

CLEARING THE INTERSECTION? ADMINISTRATIVE LAW AND LABOUR LAW IN THE CONSTITUTIONAL COURT

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The dismissal of employees in the public sector is as much a matter of administrative law as it is one of labour law – or so we all thought, encouraged by the judgment of the Appellate Division in *Administrator, Transvaal v Zenzile*.¹ But that decision comes from an era in which labour law was notable for its failure to protect employees in the public sector and administrative law had to be called on to perform this role.² Much has changed since then, and in recent years there has been debate about the continuing relevance of administrative law in cases of dismissal and other employment-related conduct.

In 2007 the Constitutional Court was asked to settle the debate in *Chirwa v Transnet Ltd & Others*,³ a case of public-sector dismissal that called attention to *Zenzile* once more. The Court also dealt with two other cases of dismissal that touched on questions pertinent to administrative law. *Masetlha v President of the Republic of South Africa & Another*⁴ raised the issue of procedural fairness in the dismissal of a high-ranking public official. *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*⁵ arose out of a dismissal in the private rather than the public sector, but administrative law was again relevant by virtue of an arbitration award by the Commission for

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¹ 1991 1 SA 21 (A) (*Zenzile*).

² The legislation of the time, the Labour Relations Act 28 of 1956, excluded state employees from its ambit.

³ 2008 29 ILJ 73 (CC), handed down on 28 November 2007 (*Chirwa*).

⁴ 2008 1 SA 566 (CC), handed down on 3 October 2007 (*Masetlha*).

⁵ 2008 2 SA 24 (CC), handed down on 5 October 2007 (*Sidumo*).

Conciliation, Mediation and Arbitration (CCMA). In all, the Court had three opportunities in 2007 to explore the intersection of labour law and administrative law and to elucidate the relationship between sections 23 and 33 of the Constitution – and between the statutes that are supposed to give effect to those rights, the Labour Relations Act 66 of 1995 (LRA) and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

As I shall show in this article, the results are interesting; but they are also rather disappointing, at least from the perspective of an administrative lawyer. In my commentary on these three cases (in the order *Sidumo*, *Chirwa* and *Masetlha*) that is the perspective I adopt. My aim is to elucidate aspects of these cases as they touch on administrative law and, in the process, to make three main points.

First, it seems to me that from the various judgments of the Constitutional Court no coherent picture emerges of this intersection or of the relationship between the rights concerned. Indeed, in their constitutional approach or ethos the *Sidumo* and *Chirwa* majority judgments seem quite different, notwithstanding that the two cases were decided by almost identical benches and within weeks of each other. A theme emerging strongly from *Sidumo*, and to a lesser extent from *Masetlha*, is that fundamental rights cannot be hermetically sealed from one other. In *Sidumo* labour law and administrative law intermingle and converge, and in *Masetlha* administrative law in the broad sense is permitted to solve a problem that labour law apparently fails to address. In *Chirwa*, by contrast, the majority insists on the strict compartmentalisation of fundamental rights and on the pre-eminence of one right to the exclusion of the other. Sections 23 and 33 of the Bill of Rights are placed in separate jurisdictional boxes, and the attitude seems to be that labour law and administrative law must have nothing to do with one other.

Secondly, in *Chirwa* the various approaches to the ‘administrative action’ issue are all problematic to some extent, and the majority view on the question of jurisdiction is wholly unconvincing. While the Court certainly managed to tidy up the busy intersection of labour law and administrative law in this case, it did so at the expense of the Constitutional Court’s own precedent – and apparently without much faith in the success of its efforts.

Thirdly, whatever labour lawyers may think of the majority judgment in *Masetlha*, administrative lawyers are likely to be perturbed by it. For us it is a decision that appears to set the law of procedural fairness back twenty years.

1 Sidumo

The appellant, Mr Sidumo, had been employed by Rustenburg Platinum Mines Ltd (the mine) for almost fifteen years when he was dismissed for negligent failure to apply established search procedures at a redressing station. He contested his dismissal and referred the dispute to the CCMA in terms of section 191 of the LRA. Conciliation failed and the matter went for compulsory arbitration. The commissioner found that while Sidumo was indeed guilty of misconduct, dismissal was not a fair or appropriate sanction; and he was reinstated with three months' compensation.

The mine applied for review of the award under s 145 of the LRA. The Labour Court dismissed its application, and the Labour Appeal Court dismissed an appeal to it. The mine was more successful on subsequent appeal to the Supreme Court of Appeal, which overturned these two decisions and found the dismissal to have been fair. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*⁶ it held that the commissioner's decision to reinstate Sidumo had not been rationally connected to the information before him.

The reasoning behind this conclusion is significant, for section 145 of the LRA lists only four grounds for the review of arbitration awards and irrationality does not feature explicitly amongst them.⁷ However, Cameron JA found for the Court that the PAJA had extended the grounds of review available to parties to CCMA arbitrations – there being no doubt that CCMA arbitrations qualified as administrative action.⁸ In this regard he drew on *Carephone (Pty) Ltd v Marcus NO*,⁹ a pre-PAJA case in which the Labour Appeal Court held that section 145 was suffused with the standard of justifiability in section 24 of the interim Constitution¹⁰ (the predecessor to section 33). Cameron JA held that as general legislation relating to administrative action the PAJA had 'superseded the LRA's specialised enactment within the [labour] field',¹¹ and it thus subsumed and overrode the more restrictive grounds of review in section 145 of the LRA.¹² An unrelated but equally significant holding of the Supreme Court of Appeal in

⁶ 2007 1 SA 576 (SCA) (*Rustenburg*).

⁷ Section 145(2)(a) allows review to be obtained for misconduct on the part of the commissioner; for a gross irregularity in the conduct of the arbitration proceedings; and where the commissioner exceeded his powers. Section 145(2)(b) provides for review where 'an award has been improperly obtained'.

⁸ *Rustenburg* (n 6 above) para 25, though without detailed analysis of the question.
⁹ 1999 3 SA 304 (LAC) (*Carephone*) paras 15 and 30 *et seq*.

¹⁰ Constitution of the Republic of South Africa, 1993.

¹¹ *Rustenburg* (n 6 above) para 24.

¹² *Rustenburg* (n 6 above) para 25.

Rustenburg was that CCMA commissioners should give some deference to the employer's choice of sanction.¹³

An appeal to the Constitutional Court was unanimously upheld and the award of the commissioner restored. The Court considered two main issues. On the first it held that a commissioner is not required to defer to the decision of the employer but rather to consider all the relevant circumstances.¹⁴ On the second issue, the applicability of the PAJA, the Court agreed on the result but was divided in its approach.

Writing for a narrow majority, Navsa AJ held that arbitral decisions of CCMA commissioners were indeed administrative action in terms of section 33 of the Constitution,¹⁵ but that the PAJA was not applicable to such decisions. In his judgment the LRA had to be regarded as specialised legislation alongside the PAJA – that is, as legislation dealing with ‘administrative action’ in the labour sphere.¹⁶ As such, the LRA had to be interpreted in accordance with section 33.¹⁷ Thus section 145 of the LRA was suffused with the content of section 33, including the constitutional standard of reasonableness¹⁸ – just as in *Carephone* the Labour Appeal Court had found section 145 to be suffused with the former standard of justifiability. Applying the new standard, Navsa AJ found that the commissioner's decision was a reasonable one: it was not a decision ‘that a reasonable decision-maker could not reach’.¹⁹ Four justices concurred in his judgment.²⁰

Ngcobo J, who had the support of three colleagues,²¹ arrived at a similar conclusion by means of different reasoning. In his judgment CCMA arbitrations were not administrative but judicial action, which meant that section 33 had no role to play.²² However, CCMA commissioners exercised public power and were thus constrained by other constitutional requirements, including those found in the doctrine of legality – an aspect of the rule of law – and in sections 23 and 34 of the Bill of Rights.²³ These constraints all informed the interpretation of section 145(2)(a) of the LRA and considerably

¹³ *Rustenburg* (n 6 above) para 42 *et seq.*, and see para 48(d).

