

**BACK OFF BUT BACK UP!  
ADMINISTRATIVE LAW  
RIGHTLY YIELDS TO LABOUR LAW**

*Martin Brassey\**

---

## **1    *Zenzile* gives and *Gcaba* takes away**

In 1990 the highest court in the land held, in *Administrator, Transvaal, and Another v Zenzile and Others*,<sup>1</sup> that the principles of administrative law provide public servants with a platform to challenge a decision terminating their employment. If a dismissed public servant could show that the decision was procedurally unfair or substantively unjustified, the decision would be reversed and, as an axiomatic consequence of such a finding, the employee would be reinstated with retrospective effect (that is, with full back-pay).

Over succeeding years, this decision provided succour for hundreds of civil servants who had been unjustifiably dismissed. The decision provided a basis for challenging decisions of which public servants might disapprove: decisions to impose a period of suspension, for instance, or to demote or decline to promote, and even (though rather more hesitantly) decisions by which a public servant was to be transferred or relocated. Private sector employees, enjoying no such claim, could only envy such beneficence; nominally they have the right to claim reinstatement or its equivalent under the equity jurisdiction of the Labour Relations Act.<sup>2</sup> In practice this relief

\* BA (UCT), LLB, H Dip Tax Law (Wits); Visiting Professor of Law, University of the Witwatersrand; Senior Counsel, Johannesburg Bar. This article has gone through a number of iterations and, in the process, I have had to call on several people for help. Among those who have read and commented on earlier versions are my colleagues Deanne Wood, Michael van As, Greta Engelbrecht and John Brand. To each of them I happily express my thanks; but, without wishing to diminish their assistance, I must single out Stu Woolman for my warmest appreciation. His contribution, which has been extraordinary, has ranged from the conceptual through the textual to the semantic. Throughout it all he has managed, in addition, to find the energy to correct my manifold failures of syntax and punctuation. I simply do not know how he fits a contribution of this kind into his highly demanding schedule of commitments.

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

<sup>2</sup> Act 66 of 1995.

is rarely granted; the best private sector employees can normally hope for is a year's salary by way of compensation (two years if the decision falls into one of the categories of egregious unfairness specified in the statute).

In the Labour Relations Act, which was introduced in 1995 as the latest of a succession of collective bargaining statutes going back to the twenties, the beneficence was redoubled by the extension of the equity-based jurisdiction to cover public servants (spies and soldiers excepted). Three choices now beckoned a member of the public service who believed a superior's decision was unwarranted and who happened to be in a comparable position to Mr Zenzile:<sup>3</sup> first, by framing a high court application in administrative law in which retrospective reinstatement was claimed; secondly by referring a dispute to the adjudicative body enjoying jurisdiction under the Labour Relations Act, where one or two years' compensation was normally the most that might be obtained; and thirdly, by basing a claim in contract (providing of course a breach of the employment contract could be proved), when damages, reduced in accordance with the doctrines of mitigation, would be the standard remedy. Of the three, the first form of relief, which remained the exclusive prerogative of the public servant, was normally the best to choose, and litigation on this basis proceeded apace.

Proceeded apace, that is, until 2009, when in *Gcaba v Minister for Safety and Security & Others*<sup>4</sup> the Constitutional Court, after a lot of dithering over the issue, held that disgruntled public servants no longer have their especial administrative law claim and must content themselves with the causes of action and remedies of a private sector employee. 'Generally,' said the court,

employment and labour relationship issues do not amount to administrative action within the meaning of PAJA.<sup>5</sup> ... When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.<sup>6</sup>

With this flourish, and a few more besides,<sup>7</sup> the court took away what

<sup>3</sup> This qualification is important because, depending on their status, some public servants enjoy or have previously enjoyed special legal protections over and above those described here.

<sup>4</sup> 2010 1 SA 238 (CC).

<sup>5</sup> The Promotion of Administrative Justice Act 3 of 2000.

<sup>6</sup> *Chirwa* (n 4 above) para 66.

<sup>7</sup> 'In *Chirwa* Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as "public" or "private" cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour related issue, based on the right

the preceding court of highest jurisdiction had granted just short of twenty years before. Public servants who thought, at the start of the nineties, that they had acquired an important right now discovered that the right had evanesced.

So, which of the two decisions offers us the most coherent account of the rights of public servants and private employees? To answer this question, we need to consider the two judgments properly. In doing so, we need to look carefully at the reasoning by which the remedy was first conferred by *Zenzile* and then taken away by *Gcaba*. The reasoning underlying the decisions is, I shall be suggesting, anything but satisfying, but the conclusions in each are arguably sound and the judgments are eminently reconcilable.

