously drafted by the Legislature to form part of South African law and consequently to put constraints on employers when they exercise their powers against employees, and that it might very well be an overstatement to say that PAJA should fall away in its entirety when dealing with employment related matters.

3.3 Two approaches to the applicability of the Promotion of Administrative Justice Act 3 of 2000 in public sector employment disputes[104]

Two approaches have been adopted in our law with regards to the applicability of PAJA and the LRA in public sector employment disputes. These approaches are briefly discussed below.

3.3.1 Regulation through the Labour Relations Act 66 of 1995

In terms of the first approach, the resolution of employment disputes should be regulated and resolved solely through the LRA and the right to fair labour

104 Section 157(2) of the LRA gave rise to these two approaches.

practices as set out in section 23 of the Constitution.[105] This approach will lead to employment disputes being resolved through "identical mechanisms and in accordance with similar values"[106] rather than an approach were both the LRA and dispute resolution in terms of PAJA will be utilised when dealing with public sector employment disputes. If this approach were to be pursued in all employment disputes concerning public sector employees, it would mean that PAJA and section 33 of the Constitution would be ignored when a court has to decide a dispute involving public sector employees. Conradie JA, in the *Transnet v Chirwa*-case, held that the legislative intent behind the enactment of the LRA was to remove employee's reliance on an administrative cause of action.[107] The LRA furthermore affords extensive remedies to employees who are indignant by employment decisions, such as dismissals.[108]

3.3.2 Regulation through both the Promotion of Administrative Justice Act 3 of 2000 and the Labour Relations Act 66 of 1995

The second approach entails that public sector employment disputes should be regulated through both the LRA and PAJA.[109] This subsequently opens the spectrum to employees to choose between the remedies afforded by both the LRA and/or PAJA.[110] Cameron JA, in his minority judgment in the

---

105 Holness and Devenish 2008 (71) *THRHR* 142. See also *Mgijma v Eastern Cape Appropriate Technology Unit and Another* 2000 (2) SA 291 (Tk) at 308-309; *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others* 1998 (1) SA 685 (C) at 688-690.

106 *SAPU & another v National Commissioner of the South African Police Service & another* [2006] 1 BLLR 42 (CC) at para 55.

107 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 48.

108 *The Labour Relations Act* 66 of 1995 sections 133-150.

109 *Ndzamela v Eastern Cape Development Corporation Ltd* [2003] 6 BLLR 619 (Tk) at para 27; *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) at para 162.

110 Holness and Devenish 2008 (71) *THRHR* 142. The remedies provided for in PAJA and the LRA differ fundamentally – being successful under the administrative law will result in setting aside a decision and remittal (decisions should be procedurally fair and lawful), whereas remedies under the LRA will include, amongst many others, re-instatement; a rehearing and substitution of the first decision if found to be incorrect. PAJA thus, arguably, offers a limited/lesser remedy - see *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 31.

Transnet v Chirwa-case, held that employee's entitlement to remedies under the LRA do not bar them from relying on PAJA.[111] The Supreme Court of Appeal, in the succinct *Digomo*-judgment,[112] held that the remedies provided for in the LRA, when dealing with unfair labour practices, do not constitute an exhaustive list of remedies, since an employer's conduct might also "give rise to other rights of action".[113] Since there are different remedies and grounds for review it can be argued that these two spheres should not be independent, but interdependent on each other.[114] If a dismissal gives rise to more than one cause of action, then surely one cannot reasonably argue that PAJA should now disperse into thin air. The question that now emerges is whether the LRA will be the absolute law in all employment related matters and whether this was in fact the intention of the legislature?

4. Applying the Labour Relations Act 66 of 1995 and the Promotion of Administrative Justice Act 3 of 2000 through case law

4.1 Historical development prior to Chirwa v Transnet Ltd & Others[115]

For several years, the question as to whether disgruntled public sector employees could rely on administrative law provisions in employment disputes grappled the minds of our courts in a diverse line of incompatible court decisions.[116] Some judges argued that claims under PAJA could not be pursued since dismissals of employees do not constitute administrative

111 *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 58.
112 *United National Public Servants Association of South Africa v Digomo NO & Others* 2005 (26) ILJ 1957 (SCA) at para 4.
113 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 60.
114 See Ngcukaitobi 2008 (29) *ILJ* 853.
115 [2008] 2 BLLR 97 (CC).
116 Olivier and Smit *Labour Law and Social Security Law* 7 and Olivier 1994 *SAPL* 50.

action,[117] whilst others argued that employees could rely on PAJA.[118] These decisions ultimately led to the *Chirwa*-matter in which the Constitutional Court made a final, yet in my view a disappointing ruling.

In order to accentuate the conflict previously created *vis-à-vis* this question, a number of contradictory judgments will briefly be discussed.[119]

In *Louw v SA Rail Commuter Corporation Ltd & Another,*[120] the court held that, even though the employer was a public authority, its power to terminate a contract of employment derived from the common law principles of contract, and that the employer accordingly did not perform a public function, nor did it implement legislation. In *Phenithi v Minister of Education and Others*,[121] a judgment handed down by the Supreme Court of Appeal, the court held that the provisions of section 14(1)(a) of the *Employment of Educators Act*[122], do not constitute reviewable administrative action since the dismissal was through the operation of law.[123] Nevertheless, in a number of preceding and subsequent judgments, our courts have held that it could in fact be possible to utilise the provisions of PAJA since PAJA

117 See for example *Greyvenstein v Kommissaris van die SA Inkomste Diens* (2005) 26 ILJ 1395 (T), *Phenithi v Minister of Education and others* [2006] 1 All SA 601 (SCA). Also Grogan 2008 (24)(1) *Employment Law* 5.

118 See, amongst others, *Mbqyeka & Another v MEC for Welfare, Eastern Cape* [2001] 1 All SA567 (Tk), *Dunn v Minister of Defence & Others* 2005 (26) ILJ 2115 (T).

119 Due to length constraints, reference will only be made to the most important and controversial judgments.

120 2005 (26) ILJ 1960 (W).

121 *Phenithi v Minister of Education and Others* [2006] 1 All SA 601 (SCA). The facts of this case are briefly as follows: the appellant, Mrs Phenithi, was discharged from active service in terms of section 14(1)(a) of the *Employment of Educators Act* 76 of 1998 since she was absent from work for more than 14 consecutive days without the consent of her employer. The appellant then argued that section 14(1)(a) was in conflict with the provisions of section 188 of the LRA, which relates to unfair dismissals, and that it, amongst others, violated her right to fair administrative action.

122 Act 76 of 1998.

123 See *Phenithi v Minister of Education and Others* [2006] 1 All SA 601 (SCA) at para 9425 E-F.

provides for an administrative cause of action which is disparate from the cause of action provided for by the LRA.[124]

4.1.1 Contradicting approaches in the application of the Labour Relations Act 66 of 1995 and the Administrative Justice Act 3 of 2000

In order to explain the reasoning in the *Chirwa*-judgment, which is discussed later in this dissertation, reference needs to be made to the two leading cases preceding it. These cases will clearly demonstrate the two approaches, as discussed earlier in this dissertation.[125]

4.1.1.1 *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 3 (E)

The case discussed in this section will illustrate the harmony in which PAJA and the LRA could co-exist.

In *POPCRU & Others v Minister of Correctional Services & Others,*[126] discussed in chapter 3 above, it was argued, for the respondents, that a decision to dismiss did not constitute administrative action, since it did not affect the public, but was part of internal decisions. The court, per Plasket J, held that the concept of public power does not necessarily denote that such power should have some form of impact on the public at large, and,

---

124 See Olivier and Smit *Labour Law and Social Security Law* 7. This view is apparent from, amongst others, *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E); *Dunn v Minister of Defence & Others* 2005 (26) ILJ 2115 (T); *De Jager v Minister of Labour* [2006] 7 BLLR 654 (LC). Cases in which it was decided that employment decisions by public sector employers comes down to administrative action and where PAJA will be applicable, is all distinguishable from each other albeit for reasons relating to dismissals, unfair labour practices or cases sourced in contract and not in statute. It seems that the question as to whether a decision constitutes 'public power' will depend on the facts and nature of each case.

