THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 024/2005

In the matter between

TRANSNET LIMITED **FIRST APPELLANT**

TRANSNET PENSION FUND **SECOND APPELLANT**

PATRICK IAN SMITH NO **THIRD APPELLANT**

and

PETRONELLA NELLIE NELISIWE CHIRWA **RESPONDENT**

CORAM: **MPATI DP, CAMERON, MTHIYANE, CONRADIE and JAFTA JJA**

HEARD: **28 FEBRUARY 2006**
DELIVERED: **29 SEPTEMBER 2006**

Summary: **Jurisdiction in an employment dispute raising a constitutional issue - whether Labour Court has exclusive jurisdiction in such matters.**
Termination of employment contract by a state organ - whether that constitutes administrative action under s 1 of PAJA or may violate s 33 of the Constitution.
Order in para 18.

Neutral Citation: **This judgment may be referred to as Transnet Limited v PNN Chirwa [2006] SCA 131 (RSA).**

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This is an appeal from the judgment of Brassey AJ sitting in the Johannesburg High Court. According to his judgment the decision by the first appellant, Transnet Ltd (Transnet), to dismiss the respondent, Ms Petronella Nellie Nelisiwe Chirwa ('the applicant'), from her employment on 22 November 2002, was set side. The dismissal was preceded by an enquiry held by the third appellant, Mr Patrick Ian Smith, into her work performance. The court ordered reinstatement of the applicant on terms and conditions no less favourable than those that operated on 22 November 2002 and directed that its order operate retrospectively for a period of nine months from the date of the order, namely 25 February 2004.

[2] The enquiry commenced with a letter by Smith to the applicant on 15 November 2002, inviting her to attend the hearing on Friday 22 November 2002. The applicant, a Human Resource executive manager of Transnet's Pension Fund Business Unit at the time, was called upon to respond to allegations of inadequate performance, incompetence and poor employee relations. In the letter Smith, the Chief Executive Officer of the Pension Fund Business Unit and the applicant's supervisor, also advised the applicant that her future at Transnet would be decided at the enquiry.

[3] At the hearing the applicant refused to participate in the proceedings mainly because she objected to the fact of Smith presiding. Her reason for doing so was that Smith could not act as the complainant, witness and presiding officer at the same time. Her objections were summed up by the judge *a quo* as follows:

'In the present case, the common cause facts reveal that, three days before the enquiry into the applicant's competence was initiated, she [the applicant] received a mere slap on the wrist (a warning) in disciplinary proceedings initiated by her superior [Smith], and that she had, only the day before, lodged a formal grievance against him. If he had considered the matter dispassionately, Mr Smith (the manager in question and the third (appellant) in these proceedings) must surely have realized that, however impartial he subjectively considered himself to be, he could not but seem to the applicant to be biased against her.'

Notwithstanding her objection Smith proceeded with the enquiry, at the conclusion of which the applicant was dismissed. Smith's argument was that as her manager and supervisor, he was not only entitled, but indeed the most suitable person, to do so, in that no one else would be able to assess the applicant's work (see *Eskom v Mokoena*.)[1] No evidence was placed by affidavit or otherwise before Brassey AJ to suggest the contrary. As to the grievance referred to in the judgment, Smith said that as at 22 November 2002 he was unaware of the grievance proceedings lodged against him, because the letters dealing with that complaint had not yet been brought to his attention at the time. I pause here to point out that since these proceedings are on motion, it is Smith's version of the facts that should have been accepted. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.)[2] However it seems as if the court based its findings with regard to application of the rules of natural justice and the failure to observe them on the applicant's version.

[4] Although the applicant challenged her dismissal on the basis that it violated her right to administrative action that was lawful, reasonable and procedurally fair as enshrined in s 33 of the Constitution, Brassey AJ decided the matter, without going into the merits, on the principles laid

[1] [1997] 8 BLLR 965 (LAC) at 976E.
[2] 1984 (3) SA 623 (A).

down in *Administrator, Transvaal, v Zenzile*[3] and *Administrator, Natal, & Another v Sibiya*[4]. In these cases it was held that the termination of a contract of a public sector employee was an exercise of public power which is subject to the principles of natural justice and administrative law. The learned judge held that since Transnet was an organ of state (*Transnet Ltd v Goodman Brothers (Pty) Ltd*)[5], the applicant was entitled to the application of the rules of natural justice, which he found were breached when the decision to dismiss was taken. The judge declared the dismissal a nullity and granted Transnet and the other respondents leave to appeal to this court.

[5] On appeal two issues were raised. The first is whether the dismissal was a matter which fell to be determined exclusively by the Labour Court in terms of s 157(1) of the Labour Relations Act 66 of 1995 ('the LRA'). The second was whether the dismissal of the applicant constituted an administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[6] I deal first with the issue of whether the High Court had jurisdiction to hear and determine the dismissal dispute given the provisions of s 157(1) of the LRA. I quote s 157(1) and (2) of the LRA *in extenso*:

'**157 Jurisdiction of Labour Court**

(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.

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[3] 1991 (1) SA 21 (A).
[4] 1992 (4) SA 532 (A) at 536 G-I.
[5] 2001 (1) SA 853 (SCA) at 866.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;

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

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

The appellant alleges that the 'termination of [her] services constituted a violation of [her] right to administrative action that is lawful, reasonable and procedurally fair as enshrined in s 33 of the Constitution.' She thus raised a constitutional issue justiciable in the High Court.[6] The High Court derives its power to deal with such a matter from s 169 of the Constitution. The Labour Court on the contrary has 'concurrent jurisdiction' with the High Court in respect of any violation of a constitutional right. It does not have general jurisdiction on labour matters where a constitutional dispute is raised. The applicant could therefore institute proceedings in either the Labour Court or the High Court. That she deliberately exercised her option, is clear from her founding affidavit where she says:

'I have been advised that I have, available to me, more than one cause of action; one flowing from the Bill of Rights as enshrined in the Constitution of this country as read with the provisions of PAJA. For practical considerations and in the exercise of my constitutional right of access to the courts I have elected to base my cause of action on the Constitution and the PAJA and to approach the above named Honourable Court for appropriate relief.'

[6] See s 157(2) of the LRA.

[7] If an employment dispute raises an alleged violation of a constitutional right a litigant is not confined to the remedy provided under the LRA and the jurisdiction of the High Court is not ousted. The position was dealt with by the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape*.[7] In *Fredericks* O'Regan J said:

'[T]he High Court "may decide any constitutional matter" other than a matter that falls within the exclusive jurisdiction of the Constitutional Court or a matter "assigned by an Act of Parliament to another Court of a status similar to a High Court."'

And further:

'As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction will only be ousted in respect of matters that "are to be determined" by the Labour Court in terms of the Act.'

The question raised in the above case was whether the employees' constitutional right to just administrative action had been infringed and whether this issue was justiciable in the High Court.