### 1.1 *Zenzile* examined

Under our law, the law of contract provides some basis for curtailing the power of an employer to act arbitrarily against an employee. If an employee has a fixed term contract, then the employer can dismiss the employee before the expiry of the term if the employee has committed an act of grave misconduct. If however the employer cannot demonstrate grave misconduct, then the employer can be required to remedy the breach by reinstating the employee (a wholly exceptional form of relief) or, at the very least, paying damages (which equate to the amount the remuneration receivable for the balance of the contract period less the amount the employee earn might reasonably be expected to earn elsewhere). Notionally, employees engaged on an open-ended basis can claim the same protections, but in practice this form of control is ineffectual; their employment is terminable on notice (normally of just a month or two), and so they can be bought off with a relatively paltry sum by way of payment in lieu of notice. During the subsistence of the contract, an employee can keep the employer within the scope of the powers conferred by the contract by refusing to execute unlawful instructions or treating the abuse of power as a repudiation of the relationship justifying cancellation or a claim for damages and (tough, once again, only in exceptional circumstances) an interdict. These contractual remedies have, over the years, steadily been expanded by

to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.' *Chirwa* (n 4 above) para 66. Ngcobo J further notes: 'Accordingly, the failure to promote and appoint the applicant was not administrative action. If his case proceeded in the High Court, he would have been destined to fail for not making out the case with which he approached this court, namely an application to review what he regarded as administrative action.' *Chirwa* (n 4 above) para 68. He concludes: [The] 'conduct behind employment grievances like those of Ms Chirwa and the applicant is not administrative action ...'. *Chirwa* (n 4 above) para 69.

a range of judicial interpolations: first, by affirming the existence of a right to work, the courts have recognised the interests that employees, principally those in the professional or managerial class, have in actually carrying out their duties; secondly, by recognising the existence of a duty of mutual, they have significantly enlarged the protection against the oppressive or abusive conduct of the employer; and thirdly, by enhancing job security through the acceptance, as yet tentative, that employees have a contractual right to be heard before the decision to dismiss can be taken.

Over the last century, higher-ranking public servants have enjoyed significant protection against abuse of power under statutes specifically tailored for their protection. Famously, a magistrate (Schierhout) invoked his statutory protections in a number of cases against the government and, in one, managed to secure his reinstatement on the grounds that the decision to dismiss him was in breach of the procedure laid down under the enactment. Similar, but by no means identical, protections were extended to the general run of employees by the introduction of an equitable jurisdiction in 1979 that, by way of amendments to the prevailing Labour Relations Act, conferred a right to oppose decisions by employers that produced unfair consequences in the workplace. By a creative interpretation of the very broadly framed enabling section, the industrial court created a comprehensive system of workplace justice that prevented employers from dismissing employees unless the decision to dismiss was justifiable and preceded by due process.

That said, until a few years before the end of the last century, employees were otherwise bound to submit to the decisions of their employer – no matter how arbitrary they might be. Courts were opposed to the notion that a general duty to act fairly might be implied into the contract, and attempts to extend the principles of administrative law to impose a comparable duty on the state had come to nothing. All this changed dramatically when the appeal court handed down its decision in *Administrator, Transvaal, and Another v Zenzile and Others*.<sup>8</sup> In *Zenzile*, employees of the provincial administration successfully challenged their dismissal for striking on the grounds that the decision had been taken without first giving them a hearing. They argued that, as public servants, they were protected by the principles of administrative law. Rightly contending that the doctrine of *audi alteram partem* is a well-established principle of administrative law, they contended that the admitted failure to observe those principles made the decision premature and thus unlawful. The court of appeal agreed and reinstated the dismissed strikers with retrospective effect. Since they had abandoned their

<sup>8</sup> 1991 1 SA 21 (A).

strike in the interim and tendered their services, the relief they received encompassed full back pay – no mean sum given the length of time over which the case had been litigated through the courts.

In his decision, Hoexter JA properly declined to follow earlier decisions in which the application of administrative law to cases of this kind had been located on the potential loss of pension rights that a dismissal might entail. This line of cases, recognising that administrative law review is triggered by a decision that takes rights away, held that it was important that the right should still be actionable. But this conception of right, according to Hoexter JA, was too narrow: all that was in fact required was the deprivation of interests by a decision that, lawful though it might be, had the effect of bringing an end to the existence of an otherwise extant right. In the present case, the employees' loss of pay and related benefits was enough to trigger the review of the decision under administrative law if this is what the law demanded.

In resisting the appeal, counsel for the state argued that the relationship between employer and employee was contractual and so fell to be decided purely on the basis of the principles governing the law of contract. These principles, so counsel submitted, precluded a court from scrutinising a decision to dismiss under the principles of administrative law. In responding to this submission, the judge said that 'no reason in principle why a statute relating to contracts should be approached otherwise than a statute dealing with some other subject matter'.<sup>9</sup> In his view, the proper way to approach the matter was to ask whether the decision-maker's powers to dismiss are sourced in statute and, if so, whether the decision warranted judicial intervention by way of review.

On the second issue, he held that decisions to dismiss, being of a disciplinary nature, cried out for the application of natural justice. On the facts of the case before him, this was a telling point to make, for the decision, being a response to the misconduct implicit in participating in the strike, did indeed possess a punitive element. The first reason was no sooner articulated than it was exposed as barren; the same judge, delivering the decision in *Administrator, Natal and Another v Sibiyi and Another*,<sup>10</sup> held that employees were entitled to the protections of due process even though their dismissal – redundancy – was occasioned by no conduct of their own, whether disciplinable or otherwise. Following *Sibiyi*, the court routinely accepted that employees need only show that the impugned decisions had impaired their interests in continued employment.