125 See para 3.3 *supra*.

126 [2006] 4 BLLR 3 (E).

furthermore, held that the dismissal amounted to administrative action.[127] The court further held that to remove PAJA from public sector employment disputes will imply that the constitutional right to fair labour practices now "trumps every other right" and went on to say that there is in principle nothing wrong when employees have more remedies applicable to them to exercise rather than less.[128]

The difficulty with this line of thinking is that it may result in forum shopping and different outcomes in different tribunals and in some instances raise serious questions of jurisdiction. The result of having different outcomes may also lead to legal uncertainty.

When public sector employers employ and let off their employees this may not, simply stated, have the same effect as a contract between a private employer and employee. To a certain extent, when public sector employers' power to employ is derived from statute, it would appear to be a matter of particular public character and importance since the public as a whole are indeed affected by the actions of state employees, particularly in circumstances where public sector employees' decisions are of public nature.

4.1.1.2 The *South African Police Union v National Commissioner of the South African Police Service* [2006] 1 BLLR 42 (LC)

The case discussed in this section will support the argument that the LRA should be the supreme "power" in employment disputes.

---

127 See *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E) at para 53. Ngcukaitobi 2008 (29) *ILJ* 855.

128 See *POPCRU*-judgment *ibid* at para 59-60. The court held that "the protections afforded by the labour law and administrative law are complementary and cumulative, not destructive of each other simply because they are different."

In the *South African Police Union v National Commissioner of the South African Police Service*[129] is a noteworthy judgment in which it was emphasised that the LRA should solely be applicable in employment disputes and . The court, per Murphy AJ (as he then was), held that there was nothing public about setting working hours, since it fell within the realm of internal conduct premised on "a contractual relationship of trust and good faith" and that "the concept of administrative law is not intended to embrace acts which are already properly regulated by private law".[130] According to this judgment, actions of public sector employers will and should fall mainly in the sphere of employment law and the laws that govern it.[131]

The distinction between administrative action of public sector employers and conduct which falls within the ambit of private law (LRA) will in practice be difficult to sustain, since many functions of public sector employers are frequently being outsourced to private actors – as rightly pointed out by Murphy AJ.[132] The SCA in *Logbro Properties*[133] held that tendering will constitute administrative action. Tendering, just as employment, involves a contractual relationship. However, Murphy AJ held that there is a considerable difference between tendering and employment in that

129 [2006] 1 BLLR 42 (LC). This case involved a new shift system to replace the traditional 12 hour shifts of the SAPS. The decision was challenged and a dispute was referred in that it amounted to a unilateral change in their terms and conditions of employment. The matter remained unresolved and the dispute was referred to the labour court on the ground that the respondent breached the bargaining council's and its member's rights to just administrative action under PAJA. The applicants argued that the change in the shift system was sourced in section 24(1) of the *Police Service Act* 68 of 1995 and the decision thus amounted to reviewable public power whilst the respondents argued that the decision could not constitute administrative action since it flows from al collective agreement which is part of the managerial powers. The *SAPU*-judgment was followed by the Labour Court in *Hlope and Others v The Minister of Safety and Security and Others* [2006] 3 BLLR 297 (LC).

130 *South African Police Union Ibid* at para 51 and 52.

131 *South African Police Union Ibid* at page 44.

132 *South African Police Union Ibid* at para 52.

133 *Logbro Properties CC v Bedderson NO & Others* 2003 2 SA 460 (SCA).

tendering serves the public interest and impacts on the rights and interests of external parties whilst employment involves mere internal processes.[134] The court further held that the Constitution draws a distinction between the right to administrative action and the right to fair labour practices in that they have distinct forms of regulation and subsequent remedies. It was held that, even though it might be a fine line, the Constitution treats them as two distinct and severed acts.[135] This seems to be formalistic in that it focuses too much on the how it appears than on the real content and meaning of each case. It is argued that the rights in the Bill of Rights should be read together and stands in harmony with each other and the rights enacted to give effect thereto.[136]

Accordingly, Murphy AJ held that:

> There seems to be no logical, legitimate or justifiable basis upon which to categorise **all** employment conduct in the public sector as administrative action, if only because of the principle of equality, and especially in the light of the express provisions of the definition of "administrative action" in PAJA. [own emphasis added]

The controversy augments when one has regard to *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services*[137] where the court was faced with the transfer of an employee to another post. The court followed the *POPCRU*-judgment and distinguished the *SAPU*-judgment and held that public power was involved in that section 14(1) of the *Public Services Act*, 1994 permits transfers "when the public interest so

---

134 *SAPU & another v National Commissioner of the South African Police Service & Another* [2006] 1 BLLR 42 (LC) at para 52. It was also pointed out that one should be mindful of the fact that collective bargaining is aimed at realising equality between the employer and its employees and that the public sector employees are thus placed on the same footing as their employers.

135 *SAPU Ibid* at para 53.

136 Sections 23 and 33 of the *Constitution of the Republic of South Africa*, 1996 should be read together so as to have the same effect on the LRA and PAJA in its application and reach.

137 [2006] 10 BALR 960 (LC).

requires"[138] and that the actions, therefore, amounted to the exercise of "public power". The court thus held that discretionary power to transfer was derived from statute and not through the execution of a contractual right.[139] The court was not persuaded that the LRA "must be taken impliedly to have removed existing rights enjoyed by public sector employees".[140]

4.2 The decision of the Supreme Court of Appeal in Transnet Ltd v Chirwa[141]

Consequently, the divergent views of the courts on this issue were such that no consistent approach could possibly have been followed. The inconsistency and legal uncertainty resulting from the conflicting judgments was cleared in the renowned *Chirwa*-case,[142] where the High Court held that the dismissal of an employee amounted to administrative action which should be reviewed by the applicable administrative law principles. The High Court, however, based its decision on certain common law principles, and not on the application of PAJA or section 33 of the 1996 Constitution. Subsequently, the SCA was approached to consider (1) whether the dismissal constituted "administrative action" within the meaning of PAJA; and (2) whether the dismissal was a matter that had to be determined exclusively by the Labour Court in terms of section 157(1) of the LRA. The SCA was split 3:2 on the outcome of this matter. A brief outline of both the majority and the minority judgments will be given below. The focus of the

---

138 *Nxele v Chief Deputy Commissioner Corporate Service Department of Correctional Service and Others* [2006] 10 BALR 960 (LC) at para 59.

139 *Nxele ibid* at para 67.

140 *Nxele ibid* at paras 69-70. See also Holness 2008 (71) *THRHR* 143.

141 [2007] 1 BLLR 10 (SCA).

142 The facts of this case are, briefly, the employee (Chirwa) was dismissed for poor work performance. The employee did not attend her disciplinary enquiry as the presiding officer was allegedly biased. The applicant challenged her dismissal in the High Court on the basis that the dismissal violated her constitutional right to fair labour practices and to have the dismissal reviewed and set aside. The High Court decided that the dismissal amounted to "administrative action" in her favour in that there was no compliance with the *audi alteram partem* principle. Transnet appealed on the grounds that the High Court lacked jurisdiction and that the actions of Transnet, as the employer, did not amount to administrative action.

discussion below will only be on the applicability of PAJA. The question as to whether the High Courts will have jurisdiction to adjudicate on matters alike is not discussed in this dissertation.

4.2.1 Majority judgment

Mthiyane JA, with Jafta JA concurring, held that the termination of Chirwa's contract of employment did not constitute an "administrative action" as provided for under PAJA. The majority held that the termination of a contract of employment does not involve any form of public power or public function in terms of any legislation.[143] The court held that "the power to dismiss is found not in legislation, but purely in the employment contract".[144] However, in section 1 of PAJA, an "empowering provision" is defined as:

> . . . a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

According to the meaning of "empowering provision" one can argue that an administrative action can be based in contract and the mere fact that the action was founded in contract can therefore not necessarily result in a blatant exclusion of PAJA; provided that it is borne in mind in this regard that the administrator is a "natural or juristic person, other than an organ of state"[145]

According to this judgment, public sector employers can be "released" from their inherent public nature and act as ordinary employers without the stigma of "public interest" affecting them. The court in effect held that the

---

143 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 14. In this regard the court made reference to *President of RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) where the court held that "the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government."

144 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 15.

145 Section 1 of the PAJA.

common law and the administrative law which have been applicable to public sector employers are no longer good law.[146] It is nevertheless evident that, if the legislature intended to exclude PAJA, it would have and could have done so expressly when PAJA was enacted to give effect to section 33 of the Constitution.[147]

Conradie JA, accepted that the dismissal in Chirwa did constitute administrative action in that dismissals in the public sector "necessarily has the procedural attributes of administrative action".[148] Conradie JA however further argued that since the enaction of the LRA, the structure of the legislation no longer entail that dismissals in the public sector be dealt with as administrative actions.[149] According to the arguments set out above the legislature could not have intended for public sector employees to have a right to choose the protection of either the LRA or PAJA. This in effect means that public sector employee's right to an administrative cause of action in terms of PAJA in dismissal disputes vanished through the enactment of the LRA.