¹⁴ *Sidumo* (n 5 above) para 79 in the judgment of Navsa JA, and see para 161 in the judgment of Ngcobo J.

¹⁵ *Sidumo* (n 5 above) para 88.

¹⁶ *Sidumo* (n 5 above) para 89.

¹⁷ *Sidumo* (n 5 above) paras 89 and 91.

¹⁸ *Sidumo* (n 5 above) paras 106 and 110.

¹⁹ *Sidumo* (n 5 above) para 119, using the words of O' Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) (*Bato Star*) para 44.

²⁰ Moseneke DCJ and Madala, O' Regan and Van der Westhuizen JJ.

²¹ Mokgoro, Nkabinde and Skweyiya JJ.

²² *Sidumo* (n 5 above) paras 207-40.

²³ *Sidumo* (n 5 above) para 260.

expanded the three grounds of review listed there.²⁴ Ultimately, however, the facts did not establish any of those grounds of review.²⁵

O'Regan J, who concurred in the judgment of Navsa AJ, wrote a separate judgment in which she responded to Ngcobo J and gave additional reasons for supporting the view that CCMA arbitrations are administrative action.²⁶

Sachs J, too, produced a separate judgment in which he found himself 'in the pleasant but awkward position of agreeing with colleagues who disagree with each other'.²⁷ He saw the judgments of Navsa AJ and Ngcobo J as being animated by the same goal – to determine what standard of conduct the Constitution expects of a CCMA commissioner – and as substantially in agreement on the interests and values involved.²⁸ The key to the case, as he saw it, was to make those interests and values explicit. This he proceeded to do, identifying values such as fair dealing and rationality in sections 23, 33 and 34. His application of these standards to the commissioner's conduct then led him to the same conclusion as his colleagues.

Of the many points of interest raised by *Sidumo*, I wish to highlight three features for the attention of constitutional lawyers in general and administrative lawyers in particular.

The first is the slender majority achieved on the 'administrative action' issue – an improvement on the bewildering inconclusiveness of *New Clicks*,²⁹ but surely further evidence of the intrinsic difficulty of deciding what is and what is not administrative action. That difficulty exists even when, as here, the Court is relying on the general conception of administrative action developed judicially under section 33 rather than the more nit-picking definition in the PAJA. I think the majority gets it right. Navsa AJ reasons convincingly on the basis of significant differences between a court of law and a tribunal such as the CCMA, including the relative informality of its processes, the absence of a system of binding precedent and the less secure tenure of its presiding officers,³⁰ and O'Regan J adds that 'it is entirely consistent with our constitutional order that the

²⁴ *Sidumo* (n 5 above) paras 256-77, and for the grounds of review see n 7 above.

²⁵ *Sidumo* (n 5 above) para 289.

²⁶ *Sidumo* (n 5 above) paras 122-41.

²⁷ *Sidumo* (n 5 above) para 146.

²⁸ As above.

²⁹ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) (*New Clicks*), a case concerning pharmaceutical regulations. Two members of the Court found that regulation-making in general amounted to administrative action under the PAJA, while three others regarded the Act as applicable but on a narrower basis. Five members found it unnecessary to decide the question, and one found that subordinate legislation was generally governed by the principle of legality rather than the PAJA.

³⁰ *Sidumo* (n 5 above) para 85.

procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair'.³¹ But the merits are not my main concern here. I wish merely to note that *Sidumo* bears out (yet again) the Court's gloomy prognostication in the *SARFU* case³² about the difficult boundaries that would have to be drawn in the administrative action inquiry.

The second feature is the further development, or complication, of administrative law by the official recognition of yet another pathway to review. The pre-democratic era knew only two such routes: 'ordinary' review of the decisions of public bodies at common law³³ and the special statutory review jurisdiction created occasionally by the legislature (of which section 145 of the LRA was a prime example). With this second type of review the grounds specified by the legislature, and indeed the remedies available, could be wider or narrower than those associated with ordinary review.³⁴ The democratic constitution brought with it a new constitutional pathway to administrative-law review in the form of section 33 (previously section 24 of the interim Constitution), duly informed by the common law; but this third route was reserved for exercises of 'administrative action'. A few years later the Constitutional Court identified a fourth pathway, the principle of legality, for the residual review of all those exercises of public power that did *not* qualify as administrative action,³⁵ and proceeded to develop the principle so that it mimics the content of section 33 to a considerable extent.³⁶ Then came the PAJA, the national legislation enacted to give effect to section 33 and supposedly the default pathway to review³⁷ – but one that often cannot be used because the conduct being reviewed does not qualify as administrative action in terms of the Act's very demanding definition. That makes five pathways, as we still have common-law review (though it is used only for exercises of private power these days)³⁸ and presumably we still have instances of special statutory review in the traditional sense.

³¹ *Sidumo* (n 5 above) para 140.

³² *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) (*SARFU*) para 143.

³³ *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 115.

³⁴ See *Nel NO v The Master* 2005 1 SA 276 (SCA) para 23 and the discussion by Froneman J in the court a quo: *Nel NO v Master of the High Court* ECD case no 1633/2001 (undated) 8-9, unreported.

³⁵ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) (*Fedsure*) paras 56-9.

³⁶ *SARFU* (n 32 above) and in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) (*Pharmaceutical Manufacturers Association*).

³⁷ *Bato Star* (n 19 above) para 25.

³⁸ See C Hoexter *Administrative law in South Africa* (2007) 119ff.

The majority judgment in *Sidumo* would seem authoritatively to have opened up a sixth route: special statutory review under the LRA for labour-related action that also qualifies as administrative action under section 33. This, then, is not special statutory review in the traditional sense – review, wide or narrow, on whatever grounds the legislature specifies within a particular statutory regime. In this new type of (extra-special?) statutory review the grounds specified in the LRA are suffused with the content of the rights to administrative justice in section 33, thus as it were achieving full administrative-law review via labour law. Presumably this will apply to other statutory regimes too, such as section 131 of the Liquor Act 27 of 1989³⁹ and section 151 of the Insolvency Act 24 of 1936: whenever the conduct in question qualifies as administrative action under section 33, the grounds of review in such statutes will also be suffused with the content of section 33.

If this is correct, an interesting situation will arise in relation to the Promotion of Access to Information Act 2 of 2000. Decisions taken by information officers are specially reviewable under that statute⁴⁰ and would almost certainly qualify as administrative action for the purposes of section 33 – but they are expressly excluded from the more detailed definition of administrative action in the PAJA.⁴¹ This piquant scenario is no doubt further evidence of the constitutional untenability of having two different and sometimes incompatible meanings for ‘administrative action’.⁴² (It remains one of life’s mysteries that the constitutionality of the PAJA definition has not yet been challenged in court.)

That brings me to a related point, which is that the approach of the Constitutional Court has a distinct practical advantage over that of Cameron JA in the Supreme Court of Appeal: it means not having to engage with the detail of the PAJA. In *Rustenburg* Cameron JA is faced with conflicting time limits within which review must be sought – six weeks in terms of section 145 of the LRA and six months in terms of the PAJA – and his choice of the shorter time limit⁴³ sits rather awkwardly with the proposition that the PAJA overrides section 145 of the LRA. For Navsa AJ the difficulty does not arise: the PAJA and section 145 of the LRA exist alongside one another as separate and

³⁹ Cf the approach in *Bulk Deals Six CC v Chairperson, Western Cape Liquor Board* 2002 2 SA 99 (C), where the court applied the grounds in the PAJA to a review under s 131 of the Liquor Act.