<sup>9</sup> *Zenzile* (n 1 above) 35G-H.

<sup>10</sup> 1992 4 SA 532 (A).

In his reasoning in *Zenzile* on the first issue (whether the power being exercised was sourced in statute), the judge relied on the existence of a Code that had been promulgated under the prevailing Public Service Act to regulate conditions of employment within the service. Though the Code dealt mainly with officials, it did regulate the dismissal of ordinary employees by sanctioning their dismissal on notice or summarily for good cause. Counsel for the state contended that these provisions were enough to legitimate the summary dismissal of the strikers. Hoexter JA would have none of it. He held that the Code, supported by the Act as it was, put the relationship beyond the realm of pure contract. In Hoexter JA's words, this relationship was no

mere employment under a contract of service between two private individuals, but ... a form of employment which the law will protect. Here the employer and decisionmaker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct. Where an employee has this protection legal remedies are available to him to quash a dismissal not carried out in accordance with the principles of natural justice ... The removal of the plaintiff, contrary to the peremptory provisions of the Act, was therefore a nullity, and he is entitled to claim that it should be regarded as never having been done.

In short, the employees in question were entitled to the benefits of the protections of administrative law because their relationship with their employer had some basis in a statutory instrument.

Reasoning such as this, which makes administrative law applicable provided the source of the power is statutory, is now somewhat out of fashion. Being mechanical, it fails to give proper effect to the object of administrative law, which is to control the exercise of power, especially public power, when its control is warranted. In addition, it postulates a test that is both under-inclusive and over-inclusive. It is under-inclusive because administrative law principles can be invoked even though no statute can be discovered that directly confers the public powers under scrutiny. It is over-inclusive since there are cases – many of them – in which the exercise of a power conferred by statute will not attract the application of administrative law. For one thing, the exercise of power must not be legislative or executive in nature; for another, it must be discretionary and not purely administrative; and even when both requirements are satisfied, there remain many cases (more on this below) in which the courts, for one reason or another, will refuse to intervene to correct an exercise of power of a supposedly irregular nature even though its provenance is statutory.

In an illuminating article entitled ‘What is public power?’,<sup>11</sup> PP Craig contrasts two different approaches to administrative action. The institutional method reflects a formalism that makes the application of administrative law turn on existence of a statutory enactment. The teleological approach, on the other hand, seeks to identify the function that the power is designed to serve. Under the teleological approach, the courts consider whether and to what extent the exercise of power must be brought under control. That teleological approach is the modern, preferred way. As Van der Westhuizen J said in *Gcaba v Minister for Safety & Security*,<sup>12</sup> areas of law ‘are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation [so] rigid compartmentalisation should be avoided.’<sup>13</sup>

Until recently, the courts, relying on these judgments, routinely subjected the dismissal of state and parastatal employees to scrutiny under the principles of administrative law. In conformity with basic principle, they treated the *Zenzile* innovation as having a substantive as well as a procedural aspect. If a hearing is designed to ensure that the decision-maker is properly informed, then it takes little imagination to reach the conclusion that the decision, to be lawful, has to be capable of justification. In practice, the courts required the decision at least to be rational – that is, that, on the facts that were known or should have been known, the decision could be characterised as a justifiable pursuit of the decision-maker’s objectives. On some occasions, however, the decision was assessed against the standard of reasonableness (one that cannot be condemned for failing to strike a proper balance between the contending parties).

At the time the two cases were decided, public servants fell outside the purview of the fair treatment provisions conferred by the equitable jurisdiction of the Labour Relations Act. Bringing public servants within the scope of this enactment had been seen as unnecessary because the public servants to whom the government answered, white employees in white collar positions (so-called ‘officials’), had already been granted comprehensive job security by the specific statutory enactments to which I have already referred. However, unless the court did something to protect the kind of black workers who launched *Zenzile* and *Sibiya*, they would be at a gross disadvantage when compared to every other employee in both the public sphere and the private sector. The court of appeal plugged the gap by this dramatic development of the law – rightly characterised

<sup>11</sup> H Corder & T Maluwa *Administrative justice in South Africa* (1997) 25.

<sup>12</sup> *Gcaba v Minister for Safety and Security & Others* 2010 1 SA 238 (CC).

<sup>13</sup> *Gcaba* (n 12 above) para 53.

by some as the judiciary's principal contribution to transformation. To achieve this result, the decision in *Zenzile* had to shake free of the shackles of earlier decisions that, to put it no higher, were certainly suggestive of the contrary conclusion. In addition, it had to disavow the persuasive force of the English law; that jurisdiction customarily treats decisions of the fate of employees within the public service as beyond the scope of judicial review.