4.2.2 Minority decision

The minority judgment was written crisply and to the point by Cameron JA Mpati DP concurring. Cameron JA disagreed with Mthiyane JA and Conradie JA and argued that:

> . . .the Constitution permits an employee of a public body to seek relief in the ordinary courts for dismissal related process injustices that constitute administrative action.[150]

146 Partington and Van der Walt 2007 *Obiter* 390.
147 *Ibid* at 391.
148 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 26.
149 *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 27.
150 *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 47.

The minority judgment was premised on two main questions: (1) if there were no LRA, would public sector employees bring their claims under PAJA, and, (2) if they can, did the LRA take away that entitlement?[151] It was held that the existence of a contract between Ms Chirwa and Transnet did not alter the public relationship due to the fact that one in fact deals with a public entity created by legislation which exercises public power in "the ordinary course of administering the business of Transnet".[152] It is this very public dimension which renders the contract administrative in nature and subject to PAJA. Furthermore, the fact that a public sector employee has remedies under the LRA should not preclude the employee from seeking remedies under PAJA. Cameron JA held in paragraph 63:

> 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.

Cameron JA explained that the enactment of the Constitution, the LRA and PAJA did not supersede the predated *Zenzile*-judgment, but that it endorsed its reasoning.[153] The LRA's remedies can never be seen as exhaustive of those remedies that may be available to employees through their employment and that one action can give rise to more than one cause of action, namely, in terms of section 23 of the Constitution as given effect in the LRA and in terms of section 33 of the Constitution as given effect to by PAJA.[154] The minority judgment of the SCA in Chirwa can arguably be used to argue that public sector employees can challenge their dismissals and unlawful employment practice grievances as an infringement of their right to just administrative action.

---

151 *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 49 and Partington and Van der Walt 2007 *Obiter* 394.

152 *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 53. This line of reasoning was followed in *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & Others* 1991 1 SA 21 (A) at para 28.

153 *Transnet Ltd & Others v Chirwa* [2007] 1 BLLR 10 (SCA) at para 53.

154 *Fedlife Assurance v Wolfaardt* 2002 (1) SA 49 (SCA).

4.3 The Constitutional Court on the Chirwa-matter

In light of the SCA's split on the issues involved, the uncertainty was not resolute, and the Constitutional Court was approached to decide and give clarity on the issue as to whether or not dismissal of public sector employees by their public sector employers' , would amount to administrative action. The Constitutional Court was also split on the outcome and three separate judgments were produced.

4.3.1 Majority judgment – per Skewyiya J; Moseneke DCJ, Madala J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J and Van der Westhuizen J concurring

Skweyiya J held that since he finds that the High Court does not have concurrent jurisdiction with the Labour Court, he does not have to decide whether the dismissal in question amounted to administrative action.[155] Ngcobo J, in a separate judgment, extensively referred to the reasons for the enactment of the LRA with reference to the Explanatory Memorandum prepared by the Ministerial Legal Task Team.[156] This memorandum raised that there is a changing nature in the state and its employees are no longer seen as its "servants". Along with this, international developments[157] have encouraged the erosion of the public/private divide. According to this report the unique and political character of the state, as an employer, does not in itself justify a separate legal framework.[158]

Ngcobo J held that the conduct in this matter did not amount to administrative action, since the nature of the power involved was purely contractual and did not involve "the implementation of legislation which

155 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 73.
156 1995 (16) *ILJ* 278 at 288.
157 *Ibid* at 288. The ILO Convention 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize and the European Social Charter apply equally to both the public and the private sector.
158 *Ibid.*

constitutes administrative action".[159] The learned Judge supported his approach within the structure of the Constitution.[160] Employees should be treated equally regardless of the sector in which they are employed, since the LRA now afford all employees the right to a fair hearing, substantive fairness and remedies and employees no longer need to rely on the protection of the administrative law.[161]

Accordingly, the majority held that public sector employees are placed in a preferential position by having access to more than one forum, simply because of their status. To depart from the mechanisms in the LRA is to create a dual system of law.[162]

In *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others*[163] the Constitutional Court held that Labour Courts do not have general exclusive jurisdiction in employment matters and that the High Court's jurisdiction will not be ousted by section 157(1) simply because "a dispute is one that falls within the overall sphere of employment relations". The applicant in *Fredericks* was thus allowed to pursue a course of action outside the framework of the LRA and to base the claim on the alleged infringement of section 33 of the Constitution.[164] The Constitutional Court, in Chirwa, tried to distinguish *Chirwa* from the *Fredericks*-judgment, but failed to do so persuasively[165]. It is thus respectfully argued that the distinction is unconvincing in that one now has two conflicting Constitutional

159 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 142.
160 *Ibid* at para 143-148. Also see *supra* at para 3.2.1.1.
161 *Ibid* at para 145.
162 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 66.
163 2002 2 SA 693 (CC) at para 40. This case concerned the scope of the High Court's jurisdiction to determine employment related complaints. Teachers in the employ of the Department of Education in the Eastern Cape applied for voluntary retrenchment, but the application was refused. They approached the High Court contending that their right to equality in terms of section 9 and their right to just administrative action as per section 33 of the Constitution were been breached.
164 Olivier and Smit *Labour Law and Social Security Law* 9.
165 2002 (1) SA 49 (SCA) at para 22 also see *Digomo* at para 4.

Court judgments dealing with section 157(2) of the LRA.[166] It is argued that the Constitutional Court had to reject *Fredericks* to have excluded the legal uncertainty created by it in the *Chirwa*-judgment. What contributes to this uncertainty is the fact that employment disputes can still be referred to the High Courts when employees bring a claim on the grounds of an infringement of their contractual rights.[167]

Furthermore, in *Fedlife, discussed above,*[168] the Supreme Court of Appeal held that the LRA is not exhaustive of the rights and remedies available to employees when their contracts of employment is terminated and also held that the *Zenzile*-judgment cannot be faulted, save for the fact that it was decided at a time when public sector employees did not have any rights within the rules of natural justice and that many changes[169] has came to the forefront since that decision.[170]

4.3.2 Minority judgment – Langa CJ, Mokgoro J and O'Regan J concurring

According to the minority the primary question that the court had to decide on was whether or not the dismissal in question qualified as administrative action in terms of PAJA.[171] The learned Judges again emphasised that there is an overlap between the LRA and PAJA and held that the applicant (a public sector employee) cannot be deprived from administrative causes

166 Section 157 (2) deals with concurrent jurisdiction of the High Court when there is a breach of a constitutional right when dealing with public sector employers. See Olivier and Smit *Labour Law and Social Security Law* 9.

167 For example terminating a contract prior to its agreed termination date; employers failing to adhere to employee benefits or unreasonable work hours which were not agreed on in the employment contract. In this regard see *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) and *Boxer Superstores Mthatha & another v Mbenya* [2007] 8 BLLR 693 (SCA) which were not overruled by *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC). See Grogan 2008(24)(4) *EL* 15.

168 *Supra* at para 3.1.3.

169 There has been significant changes in the employment legislation, procedures as well as politically.

170 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 38.

171 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 154.

of action merely because they arose in the employment context.[172] Support for this contention was found in section 157(2) of the LRA, which makes the Legislature's intention clear in this regard. Langa CJ went on to state that both PAJA and the LRA protect important constitutional rights and that one should not presume that the one should be protected above the other[173] and thus agreed with Cameron JA that there is no indication in the Constitution that beneficiaries should be confined to only one legislative scheme where there is more than one right.[174] This reasoning alludes to the conclusion that one cause of action can give rise to both a dismissal in terms of the LRA and an administrative action in terms of PAJA.