⁴⁰ Secs 78-82.

⁴¹ Sec 1(hh).

⁴² On the various problems arising from the PAJA definition and the disparity between the two meanings, see C Hoexter “Administrative action” in the courts’ 2006 *Acta Juridica* 303 and Hoexter (n 38 above) 216ff.

⁴³ *Rustenburg* (n 6 above) para 27.

equally valid manifestations of section 33, and there can thus be no conflict between them.

The third feature to note about *Sidumo* is the ethos or vision of the Constitution that underlies the judgments handed down by the Constitutional Court. The majority judgment of Navsa AJ, in particular, supports a view of constitutional rights as interconnected and overlapping. Nor is this view merely implicit in the judgment. There is strong and explicit affirmation of it when Navsa AJ is rejecting an argument that the rights implicated in CCMA arbitrations are those in sections 23 and 34, and not section 33, of the Constitution:

This submission is based on the misconception that the rights in ss 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.⁴⁴

Although Ngcobo J may not share this view of things,⁴⁵ it is given particularly strong expression in the judgment of Sachs J. He sees the function of the commissioner as a hybrid one, ‘composed of an amalgam of three separate but intermingling constitutional rights’,⁴⁶ whose underlying values ‘resist compartmentalisation’.⁴⁷ The Bill of Rights ‘should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity’,⁴⁸ and indeed the relationship of the various rights should be regarded as ‘osmotic rather than hermetic’.⁴⁹ In this judgment ‘seepage’, ‘permeability’, ‘interpenetration’ and ‘hybridity’ are all desirable qualities that help ensure the full achievement of constitutional justice, while an attempt to establish the primacy of one right or another could actually defeat the constitutional objectives to be realised.⁵⁰

To say the least, the constitutional vision outlined here seems to be absent from the two main judgments in *Chirwa*. Rather, these judgments insist on the primacy of section 23 and the LRA in a labour matter, and indeed do their utmost to exclude section 33 and the PAJA from the picture. It is to *Chirwa* that I now turn.

⁴⁴ *Sidumo* (n 5 above) para 112.

⁴⁵ There are hints of it, however: see eg *Sidumo* (n 5 above) para 266.

⁴⁶ *Sidumo* (n 5 above) para 147.

⁴⁷ *Sidumo* (n 5 above) para 149.

⁴⁸ *Sidumo* (n 5 above) para 151.

⁴⁹ As above.

⁵⁰ *Sidumo* (n 5 above) paras 151-7.

2 Chirwa

Ms Chirwa, the appellant, had been dismissed by the Transnet Pension Fund pursuant to a disciplinary hearing. She alleged procedural unfairness in the hearing and referred the dispute to the CCMA for conciliation. When that failed she sought administrative-law review of the dismissal in the Witwatersrand Local Division. There, relying on the common law rather than the PAJA, Brassey AJ set aside the decision to dismiss Ms Chirwa and ordered her reinstatement.⁵¹ He followed the reasoning of the Appellate Division in *Zenzile*,⁵² holding that the termination of an employment contract in the public sector is an exercise of public power and not (as the respondent argued) a matter of pure contract falling beyond the reach of administrative law. *Zenzile*-type reasoning had indeed become the dominant approach⁵³ in such cases, and here I may mention an important and more recent example of it: the judgment of Plasket J in *POPCRU v Minister of Correctional Services*.⁵⁴ But, as evidenced by cases such as *South African Police Union v National Commissioner of the South African Police Service*,⁵⁵ a contrary approach had begun to gain momentum – one that challenged the post-1994 status of *Zenzile* and denied administrative law a role in employment matters.

In Transnet's appeal against the decision of Brassey AJ two main questions were raised: whether this was a matter over which the High Court had jurisdiction, and whether the dismissal qualified as administrative action under the PAJA.⁵⁶ Though the Court agreed that the appeal had to be upheld, its members adopted three quite different approaches. Cameron JA, Mpati DP concurring, endorsed both *Zenzile* and *POPCRU*.⁵⁷ These judges held that this was a case of administrative action and that the High Court did have jurisdiction, concurrently with the Labour Court, to hear it in terms of section 157

⁵¹ *Chirwa v Transnet Ltd* WLD case no 03/01052 of 4 January 2005, unreported.

⁵² *Zenzile* (n 1 above).

⁵³ Before 1994 the approach in *Zenzile* was applied and extended beyond dismissal in cases including *Administrator, Natal v Sibiyi* 1992 2 SA 532 (A), *Bula v Minister of Education* 1992 4 SA 716 (Tk) and *Hlongwa v Minister of Justice, KwaZulu-Natal* 1993 2 SA 269 (D); and after 1994 it was applied in cases such as *Mbayeka v MEC for Welfare, Eastern Cape* 2001 1 All SA 567 (Tk) and *Simela v MEC for Education, Eastern Cape* 2001 9 BLLR 1085 (LC).

⁵⁴ 2006 4 BLLR 385 (E) (*POPCRU*). See also *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 10 BLLR 960 (LC) (*Nxele*).

⁵⁵ 2005 26 ILJ 2403 (LC) (*SAPU*). Other examples of this approach are *Public Servants' Association obo Haschke v MEC for Agriculture* 2004 25 ILJ 1750 (LC), *Louw v SA Rail Commuter Corporation Ltd* 2005 26 ILJ 1960 (W), *Western Cape Workers Association v Minister of Labour* 2006 1 BLLR 79 (LC) and *Hlope v Minister of Safety and Security* 2006 3 BLLR 297 (LC).

⁵⁶ *Transnet Ltd v Chirwa* 2006 27 ILJ 2294 (SCA) (*Chirwa SCA*).

⁵⁷ n 54 above.

of the LRA.⁵⁸ The relevant parts of the provision read as follows:

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

Mthiyane and Jafta JJA agreed that the High Court had jurisdiction concurrently with the Labour Court but held that this was not an instance of administrative action. These judges relied on *SAPU*⁵⁹ and on Supreme Court of Appeal authority, *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*,⁶⁰ in holding that the dismissal was based on contract and so did not satisfy one of the most important elements of the PAJA definition: it was not an exercise of public power.⁶¹

Conradie JA was prepared to accept that the dismissal amounted to administrative action but held that the High Court did not have jurisdiction over what was quintessentially a labour matter. The legislature, he reasoned, had set its face against labour matters being litigated in other courts.⁶² Thus, even if Chirwa had a cause of action under the PAJA she was required to pursue it under the LRA in the Labour Court.⁶³

The two issues were aired again on further appeal to the Constitutional Court.⁶⁴ Skweyiya J gave judgment for the majority with the concurrence of seven justices.⁶⁵ Essentially he supported the line taken by Conradie JA, and held that the High Court did not have

⁵⁸ *Chirwa* SCA (n 56 above) paras 57-65. Similar reasoning was subsequently adopted by the Supreme Court of Appeal in *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA) (*Gumbi*) and *Boxer Superstores Mthatha v Mbenya* 2007 5 SA 450 (SCA).

⁵⁹ n 55 above.

⁶⁰ 2001 3 SA 1013 (SCA) (*Cape Metropolitan*).

⁶¹ *Chirwa* SCA (n 56 above) para 15.

⁶² *Chirwa* SCA (n 56 above) para 32.

⁶³ *Chirwa* SCA (n 56 above) para 33.

⁶⁴ *Chirwa* (n 3 above).

⁶⁵ Moseneke DCJ, Navsa AJ and Madala, Ngcobo, Nkabinde, Sachs and Van der Westhuizen JJ.

jurisdiction. The appellant should therefore have followed to its end the route laid down by the LRA for resolving her dispute. Ngcobo J produced a separate concurring judgment which dealt in addition with the ‘administrative action’ issue and was supported by six justices.⁶⁶ Langa CJ dissented with the support of Mokgoro and O’Regan JJ.