## 1.2 *Gcaba* examined

In *Gcaba*, the Constitutional Court had to decide whether the failure by the state to promote a police officer is subject to review under the principles of administrative law. The court unanimously held that it is not, since it does not constitute administrative action.<sup>14</sup> In coming to this conclusion, the court made it clear that dismissal of public servants would equally be beyond the purview of review under administrative law. Dismissal, in its view, was *a fortiori*.<sup>15</sup>

Van der Westhuizen J based his judgment principally on what he termed 'a few general principles and policy considerations'.<sup>16</sup> What had to be recognised, he contended, was that the same conduct could give rise to a range of legal consequences; for example, a sexual assault in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, and give rise to a delictual claim and amount to an unfair labour practice.<sup>17</sup> In some cases the enactment of legislation specifically tailored to resolve the problem might reveal an intention to limit or abolish the other causes of action. But in the absence of such an intimation, the choice of remedy was entrusted to the potential claimant, who could not be non-suited simply because the court considered another forum to be preferable.<sup>18</sup> Once the choice was made, however, the claimant could not abandon it as soon as a negative development occurred. Forum shopping was not desirable and, if the original choice was of a forum especially designed to resolve the kind of claim being pressed,

<sup>14</sup> *Gcaba* (n 12 above) para 68.

<sup>15</sup> This is certainly the effect of the judgment, but the instance of dismissal is only obliquely dealt with by the Court. *Gcaba* (n 12 above) paras 66 and 67.

<sup>16</sup> *Gcaba* (n 12 above) para 52.

<sup>17</sup> *Gcaba* (n 12 above) para 53.

<sup>18</sup> *Gcaba* (n 12 above) para 56. The nature of the claim has to be determined on the pleadings and the pleadings alone; if one of two actions can competently be brought, then it is wrong to ask what the true nature of the case is and decline jurisdiction on the basis that the other option constitutes a more appropriate cause of action. *Gcaba* (n 12 above) para 75.



the litigant must be precluded from jettisoning it and using another.<sup>19</sup>

Having established the context within which he was operating, the judge then turned to consider the specific problem before him. 'Was the failure to promote and appoint the applicant administrative action?' he pertinently asked. He began his answer by providing the following unequivocal statement of principle:

Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and *it has few or no direct implications or consequences for other citizens*, it does not constitute administrative action. (Emphasis supplied.)<sup>20</sup>

Explaining why he was taking up this stance, the judge said that:

the failure to promote and appoint Mr Gcaba appears to be a quintessential labour related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and *has little or no direct consequence for any other citizens*. (Emphasis supplied.)<sup>21</sup>

Taken at face value, the italicised *dicta* may be semantically understandable. They are, however, jurisprudentially incomprehensible. Reviews are regularly brought by citizens (and others, for that matter) whose outcome has a bearing only on the rights of the individuals concerned. The grant or the refusal of a trading licence, which can be said to have a direct consequence for other citizens only by stretching the admittedly elastic notion till it snaps, provides but one example of a decision that is traditionally

<sup>19</sup> This outcome seems to be the effect of the following passage. *Gcaba* (n 12 above) para 57 reads:

[F]orum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should be allowed to abandon that cause as soon as a negative decision or event is encountered. One may especially not want litigants to 'relegate' the LRA dispensation because they do not 'trust' its structures to do justice as much as the High Court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in *Chirwa*, referred to above.

<sup>20</sup> *Gcaba* (n 12 above) para 64.

<sup>21</sup> *Gcaba* (n 12 above) para 66.

regarded as reviewable. The examples of such cases are limited only by one's imagination. The Constitutional Court obviously did not intend to sweep aside the review of these cases. Yet it would be wrong to dismiss the two italicised passages as valueless: they have an intuitive resonance that is hard to deny and, beneath them, there is a point of principle that is fundamental and profound.

At the start of his judgment, Van der Westhuizen J gave an overarching explanation of the constitutional mandate and, in the process, placed his reasoning squarely within a framework in which the presence or absence of rights would be determinative – in a rights-based matrix, in short. 'As supreme law,' he said:

the Constitution protects basic rights. These include the rights to fair labour practices and to just administrative action. Legislation based on the Constitution is supposed to concretise and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes in the workplace and by regulating administrative conduct to ensure fairness.<sup>22</sup>

Knowing, from the headnote, what the result of his reasoning was to be, the informed reader could be forgiven for expecting an answer to the conundrum posed at the beginning of this article: if public servants have an established right to invoke the principles of administrative law in order to challenge a decision inimical to their interests as employees, by what authority, statute aside, can a court deprive them of it? The judgment answers a number of questions and firmly lays down the law, but this important question is never answered.

Indeed, it is never even posed. The judgment is able to skirt it by the simple device of saying nothing whatsoever about *Zenzile*. This is surprising, to say the least. In the judgment, much time is spent in describing the effect of two earlier Constitutional Court decisions (*Fredericks*<sup>23</sup> and *Chirwa*)<sup>24</sup> and there is a useful exposition of the basis on which they can be reconciled.<sup>25</sup> But it is *Zenzile* that sets up the conceptual challenge that truly confronted the court. Had Van der Westhuizen J engaged *Zenzile*, there is much that he might have said. He might, for instance, have reasoned that the Promotion of Administrative Justice Act (PAJA) has revolutionised the approach a court must now take to the issue. It would have been a hard argument to mount. PAJA and the constitutional mandate that brought it into being are designed to *extend*, not *shrink*, the scope of administrative

<sup>22</sup> *Gcaba* (n 12 above) para 1.