The minority held that, without a clear and palpable legislative provision to the contrary, PAJA cannot be ignored purely for the sake of the LRA.[175] With regards to the applicability of PAJA, it was stated that dismissals may at times amount to "administrative action", particularly when the public sector employee is dismissed in terms of a specific legislative provision or where the dismissal will impact "seriously and directly" on the public, either through the manner in which the dismissal was carried out or the class of employee dismissed.[176]

The minority distinguished Chirwa from the *POPCRU*-judgement above in that it did not give rise to administrative action due to its nature. If one applied the principles of PAJA, it is evident that this specific dismissal did not impact on the public at large, and accordingly, Transnet did not have any power over this particular employee flowing from its public position. Therefore, each case should be argued and decided on its own merits and nature – it is apparent that the circumstances of every employee relying on PAJA will be different. Furthermore, it is contended that the concern of "forum-shopping" should not be of a huge concern as long as it does not

172 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 173.
173 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 175.
174 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 175.
175 *Chirwa ibid* at para 176.
176 *Chirwa ibid* at para 194.

cause prejudice to the rights of the defendant – this can once again be ascertained on a case by case basis.

5. The position after *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC)

The effect of the majority decision in the *Chirwa*-judgment is that public sector employees can only rely on the remedies and rights as contained in the LRA and that any possible overlap between section 23 and section 33 of the Constitution does not give employees a choice of claims or forum in terms of either the LRA or PAJA.[177] The LRA will thus enjoy precedence in all circumstances. Although, from the discussions above, it is clear that public sector employment law does have qualities which place them in a unique category.[178] The first point of critique against the Constitutional Court's majority judgment is that it held that the *Zenzile*- and *Sibiya*-judgments could no longer be a point of reference due to the changed labour law regime. This reasoning respectfully disregards the fact that there was a long line of "pro-PAJA" judgments, even at a time when public sector employees fell under the protection of the LRA.[179] Secondly, the facts of the *Chirwa*-judgment might in many instances be distinguishable from cases to follow and there will definitely be cases that could fall within the ambit of PAJA, as discussed later in this dissertation.[180] The lower courts are bound by the judgments of higher courts and will thus have to follow the reasoning of the Constitutional Court's majority judgment, but lower courts

177 Grogan 2008 (24)(1) *EL* 3.

178 One can here have regard to the public nature of the employers; the legislative impact, employee's prior unequivocal reliance on PAJA and the public interest.

179 Olivier and Smit *Labour Law and Social Security Law* 14. See the discussion on *the POPCRU*-judgment supra at para 4.1.1.1 and footnote 75 above.

180 Grogan 2008(24)(1) *EL* 12-3. Furthermore, one should not lose sight of the fact that the Chirwa-judgment involved an individual dismissal and other cases involving public sector employees and which does not deal with individual dismissals might give rise to greater public interest as required by PAJA.

will only be bound to follow this reasoning insofar as it relates to the facts before them that correspond with the facts in *Chirwa*.[181]

Even though one should be hesitant to contend that the judgment of the Highest Court in the land was wrong, this dissertation respectfully argues that the Constitutional Court should have had more regard to the minority judgment of Langa CJ and that such approach would have given lower courts more certainty in anticipation of a more procedurally unflawed case (unlike the *Chirwa*-case) to come before the Constitutional Court. Therefore, litigants could attack the correctness of the majority judgment relying on the back door left open by the minority judgment.[182]

5.1 High Court's approach after the Chirwa-judgment

The question that our courts, especially the High Court, now have to come to grips with is whether public sector employment disputes could ever again fall within the administrative law ambit. If PAJA could apply, will the *Chirwa*-judgment then only close the door to dismissed public sector employees but open the door to other employment disputes?[183] This dissertation will briefly refer to two recent judgments to illustrate the difficulty caused by the *Chirwa*-judgment.

---

181 Grogan 2008(24)(1) *EL* 12. The *Chirwa*-case will be distinguishable from other cases in that Mrs Chirwa might have instituted her action against Transnet in an incorrect manner in that she first instituted her claim according to the LRA in the CCMA and then switched to the High Court – this did leave it open to the Constitutional Court to either view the case on a narrow basis or to try and resolve the long standing conflict on this point. If one reads the facts as Langa CJ did, it could be argued that Skewyiya J and Ngcobo J could possibly have come to a different conclusion.

182 Grogan 2008(24)(1) *EL* 13.

183 Grogan 2008(24)(4) *EL* 17. The majority in *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) held that the High Courts is deprived of jurisdiction once it is established that the matter is an employment matter whilst the minority held that the High Court will only be deprived of its jurisdiction once it falls within the exclusive jurisdiction of the Labour Court.

5.1.1 *Mkumatela v Nelson Mandela Metropolitan Municipality (case nr 2314/06, dated 28 January 2008)*

In this case the applicant was unsuccessful in his promotion application and subsequently approached the High Court seeking to have the appointment process set aside as it was allegedly in breach of his right to just administrative action. The court followed the reasoning in the *Fredericks*-judgment and distinguished it from the *Chirwa*-judgment in that the applicant did not rely on the LRA.[184] The court accordingly held that the applicant in this case had a choice; (1) to approach the CCMA under the LRA; or (2) to approach the High Court by relying on his constitutional right to just administrative action.[185]

5.1.2 *Nakin v MEC, Department of Education, Eastern Cape Province & Another*[186]

This case dealt with a teacher who had been wrongly demoted. The respondents, in relying on the majority judgment in *Chirwa*, contended that the High Court does not have jurisdiction since the matter had to be referred under the LRA. The court, per Froneman J, held that the respondent Department's conduct amounted to unlawful administrative action. In this case Froneman J explained that to put constitutional rights in separate compartments, as Ngcobo J did in the *Chirwa*-case, will not give effect to the values which underlies each of these rights.[187] Froneman held:

> Fairness in public employment may conceivably have a different content to that in the private sector, for reasons relating to constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service. From that

184 *Mkumatela v Nelson Mandela Metropolitan Municipality* case nr 2314/06, dated 28 January 2008 at para 9-11.

185 Olivier and Smit *Labour Law and Social Security Law* 11 asnd Grogan 2008(24)(4) *EL* 15.

186 [2008] 5 BLLR 489 (Ck).

187 *Grogan 2008(24)(4) EL 17 and Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] 5 BLLR 489 (Ck) at para 31.

perspective, the substantive coherence and development of employment law can only gain from insights derived initially from administrative law concerns.[188]

It was furthermore held that courts could give more content to the right to fair labour practices through "recognising and giving appropriate expression to the interconnectedness" between the right to fair labour practices and other constitutional rights such as the right to just administrative action.[189] What is clear from these two judgments is that the employees directly relied on their administrative law rights and did not rely on the LRA whatsoever. Furthermore, the *Nakin*-case could be distinguished from *Chirwa*-judgment in that it ended up being a contractual claim arising from an employment dispute.

6. Applying the Promotion of Administrative Justice Act 3 of 2000 in other areas of public sector employment disputes

Grogan[190] argues that the *Chirwa*-judgment mainly dealt with an individual employee's dismissal and that the Constitutional Court did not decide or particularly consider whether other employment disputes, excluding dismissals, could be distinguished from the reasoning of *Chirwa*. Since the Constitutional Court did not decide on this, it could be argued that other employment disputes could fall within the ambit of PAJA, especially when such disputes could affect the public interest. It is accepted that not all employment disputes will fall within the ambit of t the principles of PAJA, but that the courts ought to deal with this difficult question on a case by case basis with reference to the nature of the contract and the relevant statutes before them.[191]

---

188 *Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] 5 BLLR 489 (Ck) at para 35.
189 *Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] 5 BLLR 489 (Ck) at para 37.
190 Grogan 2008(24)(1) *EL* 13.
191 Ngcukaitobi 2007 (28)(4) *ILJ* 782.

According to Ngcukatoibi,[192] conduct which impacts on various constitutional rights (such as section 23 and section 33 of the Constitution) should be approached by the courts on the basis that these rights are "reinforcing, interdependent and indivisible".[193] Support for the contention that constitutional rights should be interdependent and not "compartmentalised" can be found in the Constitutional Court judgment of *Government of the RSA & others v Grootboom & others*[194] where the court explicitly held that "all the rights in our Bill of Rights are inter-related and mutually supporting."[195] Also in *National Coalition for Gay & Lesbian Equality v Minister of Justice*[196] the Constitutional Court held that constitutional rights cannot be seen as separate and indivisible. Sachs J held that "the rights must fit the people, not the people the rights".[197]

It is thus evident that the Constitutional Court itself held that where two or more constitutional rights are at stake, they should be mutually supporting of each other, only to decide later in the *Chirwa*-judgment that the right to fair labour practices as entrenched in the LRA will surpass the right to just administrative action, as entrenched in PAJA, when dealing with public sector employment disputes.