2.1 Jurisdiction

The majority conclusion that the Labour Court had exclusive jurisdiction in the matter was evidently inspired by considerations of policy, and by the legislature’s failure to heed various calls for the amendment of section 157. Both Skweyiya and Ngcobo JJ reasoned that employees ought not to be in a preferential position merely by virtue of their employment in the public sector. Public and private employees ought rather to be treated equally, and parity was indeed one of the main aims of the current labour regime.⁶⁷ That regime included a ‘one-stop shop’,⁶⁸ a specialised and purpose-built system for resolving labour disputes, which should be pursued to its end.⁶⁹ Furthermore, to allow the High Court concurrent jurisdiction with the Labour Court in employment matters would be to encourage forum-shopping and the development of a dual⁷⁰ and possibly less coherent⁷¹ system of law. In the light of these considerations, Ngcobo J thought the use of the word *concurrent* in section 157(2) was ‘unfortunate’.⁷²

The problem, however, is that policy arguments cannot alter the express terms of section 157 of the LRA – however unfortunate those terms may seem. Leaving aside for a moment the cogency of the arguments, the majority’s interpretation of the provision is in conflict not only with the wording of section 157 but also with the Court’s own previous interpretation of that wording in *Fredericks & Others v MEC for Education and Training, Eastern Cape, & Others*.⁷³

In *Fredericks*, teachers who had been refused voluntary retrenchment sought review of this action in a High Court, alleging a violation of their constitutional rights to equality and just administrative action. White J found that his Court had no jurisdiction

⁶⁶ Moseneke DCJ, Navsa AJ and Madala, Nkabinde, Sachs and Van der Westhuizen JJ.
⁶⁷ *Chirwa* (n 3 above) para 66 (Skweyiya J) and paras 99-102 and 149 (Ngcobo J).

⁶⁸ *Chirwa* (n 3 above) para 47 (Skweyiya J).

⁶⁹ *Chirwa* (n 3 above) paras 65-7 (Skweyiya J), and see paras 105, 110-13 and 117-20 (Ngcobo J).

⁷⁰ *Chirwa* (n 3 above) paras 65 (Skweyiya J) and 121, 124 (Ngcobo J).

⁷¹ *Chirwa* (n 3 above) para 118 (Ngcobo J).

⁷² *Chirwa* (n 3 above) para 121.

⁷³ 2002 2 SA 693 (CC) (*Fredericks*). See also *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA); *United Public Servants Association of South Africa v Digomo* NO 2005 26 ILJ 1957 (SCA).

in the matter. He saw it in essence as a labour case that had to be dealt with under section 24 of the LRA, a provision that envisages the involvement of the CCMA. On appeal, however, a unanimous Constitutional Court corrected this misapprehension. O'Regan J pointed out that section 157(2) is the sole source of the Labour Court's jurisdiction to determine disputes arising from the alleged infringement of constitutional rights, and that it clearly gives the Labour Court and the High Court concurrent jurisdiction over such matters.⁷⁴ She emphasised that the LRA gives the Labour Court no *general* jurisdiction over labour matters, so that the High Court's jurisdiction is not ousted by the mere fact that something happens to be a labour matter.⁷⁵ Nor could section 158(2)(h) be read with section 157(1) of the LRA to oust the High Court's jurisdiction, since section 158(1)(h) 'does not expressly confer on the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the state acting as an employer'.⁷⁶ O'Regan J also made it clear that in terms of section 169 of the Constitution, such ousting of the High Court's jurisdiction is permissible only where the matter is assigned to a court of similar status – which the CCMA clearly is not.⁷⁷

In *Chirwa*, notwithstanding the way the matter was framed and the many detailed references to the PAJA in the papers, Skweyiya J chose to fix on the appellant's brief reference to provisions in the LRA (evidently included for the purpose of establishing grounds of review in the PAJA).⁷⁸ He held that this was a dispute envisaged by section 191 of the LRA, which provides a procedure for the resolution of disputes about unfair dismissals. It was thus a matter that 'must, under the LRA, be determined exclusively by the Labour Court'.⁷⁹ While *Fredericks* clearly stood in the way of such an interpretation of section 157, Skweyiya J distinguished it on the basis that there had been no reliance in the earlier case on section 23 or on the LRA.⁸⁰

That, with respect, seems an unconvincing point of distinction. After all, *Fredericks* was so obviously a 'labour' matter that the High Court believed it lacked jurisdiction to hear it – despite the applicants' own characterisation of the case as one relating to sections 9 and 33 of the Bill of Rights. Conversely, what about the inconvenient fact that the appellant in *Chirwa* evidently abandoned

⁷⁴ *Fredericks* (n 73 above) para 41.

⁷⁵ *Fredericks* (n 73 above) paras 38 and 40.

⁷⁶ *Fredericks* (n 73 above) para 43. Section 158(1)(h) allows the Labour Court to review 'any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law'.

⁷⁷ *Fredericks* (n 73 above) paras 29-31.

⁷⁸ *Chirwa* (n 3 above) para 157 in the judgment of Langa CJ.

⁷⁹ *Chirwa* (n 3 above) para 63.

⁸⁰ *Chirwa* (n 3 above) para 58.

her initial reliance on section 23 and the LRA⁸¹ and deliberately framed her case as one in administrative law.⁸²

As Nugent JA has remarked, it is difficult to find a ‘clear legal – as opposed to policy – reason for the outcome in *Chirwa*’.⁸³ The majority was apparently bent on characterising the case purely as a labour matter whatever the cost. It thus depicted the appellant’s High Court application as an instance of asking an ordinary court to decide a specialist dispute.⁸⁴ Langa CJ bluntly described this manoeuvre as a mischaracterisation,⁸⁵ for in truth Ms Chirwa was ‘asking a High Court to consider an administrative law issue’.⁸⁶ Langa CJ pointed out that in most cases unfair dismissal claims are decided not by the Labour Court but by the CCMA, so that in terms of section 169 of the Constitution exclusive jurisdiction could not lawfully be conferred on the Labour Court in any event.⁸⁷ The Chief Justice also indicated the irrelevance of the various policy considerations to the issue of jurisdiction, which in this instance was a matter of legislative choice. Ultimately, as he said, ‘[w]hile we may question that intention and may have preferred a legislative scheme that more neatly divided responsibilities between the various courts, that is not the path the legislature has chosen’.⁸⁸

Skweyiya J seems indeed to have been aware of this, and not entirely convinced by his own strained interpretation of section 157. Otherwise it is hard to see why he ends his judgment by underscoring the ‘urgent need for the legislature to revisit the provisions of s 157(2) of the LRA’⁸⁹ – for his account of the provision suggests no such need.

At any rate, wishful thinking cannot change the fact that in practice labour law and administrative law are *not* neatly divided, and that in many cases they *do* overlap. I doubt that neatness will ever be achieved at this intersection, legislatively or otherwise, for it seems to me that some untidiness is both natural and unavoidable. Nor, I think, should neatness be regarded as a particularly worthy aim in this

⁸¹ *Chirwa* (n 3 above); see para 67 in the judgment of Skweyiya J and paras 84-5 in the judgment of Ngcobo J.

⁸² *Chirwa* (n 3 above); see paras 157-9 in the judgment of Langa CJ.

⁸³ In a separate concurring judgment in *Makambi v MEC for Education, Eastern Cape* 2008 5 SA 449 (SCA) (*Makambi*) para 21.

⁸⁴ *Chirwa* (n 3 above) para 61 (Skweyiya J) and paras 124-5 (Ngcobo J).

⁸⁵ *Chirwa* (n 3 above) para 159.