<sup>23</sup> *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* 2001 ZACC 6; 2002 2 BCLR 113 (CC); 2002 2 SA 693 (CC).

<sup>24</sup> *Chirwa v Transnet Limited & Others* 2008 4 SA 367 (CC).

<sup>25</sup> *Gcaba* (n 12 above) para 28.

review. He might also have explained *Zenzile* away on the basis that its approach, which I have described as institutional, is misconceived and that the approach espoused by him (functional in nature) is to be preferred. Finally, he could have said that the decision was jurisprudentially unsound. But his profound silence cannot give rise to any such inference.

That the judge says nothing about *Zenzile* cannot be put down to ignorance or oversight – the decision is too well-known for that. So his failure to consider it must have been the product of a deliberate election. Perhaps he feared that its consideration might simply aggravate the ‘complexity and confusion’ against which he warns in the opening words of his judgment. Perhaps, in addition, he felt that a concentration on recent developments in the field might better serve to produce the ‘clarity and guidance’ that the judgment so manifestly sets out to provide.<sup>26</sup> Whatever the position, there is no denying that, in consequence of the choice made by the judge, we do not really know why *Zenzile* lost its relevance to the law of dismissal in the public service; nor do we know to what extent it still might be applicable in other areas – to issues or people (spies and soldiers, for instance) falling outside the intricate web of prevailing statutory enactments; nor finally, do we have any sense of whether the decision might recover its force if these specific statutory enactments were to be repealed or substantially watered down.

If we had the answer to these questions, we would have a clearer idea of the scope of administrative law within this context and the circumstances in which its protections are triggered. In the absence of these explanations, we are left to speculate, and it is to the process of speculation that this note unabashedly turns.

## 2 Synopsis

The central thesis of this article is that the outcome of both judgments is arguably correct and that neither, therefore, conflicts with the other. The same cannot be said of the reasoning in each case. As already explained, *Zenzile* was wrong to suggest that there can be no review under administrative law unless the court can identify a statutory enactment under which state power is purportedly exercised. *Gcaba*, for its part, was wrong in suggesting that a right of review turns on whether the resulting order has some consequence for citizens generally.

<sup>26</sup> *Gcaba* (n 12 above) para 2.

To understand what is really happening in the cases, we must, I venture to suggest, start by jettisoning the conceptual framework of *individual rights* and recognise that we are truly concerned with the way in which *power* is best controlled. In some cases, we can deduce from a statutory enactment that the decision-making discretion it vests in a public official was intended to be used in the promotion of the interests of a specific class of individual. If this is so, then an exercise of a discretion that flouts these rights can be corrected under administrative law and must normally be corrected without more. In the present case, however, the power in question – the power to promote or dismiss – was not of this nature. The power was enjoyed by dint of its delegation, down the line, by the Minister who is vested with it under the Constitution and, there being no indication of anything to the contrary, its intended beneficiary could only be the public at large. While the review of such powers is typically triggered by the individual who feels the brunt of them (this harm is enough to vest them with *locus standi*), the exercise of control by granting relief to the individual serves, and serves only, the ultimate object for which the power was conferred – namely, to advance the public interest.

Powers of this sort, I argue, are controlled under administrative law only for so long as the public interest continues to be served, and it will cease to have this quality when the exercise of power no longer deserves to be controlled through the processes of administrative law. This is the case when other legal controls are introduced to keep the decision-maker within proper bounds. In such circumstances, the use of administrative law to achieve the purpose is unnecessary, and thus inapposite as a basis for judicial review.

If this is true, then the control through administrative law of a discretion exercisable exclusively in the public interest can be regarded as residuary. Control of this nature will not be exercised if the law provides an appropriate alternative by which the abuse of power can be checked. The same is true if extra-curial checks exist and suffice – the interplay of market forces through the law of contract being the most obvious example. An official who buys a box of pencils for the department exercises a power, but the power needs no control under administrative law. Special circumstances aside, market forces independently set the price and provide the requisite checks. The same, however, cannot be said of tenders, where the amounts involved are high and the potential for corruption is considerable: they are subject to review under administrative law.

Before 1991, the contract of employment concluded between the state and its employees provided no meaningful check of this nature. Legislation enacted in the interest of white collar (*read white*) employees in the public service plugged up some of the

deficiencies,<sup>27</sup> but it did not extend to more menial public servants (*read black*). Market forces, finding appropriate expression in the employment contract, could not perform the task because, in contracting, menial employees have little or no bargaining power and had to accept what they were offered.<sup>28</sup> In consequence, the court in *Zenzile* crafted a suitable remedy – review for rationality under administrative law. After 1995, however, the ambient law *did* provide a requisite method of control: it brought public servants under the umbrella of the equity-based jurisdiction of the Labour Relations Act. This degree of supervision, being deemed to suffice for employees in the private sector, was equally sufficient for their public sector counterparts. The intervention of administrative law was no longer unnecessary and thus inapposite and it wanted only a judgment of the court to say as much. That the judgment took so long in coming says nothing about the principle, of course, but speaks volumes about legal conservatism and the delays inherent in the legal process.