---

192 Ngcukaitobi 2008(20) *ILJ* 860.

193 Ngcukaitobi 2008(29) *ILJ* 860.

194 2001(1) SA 46 (CC).

195 *Government of the RSA & others v Grootboom & others* 2001(1) SA 46 (CC) in para 23. In this case the Constitutional Court had to consider an application by homeless squatters who have been evicted from the land they were staying on since it was earmarked for a low cost housing development. The court held that there was an impact on more than one Constitutional right.

196 1999(1) SA 6 (CC).

197 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 112. This case concerned a challenge against the provisions which criminalised consensual sex between same sex partners in that it violated the right to privacy and equality. The respondents argued that only the right to privacy was violated.

As discussed above there are, on the one hand, many employment decisions which will not fall within the scope and ambit of PAJA,[198] but, on the other hand, many which could fall within PAJA's ambit. The purpose of the following discussion is to provide a brief illustration of these conflicting approaches.

6.1 Suspensions, transfers, appointments and promotions

In *Mbayeka & Another v MEC for Welfare, Eastern Cape*[199] the court held that the department took unconstitutional administrative action in suspending the applicant without a hearing; however, as argued by Ngcukaitobi,[200] suspension is a temporary action that employers take against their employees. I agree with this contention and contend that once the employee is dismissed and the dismissal has a "direct, external, legal effect" it could, depending on its nature and statute applicable, fall within the ambit of administrative law.

When dealing with promotions, the LRA makes it clear that any irregular or unfair conduct will constitute an unfair labour practice.[201] In *United National Public Servants Association of SA v Digomo NO & Others*[202] the SCA held that a decision to promote constitutes an administrative action that could be unreasonable, unlawful and procedurally unfair.

Furthermore, in *Kiva v Minister of Correctional Services & Another,*[203] the applicant was not appointed to a higher position and requested reasons in terms of PAJA. Plasket J then had to decide whether the decision of the

198 For example those decision which are purely private, contractual labour matters this will include employment benefits.
199 [2001] 1 All SA 567 (Tk).
200 Ngcukaitobi 2007(28)(4) *ILJ* 783.
201 The LRA provides a cause of action in terms of section 186(2) in the form of an unfair labour practice.
202 2005 (26) ILJ 1957 (SCA).
203 2007 (28) ILJ 97 (E).

Department amounted to administrative action as envisaged by and defined in PAJA. The court argued that the Department had a statutory duty to fulfil in relation to correctional services and that the employment and promotion of its correctional officers amounts to a public function. Plasket J held that the Department's refusal to appoint the applicant amounted to administrative action and that the Department accordingly had to furnish reasons for its decision.[204]

When dealing with transfers of public sector employees, the *Public Service Act*[205] applies which, in turn, can thus involve public power amounting to administrative action.[206] In this regard reference should be made to the *Nxele*-judgment, discussed earlier, where it was held that a decision to transfer public employees could be reviewed in terms of PAJA.[207]

In *Hoffman v SA Airways*[208] the applicant seemed to have relied on both the constitutional right not to be unfairly discriminated against, as well as his right to fair labour practices.[209] No one raised an objection to this; neither did the court find this to be patently wrong. It is thus contended that the implications of this decision is that, when public sector employees are dismissed on discriminatory grounds, employees have an election to institute proceedings in either the High Court or Constitutional Court (being forums designed to decide on constitutional issues) or the Labour Court (being a forum reserved to decide on labour related issues).

---

204 When dealing with promotions, the LRA does provide for a reasonable cause of action in terms of section 186(2), but PAJA will apply when the cause of action is the failure or refusal to give reasons, since the LRA does not provide for such a cause of action/claim.
205 *Public Service Act* Proc 103 of 1994. See sections 13, 14 and 15.
206 Ngcukaitobi 2007(28)(4) *ILJ* 783.
207 2001 (1) SA 1 (CC).
208 *Hoffman v SA Airways* 2000 (2) SA 628 (W) at para 6.
209 Ngcukaitobi 2007(28)(4) *ILJ* 788.

7. International perspective

In terms of section 39 of the Constitution courts, tribunals and forums "must" consider international law when interpreting the rights contained in the Bill of Rights.[210] At the same time the LRA, in section 3, provides that the Act must be interpreted so as to be "in compliance with the public international law obligations of the Republic."[211]

The regulation of public sector labour relations has been a burning topic of discussion in several countries across the world.[212] Internationally several countries do distinguish between public- and private sector employees, albeit for different reasons and different functions and situations.[213] Having regard to the Conventions of the International Labour Organisation (ILO), the inference can be drawn that public sector employees' right to strike and conditions of service could be regulated differently.[214] The Conventions adopted by the ILO indicates that, to put public sector employees in a unique category will not be against any international standards – there

---

210 Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996. For full text see footnote 50 *supra*. Section 233 of the Constitution provides that courts should, when interpreting legislation, any reasonable interpretation that is consistent with international law and that this should be considered over an interpretation which is inconsistent with international law.

211 Section 3(b) and (c) of the *Labour Relations Act* 66 of 1995 reads:

— Any person applying this Act must interpret its provisions —

— (a) to give effect to its primary objects;

— (b) in compliance with the Constitution; and

— (c) in compliance with the public international law obligations of the Republic.

The Act also states in section 1(b) that the purpose of the Act is "to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;"

212 Yemin 1993(132)(4) *International Labour Review* 469. Yemin notes that public sector employment poses numerous difficulties in terms of legislation applicable in this sphere of employment. One can have regard to countries such as Korea, Malaysia, Swaziland and Zimbabwe.

213 Olivier 1998 (13) *SAPL* 260.

214 See Article 4 of Convention 98 of 1949 – this Convention concerns the Application of the Principles of the Right to Organise and to Bargain Collectively. See for further discussion Olivier 1993 (14)(6) *ILJ* 1376; Olivier 1998 (13) *SAPL* 256. It is especially the areas of collective bargaining and the right to strike that countries differentiate between its private- and public sector employees. In France, Germany and the UK, for example the right to strike is recognised whilst it is prohibited in Canada, Japan and Switzerland. See Yemin 1993(132)(4) *International Labour Review* 487.

arguably seems to be no indication that there should be one uniform set of legislation applicable to both private- and public sector employees.[215] Article 1(2) of Convention 154 of 1981 states:

With regard to the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

Thus, the question as to whether public sector employees should have the benefit of both the LRA and PAJA can be justified, or at least be supported by this notion.

7.1 Germany, Ireland and Nigeria

In Germany, public sector employees have specific statutes that are applicable to them. Olivier[216] notes that the *Beamte*[217] in German law is covered by public law, particularly administrative law, which means that the system which regulates the employment relationship of public sector employees in Germany differs substantially from private law regulation of its private sector employees. In Ireland employment in the public sector is particularly attractive because of job security and the attractive statutorily based pension schemes. Legally, public service employment differs greatly from private sector employment, since their employment is regulated

215 Olivier 1993(14)(6) *ILJ* 1376.

216 Olivier 1998 *SAPL* 257-263 also see Olivier and Smit *Labour Law and Social Security Law* 24; Kalula and Madhuku "Public Sector Labour Relations" 39 and ANON 2007 HYPERLINK www.ilo.org 23 October.