⁸⁶ *Chirwa* (n 3 above) para 173. Not only was the claim couched in the language of administrative law, but it was ‘based squarely on the PAJA’. *Chirwa* (n 3 above) para 157.

⁸⁷ *Chirwa* (n 3 above) para 170. Furthermore, s 157(5) of the LRA states: ‘Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.’

⁸⁸ *Chirwa* (n 3 above) para 174.

⁸⁹ *Chirwa* (n 3 above) para 71.

area of the law. Both of these propositions find some support in the facts and reasoning applied in a post-*Chirwa* case, *Nakin v MEC, Department of Education, Eastern Cape & Another*.⁹⁰

The applicant in *Nakin* was a school principal who had been transferred to a lower-level post through no fault of his own. This injustice was officially rectified several years later when the department agreed to reinstate him and to correct the accumulated shortfall in salary and benefits. The department neglected to effect the correction, however, and the applicant approached a High Court for an order compelling it to do so in terms of the PAJA. In argument the respondents challenged the Court's jurisdiction to deal with what they saw as an unfair labour practice within the meaning of section 186(2) of the LRA. But Froneman J upheld the High Court's jurisdiction to determine the case as one of unlawful administrative action.⁹¹ *Fredericks*, which had not been overruled in *Chirwa*, was still good law, all the more so in a matter not involving dismissal.⁹²

The facts of *Nakin* nicely illustrate the natural overlap just referred to. More importantly, however, Froneman J challenges the policy behind the tidy-minded majority view in *Chirwa*. In relation to the concerns about forum-shopping and the growth of parallel systems of law, he points out that the coherence of labour jurisprudence depends on its giving proper expression to section 23 of the Constitution rather than its development in a single forum.⁹³ Froneman J goes on to show that in practice, labour law has gained and not lost from administrative-law insights – an example being the recent development of the common-law contract of employment so as to include a right to a pre-dismissal hearing.⁹⁴ His judgment also suggests that the policy of equality may be a misdirected one. Froneman J points out that in public employment fairness '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'.⁹⁵

This is a point of fundamental importance. Public and private employers are not the same, for under our Constitution they are not under the same public duties. To put it simply, employers in the private sector have the luxury (to the extent that they are not

⁹⁰ 2008 6 SA 320 (Ck) (*Nakin*).

⁹¹ *Nakin* (n 90 above) para 39.

⁹² *Nakin* (n 90 above); see paras 27-39. Cf *Makambi* (n 83 above) para 17, where Farlam JA found it was 'not possible to hold that this case falls on the *Fredericks* side of the line of distinction drawn in the *Chirwa* case'.

⁹³ *Nakin* (n 90 above) para 30.

⁹⁴ *Nakin* (n 90 above) para 30, with reference to *Gumbi* (n 58 above); and see also paras 31 *et seq.*

⁹⁵ *Nakin* (n 90 above) para 34.

thwarted by regulation) of acting out of pure self-interest. Organs of state do not have the same freedom, for they are generally constrained by their duty to act in the public interest – even when there is no legislation explicitly saying so.⁹⁶ Thus, while the aim of achieving equality between all employees certainly appeals to one's sense of justice, it may not be an attainable ideal under our present constitutional dispensation; not, at any rate, if one conceives of that equality as a matter of paring down the rights of public-sector employees to match those of other employees.

That does not, however, rule out the possibility of equalising up rather than down by allowing the insights of administrative law (or some of them)⁹⁷ to benefit employees more generally. To borrow the words of Froneman J, 'the substantive coherence and development of employment law can only gain' from administrative law.⁹⁸ While such reform would optimally be achieved by methodical legislative means, one must not underestimate the potential of section 39(2) of the Constitution. As I have suggested elsewhere, section 39(2) may be regarded as constitutional authority for the courts to set public-law standards for 'private administrators' to follow, especially in relationships characterised by inequality (as the employment relationship tends to be) or where coercive power is being exercised.⁹⁹

2.2 Administrative action

Though the Court in *Chirwa* agreed that the dismissal was not an instance of administrative action, its members displayed three different approaches to the issue. As I suggest in what follows, none of these approaches is unproblematic.

Skweyiya J found that it was unnecessary to decide the administrative action question since the case could be resolved on the jurisdictional issue (though he indicated his agreement, obiter, with the judgment of Ngcobo J on the administrative action diagnosis).¹⁰⁰

⁹⁶ This most basic principle of administrative law was expressed by Schreiner JA in his dissenting judgment in *Mustapha v Receiver of Revenue, Lichtenburg* 1958 3 SA 343 (A) at 347E-G – a judgment vindicated by the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO* 2003 1 SA 460 (SCA) (*Logbro*) para 13. It is in fact unusual for enabling legislation to specify that action has to be taken 'in the public interest', but an example appears in *Nxele* supra note 54 para 59.

⁹⁷ The requirements implied by 'reasonable' and 'procedurally fair' administrative action could certainly be extended in this way, but imposing the various requirements of 'lawfulness' on private employers would make less sense.

⁹⁸ *Nakin* (n 90 above) para 34.

⁹⁹ Hoexter (n 38 above) 124. Unlike the direct horizontal application of rights under s 8(2) of the Constitution, indirect application under s 39(2) does not depend on the 'nature' of the right sought to be applied.

¹⁰⁰ *Chirwa* (n 3 above) para 73.

This approach is clearly mistaken, however. As the Chief Justice pointed out, the administrative action inquiry could not legitimately be avoided: it was indeed the ‘primary question’,¹⁰¹ in the case, for the Court’s jurisdiction depended on whether the dismissal was ‘an administrative act or conduct ... by the State in its capacity as an employer’ for the purposes of section 157 of the LRA.

Ngcobo J did not seek to avoid the inquiry. Relying on the section 33 meaning of administrative action, he found (rightly, I believe) that the dismissal clearly amounted to an exercise of public power.¹⁰² However, it lacked one of the hallmarks of administrative action listed in the *SARFU* case:¹⁰³ it did not involve the implementation of legislation but had rather been effected in terms of the contract between the parties.¹⁰⁴ Ngcobo J thus treated a single factor as decisive in a manner arguably not contemplated by the Court in *SARFU*. But the real issue for him seems to have been that the dismissal was ‘more concerned with labour and employment relations’ than with administration,¹⁰⁵ and he went on to emphasise the formal division in the Constitution between labour relations and administrative conduct.¹⁰⁶

By contrast, Langa CJ relied on the definition of administrative action in the PAJA, which covers decisions made by an organ of state when ‘exercising a public power or performing a public function *in terms of any legislation*’.¹⁰⁷ He, too, held that in the absence of any particular statutory authority the dismissal had taken place in terms of the contract itself;¹⁰⁸ but unlike Ngcobo J, he went on to find that the dismissal was *not* an exercise of public power. In this regard Langa CJ noted the absence of features that tend to point to the existence of a public power: any imbalance in the employment relationship was not attributable to the respondent’s status as a public body; the dismissal had little or no impact on the public; and the source of the power to dismiss was contractual.¹⁰⁹ Furthermore, he could see none of the ‘strengthening factors’ that had been present in the *POPCRU* case.¹¹⁰ The Transnet Pension Fund did not have the same obviously public character as the Department of Correctional Services, the respondent in *POPCRU*; unlike that department it pursued no obviously public goals; and, unlike in *POPCRU*, the public interest in

¹⁰¹ *Chirwa* (n 3 above) para 154.

¹⁰² *Chirwa* (n 3 above) para 138, quoting with approval from the judgment of Cameron JA in the court below.

¹⁰³ n 32, para 143.

¹⁰⁴ *Chirwa* (n 3 above) para 142.

¹⁰⁵ As above.

¹⁰⁶ *Chirwa* (n 3 above) paras 143 *et seq.*

¹⁰⁷ Section 1 of the PAJA, my emphasis.