This reasoning reconciles the outcomes in *Zenzile* and *Gcaba*. It explains, in addition, why the rationale in *Gcaba* strikes a chord, faint though it is: once the power to grant or refuse promotion was subject to scrutiny under the equity-based jurisdiction of the labour statute, it lost its purchase under the review jurisdiction of administrative law and now had ‘few or no direct implications or consequences for other citizens’. The thesis also provides an answer to cases in which the Labour Relations Act supplies no remedy – most notably, where the employee is a soldier or a spy and thus falls outside the statute – for they, so I would argue, *do* retain the capacity to claim under administrative law. Finally, most importantly and most controversially, the thesis tells us why, in suggesting that everyone has a ‘right to administrative justice’, clause 33 of the Bill of Rights hopelessly oversimplifies the true state of the law, a consequence in no way improved by PAJA.

Such bold assertions require substantiation. To provide a general demonstration of them would require a thesis that looks at each facet of administrative law. Such a thesis would engage everything from standing to sue, through actionability in the face of delay, via the rules regulating the exhaustion of domestic remedies, to the right to claim relief in the form, for instance, of damages. Until someone has

<sup>27</sup> This legislation, it should be noted, was within the category of enactments in the interest of a specific class of individual.

<sup>28</sup> *Gcaba* (n 12 above) para 66):

Employment is not a bargain of equals, but a relationship of demand. Since the 1980s in South Africa, the legislature has realised that leaving the regulation of employment purely within the realm of contract law could foster injustice; therefore the relationship is regulated carefully through the LRA. Section 23 is an express constitutional recognition of the special status of employment relationships and the need for legal regulation outside of the law of contract.

both the enthusiasm and the energy to undertake this formidable task, we must content ourselves with nibbling at the edges of the issue. It is this process of nibbling on which I now propose to embark.

## 2.1 The synopsis explored

Speaking generally, the law tells people what they can and cannot do. In our country, for instance, motorists are told to drive on the left side of the road and not to drive on the right. These instructions, which operate directly on the people who are subject to them, work well enough when a simple rule will suffice. But where the matter requiring regulation is complex and context-sensitive, the law-giver typically vests the capacity to make a rule in another – an official, a tribunal or a committee – so that the rule/decision-making can best be tailored to the circumstances of the case. How these decisions are made, procedurally and substantively, is subject to judicial scrutiny. Broadly speaking, legal taxonomy locates this process under the heading ‘Administrative Law’.

Under such a system, the decision-maker is given the power for a purpose. Sometimes the purpose will be spelt out, but often it will have to be divined from the terms of the enabling provision. Complicating the process of deciding on the object is the fact that the ultimate source of power may be obscure. A public servant who buys a box of pencils for the department acts under mandate, but it may be a matter of some difficulty to determine precisely how the mantle of authority was bestowed. Problems of this sort are, however, simple hurdles in the way of the real task, which is to decide what the object of the power truly is. Without knowing this, and in particular, knowing who is intended as the beneficiary of the exercise of power, we cannot – or at least cannot comfortably – say whether the decision-maker, in making the decision, kept within or travelled beyond the scope of the power entrusted by the lawgiver.

In the public domain, officials are given their powers in order to promote the public interest. Whatever they may think, officials are not given their powers to promote their own interests or those of their colleagues, family and friends. They are, as the name so aptly indicates, public servants: their job is to serve the public. The source of this duty is, technically, the Constitution, but ultimately it owes its existence to the fact that it is an incident of, the concomitant of, the power that the law has conferred. The public servant stands in the same relation to the public as a trustee to a ward; the power they enjoy is, as we lawyers say, granted *sub modo* and can properly be exercised only for the benefit of the others.

If officials must exercise their powers for the benefit of others, then they cannot be allowed to behave in an uncontrolled manner. They cannot use the powers arbitrarily, for then they fail to discharge their trust. Equally, they cannot use them for their own benefit or – for what amounts to the same thing, the benefit of the wrong people. The powers are entrusted to them in the interests of the public at large and it is for the benefit of the public at large that they must be used. So much has been put beyond doubt by the way the courts have insisted that public powers must be exercised in accordance with the fundamental principles of legality that characterise a constitutional state.<sup>29</sup>

The public interest can be promoted in a variety of ways, and the public at large most certainly does not have to be the beneficiary of every enactment. The lawgiver can – and frequently does – consider that the public interest is best served by an enactment that is passed in the interests of the members of the public as individuals, and by these means they become singled out as proper recipients of special treatment. Enactments of this sort are, once again, both positive and negative. Officials are prohibited from locking a person up without cause, taking property from a landowner (without compensation, at any rate), depriving a parent of a child (again, subject to qualifications) and there are countless more prohibitions besides. Officials are also placed under positive obligations to supply welfare benefits of various sorts – medical assistance, child welfare grants, statutory pensions and so on. In cases of both types, the persons within the designated class of beneficiary are indeed vested with a right. Contingent though it may be – since it depends upon the exercise of official discretion – it remains a right nevertheless, and the individual can vindicate it through the processes of the law in order to obtain the entitlement that is his or her due.