217 The *Beamte* has a formal public law relationship with the state as its employer. In Germany distinction is made between their public sector employees and divides them into three categories namely the *Beampte*, the *Angestellte* (white-collar employees) and the *Arbeiter* (blue-collar employees). The *Angestellte* and *Arbeiter* are regulated through contract and labour law principles, but there are aspects which are dealt with through administrative law courts. Germany is integrating the *Angestellte* and *Arbeiter* with the law and principles applicable to *Beamte*. See Olivier 1998 *SAPL* 257-263.

through detailed regulations which have no equivalent elsewhere.[218] Of particular relevance is that the state and its employees in Ireland are subject to the constitutional and administrative law that are not generally applicable to its private sector employees.[219] However, in Sweden some aspects of employment are regulated in the same legislation as that which pertains to private sector employees, whilst others are regulated through different legislation whereas civil servants in the UK are subject to the same employment laws as private sector employees.[220]

Of great importance to this dissertation is the Nigerian position on the subject matter. Van Eck[221] refers to the position in Nigeria, which is similar to the situation which prevailed in South Africa prior to the enactment of the LRA. Nigerian Labour Legislation presently does not extend to government employees and their public sector employees are protected by administrative law principles, which also include the *audi alteram partem* principle.[222]

7.2 The European Union and the US

EU law and the European Convention on Human Rights have influenced a distinctive approach towards public- and private sector employees.[223] The way in which EU law and domestic law has been structured has had an impact on the distinction made between public- and private sector employees. Thus, in some instances, public sector employees are allowed

218 Forde *Employment Law* 279.
219 Forde *Employment Law* 279.
220 Olivier 1993(14)(6) *ILJ* 1377 also see Whetnall 2001 HYPERLINK www.oecd.org 21 August 2008.
221 Van Eck 2006 HYPERLINK www.llc.org.za 31 Oct 2008.
222 *Ibid.*
223 Fredman *The Legal Context: public or private?* 53. Clearly, employers in the public sector have greater *de facto* power over their employees than in the private sector which at times justifies greater or altered protection.

to rely directly, irrespective of national laws,[224] on EU law whilst the same has not always been the position for private sector employees.[225] The new Human Rights Act attach human right obligations to public sector employer's and employees, carrying out public functions, and private employers and employees fall outside its scope. Fredman[226] points out that there are two conflicting views on the subject matter in that (1) the Thatcher-Major Government argues that public employment should be as closely related to private employment as far as practically possible – this view is mainly supported by domestic courts; and (2) the state, as employer, is unique and essentially public – this view has been kept alive by constitutional imperatives and political realities which in turn makes it impossible to ignore the public nature of public sector employment. In the Austrian Public Service employees generally enjoy greater protection against dismissal than private sector employees.[227]

In the US, the *Labor Management Relations Act* of 1936 is the main body of legislation which covers workers rights in the private sector. In the US, federal employees (public sector employees) are covered by federal law,[228] whilst state and local employees are covered by state laws which vary according to states. Up until the 1960's US public sector employment law

---

224 Public sector employees have direct rights under the European directives provided that the time limit for domestic implementation has lapsed and that the directive is "clear, precise and unconditional" see Martin 2008 HYPERLINK www.personneltoday.com 28 Oct 2008.

225 Fredman *The Legal Context: Public or Private?* 66. For example, in the case of *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723 an employee was allowed to rely directly on an Equal Treatment Directive to claim her entitlement to the same retirement age as a male counterpart at a time when domestic legislation precluded claims based on retirement. If the employee were to have been in the private sector at that time, the same would not have been allowed. Fredman also refers to a case where a school's governing body decided that teachers were redundant, they were allowed to rely directly on an EU Business Transfer Directive which required consultation prior to redundancy even though the UK Transfer Undertakings Regulations precluded such claims. This was later extended to private sector employees.

226 Fredman *The Legal Context: Public or Private?* at 68.

227 This is so because career public servant employees absolute protection against dismissal. Pernicka 2002 HYPERLINK www.eurofound.europa.eu 29 Oct 2008.

228 Delman *et al Public Sector Employment* 64.

stood much in line with the South African position in that private sector employees had clear rights in terms of collective bargaining and protection against unfair labour practices which public sector employees lacked.[229] Public sector employees recently enjoy a more favourable legal framework especially with regard to the laws governing collective bargaining. Delman[230] attributes the more favourable rights of public sector employment to the different management responses to similar laws even though it is in different sectors.

7.3 Privatisation, outsourcing and deregulation

Conversely, the increasing privatisation, outsourcing and deregulation of state functions are of importance, which in turn minimise the subsequent divide between private- and public sector employees since both are now, in most countries, regulated under the same legislation.[231]

It can thus be argued that countries are not prohibited, at least by the ILO, to adopt divergent remedies and legislation pertaining to its public sector and private sector employees.

Olivier[232] rightfully notes that countries should have due regard for the demands and functions of public sector employees, as well as the nature of the enterprise which they form part of, and that this may very well justify that these employees should be afforded procedural protection that goes beyond that of private sector employees. This dissertation argues that it is for this very reason that differential treatment of public sector employees may at times be warranted and that, to have two acts applicable to public

---

229 Delman *et al Public Sector Employment* 64. In the US, public sector employees had the benefit of the protection of the civil service legislation.
230 Delman *et al Public Sector Employment* 64.
231 Oliver 1998 (13) *SAPL* 261-262. Also see Synnerstrom *et al* 2001 HYPERLINK www.worldbank.org 21 August.
232 Oliver and Smit *Labour Law and Social Security Law* 23.

sector employees (the LRA and PAJA), should not be seen as detrimental to private sector employees or the jurisdiction of our labour courts.

8. Conclusion and Recommendations

After the enactment of the LRA and the Constitution, which affords substantive protection to both private- and public sector employees, an overlap was inadvertently created between these Acts and the provisions of PAJA, the latter of which are applicable to public sector employees in certain circumstances. As pointed out elsewhere in this study, public sector employees, as a result, arguably enjoy greater legal protection. This is remarkable in that they virtually had no rights prior to the LRA and the Constitution. Should public sector employees have greater legal protection, it would subsequently create a dual system of law, one applicable in the Labour Court (through the LRA) and the other in the High Court (through PAJA).

Chirwa-judgment

After years of debate and many divergent court decisions, the Constitutional Court held, in its majority judgment, that public sector employees should use the avenues available to them in terms of the LRA since the Act specifically caters for such disputes.

The legal question that arises, therefore, is whether there can be harmony between PAJA and the LRA and whether PAJA should be excluded by virtue of the provisions of the LRA, so as not to obliterate the whole system created by the LRA. The author argues that whether or not PAJA could harshly destroy the LRA and its systems is yet to be proven. The author agrees with the minority judgment in that the right to administrative justice, as distinctly guaranteed by the Constitution and PAJA, could never be

erased merely because it arose in the employment context. The impact and importance of the minority judgment should not be underestimated.

Even though the matter of jurisdiction is not the subject of discussion, it is interrelated to the matter at hand. The majority held that section 157(2) of the LRA can be harmonised with section 157(1) by bringing it in line with the specific purpose for which the LRA was initially enacted and by giving it (section 157(2)) a narrow meaning.[233] The writer disagrees with this reasoning in that, until such time as the legislature provides otherwise, the High Court will have (and in fact, should have) concurrent jurisdiction with the Labour Court which in turn gives public sector employees the right to rely on the provisions of PAJA. The writer furthermore persists that there is no indication, in legislation or otherwise, that the LRA was enacted to the exclusion of other legal instruments and remedies. As pointed out by the minority judgment, the majority failed to characterise the claim made by Chirwa. The majority seems to have built their judgment solely on the notion that the claim squarely fell within the ambit of the LRA whilst, if one has regard to the facts of this specific case, Chirwa relied mainly on her rights in terms of PAJA. The Constitutional Court should respectfully have decided the case on that basis - courts should always approach a case as it is before them.[234] If "unfair administrative action" is the cause of action, it could not be seen or adjudicated on as one being one of "unfair dismissal" in view of the fact that the claims are clearly instituted to serve a particular purpose and a particular outcome. The majority respectfully erred by approaching this case in clear contrast with the provisions of section 157(2) in order to achieve a specific result (on jurisdiction) which in turn have huge consequences for the development of labour law in the public sector. The writer furthermore disagrees with the majority in that it can never be realistic to argue that the LRA is a more important Act than PAJA whilst both were

233 These sections deal with the jurisdiction of labour courts and its concurrent jurisdiction with the High Courts. See discussion at 3.1 *supra.*

234 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 168.

enacted to protect different constitutionally enacted rights, being the right to fair labour practices and the right to just administrative action. The writer humbly agrees with Cameron JA and Langa CJ that if the Legislature did in fact prefer the one Act (LRA) above the other (PAJA), it would have stated it unambiguously.

International Law

The court, furthermore, in both its majority and minority judgment, had no regard to international law and perspectives, nor did it even touch on the question whether or not it would be feasible to have a sector-specific legal framework for the public sector. It is furthermore respectfully submitted that the court failed to take cognisance of its constitutional duty as set out in section 39 of the Constitution. If one has regard to the international trends touched upon in this dissertation, it is clear that it is not far fetched or unlikely to have a different set of laws or more than one Act applying to public sector employment disputes. It is argued that it is permissible to draw a distinction between private- and public sector employment law in the interest of a democratic society.