[8] The subject has arisen in matters dealt with by this court. In *Fedlife Assurance Ltd v Wolfaardt*[8] Nugent AJA, writing for the majority, said that Chapter 8 of the 1995 Act (meaning the LRA) was not exhaustive of the rights and remedies that accrue to an employee upon the termination of employment. In that case the court held that whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the LRA itself, an employee was not deprived of the right to enforce a common law contract and that his or her right to do so was not abrogated by the LRA (paras 17 and 22). The same approach was adopted in the judgment of this court in *United National*

[7] 2002 (2) SA 693 (CC) at para 31 and 40.
[8] 2002 (1) SA 49 (SCA).

Public Servants Association of South Africa v Digomo NO[9]. There Nugent JA said:

'The remedies that the Labour Relations Act provides against conduct that constitutes an "unfair labour practice" are not exhaustive of the remedies that might be available to employees in the course of the employment relationship. Particular conduct by an employer might constitute both an "unfair labour practice" (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant's claim in the present case was not that the conduct complained of constituted an 'unfair labour practice' giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in the Constitution and that is protected by s 33 – which is clearly cognizable in the ordinary courts.'

[9] The topic has also been dealt with in the high courts. In *Mbayeka v MEC for Welfare, Eastern Cape*[10] Jafta J had to consider an application by government employees who challenged their suspensions from duty without emoluments as invalid/or being unconstitutional and thus sought reinstatement. The employer resisted the application on the basis that the High Court had no jurisdiction in the matter. The employer contended that the dispute fell within the exclusive jurisdiction of the LRA in terms of section 157(1). The learned judge rejected the argument and held that on a proper interpretation of section 157(2) of the LRA:

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

The point made in the judgment is in my view unanswerable and especially instructive in this case where the complaint is that Smith

[9] (2005) 26 ILJ 1957 (SCA) at para 4.
[10] [2001] 1 All SA 567 (Tk) at para 17.

breached the applicant's right to administrative action that is lawful, reasonable and procedurally fair - a constitutionally entrenched right under s 33 of the Constitution. As to the Labour Court's power to adjudicate on this right, as pointed out in *Mbayeka*, it merely enjoys 'concurrent [as opposed to exclusive] jurisdiction with the High Courts.'

[10] For the above reasons I conclude that the High Court had jurisdiction in the matter. I now turn to consider the question whether the termination of the applicant's contract of employment with Transnet violated her 'right to administrative action that is lawful, reasonable and procedurally fair'. For the success of her challenge as framed or pleaded the applicant has to establish that the dismissal constituted administrative action as defined in s 1 of PAJA. The applicant's case is that Transnet is an organ of state. With that I agree. When Smith conducted an enquiry leading to the dismissal, continues the applicant, he was performing an administrative action. That is moot, and with that I cannot agree, as I shall seek to demonstrate later in the judgment.

[11] Even though all administrative actions are subject to review under PAJA (subject to the exclusions in PAJA itself) Brassey AJ did not submit the decision to dismiss to scrutiny under PAJA. He determined that it was sufficient to apply the common law as laid down in *Zenzile* as already indicated above. In my view he erred. The 'cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past'(*Minister of Health v New Clicks SA (Pty) Ltd)*.[11] In *New Clicks* Chaskalson CJ said:

[11] 2006 (1) BCLR 1 (CC) at para 431.

'[95] PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.
[96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.' (See also *Zondi v MEC for Traditional and Local Government Affairs*.)[12]

[12] Section 33 of the Constitution confers a right to administrative action that is lawful, reasonable and procedurally fair; PAJA gives effect to this right. The common law principles developed by the courts to control the exercise of public power are now regulated by the Constitution. (*Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa*.)[13] The common law informs the provisions of PAJA and the Constitution and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis as the courts interpret and apply the provisions of PAJA and the Constitution (*Bato Star Fishing*)[14].

[13] As already indicated, in order to secure the relief that she sought, the applicant had to establish that the decision of Smith constituted administrative action as defined in s 1 of PAJA. The definition reads:

(i) '**administrative action**' means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

[12] 2005 (3) SA 589 (CC) at paras 99 to 101.
[13] 2000 (2) SA 674 (CC) at para 41, 44.
[14] 2004 (4) SA 490 (CC) at para 22.

(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.'

To this end, it was incumbent upon the applicant to establish that Transnet is an organ of state; that the decision to dismiss her was taken either in the exercise of public power or the performance of a public function in terms of some legislation. In addition it had to be shown that the decision to dismiss adversely affected her rights.

[14] It is clear from the papers that in terminating the applicant's contract of employment, Transnet, through Smith, was not exercising a public power or performing a public function in terms of any legislation. In *President of the RSA v South African Rugby Football Union*[15] dealing with the acts of the President of the Republic it was said:

'. . . 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. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not'. [Emphasis added]. As was pointed out by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works,*[16] whether a particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.

[15] 2000 (1) SA 1 (CC) at para 41.

[16] 2005 (6) SA 313 (SCA) para 24. The case was decided on the basis that the appellants had failed to show that any of their rights had been adversely affected by the Minister's decision taken in the exercise of his power to dispose of or lease state property.

[Emphasis added] By parity of reasoning Smith's conduct did not therefore fall within the definition of 'administrative action' as defined in PAJA. No reference is made in the applicant's founding affidavit to any provision in the Constitution, a Provincial Constitution or legislation. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[17] Streicher JA said that s 33 'is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it performs an act of public administration ie when it exercises public power.'[18] Whether or not conduct is 'administrative action' would depend on the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.[19] The principle of the decision in *Cape Metro* is the following. The fact that a state organ, as Transnet is, derives its power to enter into a contract from statute does not mean that its right to terminate it is also derived from public power. As Streicher JA said, *Zenzile* is no authority for that proposition. Mr Madlanga who appeared for the applicant did not argue that *Cape Metro* was wrongly decided. The decision goes to the heart of the applicant's case and there is no reason not to follow it. It is useful to draw on the remarks of Holmes JA in *S v Graham*[20] where he had to consider a series of judgments that had been the subject of academic criticism. The learned judge said: (at 577A)

'The foregoing decisions have not escaped academic criticism, but they stand as judgments of this Court. They were referred to in the arguments in the instant case without criticism and I need say no more than that I am unpersuaded that they are manifestly wrong. They are therefore binding.'

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[17] 2001 (3) SA 1013 (SCA).
[18] *Cape Metro* at para 16.
[19] Op cit at para 17.
[20] 1975 (3) SA 569 (A).