¹⁰⁸ *Chirwa* (n 3 above) para 185.

¹⁰⁹ *Chirwa* (n 3 above) paras 186-94.

¹¹⁰ *Chirwa* (n 3 above) para 192, referring to *POPCRU* (n 54 above) para 54.

the administration of the Transnet Pension Fund was not pre-eminent.¹¹¹

The different approaches of Ngcobo J and Langa CJ illustrate, once again, the problem of having two meanings for ‘administrative action’. Given that reality, however, Langa CJ is surely correct to rely on the PAJA definition. This approach accords with the constitutional principle that general norms should be resorted to only when norms of greater specificity have run out,¹¹² or when testing the constitutionality of a specific norm (the PAJA or other original legislation) against the more general norm (section 33).¹¹³

Ngcobo J, who has preferred the section 33 meaning in other cases too,¹¹⁴ does so on the basis that ‘PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action within the meaning of section 33.’¹¹⁵ This approach is rather cumbersome as it calls for two separate inquiries: Is the conduct administrative action for the purposes of s 33? If so, does the PAJA definition nevertheless exclude it? (Stopping at the first inquiry would of course make the PAJA definition completely redundant.)¹¹⁶ More importantly, this approach seems to be inconsistent with the principle mentioned above and with the Constitutional Court’s jurisprudence on the subject of constitutionally mandated legislation. As the statute giving effect to the rights in section 33, the PAJA should be resorted to directly – a point that has indeed been stressed by Ngcobo J himself.¹¹⁷ Even if it does not have the effect of bypassing the PAJA altogether, the mediation through section 33 he insists on seems quite unwarranted. It means, too, that in this instance we are deprived of his views on the application of the various elements of the PAJA definition.

As to the merits of the ‘administrative action’ diagnosis in *Chirwa*, it depended largely on a curiosity. Like appointment, dismissal in the public sector is almost always governed by statute. It certainly was in *Zenzile*, where ‘the element of public service injected by statute’¹¹⁸ played a considerable part in the reasoning of Hoexter JA. A quirk of

¹¹¹ As above.

¹¹² See I Currie & J de Waal *The bill of rights handbook* (5 ed 2005) 13.

¹¹³ See Hoexter (n 38 above) 115.

¹¹⁴ See eg *New Clicks* (n 29 above) para 446.

¹¹⁵ *Chirwa* (n 3 above) para 139.

¹¹⁶ Construing the PAJA consistently with s 33 is constitutionally appropriate (as indicated by Nugent JA in *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 22), but it is quite another thing to behave as if the statute and its detailed definition of administrative action did not exist. See further Hoexter (n 42 above) and I Currie ‘What difference does the Promotion of Administrative Justice Act make to administrative law?’ 2006 *Acta Juridica* 325.

¹¹⁷ See eg *New Clicks* (n 29 above) para 436, and in relation to s 23 of the Constitution see eg *Sidumo* (n 5 above) paras 248-9.

¹¹⁸ n 1 above, 34C.

the *Chirwa* case was the absence of governing legislation after the repeal of the South African Transport Services Conditions of Service Act 41 of 1988. Technically, then, the dismissal really did seem to be a purely contractual matter in this instance – if not in others.¹¹⁹

But the judgment of Langa CJ (and that of Mthiyane JA before him) is nevertheless open to criticism on the contractual issue. As Stacey has pointed out in a perceptive article,¹²⁰ it is difficult to square with the approach of the Constitutional Court in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*.¹²¹ There the Court firmly rejected the idea that a decision loses its public character simply because the most immediate source of the power happens to be a contract. In that case the contractual element led the Supreme Court of Appeal to regard the Micro Finance Regulatory Council as ‘a private regulator of lenders who choose to submit to its authority by agreement’¹²² – and was rebuked by the Constitutional Court for putting form above substance.¹²³ Is the Chief Justice not open to the same charge here?

In *Transnet Ltd v Chirwa*, it is interesting to note, the absence of governing legislation does not trouble Cameron JA at all. As he sees it,

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.¹²⁴

On this approach public entities can never be on exactly the same footing as private ones, contract or no contract; and even when there is a contract, the principles of administrative justice (in one form or another) still *frame the contractual relationship*.¹²⁵ In the Constitutional Court Ngcobo J supports this line of reasoning:¹²⁶

In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official

¹¹⁹ Cf for instance *SAPU* (n 55 above), where the ‘purely contractual’ label is far less convincing, and see further C Hoexter ‘Contracts in administrative law: Life after formalism?’ (2004) 121 *South African Law Journal* 595.

¹²⁰ R Stacey ‘Administrative law in public-sector employment relationships’ (2008) 125 *South African Law Journal* 307 315.

¹²¹ 2006 11 BCLR 1255 (CC) (*AAA Investments*).

¹²² *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd* 2006 2 SA 27 (SCA) para 24.

¹²³ *AAA Investments* (n 121 above) para 45.

¹²⁴ *Chirwa* SCA (n 56 above) para 52.

¹²⁵ Cameron JA for a unanimous court in *Logbro* (n 96 above) para 8, writing an important gloss on the *Cape Metropolitan* case (n 60 above)

¹²⁶ *Chirwa* (n 3 above) para 138.

exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power, and '(t)hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution'.

By contrast, Langa CJ finds that the dismissal is not an exercise of public power. In arriving at this conclusion he relies on a number of factors that have been used by the courts for determining whether a power or function is public. However, his paradigm seems to be quite different from that of Cameron JA and Ngcobo J, for in his analysis the public and intrinsically statutory nature of the entity apparently carries no independent weight. The factors seem to be applied just as they would be to a completely private entity such as a club or a business. Because of this, and notwithstanding the detailed and nuanced reasoning of the Chief Justice and the cumulative force of the various features listed by him, one is left with questions.

Here are some of them. Given that Transnet would not exist without statute, does it really matter that a contract happened to intervene in this instance? (Langa CJ is clear that where it is achieved 'in terms of a specific legislative provision' a dismissal may amount to administrative action.)¹²⁷ Given the undoubted public status of Transnet, does it really matter that the Transnet Pension Fund is not as distinctively public as the Department of Correctional Services was in *POPCRU*, or that it does not pursue its public goals in so obvious a manner? Given that Transnet is generally supposed to serve the public interest, does it really matter that this particular dismissal was of scant interest to the public or that it had no real impact on the public? (As Plasket J pointed out in *POPCRU*, very many actions acknowledged to be administrative have little or no such impact.)¹²⁸ And is it realistic to say – is it ever entirely realistic to say – that no power imbalance derived from the employer's public status?

Similarly, there is something troubling about the Chief Justice's statement that '[w]hilst Transnet is certainly subservient to the Constitution, so are all business entities in South Africa'.¹²⁹ This fails to acknowledge that as an organ of state Transnet is under special duties (such as the obligation in section 7(2) of the Constitution) that simply do not apply to private employers.

In short, I wonder whether an entity like Transnet is ever entirely free to do as it pleases, and whether it is capable of shedding its

¹²⁷ *Chirwa* (n 3 above) para 194.

¹²⁸ n 54 above, para 53.

¹²⁹ *Chirwa* (n 3 above) para 192.

public, statutory nature so conveniently and completely. I doubt that public entities are capable of acting ‘simply in [their] capacity as employer’, as Mthiyane JA would have it;¹³⁰ and with respect, nothing said in *Chirwa* eliminates that doubt.