Legal Certainty

Legal certainty demands that there should be an unfettered regime from which it would be unambiguously clear whether the LRA and PAJA co-exist, and, if so, in which circumstances either the LRA or PAJA would find application. Langa CJ, for the minority, argued that legal certainty should not be too perturbing, since the different divisions of the South African High Court often differ in their interpretation of the law, and concludes by stating that this is how law develops. However, since the LRA creates a special and speedy mechanism for the resolution of labour disputes, one should not overlook the fact that it is extremely difficult to determine, in practice,

whether or not PAJA is applicable and whether an action actually falls within the ambit of PAJA and the right to just administrative action as per section 33 of the Constitution. This will, in many cases, automatically exclude PAJA, since one or two of the required grounds might be absent.[235] Litigants should thus first establish that a dismissal or employment irregularity amounted to "administrative action" which had an impact on the public at large. By and large it is suggested that not all employment decisions which affect employees such as secretaries, administrative assistants, cleaners and security guards, of every organ of state, can be characterised as administrative action within the scope and meaning of PAJA and just administrative action as per section 33 of the Constitution, given that these actions or decisions do not have a direct impact on the public at large and only affect the direct internal processes of such an organ of state. However, the line of reasoning in *POPCRU* suggests that the concept of public power should not be limited to public interest in view of the fact that some administrative actions may not have any effect on the public. The court, in *POPCRU* referred to the power to arrest which only impacts on the arrestee and the complainant.

Concluding remark on the Chirwa-judgment

It took the Constitutional Court months to produce the long awaited and much needed judgment in *Chirwa*, yet it seems to be somewhat unconvincing since there is considerable disagreement in the judgment. It did not take long before the majority judgment was challenged. In *Mkumatela v Nelson Mandela Metropolitan Municipality*[236] Revelas J held that the *Chirwa*-judgment did not overrule *Fredericks* and therefore courts

235 Langa CJ held that where a person is dismissed in terms of specific legislative provisions, or if the dismissal is likely to impact seriously and directly on the public albeit the manner in which it was carried out or the class of employee dismiss, the requirements of an administrative action as per PAJA may be fulfilled and a dismissal may amount to an "administrative action" for which PAJA will be applicable. See *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) at para 194.

236 Unreported, case nr 2314/06 delivered on 28 January 2008 at para 10-13.

are entitled to follow the latter especially when a case is not premised on the unfair labour practice provisions of the LRA. The Constitutional Court definitely did not choose the best case for such an important judgment, assuming the merits were different or the case was framed differently by Chirwa, the court may very well have taken the stance of the minority. The *Chirwa*-judgment dealt with unfair dismissals and as the law presently stands it seems as if more confusion and debates came to the fore on whether or not other forms of employment disputes could fall under PAJA than answers given.

Laws and remedies applicable to public sector employees

Public sector employees are regulated by the Constitution, the LRA, PAJA and the common law forms an underlying part of their contract of employment. The majority in Chirwa furthermore held that courts should not provide public sector employees with more rights and that forum shopping should not be allowed since it goes directly against the aim of the LRA – establishing a single and simple system of dispute resolution. Indeed, forum shopping is not the best practice, but it is argued that there is in principle nothing wrong with having more legal protection or more than one constitutional right applicable to one cause of action, save that it be regulated strictly and it does not prejudice any one of the parties to the litigation. Either a litigant refers a dispute on the dispute resolution avenues provided for in the LRA or choose the administrative action route in terms of PAJA – once a choice is made, a litigant should not be allowed to change the cause of action and shop for another forum. This will help to minimise any confusion that may arise.

The majority held that the scope or review and remedies are much more extensive under the LRA than PAJA. The LRA filled the vacuum which existed in labour law in that it provides for the effective resolution of labour

disputes, orderly collective bargaining and on top of that, covers all employees, including public sector employees. Clearly the LRA is more beneficial to employees since it is designed to establish different specialist forums for employment related relief, such as the CCMA, bargaining councils and labour courts; it offers compensation, reinstatement or re-employment whilst PAJA do not cater for specific forums to deal with employment disputes and has limited relief such as to have an unlawful administrative action being set aside. If one has regard to the remedies provided under the common law and PAJA and compares it with those in the LRA, the LRA clearly offers the best substantive protection albeit that a dispute may constitute an administrative action.

The relationship between PAJA and the LRA

To emphasise the point made that PAJA should co-exist with the LRA the explanation given by Sachs J, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (Treatment Action Campaign and Another as *Amici Curiae*),[237] has significant reference. Sachs J stated that:

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

This dissertation illustrates that one should be cautious to remove the special protection afforded to and needed by public sector employees and that one should have a "hard headed" approach when applying, criticising and adjudicating on constitutional rights. It should furthermore, respectfully, be clear that judges and courts are not politicians and should not step into the terrain of trumping one right (PAJA) for gain of another (LRA) when conflict is perceived to exist between them. An Act can never restrict an

237 2006 (2) SA 311 (CC) at para 583.

employee's rights unless an interpretation to that effect is so clear and indispensable that there can't be any doubt or conflict.[238]
Arguably, it presently appears as though the legislature intended for the LRA and PAJA to co-exist in harmony, even though PAJA not only involves decisions taken by the state, but any body exercising public power, whilst the LRA regulates a specific relationship, *vís* that of employer and employee.

Lastly, protection in terms of PAJA is mainly of a procedural nature and there seems to be no reason why, through strict regulation and in specific circumstances, these two Acts cannot co-exist. The state as employer acts in ways different than other employers, since the state need to act strictly in accordance with set legislation applicable to a specific sector and, due to the states immense power, its employees need special protection.

Recommendation

This debate will only be resolved through legislative intervention. The legislature urgently needs to step in and cure the overlap between the LRA and PAJA, should the legislature wish to follow the Constitutional Court's line of thinking. The Legislature will have to revisit section 157(2) of the LRA which provides for concurrent jurisdiction in constitutional matters arising from employment and labour relations by specifically stating that reviews of public sector employment disputes should specifically be lodged in the Labour Courts. For the latter part the legislature will furthermore need to revisit PAJA, specifically the category dealing with exclusions and if the legislature were to follow the Constitutional Court's majority judgment, list employer-employee relationships as being excluded from its ambit.

238 Forde *Employment Law* 279.

Bibliography

Books

C

Corby and White *Employee Relations in the Public Service*

Corby S and White G *Employee Relations in the Public Service: Themes and Issues* (Routledge London 1999).

D

Delman *Public Sector Employment in a Time of Transition*

Delman D *et al Public Sector Employment in a Time of Transition* (Cornell University Press, 1996).

Devenish; Govender and Hulme *Administrative Law and Justice*

Devenish GE; Govender K and Hulme D *Administrative Law and Justice in South Africa* (Butterworths Durban 2001).

Du Toit *et al Labour Relations Law*

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Butterworths Durban 2006).

F

Forde *Employment Law*

Forde M *Employment Law* (Dublin Round Hall 2001).

Fredman and Morris *The State as Employer*

Fredman S and Morris G *The State as Employer* (London Press 1989).

H

Hoexter; Lyster and Currie *The New Constitutional & Administrative Law*

Hoexter C; Lyster R and Currie I (Ed) *The New Constitutional & Administrative Law* (Juta Lansdowne 2002).

Hoexter *Administrative Law*

Hoexter C *Administrative Law in South Africa* (Juta Landsdowne 2007).

L

Lange *The Right to Know*

Lange C and Wessels J *The Right to Know* (SiberInk 2004).

V

Van Niekerk *Law@work*

Van Niekerk *et al Law@work* (LexisNexis Durban 2008).

Dictionaries

Hiemstra VG and Gonin HL *Trilingual Legal Dictionary* 3rd ed (Juta Kenwyn 2000).

Martin EA (ed) *A Dictionary of Law* 5th ed (Oxford New York 2002).

Contributions from collected work

Fredman S "The Legal Context: Public or Private?" in Corby S and White G (eds) *Employee Relations in the Public Service: Themes and Issues* (Routledge London 1999).

Treu T "Labour Relations in the Public Service: A Comparative Overview" in Tiziano Treu (ed) *Public Service Labour Relations: Recent Trends and Future Prospects* 1 (Geneva 1987).

Contributions at conferences

Kalula E and Madhuku L "Public Sector Labour Relations in Southern Africa: developments and trends" delivered at a regional workshop on Labour Relations in the Public Sector in Southern Africa 22-24 July 1996 Harare 39-50.

Cases

A

Administrator, Natal & another v Sibiya & another 1992 (4) SA 532 (A).

Administrator, Transvaal & Others v Traub & Others 1989 (4) SA 731 (A).