[15] Brassey AJ found that the applicant's dismissal is administrative action subject to administrative law by relying on the decision in *Zenzile*. In *Zenzile* the court held that the public authority's statutory power to dismiss public section employees was subject to administrative law particularly the right to be heard before their dismissal, despite the existence of a right to dismiss at common law or in contract.[21] The decision and the two others that followed it (*Administrator, Natal, v Sibiya* [22] and *Minister of Water Affairs v Mangena*)[23] are distinguishable in that they were dealt with before the new definition of administrative action in PAJA; the employees' conditions of service in those cases were governed by legislation.[24] Under PAJA, which now governs the position, conduct only amounts to administrative action if it is the exercise of public power or the performance of a public function in terms of any legislation. The nature of the power or function is paramount, the identity of the functionary exercising the power or performing the function, secondary. The question requires an analysis of the nature of the power or function exercised. That in turn requires a consideration of, *inter alia*, the source of the power or function exercised, its nature, its subject matter, whether it involves the exercise of a public duty and how closely it is related to legislation. The nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public

[21] *Zenzile* at 33J-34H; *Sibiya* at 534 E-F; *Manzene* at 1206-7.
[22] 1992 (4) SA 532 (A).
[23] (1993) 14 ILJ 1205 (A).
[24] *Zenzile* at 26C-E. The termination of the employees' contract of employment was governed by the Public Service Staff Code which was promulgated in terms of s 36 of the Provincial Government Act 69 of 1986 (rw s 140) the Public Service Act 111 of 1984. The contract could not be terminated without notice. It follows therefore that the audi rule was embodied in their employee's conditions of employment.

function in terms of some legislation. Ordinarily[25] the employment contract has no public law element to it and it is not governed by administrative law.[26] The mere fact that Transnet is an organ of state does not impart a public law character to its employment contract with the applicant. The power to dismiss is found, not in legislation, but in the employment contract between Transnet and the applicant. When it dismissed the applicant, Transnet did not act as a public authority but simply in its capacity as employer. The factual matrix in which *Zenzile*, *Sibiya* and *Mangena* were decided has changed. Furthermore at the time, public sector employees were expressly excluded from the Labour Relations Act, 28 of 1956 by virtue of which employees were entitled to be heard. At the time of her dismissal by Transnet the applicant, like public sector employees, enjoyed protection under the LRA, which is the statutory embodiment of the constitutional right to fair labour practices. Although s 23(2) of the Constitution imports into the employment contract a reciprocal duty to act fairly it does not deprive the employment contract of its legal effect (see *Denel (Edms) Bpk v Vorster*.[27]) For the above reasons it has not been shown that the dismissal of the applicant by Transnet was an administrative action as defined in PAJA or that any of her rights under s 33 of the Constitution were violated.

[16] Mr Madlanga submitted that even if it were found that the applicant could not succeed on the basis of PAJA the principles enshrined in s 195 of the Constitution inured to the applicant's benefit and were sufficient to afford her relief. I do not agree. Section 195 does not create rights but sets out the basic values and principles that govern public administration. Although Transnet as an organ of state is bound by those

[25] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 56F.
[26] *Lamprecht v McNeillie* (1994) 15 ILJ 998 (A) at 1000 A-H.
[27] 2004 (4) SA 481 (SCA) at para 161, 2 at paras 13-16.

principles I do not think that the applicant's right to relief could be founded on the section.

[17] In the result the appeal is upheld with costs, including costs consequent upon the employment of two counsel. The order of the court *a quo* is replaced with the following:
'The application is dismissed with costs.'

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

JAFTA JA

CONRADIE JA

[18] I respectfully agree that the appeal should be upheld. The respondent sought to review her dismissal by Transnet because, she said, the administrative procedures culminating in the dismissal had been tainted by unfairness, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) vouchsafed her the right to procedurally fair administrative treatment, a right guaranteed by s 33 of the Constitution, one on which she could rely for lawful, reasonable and procedurally fair administrative action even if she could not invoke PAJA.

[19] It is important to understand just what the respondent's case is. She articulates it in the penultimate paragraph of her founding affidavit:

'I have been advised that I have available to me more than one cause of action; one flowing from the LRA, and another flowing from the Bill of Rights as enshrined in the Constitution of this country as read with the provisions of PAJA. For practical considerations, and in the exercise of my constitutional right of access to courts I have elected to base my cause of action on the Constitution and the PAJA and to approach the above-named honourable court for appropriate relief.'

[20] The respondent had first tried the labour dispute resolution route prescribed by the Labour Relations Act 66 of 1995 (LRA). The compulsory conciliation process before the Commission for Conciliation Mediation and Arbitration came to naught. The CCMA issued a certificate to that effect. 'For practical considerations and in the exercise of [her] constitutional right of access to court' the respondent then shopped for another forum, the Johannesburg High Court. By reason of the provisions of s 157(1) of the LRA she could not bring the same claim before that court, so she changed her cause of action from an unfair

dismissal under the LRA to a claim of unfair administrative action under PAJA or, if that should fail, one based on a violation of her constitutional right to procedurally fair administrative action. The crisp but uncommonly difficult question before us is whether she was entitled to have done so.

[21] In *United National Public Servants Association of SA v Digomo NO & others*[28] a commission investigating irregular promotions in the department of health and welfare in Gazankulu instructed the department of health of the Northern Province to establish a task team to determine which civil servants qualified for promotion on the basis of merit and seniority; the task team carried out its assessment on the basis of seniority only. The applicant trade union approached the high court on behalf of its members, complaining that their right to fair administrative action had been infringed. The only question before the supreme court of appeal was whether the lower court had been correct in concluding that, since the conduct of the department involved an unfair labour practice, the union was seeking relief within the labour field that a high court had no jurisdiction to grant. On appeal the court found that on the applicant's allegations the court did have jurisdiction. Whether or not the allegations sustained a cause of action was not an issue before the court of appeal.[29]

[22] We are called upon to consider whether the court below had jurisdiction to review under PAJA an act performed by the state in its capacity as an employer; if it had the jurisdiction, whether it correctly found that the respondent has a claim under PAJA; and whether, if she

[28] (2005) 26 ILJ 1957 (SCA).
[29] At para 5 Nugent JA said that 'It is sufficient to say that the appellant's claim *as formulated in its application* (my emphasis) did not purport to be one falling within the exclusive jurisdiction of the labour courts and the objection to the jurisdiction of the High Court ought to have been dismissed.'

does not, she nevertheless has a claim under the Constitution.[30] I have set out the issues in their logical sequence, but I deal with the first two in their order of importance.

[23] In the court *a quo* Brassey AJ decided that the respondent's dismissal by Transnet was an administrative act. He relied for that conclusion on *Administrator, Transvaal, and others v Zenzile and others*[31] and the cases that followed it.[32] *Zenzile* held that the dismissal of an employee by a provincial government[33] was not simply the termination of a contractual relationship but amounted to an act pursuant to the exercise of a public power which made it administrative in nature. This, it was held, obliged such an employer to apply the rules of natural justice appropriate to the exercise of public power under the common law. Despite the applicant having requested that the quality and consequences of her dismissal be assessed under PAJA, which had by then come into force, the *Zenzile* principles nevertheless played a crucial role in deciding whether the dismissal of a public sector employee amounted to the exercise of a public power.