2.3 The interconnectedness of rights

In *Sidumo*,¹³¹ as we have seen, the majority fully acknowledges the interconnectedness of constitutional rights and their natural tendency to overlap. This view of things is also clearly apparent in the dissenting judgment in *Chirwa*, in which Langa CJ more than once recognises the overlap of the LRA and the PAJA and their parent rights.¹³² But there is little hint of this understanding in the majority judgments in *Chirwa*. Instead, emphasis is laid on the entrenchment of the respective rights in two separate provisions in the Constitution, ‘each with its own aims and specialised legislation ... that seeks to give effect to its own distinct objectives’.¹³³ While Skweyiya J concedes that the dismissals of public sector employees ‘appear to implicate’ not only labour rights but also those of administrative justice (or that this ‘is at least what Ms Chirwa is asserting’),¹³⁴ and though he briefly admits a possible overlap of the LRA and the PAJA,¹³⁵ he is clear about the ‘pre-eminence of the LRA’ in labour disputes, and about the absence of any legislative intention that the PAJA should detract from it.¹³⁶ In short, he refuses to see *Chirwa* as a case involving administrative law at all. Ngcobo J achieves this view of the case too, and he does so by relying heavily on the Constitution’s ‘clear distinction between administrative action on the one hand and employment and labour relations on the other’.¹³⁷

This categorical view of things is a pity – not just because the vision of the majority is so completely at variance with the ethos of *Sidumo*, but also because it ignores an important constitutional principle. In *POPCRU* Plasket J warns against formalistic attempts to pigeonhole administrative law and labour law, which are after all mere classifications of convenience.¹³⁸ Under our Constitution, he observes,

[t]here is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right

¹³⁰ *Chirwa* SCA (n 56 above) para 15.

¹³¹ n 5 above.

¹³² *Chirwa* (n 3 above) paras 167 and 176.

¹³³ *Chirwa* (n 3 above) para 46 (Skweyiya J).

¹³⁴ *Chirwa* (n 3 above) para 46.

¹³⁵ *Chirwa* (n 3 above) para 71.

¹³⁶ *Chirwa* (n 3 above) para 50.

¹³⁷ *Chirwa* (n 3 above) paras 143-4.

¹³⁸ n 54 above, para 61.

applying to one act, or of more than one branch of law applying to the same set of facts.¹³⁹

In *Transnet Ltd v Chirwa* Cameron JA finds in the Constitution ‘no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme’.¹⁴⁰ In *Chirwa* the Chief Justice expresses the same principle in the following way:¹⁴¹

Both PAJA and the LRA protect important constitutional rights and we should not presume that one should be protected before another or presume to determine that the ‘essence’ of a claim engages one right more than another. A litigant is entitled to the full protection of both rights, even when they seem to cover the same ground.

It is unfortunate that the majority is impervious to this wisdom.

3 *Masetlha*

Masetlha,¹⁴² chronologically the first case in the series, arose out of an atypical case of ‘executive’ dismissal featuring the President of the Republic and the head of the National Intelligence Agency (NIA). The ‘one-stop shop’ of the LRA was not open to the appellant in this case, and nor was the PAJA of application; but it is nevertheless a matter that touches both labour law and administrative law more broadly. For administrative lawyers its main interest lies in what the majority judgment says, or fails to say, about procedural fairness.

The facts are widely known. Briefly, in December 2004 the President appointed the appellant, Mr Billy Masetlha, head and Director-General of the NIA for a period of three years. In October 2005 Masetlha was suspended from this position as a result of the ‘Macozoma affair’, wherein a prominent businessman was placed under surveillance and subsequently lodged a complaint about it with the Minister. The suspension followed an investigation by the Inspector-General of Intelligence, and was challenged by Masetlha in an application for setting aside. In March 2006, before that had been decided, the President unilaterally amended Masetlha’s term of office so that it expired two days later – thus effectively dismissing him 21 months before his term was due to end. The President’s justification was that the relationship of trust between him and the NIA head had

¹³⁹ *POPCRU* (n 54 above) para 60. See further Stacey (n 120 above) 323ff, where he demonstrates the potentially absurd consequences of the proposition that the remedies offered by one branch of the law oust those of another.

¹⁴⁰ *Chirwa SCA* (n 56 above) para 65.

¹⁴¹ *Chirwa* (n 3 above) para 175.

¹⁴² n 4 above.

broken down irreparably. Masetlha was offered his full salary and benefits for the unexpired period. He declined the offer and sought review of the President's decisions and reinstatement in his position.

Du Plessis J held for the Pretoria High Court that the dispute about the suspension had been rendered moot by the dismissal, and that the dismissal itself amounted to lawful executive action.¹⁴³ This decision was upheld on appeal to the Constitutional Court (which did not doubt that the President's action amounted to a dismissal).¹⁴⁴ Moseneke DCJ gave judgment for the majority with the concurrence of six colleagues;¹⁴⁵ Ngcobo J dissented with the support of Madala J; and Sachs J produced a separate judgment.

The first main issue related to lawfulness. Neither the Constitution nor the relevant legislation mentioned dismissal of the head of the NIA but, notwithstanding some disagreement about where the authority resided, all the justices agreed that the President had the implied authority to do what he did.¹⁴⁶ More interesting was the second issue: what constraints there were on the exercise of the power to dismiss, and whether they included a requirement of procedural fairness – for the President had acted without giving the appellant notice or a hearing on the issue of his dismissal.¹⁴⁷

The usual constraints were soon ruled out. They clearly did not include the LRA, since it does not apply to members of the NIA.¹⁴⁸ The majority did not pause to consider whether the appellant still had the benefit of the section 23 right to fair labour practices – which was the solution favoured by Sachs J in his separate judgment – and so there was no hint here of the *Chirwa* insistence on the primacy of labour law in a case of dismissal. In fact administrative law ultimately came to the rescue, though not in the form of the PAJA. The latter did not apply either: the dismissal was an exercise of executive powers that are specifically excluded from the definition of administrative action in the PAJA (and would not count as administrative action for the purposes of section 33).¹⁴⁹ As for the common-law right to a pre-dismissal hearing recognised by the Appellate Division in *Zenzile*,¹⁵⁰ the majority reasoned that this case was distinguishable from the

¹⁴³ See *Masetlha* (n 4 above) paras 22-4 in the judgment of Moseneke DCJ.

¹⁴⁴ *Masetlha* (n 4 above) para 52.

¹⁴⁵ Langa CJ, Navsa AJ and Nkabinde, O'Regan, Skweyiya and Van der Westhuizen JJ.

¹⁴⁶ The majority found that the necessary power lay in s 209(2) of the Constitution and s 3(3) of the Intelligence Services Act 65 of 2002 (see *Masetlha* n 4 above, para 73), whereas Ngcobo J found that provisions of the Public Service Act 103 of 1994 were equally relevant (*Masetlha* n 4 above, para 157).

¹⁴⁷ *Masetlha* (n 4 above) para 84, and see para 197 in the judgment of Ngcobo J.

¹⁴⁸ See s 2(b) of the LRA.

¹⁴⁹ *Masetlha* (n 4 above) para 76n39, though Moseneke DCJ does not deal fully with the s 33 meaning.

¹⁵⁰ n 1 above.

earlier one: it concerned a ‘special legal relationship’ between the President and the head of the NIA, and the dismissal involved the exercise of an executive power deriving from the Constitution and national legislation.¹⁵¹ In the view of the majority the dismissal attracted only the grounds of review implied by that residual pathway to administrative-law review, the principle of legality.¹⁵²

As already noted, the content of the principle has been developed considerably over the years: it has been held to imply that those who wield public power must act lawfully¹⁵³ and in good faith,¹⁵⁴ must not misconstrue their power,¹⁵⁵ and must act rationally in relation to the purpose for which the power was given.¹⁵⁶ These requirements effectively cover many of the grounds of review in ‘regular’ administrative law (the PAJA), and they explain why the rule of law in general, and the principle of legality in particular, have been described as ‘administrative law applied under another name’.¹⁵⁷ But while procedural fairness may be a standard component of the rule of law,¹⁵⁸ the narrower principle of legality has not yet been held to require such fairness. In *Masetlha* the majority showed no inclination to change the position. Moseneke DCJ observed that powers to appoint and dismiss this type of official were conferred specially on the President for the effective business of government and the pursuit of national security, and he concluded that ‘it would not be appropriate to constrain executive powers to requirements of procedural fairness’.¹⁵⁹

When one considers how well established the *audi alteram partem* principle is in our law generally, and how well established it is in the context of dismissal (at least in administrative law),¹⁶⁰ the majority’s conclusion seems sadly retrogressive. First, in what way would national security or effective government be jeopardised by requiring the President to hear the appellant? Secondly, as Ngcobo J indicates in his dissenting judgment, it seems inconceivable that the content of the rule of law should be less today than it was under the

¹⁵¹ *Masetlha* (n 4 above) para 75.