The statutes protecting public servants from unlawful dismissal provide apt examples within the field with which this note is specifically concerned. Before their enactment, public servants were employed at the pleasure of the state. Not even their contractual entitlements protected them from dismissal. In conformity with the doctrine that the Crown can do no wrong, not even a summary termination in breach of a fixed term engagement was actionable. The statutes enacted to correct this unhappy state of affairs, besides recognising the legal enforceability of employment contracts within

<sup>29</sup> See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) paras 56, 58 and 59; *Pharmaceutical Manufacturers Association of SA & Another: In re ex parte President of the Republic of South Africa & Others* 2000 2 SA 674 (CC) para 50. See also F Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, December 2005) Chapter 11.

the public service, protected officials (though not, as we have already seen, employees lower down the hierarchy) from dismissal without cause and gave them a right to be heard in their defence before the decision to terminate their services was taken.

From early on, courts declined to give effect to decisions of the sort that we are now considering: namely, decisions taken in breach of a right conferred on the individual by statute. They treated a thing done contrary to law as a nullity and, in consequence, considered that the *status quo* continued uninterrupted. This doctrine was given its ultimate endorsement of the appeal court in the *Schierhout* case.<sup>30</sup> The Appellate Division's decision was the last in a celebrated line of cases brought by a magistrate to reverse his dismissal on the grounds that it constituted a breach of his statutorily entrenched rights of tenure. On exception to the claim, the state invoked the principle that no order can be granted for the specific performance of a contract of personal service. The *Schierhout* court rejected the argument on the grounds that a decision to dismiss in violation of the peremptory injunctions of a statute, being a nullity, has no effect in law. The reasoning, so apposite to the argument being made in this article, calls for quotation at length:

The section of the Cape Act which is applicable in this case is sec 36 which, after dealing with the removal of civil servants for various reasons, continues thus: 'Provided that no person shall be removed from the service in order to facilitate improvements in the department to which he belongs without the previous concurrence of both Houses of Parliament.' That is a peremptory and not a mere directory provision. ... The effect is to direct that there shall be no such removal until the proposal has been submitted to and approved by both Houses of the Legislature. That statutory prohibition has in this case been disregarded. On the principles laid down in *Patz v Green & Co* (1907 TS 42) the plaintiff would have been entitled, had he applied before his removal, to an interdict restraining the Government from acting in contravention of the statute. Such an interdict was granted in *SA Railways v O'Donnell* (1923 CPD 161). But after the event he is entitled to rely upon another doctrine. It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect ... So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act.<sup>31</sup>

The reasoning in the case is questionable. The decision in *Stag Packings*<sup>32</sup> suggests that *Schierhout* confuses considerations of right

<sup>30</sup> *Schierhout v Minister of Justice* 1926 AD 99.

<sup>31</sup> *Schierhout* (n 30 above) 110-111.

<sup>32</sup> *National Union of Textile Workers & Others v Stag Packings (Pty) Ltd & Another* 1982 4 SA 151 (T).



of action (that is, the right that flows from the nullity of the act) and remedy (whether specific performance is the proper remedy from the wrong undeniably done). Nevertheless, *Schierhout* provides a striking illustration of the control over official decision-making that courts exercise, even within the domain of employment, in support of rights conferred by law on the individual.

Underlying *Schierhout* is an assumption that the enactment was passed entirely for the benefit of the individual civil servant. This may be true, but the conclusion is by no means axiomatic. There might be a second object, working in tandem with the first, whose aim is to structure and to regularise the workings of the public service. In such a case, the presence of the more general object does not nullify the specific one, and the public servant continues to be the beneficiary of rights under the statute. But where the enactment is passed solely in the public interest, no specific individual obtains rights under it, and so no claim can be mounted even by people who suffer harm in consequence of conduct in breach of the statute.

This proposition is, I accept, in conflict with the decision upon which much reliance is placed in the passage in *Schierhout* cited above. In the decision in question, *Patz v Greene & Co*,<sup>33</sup> the Transvaal Supreme Court held that an individual has a right, and so a right of action for damages, whenever harm is suffered in consequence of a breach of statute. The law was laid down in terms so absolute that they encompass every case in which damage is suffered by reason of a breach of the statute:

Where an act is expressly prohibited in the interests of a particular person, the court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can show that he has sustained damage is entitled to his remedy.<sup>34</sup>

The decision makes, of course, precisely the distinction that I treat as crucial in the present article (for which, much thanks); but it stands in conflict with the English law on which it purports to rely, and it has been strenuously criticised as unsound.<sup>35</sup> In *Olitzki Property Holdings (Pty) Ltd v State Tender Board & Another*,<sup>36</sup> the Supreme Court of Appeal brought the law back into line by holding that an individual has

<sup>33</sup> 1907 TS 427.

<sup>34</sup> *Patz* (n 33 above) 433.

<sup>35</sup> RG McKerron *The law of Delict* 7 ed (1971) 278.