[24] Whether or not the dismissal of an employee of the state or one of its organs might be characterized as administrative action within the meaning of PAJA has been the subject of consideration before several

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[30] Cf *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others* 1999 (2) SA 234 (T) and *Mgijima v Eastern Cape Appropriate Technology Unit and another* 2000 (2) SA 291 (TkH); *Mbayeka and another v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) [2001] 1 All SA 567 (Tk).

[31] 1991 (1) SA 21 (A).

[32] Notably, *Administrator, Natal, and another v Sibiya and another* 1992 (4) SA 532 (A).

[33] By virtue of the definition in s 239 of the Constitution, an organ of State includes an administration in the provincial sphere of government. It also includes an institution like Transnet exercising a public power or performing a public function in terms of any legislation: *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 67; 2005 (4) BCLR 301 (CC).

courts whose conclusions have not been harmonious.[34] What appears to be the prevailing labour court view is articulated in a thoughtful judgment by Murphy AJ who said in *South African Police Union and another v National Commissioner of the Police Service and another*[35] –

' . . . our Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement.'

[25] Pillay J in *Public Servants Association v MEC for Agriculture & others*[36] added the weight of her opinion to the debate by declaring:

'. . . pursuant to the affirmation of the interim Constitution and the final Constitution that everyone has a right to fair labour practices, the LRA, the EEA and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) codified labour and employment rights. Adjustments were also made to other national laws, such as the Public Service Act (Proc 103 of 1994), the Police Services Act 68 of 1995 and the Employment of Educators Act 76 of 1998 to bring them in line with the Constitution. Remedies for non-compliance are codified in the LRA. Similarly, the EEA and BCEA were also promulgated prior to PAJA with a view to codifying the right to equality in the context of employment and labour standards respectively.'

[26] In my view the interpretational difficulties to which the provisions of the LRA and PAJA have given rise can only be addressed by an

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[34] Favouring the view that a public sector dismissal is (also) an administrative act that escapes the (exclusive) jurisdiction of the labour court is *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* (case 603/05 Eastern Cape High Court delivered 12 January 2006, para 59 – 60; *Mbayeka & another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk); *Simelela and Others v MEC for Education, Eastern Cape & Another* [2001] BLLR 1085 (LC) (where the dicta at paras 57 & 58 may be said to have been *obiter*).

[35] (2005) 26 ILJ 2403 (LC) at para 54.

[36] (2004) 25 ILJ 1750 (LC) at para 12 and 13.

holistic approach. The real enquiry in this case is not whether the decision to dismiss the respondent amounted to administrative action. I am prepared to accept that it did. After all, any proper dismissal enquiry in the public domain necessarily has the procedural attributes of administrative action. PAJA governs all administrative action falling within its scope. But not all administrative action falls within its scope. The definition of 'administrative action' in s 1 of PAJA excludes certain administrative acts from its ambit. It does not exclude a decision by a public sector employer to dismiss an employee. This omission has been interpreted[37] as an indication that such a decision might, provided all the other requirements of the definition are met, be considered administrative action. In the light of the considerations that I mention later the failure to exclude a dismissal from the definition is not decisive.

[27] The important question is whether the structure of the legislation entails that dismissals in the public domain be dealt with as administrative acts; since the advent of the LRA the answer must be no. Nothing could be further from the true effect of the legislation than that every dismissal of an employee from the service of an organ of state or the state itself should at the option of the employee be litigated in either the high court or the labour court. It does not fit in with the state's desired comprehensive scheme of labour regulation.[38] The legislative intent

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[37] *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 59.

[38] Per Murphy AJ at para 55 and 62 of *SA National Police Union:* ' . . . there are important underlying substantive principles or policy concerns at play here, namely that the resolution of employment disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values as in the private sector: that is, through collective bargaining and the adjudication of unfair labour practices, as opposed to judicial review of administrative action. And additionally that our constitutional prescriptions in that regard ought to be consistently maintained . . . .There seems to me to be no logical, legitimate or justifiable basis upon which to categorize 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.' These sentiments were shared by Mbha J who declared in *Louw v SA Rail Commuter Corporation & another* (2005) 26 ILJ 1960 (W) that the right entrenched in s 23 of the Constitution obviously regulates the powers of

evident from the LRA is beyond doubt: it is to subject a dispute about the unfair dismissal of any employee falling within its scope to the dispute resolution mechanisms of that Act. If there is a way to give effect to that intention, I think one should try to find it.

[28] The LRA lays down the elements of procedural fairness that it considers essential for a valid dismissal decision by an employer. PAJA, enacted seven years later, lays down the procedural elements for a lawful and fair administrative decision. It applies not only to all decisions of the state but to all decisions of all bodies exercising public power or fulfilling a public function of whatever description. Its scope is broader than that of the LRA which is a special statue regulating a particular type of relationship. Steyn, *Die uitleg van Wette*[39] cites a passages from the speech of lord Hobhouse in *Barker v Edger*[40] [reproduced in *R v Gwantshu*]:[41] ‘

'The general maxim is "Generalia specialibus non derogant." When 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. Each enactment must be construed in that respect according to its own subject-matter and its own terms.'

Maxwell on Interpretation of Statutes 12 ed by P St J Langan cites a passage from *The Vera Cruz*[42] where Lord Selborne said:

“Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without

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dismissal of employees, so that the remedies for any unfair dismissal would be under the fundamental right to fair labour practices as opposed to the fundamental right to fair administrative action.

[39] 4 ed p 190.

[40] [1898] AC 748 at 754.

[41] 1931 EDL 31.

[42] (1884) 10 App. Cas. 59 at 68.

extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'

[29] PAJA was enacted against the background of a provision in the LRA conferring exclusive jurisdiction on the labour court 'in respect of all matters that elsewhere or terms of this Act or in terms of any other law are to be determined by the Labour Court.'[43] That provision applies also to public sector employees unless the rather special circumstances set out in ss (2) of s 157 confer concurrent jurisdiction on the labour and the high courts. By extending the benefits of the LRA to, and imposing its restrictions on, employees of the state and its organs the legislature, for them also, took dismissals out of the realm of administrative law.[44] It would thus seem perverse that PAJA should, in respect of those matters specially assigned to the labour court, and without expressly saying so, effectively have repealed the exclusive jurisdiction provision of the LRA in respect of public sector employees.

[30] What I have said above applies only to matters such as a dismissal based on conduct, capacity or operational requirements that are to be determined by the labour court. Not all issues arising from an employment relationship are governed by the LRA. The jurisdiction of the Labour Court is limited to the four corners of the LRA.[45] A cause of action falling outside that for which the legislature has prescribed recourse to the labour court as the only remedy, is not taken away by the

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[43] Subsections (1) and (2) of Section 157 of the Labour Relations Act are quoted in para 6 of my brother Mthiyane's judgment.