Administrator, Transvaal v Zenzile 1991 (12) ILJ 259.

B

Barker v Edgar [1898] AC 748.

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) 490 (CC).

Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC).

Boxter Superstores Mthatha & another v Mbenya [2007] 8 BLLR 693 (SCA)

Boyd v Stuttaford & Co 1910 AD 141.

C

Carephone (Pty) Ltd v Marcus NO & Others 1998 (11) BLLR 1093 (LAC).

Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC).

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

Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others 1998 (1) SA 685 (C)

F

Fedlife Assurance Ltd v Wolfaardt 2001 (22) ILJ 2407 (SCA).

Fredericks & Others v MEC for Education & Training, Eastern Cape & others 2002 (2) BCLR 113 (CC).

G

Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W).

Government of the RSA & others v Grootboom & others 2001 (1) SA 46 (CC).

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA).

H

Hoffman v SA Airways 2000 (2) SA 628 (W).

J

Jeeva v Receiver of Revenue, Port Elizabeth 1995 (2) SA433 (SE).

K

Kiva v Minister of Correctional Services & another 2007 (28) ILJ 97 (E).

L

Langeni & others v Minister of Health & Welfare & others 1988 (4) SA 93 (W).

M

Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723.

Mbayeka & another v MEC for Welfare, Eastern Cape [2001] 1 All SA 567 (Tk).

Mkumatela v Nelson Mandela Metropolitan Municipality (SEC) [unreported] case nr 2314/06 date of delivery 28 January 2008.

Mokoena & Others v Administrator, Transvaal 1988 (4) SA 912 (W).

Mgijma v Eastern Cape Appropriate Technology Unit and Another 2000 (2) SA 291 (Tk)

N

Nakin v MEC, Department of Education, Eastern Cape Province & another [2008] 5 BLLR 489 (Ck)

National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

National Education Health & Allied Workers Union v University of Cape Town & others 2003 (24) ILJ 95 (CC).

Ndzamela v Eastern Cape Development Corporation Ltd [2003] 6 BLLR 619 (Tk).

Nell v Minister of Justice & Constitutional Development & Another [2006] 7 BLLR 716 (T).

O

Old Mutual Life Assurance Co SA v Gumbi Ltd [2007] 8 BLLR 699 (SCA).

P

Phenithi v Minister of Education and Others [2006] 1 All SA 601 (SCA).

POPCRU & Others v Minister of Correctional Services & others [2006] 4 BLLR 385 (E).

President of the RSA v SA Rugby Football Union 1999 (10) BCLR 1059 (CC).

Public Servants Association obo Haschke v MEC for Agriculture & Others 2004 (25) ILJ 1750 (LC).

R

R v Gorekwang 1961 (4) SA 40 (T).

Rex v Padsha 1923 AD 281.

S

SAPU & another v National Commissioner of the South African Police Service & another [2006] 1 BLLR 42 (LC).

Schierhout v Union of Government (Minister of Justice) 1991 AD 30.

Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others.

T

Transnet Ltd v Chirwa [2007] 1 BLLR 10 (SCA).

U

United National Public Servants Association of SA v Digomo NO & others 2005 (26) ILJ 1957 (SCA).

Journals

B

Beatty D "Constitutional Labour Rights: Pros and Cons" 1993 *ILJ* 1.

C

Cheadle H et al "Administrative Law Principles" 2007 *Current Labour Law* 12-14.

Cockrell A "Can You Paradigm? Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227.

Cohen T "Placing Substance over Form – Identifying the True Parties to an Employment Relationship" 2008 (29) *ILJ* 863.

E

Explanatory Memorandum Prepared by the Ministerial Legal Task Team January 1995 (note) 1995(16) *ILJ* 278.

G

Grogan J "Supreme Law Public servants read their rights" 2008 (24)(1) *Employment Law* 4-25.

Grogan J "Schizophrenic Courts Does *Fredericks* hold, or *Chirwa*?" 2008(24)(4) *Employment Law* 11-19.

H

Holness D and Devenish G "The Law in relation to employee claims relating to dismissal: Jurisprudential principle or legal pragmatism? Transnet Ltd v Chirwa 2007 2 SA 198 (SCA)" 2008 (71) *THRHR* 142-154.

L

Laubscher T "Employment Law Update" 2004 (4) *De Rebus*.

N

Ngcukaitobi T "Life After Chirwa: Is there Scope for Harmony Between Public Sector Labour Law and Administrative Law?" 2008 (2) *ILJ* 841-862.

Ngcukatitobi T and Brickhill J "A Difficult Boundary: Public Sector Employment and Administrative Law" 2007(28)(4) *ILJ* 769-792.

M

Mischke C "Administrative action and employment law: Do employees in the public sector enjoy additional remedies?" 2006 (15)(9) *Contemporary Labour Law* 86-90.

O

Olivier MO "Public sector employment law: recent case law developments in South Africa" 1994 *SAPL* 50-73.

Olivier M "Reshaping private and public employment in South Africa: the impact of the Constitution and the Bill of Rights" 2006(20) *Speculum Juris* 215.

Olivier M "Labour relations legislation for the public service: an international and comparative perspective" 1993(14) *ILJ* 1371

Olivier M "Die werksbeskerming van opbenbare sektor-werknemers: 'n regsvergelykende ondersoek" 1998(13) *SAPL* 256.

P

Parker R and Bradley L "Bureaucracy or Post-Bureaucracy? Public Sector Organisations in a Changing Context" 2004(26)(2) *The Asia Pacific Journal of Public Administration* 197-215.

Partington JP and Van der Walt JA "Does the Promotion of Administrative Justice Act Apply to Dismissals in the Public Sector? Transnet Ltd v Chirwa (2007) 11 BLLR 10 SCA" 2007 *Obiter* 388-396.

Q

Quinot G "Labour Law and Administrative Law: Uneasy Bed-Fellows?" 2000 *Responsa Meridiana* 16-32.

S

Stewart A "The Characteristics of the State as Employer: Implications for Labour Law" 1995 (16) *ILJ* 15-28.

T

Tshiki P "The Turquand rule vs the doctrine of ultra vires The decision in Mbana V Mnquma Municipality 2004 (1) BCLR 83 (TK)" 2004 *De Rebus* 48.

Y

Yemin E "Labour Relations in the public service: a comparative overview" 1993 (132)(4) *International Labour Review* 469-487.

Publications

Olivier M and Smit N *Labour Law and Social Security Law* Annual Banking Law Update (University of Johannesburg 2008)

Patel I *Developments in public sector labour relations in South Africa* Public Sector Labour Relations in Southern Africa: Developments and trends (Institute of Development and Labour Law University of Cape Town 1997).

Acts

Basic Conditions of Employment Act 75 of 1997.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998.

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995.

Promotion of Administrative Justice Act 3 of 2000.

Public Service Act 111 of 1984.

The Agricultural Labour Act 147 of 1993.

The Education Labour Relations Act 146 of 1993.

The Public Service Labour Relations Act 103 of 1994.

Conventions

ILO Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948

ILO Convention on the Right to Organise and Collective Bargaining, 98 of 1949

ILO Convention Concerning the Promotion of Collective Bargaining 154 of 1981

Internet

ANON 2007 Germany [Found on Internet] HYPERLINK www.ilo.org [Date of use 23 October 2008].

Abrahams E 2008 Does the dismissal of a public sector employee constitute administrative action [Found on Internet] HYPERLINK www.problemsolved.co.za [Date of use 20 July 2008]

Du Plessis L 2002 Bill of Rights Compendium [Found on Internet] HYPERLINK www.lexisnexis.com [Date of use 4 September 2008]

Van Eck 2006 The Dismissal of Public Service Employees: Applicability of the PAJA [Found on Internet] HYPERLINK www.llc.org.za [Date of use 29 October 2008]

Martin R 2008 Case of the week: enforcing EU law against public sector employers [Found on Internet] HYPERLINK www.personneltoday.com [Date of use 28 October 2008].

Pernicka S 2002 Government plans to limit public employees' protection against dismissal [Found on Internet] HYPERLINK www.eurofound.europa.eu [Date of use 29 October 2008].

Synnerstrom S *et al* 2001 Civil Service Law & Employment Regimes [Found on Internet] HYPERLINK www.wordlbank.org [Date of use 21 August 2008].

Whetnall A 1995 The Management of Ethics and Conduct in the Public Service United Kingdom [Found on Internet] HYPERLINK www.oecd.org [Date of use 21 August 2008].