¹⁵² *Masetlha* (n 4 above) para 81, where it is referred to as ‘the principle of legality and rationality’.

¹⁵³ *Fedsure* (n 35 above) paras 56-9.

¹⁵⁴ The *SARFU* case (n 32 above) para 148.

¹⁵⁵ As above.

¹⁵⁶ *Pharmaceutical Manufacturers Association* (n 36 above) para 85.

¹⁵⁷ C Plasket ‘The fundamental right to just administrative action: Judicial review of administrative action in the democratic South Africa’ unpublished doctoral thesis, Rhodes University, 2002 164.

¹⁵⁸ See C Hoexter ‘The principle of legality in South African administrative law’ (2004) 4 *Macquarie Law Journal* 165.

¹⁵⁹ *Masetlha* (n 4 above) para 77; and see also para 78.

¹⁶⁰ See the cases cited in n 53 above.

old regime.¹⁶¹ In *Zenzile*, a judgment handed down during the apartheid era, the lowliest employees, temporary hospital workers, were held to have the right to be heard before being dismissed. Now, in the democratic era – under a constitution committed to accountability, responsiveness and openness¹⁶² – a member of the public service¹⁶³ is held to have no entitlement at all to procedural fairness. The majority apparently made nothing of the differences between this appointment and ‘purely political appointees’ such as Cabinet Ministers;¹⁶⁴ though I remain unconvinced that under our Constitution it is justifiable to dismiss *anyone*, however political their appointment, without the benefit of a hearing.

In his dissenting judgment Ngcobo J held that the rule of law required the appellant to be heard before being dismissed. He linked this procedural requirement to the existing substantive requirement of rationality, pointing out that fairness provides insurance against irrationality or arbitrariness – it ensures that the decision-maker has all the facts before making a decision.¹⁶⁵ Ngcobo J also reminded us of the importance of the *audi* principle by quoting from the Court’s own judgment in *Zondi v MEC for Traditional and Local Government Affairs*:¹⁶⁶

A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained.

It was not necessary for Ngcobo J to point out that if the President had acted fairly before dismissing the appellant, misunderstandings between them might conceivably have been cleared up.¹⁶⁷

Judicial disagreement about the content of the rule of law is not all there was to the case, however. Moseneke DCJ went on to say that if procedural fairness were indeed a requirement, it had been satisfied in this instance. The appellant had had ‘ample occasion’¹⁶⁸ to respond to the allegations made against him in relation to the Macozoma affair: he had had at least two meetings with the Minister at which he was called upon to explain the surveillance and his role in

¹⁶¹ *Masetlha* (n 4 above) para 188.

¹⁶² Section 1 of the Constitution.

¹⁶³ See *Masetlha* (n 4 above) para 37.

¹⁶⁴ *Masetlha* (n 4 above) paras 288-9, where Sachs J records the differences: Ministers ‘know they are hired and can be fired at the will of the President; and if fired, they can mobilise politically’, whereas the head of the NIA has ‘one foot in government and one in the public administration’ and has no equivalent political remedies.

¹⁶⁵ *Masetlha* (n 4 above) paras 184-7.

¹⁶⁶ 2005 3 SA 589 (CC) para 112, quoted in para 204 of his dissenting judgment.

¹⁶⁷ Whether they would have been is of course immaterial: see *Masetlha* (n 4 above) para 204.

¹⁶⁸ *Masetlha* (n 4 above) para 83.

it, and he had made submissions to the Inspector-General's investigation. There had also been a meeting with the President at which the appellant had expressed his dissatisfaction with the Inspector-General's findings and the recommendation that disciplinary action should be taken against him. So,

[a]lthough the President did not ask the applicant for his views at the point of dismissing him, he had the benefit of the views of the applicant on all material issues that led to the dismissal.¹⁶⁹

With respect, this reasoning gives cause for concern. To say that there is no right to procedural fairness at all in this unique executive setting is one thing. It is quite another to say that if there was such a right, it was satisfied in the circumstances. The potential effect is to dilute the content of the *audi alteram partem* principle in relation to dismissal – which is just where it deserves to be applied rigorously. As Ngcobo J points out in his dissenting judgment, fairness surely demands that any person being dismissed be heard on the proposed dismissal itself.¹⁷⁰ It is certainly not enough, at least not in administrative law, for one party to have had the benefit of the other party's views in general. The essence of a fair hearing is that the person adversely affected has a chance to comment specifically on the proposed adverse action.¹⁷¹ It is a pity, then, that the majority did not make it clearer that this was an exception to the general principles of procedural fairness, and it is to be hoped that its proposition does not infect those general principles.

The judgment of Sachs J, too, is worrying in this regard. While he found that the appellant was entitled to be treated fairly under section 23 of the Constitution and took a broad view of what substantive fairness demanded, Sachs J seemed to take a strangely constrained view of what *procedural* fairness required in the circumstances. In his judgment the President ought to have consulted the appellant on the manner in which the termination was to be publicly communicated;¹⁷² but, in the absence of a charge of misconduct or other form of breach, Sachs J apparently saw no need for a hearing on the dismissal itself.¹⁷³ This seems a somewhat formalistic approach, too, since misconduct was surely implied: the Court apparently accepted that the breakdown of trust between the parties was a direct result of the appellant's conduct in the Macozoma affair – for which the Inspector-General had recommended disciplinary action against him.

¹⁶⁹ *Masetlha* (n 4 above) para 84.

¹⁷⁰ *Masetlha* (n 4 above) para 205.

¹⁷¹ As to the common law, see L Baxter *Administrative law* (1984) 546; and more generally, see Hoexter (n 38 above) 332ff.

¹⁷² *Masetlha* (n 4 above) para 236.

¹⁷³ *Masetlha* (n 4 above) para 234.

4 Conclusion

The cases of *Masetlha*, *Sidumo* and *Chirwa* presented the Constitutional Court with opportunities to pronounce on the intersection of labour law and administrative law in employment matters, and to expound on the relationship between the constitutional rights concerned and their associated pieces of legislation. As I have tried to show in this article, the judgments of the Constitutional Court are full of interest. *Sidumo* in particular develops the connection between the relevant rights in a creative manner, while *Chirwa* raises fundamental questions about the concept of administrative action and the nature of public power.

But the judgments of the Constitutional Court in these cases also leave one with a sense of wasted opportunity. *Masetlha* seems a retrogressive decision, at least to an administrative lawyer, for allowing an unfortunate exception to the established principles of procedural fairness. And *Sidumo* and *Chirwa* appear to be far apart in the constitutional vision or ethos expressed by the majority in each case, for the former encourages the interconnectedness of rights while the latter disavows it. As I have argued above, *Chirwa* is unsatisfying in other respects as well: none of the Court's approaches to the 'administrative action' issue is unproblematic, and the majority's reasoning on the question of jurisdiction is not only unconvincing but also contradicts the Court's own jurisprudence. The decision in this case certainly clears up the intersection between labour law and administrative law, but the cost of that tidiness may be thought unacceptably high.