[45] *Fredericks & Others v MEC for Education and Training, Eastern Cape, & Others* 2002 (2) SA 693 at para 31.

LRA. *Fedlife Assurance Ltd v Wolfaardt* [46] held just that. It was held that an employee's common law claim for damages for breach of a fixed term contract fell outside the scope of the LRA. Since the LRA did not mean to abolish Mr Wolfaardt's claim, he was free to pursue it in another court. There are many other decisions establishing that a litigant may very well have more than one cause of action, one justiciable in the labour court and another or others in the high court. The situation has arisen particularly in the strike context.[47] Troublesome questions about whether administrative action might be challenged under PAJA will continue to arise. I am merely suggesting that for a complaint arising from a procedurally unfair dismissal for poor work performance, a quintessential LRA matter, relief under PAJA is not intended to be available.

[31] The Bill of Rights creates two distinct sources of power. Natural justice is a philosophical cornerstone of both but they are nevertheless distinct. The one, in s 23 of the Constitution, feeds the procedures of the labour law, the other, in s 33, those of the administrative law. Administrative power over the subject has one source, an employer's power over its employees another. The statutes enacted to give effect to each of the constitutional provisions, PAJA and the LRA, differ fundamentally in the substantive remedies they provide. If an application for the review of administrative action succeeds, the applicant is usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant's case and only in rare cases

[46] 2002 (1) SA 49 (SCA).
[47] A high court has jurisdiction to award damages for injury to property during a protest action: *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W); *Minister of Correctional Services and Another v Ngubo and Others* 2000 (2) SA 668 (N); (2000) 21 ILJ 313 (N) decided that the high court could grant an interdict against assaults by employees on a co-employee.

substitutes its decision for that of the decision-maker.[48] The guiding principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one. Under the LRA the procedure to have a dismissal overturned or adjusted involves a rehearing with evidence by the parties and the substitution of a correct decision for an incorrect one. The scope for relief consequent upon such an order is extensive. It is quite unlike that afforded by an administrative law review.[49]

[32] One might say, as my brother Cameron does, that an employee who is content with the lesser remedy afforded by PAJA should be free to pursue it, but that opinion in my respectful view does not take adequate account of the fact that the legislature has firmly set its face against matters governed by the LRA being litigated in another court regardless of whether the employee is employed in the public or the private sector.

[33] In starting out on this judgment I said that the issues are of mystifying complexity.[50] If I am wrong in thinking that the respondent has no cause of action under PAJA and she indeed has a remedy under that Act or even under the common law, I consider that she is not entitled to pursue it in the high court.

[34] The jurisdiction provision in s 157(1) of the LRA confers on the labour court 'exclusive jurisdiction in respect of all matters that elsewhere

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[48] The court *a quo*, exceptionally for a court exercising review powers, instead of merely setting aside the decision and remitting the matter, granted the respondent the substantive relief of nine months' retrospective reinstatement. See s 8(*c*)(ii)(*aa*) of PAJA.

[49] Under the LRA the respondent would have had to go to a bargaining council, if there was one, or otherwise to the Council for Conciliation, Mediation and Arbitration, the CCMA, to have the dispute conciliated and, if it remained unresolved, have it determined by arbitration. For a fuller exposition see *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others* 1999 (2) SA 234 (T) at 239.

[50] One thinks with empathy of Zondo JP's lament in *Langeveldt v Vryburg Transitional Local Council* (2001) 22 ILJ 116 (LAC). Things have not become any easier since then.

in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

The phrase 'elsewhere in terms of this Act' means in a section of the Act other than s 157. The very next section, s158, confers powers on the labour court, not jurisdiction. However, I tend to agree with Brassey in *Commentary on the Labour Relations Act* vol 3 A7-116 who suggests that at least some paragraphs of s 158(1) by implication extend the jurisdiction of the labour court. Clearly not all the paragraphs of that subsection do so, but paragraph (h), it seems to me, does. Under that paragraph the labour court may 'review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

[35] The fact that it was thought necessary to make special provision for a review of state decisions in the employment sphere on any grounds permissible in law suggests an extension of jurisdiction to bring the kind of employment-related decision that might be considered to fall outside the scope of the LRA – an administrative decision under PAJA or under the common law for example – under the exclusive jurisdiction of the labour court. In his customary limpid fashion Brassey makes the following comment:[51]

'The state as employer inhabits two legal worlds: contract law and administrative law. Courts have wrestled how best to characterise and deal with its acts in this capacity. In a line of important cases in our law the decision was made to treat the state *qua* employer as an administrative actor and, as a result, to require it to conform to the rules of natural justice

[51] Commentary on the Labour Relations Act vol 3 A7-149.

before taking a decision that might deprive employees of their rights or frustrate their legitimate expectations.'[52]

[36] I do not think that it attributes too much insight to the framers of the Act to suppose that they had the *Zenzile* line of cases in mind when formulating s 158(1)(h). If I am correct in this, the labour court has exclusive jurisdiction to review the decision to dismiss the respondent so that, although she has a cause of action under PAJA, the high court is not the forum for it.

[37] It was common cause before us that if the respondent had an action directly under the Constitution she could enforce it in the high court. Did she have one? *NAPTOSA and Others v Minister of Education, Western Cape, and Others*[53] held that it is impermissible 'for an applicant, save by attacking the constitutionality of [a statute], to go beyond the regulatory framework which it establishes.' In *NEHAWU v University of Cape Town and Others*[54] the Constitutional Court distinguished the decision. *Ingledew v The Financial Services Board and Others: in re Financial Services Board v Van der Merwe and Another*[55] may be said to have given some support to the notion but the court ultimately found it unnecessary to decide the issue.

[38] Since *Ingledew,* stronger endorsement has come from the Constitutional Court. Chaskalson CJ, writing for certain members of the

[52] The *Zenzile* line of cases. .
[53] 2001 (2) SA 112 (C); 2001 (4) BCLR 388 (CC) at para 61.
[54] 2003 (3) SA 1 (CC) para 17 ; 2003(2) BCLR 154 (CC).
[55] 2003 (4) SA 584 (CC) para 23 - 24; 2003 (8) BCLR 825 (CC).

court, held in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others* [56] that –

'A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.'

Having remarked at para 436 that there was 'considerable force' in the NAPTOSA approach Chaskalson CJ continued at para 437:

'Where, as here, the Constitution required Parliament to enact legislation to give effect to the constitutional right guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'[57]

[39] The development has continued with Mokgoro J remarking in D*u Toit v Minister of Transport* [58] that the difficulty in the applicant's case was that he had not impugned the validity of a statutory provision before seeking to place reliance on the Constitution.

[40] The remarks by Chaskalson CJ accord with the golden rule first stated in *S v Mhlungu and Others*[59] and since repeatedly enunciated by the Constitutional Court, most recently in *Motsepe v Commissioner for Inland Revenue* [60] that if it is possible to decide a case without reaching a

[56] 2006 (2) SA 311 (CC) at para 96; 2006 (1) BCLR 1 (CC).
[57] Footnote omitted.
[58] 2006 (1) SA 311 (CC) at para 29.
[59] 1995 (3) SA 867 (CC).
[60] 1998 (1) SA 300 (CC).

constitutional issue, that is the course that should be followed. *Motsepe* was distinquished in *Harksen v Lane NO and Others,*[61] Goldstone J remarking[62] that the applicant had no non-constitutional remedies available to her. The point here is that where a statute affords a direct remedy it is unnecessary and inappropriate to go directly to a constitutional provision.

[41] The situation with regard to the common law is no different. If it is unable to meet the exigencies of a case, it may be developed in the light of the Constitution; as illustrated by *Fourie and Another v Minister of Home Affairs and Others,*[63] that development can be extensive. That is the way the Constitution should be applied, by shaping our system of law, not by affording direct reliance on it except in exceptional circumstances such as those in *Harksen* where there was no non-constitutional remedy.[64]

[42] In *Institute for Democracy in South Africa and others v African National Congress and others*[65] Griesel J dealt with this issue by relying on what was said in NAPTOSA and by quoting approvingly from the work of Currie and Klaaren , *The Promotion of Access to Information Act Commentary* (2002) para 2.12. The same views are expressed by the authors on PAJA in their work *The Promotion of Administrative Justice Benchbook* 2001 para 1.28:

'It was argued in the previous paragraph that there remains, after the AJA [PAJA] has commenced a *free standing constitutional right to administrative justice.* The question is therefore not *whether* but *when* the

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[61] 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241.
[62] At para 26.
[63] 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241.
[64] *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) was decided before the enactment of PAJA: at the time the applicant had no non-constitutional remedy.
[65] 2005 (5) SA 39 (C) para 16.

constitutional right to administrative justice can be directly relied on. The answer must be – only in the exceptional case where a provision of the AJA or other parliamentary legislation is challenged as an infringement of s 33. This would be in accordance with the principle of avoidance, which dictates that remedies should be found in common law or legislation before resorting to constitutional remedies. This would also be in accordance with the related principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority of Parliament to give effect to the constitutional right to administrative justice. This means that the Act must be treated as the principal instrument defining and delineating the scope and content of the administrative justice rights, the mechanisms and procedures for their enforcement. The Constitutional right recedes to the background, indirectly informing the interpretation of the Act but directly applicable only to an allegation that the AJA or legislation beyond the control of the AJA is unconstitutional.'

Cora Hoexter *The New Constitutional & Administrative Law*[66] voices the same opinion in regard to the Promotion of Access to Information Act.

[43] Recently, Botha J agreed in *Jones and another v Telkom SA Ltd & others*[67] with *Mgijima v Eastern Cape Appropriate Technology Unit and another*[68] that a claimant cannot escape the provisions of the LRA by alleging that the case involves a constitutional issue.[69] I agree. Every labour dispute can be said to have a constitutional dimension. That does not mean that the constitutional right to fair labour practices of someone

[66] Vol 2 at 57
[67] [2006] BLLR 513 (T)
[68] 2000 (2) SA 291 (TkH).
[69] See also *Mcosini v Mancotywa* (1998) 19 ILJ 1413(Tk).

who has been unfairly dismissed has been violated. It means that the dismissal is unlawful in terms of the LRA. The labour court retains its exclusive jurisdiction. However, the point was not argued and I need say no more about it.

[44] The respondent's reliance on PAJA was misplaced. Insofar as she may have had a claim under PAJA, she chose the wrong forum to enforce it. Also misplaced was her alternative attempt to found a cause of action directly on s 33 of the Bill of Rights. I agree with my brother Mthiyane that s 195 of the Constitution does not afford the respondent discrete relief.[70] It follows that I agree that the appeal should succeed and that the order proposed should be substituted for that in the lower court.

J H CONRADIE
JUDGE OF APPEAL

[70] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 para 21.

[45] The appeal raises the difficult question whether public employees can challenge dismissal proceedings against them, arising from their employment, in the ordinary courts. Ms Chirwa, the employee, was dismissed by Transnet (an organ of State),[71] and chose to bring proceedings against it in the high court, where she sought (a) to set aside the procedure that resulted in her dismissal (claiming it was flawed because her immediate supervisor and chief critic presided), and consequently (b) reinstatement. Brassey AJ granted her the relief she sought, even though her cause of action arose from a dismissal as defined in the Labour Relations Act 66 of 1995 (the LRA).

[46] I am grateful to my colleagues Mthiyane JA and Conradie JA for the benefit of their judgments. In addition, two deeply considered judgments at first instance, going opposite ways (Murphy AJ[72] and Plasket J),[73] have lighted the way. After hesitation I find myself driven to a different conclusion from my colleagues, and to endorse that of Plasket J. In my view, Transnet's appeal should substantially fail. While I differ from the approach of Brassey AJ in the court a quo (who eschewed the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and gave the employee a common law remedy), I agree with his main conclusion that the employee was entitled to relief. However, he granted the employee reinstatement with nine months' back-pay. That I think was wrong. In my view, reinstatement should be refused altogether: the matter should go

[71] Constitution s 239 ('organ of state', besides departments of state, includes any other functionary or institution 'exercising a public power or performing a public function in terms of any legislation' (not including courts or judicial officers)).
[72] *SA Police Union v Commissioner of the SAPS* (2005) 26 *ILJ* 2403 (LC) (where a change in shifts was in issue) (the Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement; employment-related decisions by an organ of state do not constitute administrative action under PAJA);
[73] *Police and Prisons Civil Rights Union v Minister of Correctional Services* [2006] 2 All SA 175 (E) (where dismissals were at issue) (an organ of state in exercising the power to dismiss engages in administrative action under PAJA cognisable in the high courts).

back to Transnet for a proper hearing. Even on this approach, however, the employee was entitled to at least declaratory relief, so that Transnet's appeal should only partly succeed.

[47] The essence of my difference with my colleagues Mthiyane and Conradie is that I think 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. And I consider that too many conceptual, doctrinal and interpretative difficulties obstruct the path to the conclusion they both reach, which is that the employee was not entitled to any relief in the ordinary courts. In my view these difficulties compel the contrary conclusion. However, in my view the ordinary courts should be careful in employment-related matters not to usurp the remedial role and special aptitudes of the labour courts: public employees may properly be discouraged from having recourse to the ordinary courts in such matters by limiting the remedy granted.

[48] Mthiyane JA considers that the ordinary courts have jurisdiction to entertain the employee's claim, but that her dismissal did not constitute 'administrative action' under PAJA, since her employment contract with Transnet (and therefore its termination) lacked a public law character. Conradie JA likewise accepts that the ordinary courts have jurisdiction, but, unlike Mthiyane JA, is willing to accept that the dismissal constituted 'administrative action' on the part of Transnet. He finds however that the employee nevertheless had no cause of action under PAJA that was cognisable in the ordinary courts. The difference between my colleagues is that Mthiyane JA denies the employee a remedy without relying on the provisions of the LRA, because he finds that the dismissal process was not administrative action; whereas Conradie JA finds that the legislative

intent behind the enactment of the LRA entails the disappearance of the employee's administrative action-related cause of action in the ordinary courts. I respectfully dissent from both approaches and their conclusion.

[49] We must start, as always, with the Constitution, which regulates the exercise of all power, and entitles all persons not only to fair labour practices (as enacted in the LRA),[74] but also to just administrative action (the right to which is now embodied in PAJA).[75] The problem the employee's claim presents may be considered in two stages. If there were no LRA, would the employee be able to bring her claim under PAJA? Though my colleague Mthiyane says No, I conclude that she can. Second, does the LRA obstruct that conclusion? Though my colleague Conradie JA says Yes, I conclude that it does not.

Does an organ of state when dismissing an employee engage in 'administrative action'?

[50] Since Transnet conceded that it is an organ of state under the Constitution, the question is whether its decision to dismiss falls within PAJA's definition of administrative action, which (subject to exclusions) encompasses decisions taken by organs of state 'when exercising a public power or performing a public function in terms of any legislation'. The answer to the question is not affected by the fact that Transnet is now a profit-directed commercial entity operating on market principles: we must

[74] See *NAPTOSA v Minister of Education, Western Cape* 2001 (2) SA 112 (C) 123I-J (endorsed by Chaskalson CJ for some members of the court in *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) paras 436-7 and 95).

[75] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25, per O'Regan J on behalf of the Court; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 95, per Chaskalson CJ; paras 433-7 per Ngcobo J.

decide it as if Ms Chirwa were employed by any other organ of state, or indeed a state department.[76]

[51] It is hard to see why the decision of a state organ to dismiss an employee does not constitute administrative action. Indeed, as a matter of doctrine, this court more than a decade and a half ago so held. In *Administrator, Transvaal v Zenzile*[77] it unequivocally rejected the argument that a public body's decision to dismiss falls beyond the reach of administrative law and the rules of natural justice. It held that it was 'logically unsound and wrong in principle' to postulate that administrative law principles have no application to 'purely contractual relations': rather, it held, the existence of a contract cannot alter the essential nature of the parties' relations.[78] This court therefore affirmed that when public bodies dismiss employees, one is concerned –

'not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decisionmaker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by the statute necessarily entails, so I consider, that the [employees] were entitled to the benefit of the application of the principles of natural justice …'[79]

[52] Despite the allusion to 'the statute', it is in my view of no significance that the employee's contract of employment, or Transnet's authority to employ her, did not derive from a particular, discernible,

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[76] Transnet in its written argument suggested, on the basis of its statutory history as set out in *Industrial Council for the Building Industry (Western Province) v Transnet Industrial Council* 1999 (1) SA 505 (SCA) at 511B-H, that the fact that the LRA was made statutorily applicable to its employees somehow rendered them ordinary employees in a class different from other state employees, but the contention was rightly not pursued in oral argument.
[77] 1991 (1) SA 21 (A).
[78] 1991 (1) SA 21 (A) 35I-J.
[79] 1991 (1) SA 21 (A) 34B-D, per Hoexter JA on behalf of the court.

statutory provision. Transnet is a public entity created by legislation and operating under statutory authority. It would not exist without statute. Its every act derives from its public, statutory character, including the dismissal at issue here. The doctrine propounded in *Zenzile*, and the cases that followed it, was that employment with a public body attracts the protections of natural justice because the employer is a public authority whose employment-related decisions involve the exercise of public power. That power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution. Its exercise therefore constitutes administrative action. That reasoning is as compelling today as it was a decade and a half ago.

[53] *Zenzile* pre-dated both the Constitution and PAJA, but far from superseding it, they seem to me merely to have confirmed its authority. This court has recently observed, in the light of the constitutional right to administrative justice, its embodiment in PAJA, and Constitutional Court decisions, that administrative action is, in general terms, the conduct of the bureaucracy in carrying out the daily functions of the State (which here includes Transnet), which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[80] Rejecting an argument that a policy-based decision to rent out state property did not constitute administrative action, Nugent JA observed that the decision was made 'in the exercise of a public power conferred by legislation, in the ordinary course of administering the property of the State, and with immediate and direct legal consequences'.[81] The same approach applies here. The decision to dismiss the employee was made in the exercise of

[80] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 24, per Nugent JA on behalf of the court.
[81] 2005 (6) SA 313 (SCA) para 28.

public power, conferred by legislation, in the ordinary course of administering the business of Transnet (and, through it, the State), and had immediate and direct legal consequences. It was therefore administrative action under PAJA.

[54] *Zenzile* was distinguished in *Cape Metropolitan Council v Metro Inspection Services CC*,[82] which refused to generalise its doctrine by extending it to cases of purely commercial cancellation by a public body that had contracted with a large enterprise on terms of equal bargaining power. *Cape Metro* left the core doctrine of *Zenzile* intact, which is that in terminating a contract of employment a public body engages in administrative action. The reason emerges from *Cape Metro* itself, which observed that the public body there in concluding the contract was not acting 'from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution'.[83] While the principles of labour law recognise that contracts of employment are not universally concluded on terms of inherent hierarchical subordination, Transnet rightly did not seek to establish that exception here: for though Ms Chirwa was in a senior position, in taking up her job she was clearly no more than a private citizen contracting with a public colossus.[84]

[55] And *Cape Metro* was itself distinguished in *Logbro Properties CC v Bedderson NO*,[85] which held that the former decision 'turned on its own facts'. These showed that a public authority's invocation of a power of

[82] 2001 (3) SA 1013 (SCA) para 11.
[83] 2001 (3) SA 1013 (SCA) para 18, per Streicher JA on behalf of the court.
[84] See generally Angus Stewart 'The Characteristics of the State as Employer: Implications for Labour Law' (1995) 16 *ILJ* 15.
[85] 2003 (2) SA 460 (SCA) paras 9-14.

cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power. *Logbro* reasserted the general principle: where a public body is empowered by statute to contract, the principles of administrative justice frame the parties' contractual relationship, and, in particular, they govern the public body's exercise of the rights it derives from the contract. That applies to the employment contract here.

[56] But the authority of *Zenzile* does not turn on the minutiae of precedent and on whether it can plausibly be distinguished. For underlying it is a large principle, namely that employment with a state organ triggers a public dimension that imposes public duties that the courts will supervise. As has been observed,

'Whether one's view of administrative law is that it should control government power and protect individual rights, or that it should ensure accountability and foster participation, the power that the state exerts in the relationship with its employees, at times as an instrument of public policy and with potentially devastating effects on their lives, is an appropriate subject for administrative law control.'[86]

This in my respectful view applies to Transnet, and it necessitates the conclusion that, whatever the position might be in relation to purely commercial contracts, the public dimension of employment service with a public body renders it subject to administrative law oversight (and hence within the definitional reach of PAJA).[87]

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[86] Angus Stewart 'The Characteristics of the State as Employer: Implications for Labour Law' (1995) 16 *ILJ* 15 at 23.

[87] It follows that I am unable to agree with the view of Murphy AJ in *SA Police Union v Commissioner of the SAPS* (2005) 26 *ILJ* 2403 (LC) paras 51, 57 that there is 'nothing inherently public' about a public employer's action in changing terms and conditions of employment since it amounts to 'an internal matter of departmental organisation'.

Does the enactment of the LRA deprive the employee of her administrative justice cause of action?

[57] When Transnet dismissed Ms Chirwa, its action trenched on two constitutional rights: her right to fair labour practices,[88] and her right to just administrative action.[89] The legislature has augmented the right to fair labour practices by affording employees an elaborate set of remedies in the LRA. When conciliation under the LRA failed, she could have subjected her unfair dismissal claim to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) (LRA ss 133-150). She chose not to. Instead, she launched this application for relief in express reliance on PAJA, asserting that two causes of action arose from her dismissal – one under the LRA; the other under the Constitution and PAJA. That assertion was in my view right.

[58] Does the fact that the employee has remedies under the LRA preclude her from asking the ordinary courts to vindicate her PAJA rights? In my respectful view, it does not. Both existing authority and principle in my view compel the conclusion that she is entitled to bring her claim for relief in the ordinary courts.

[59] It is by now well established that the LRA does not confer exclusive jurisdiction on the labour courts in matters arising from the employer/employee relationship – it was intended to supplement the employee's common law rights, and not to exhaust the rights and remedies accruing to an employee on termination of employment: *Fedlife*

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[88] Bill of Rights s 23(1): 'Everyone has the right to fair labour practices.'

[89] Bill of Rights s 33(1): 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair', now embodied by virtue of s 33(3) ('National legislation must be enacted to give effect to these rights') in PAJA.

Assurance Ltd v Wolfaardt.[90] And since the LRA affords the labour courts no general jurisdiction in employment matters, the ordinary courts' jurisdiction is not ousted simply because a dispute falls within the sphere of employment relations; they retain their competence in relation to disputes arising from the alleged infringement of constitutional rights: *Fredericks v MEC for Education and Training, Eastern Cape*.[91]

[60] These principles were recently applied in *United National Public Servants Association of SA v Digomo NO*,[92] where this court held that public servants who claimed to have been irregularly and unfairly passed over for promotion (a pure employment claim) could challenge the adverse decision in the ordinary courts. Applying *Fedlife* and *Fredericks*, this court reasserted that the LRA's remedies are not exhaustive of those that might be available to employees arising from their employment:

'Particular conduct by an employer might constitute both an "unfair labour practice" (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant's claim in the present case was not that the conduct complained of constituted an "unfair labour practice" giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in the Constitution and that is protected by s 33 – which is clearly cognizable in the ordinary courts.'

This court was not called on to decide whether the conduct in issue was indeed administrative action liable to be set aside:

'It is sufficient to say that the appellant's claim as formulated in its application did not purport to be one that falls within the exclusive jurisdiction of the labour courts'.

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[90] 2002 (1) SA 49 (SCA), para 25per Nugent AJA for the majority.
[91] 2002 (2) SA 693 (CC) paras 36-43, per O'Regan J on behalf of the court.
[92] (2005) 26 *ILJ* 1957 (SCA)

[61] The present claim is no different. The employee was entitled to formulate her complaint against her public employer in terms cognizable in the ordinary courts. By invoking PAJA, she did so. Why should she not be able to claim relief? My colleague Conradie finds an answer in the structure and comprehensive reach of the LRA, which he concludes entails that all dismissal procedures, whatever their characteristics, be dealt with under the LRA. With respect, I cannot agree. That approach suggests that the LRA – a statute that preceded PAJA – must be read to have deprived the employee of her administrative justice rights of action. It does not do so expressly. So it must have done so by implication. With respect, I flinch to draw so large a conclusion from such obliquely inferred grounds.

[62] And behind this debate looms the broader question whether, when the legislature provides an express statutory vehicle for the realisation of one constitutional right, it thereby occludes reliance on other rights whose breach may be involved. To do so may indeed lie within its power, but it would in my view have to use far clearer, more precise and robust language to achieve that object: for the evaporation of a constitutional cause of action should be inferred only with great hesitation.

[63] So far as I know, no doctrine of constitutional law confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude. If the legislature sought to deprive dismissed public employees of their administrative justice cause of action in the ordinary courts, because they enjoy rights under the LRA, it could have said so when it enacted PAJA. Far from doing so, PAJA's extensive list of exclusions from the definition of 'administrative action'

refrains from any such mention. That cannot but be a telling feature. It follows in my view that their cause of action survives unscathed.

[64] Nor am I able to read into s 158(2)(h) of the LRA the exclusionary effect Conradie JA ascribes to it. The provision seems to me with respect merely to give the labour courts power to review the State's conduct as employer, without the intention to confer exclusivity.

[65] We must end where we began: with the Constitution. I can find in it no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them.[93] Ms Chirwa was free to frame her cause of action under PAJA, as she did: what relief she should have been afforded I turn to in conclusion.

Relief

[66] Transnet sought only faintly to contend that the process by which Ms Chirwa was dismissed could be considered fair. It was not, since she had at least a reasonable suspicion that her superior, with whom relations had been overtly acrimonious, would be biased against her (PAJA s 6(2)(a)(iii)). The decision must therefore be set aside. However, as mentioned earlier, Brassey AJ also granted retrospective reinstatement. In my view, that was wrong. In administrative law the subject is usually entitled only to have the decision at issue set aside, and the matter remitted for a fresh decision. By reinstating the employee, Brassey AJ

[93] What Plasket J – in my respectful view, correctly – rejects as 'the pre-eminence argument': *Police and Prisons Civil Rights Union v Minister of Correctional Services* [2006] 2 All SA 175 (E) para 59.

substituted his view of her fitness and capacity for that of the employer. It may be that an immaculate process concludes that the employee should have been dismissed when she was. In that case, reinstatement would be quite wrong. If on the other hand a fair hearing concludes that she should not have been dismissed, then she must in my view be left to prove what loss she can in respect of the intervening period.

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

[68] I would therefore allow the appeal to the extent that the order reinstating the employee is set aside. Otherwise I would dismiss it. That entails only limited success for Transnet, and in my view each party should pay its own costs in this court. As for the costs in the court below, the main focus of the parties' dispute from the outset was whether the employee was entitled to any relief at all. Since Ms Chirwa established that she indeed was, she should get her costs in the court below.

E CAMERON
JUDGE OF APPEAL

CONCUR:

MPATI DP