<sup>36</sup> 2001 3 SA 1247 (SCA). Compare, within the private domain, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA), in which the Supreme Court of Appeal declined to countenance a claim against a privately established regulatory body for loss suffered as a result of a decision pleaded to be negligently taken, with *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 200 (SCA), where the court awarded damages for the loss suffered when a tender was fraudulently rejected by a parastatal body.

a claim for damages only if, upon a proper construction of the legislation, such a claim was contemplated as exigible at the individual's instance. In short,

whether an organ of State is liable for damages because of negligent non-judicial decisions with a statutory basis depends often on the intention of the legislature and on an interpretation of the statutory instrument concerned.<sup>37</sup>

Underlying the quest for the law-giver's intention, I venture to suggest, is the distinction between an enactment for the benefit of a specific class of person and one intended to operate only in the interests of the public generally.<sup>38</sup>

In cases where no enactment is manifest, the decision-making powers being exercised will invariably be derivative. They vest in the decision-maker as delegate of the Minister, who in turn derives them by dint of an executive decision made under the Constitution. In such cases there will seldom, if ever, be a basis for contending that the decision-maker is obliged to exercise the powers in the interests of a specific class of person. Rights vested in individuals are the gift of the lawgiver and, when conferred, are conferred specifically; the courts have no power to confer them, for (in form at least) they still regard themselves as interpreters, not creators, of the law. Courts can, of course, recognise rights and benefits by employing the process of implication, but they cannot take the implication beyond what is warranted by the principal enactment, and an enactment of general application (one, that is, which does not single out a class of individuals for special attention) provides a basis only for implications of a general nature.

So we discover that, where, properly construed, the decision-making power is shown to be in the interests of a class of individual, it will be enforced in order to advance those interests; but where it is passed in the public interest, then (I suggest) the individual can show no *right* vesting in him or her upon which to base a claim. By saying this, I do not mean to suggest that an individual cannot come to court and vindicate the public interest. I intend no such absurd misconstruction of the law. Claims are daily brought for such relief, typically in the nature of an interdict but occasionally for a positive injunction in the form of a *mandamus*. In such cases, the main

<sup>37</sup> *Telematrix* (n 36 above) para 25.

<sup>38</sup> What RG McKerron, in *The law of delict* 7th ed (1971) said thirty years ago is, I suggest, still true today: 'to allow anyone who has suffered loss in consequence of the breach of a statutory duty an action for damages, irrespective of whether or not the statute was intended for his protection, would be to infringe a fundamental rule ... namely, that the plaintiff must show a breach of a duty owed to himself, not merely a breach of duty in the air.'

question, merits aside, is whether the claimant has the requisite standing (*locus standi in judicio*) to bring the suit. Standing will frequently turn on whether an individual has an especial concern in the outcome. It is easy to conflate this concern with a right vesting in the individual qua individual. But collapsing these two distinct stages of legal analysis or kinds of interest is simply wrong. The interest being prosecuted is and remains the preserve of the public at large.

In short, in the course of exercising control in the public interest, the court will frequently produce a result that has some specific benefit for the individual. For example, a judgment overturning a decision to permit a protest march through a suburb will appear to confer a benefit on the residents of the suburb who see the march as a disruptive nuisance. By the same token, a judgment setting aside a decision to give one official a promotion will be treated as a boon by the contenders for the post who so far have been unsuccessful in the race. Recognising their interest in the outcome, the law lets potential beneficiaries of this kind move the court for relief. The benefits they receive are purely incidental to the assertion of the underlying entitlements that are created in the public interest.

Were it otherwise, the successful litigant, contending that a personal right had been invaded, would be entitled in defiance of prevailing principles to claim damages for losses suffered in consequence of the implementation of the impugned decision. We have already seen that such consequences do not obtain.<sup>39</sup> Once again, were it otherwise, the claim for relief would be maintainable even though it was brought after the expiry of a reasonable time: in our law, rights are not foregone by dint of the doctrine of *laches*. However, the true position is that a remedy will be refused, if the litigation, perhaps for reasons for which the litigant is in no sense responsible, has been brought so late that the public interest would suffer more harm than good in consequence of the unsettling of expectations that the decision has engendered.<sup>40</sup> As has been pointed out, the availability of the discretion to refuse relief in these circumstances provides the court with its 'indispensable moderating tool' for promoting the public interest.<sup>41</sup>

<sup>39</sup> See *Olitzki* (n 36 above).

<sup>40</sup> See, for example, *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others* 2008 2 SA 481 (SCA), in which loss to the public purse and disruption of the service for removal, treatment and disposal of hospital waste were considered as factors by this court in the exercise of its discretion.

<sup>41</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 6 SA 222, 246 (SCA). See also *Eskom Holdings Ltd & Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9.

If we consider the standard by reference to which the courts scrutinise and review decisions that must be made in the public interest, then we come to the same conclusions. The courts do not require such decisions to be correct; they normally require them to be reasonable or, under a slightly weaker test, merely rational. The rationale behind both standards is that the imperatives of good governance in the public interest require deference to decisions that are sensible. In some circumstances, however, the public interest is served by employing an even lighter standard. For example, decisions to prosecute criminal or comparable complaints (anti-competitive conduct, for instance) are only reviewed for manifest want of merit coupled with bad faith. There can be no point in entertaining a review, costly in time and money as it is, when a prosecutorial decision that is simply irrational or unreasonable will be exposed as barren by a proper decision taken in the ensuing criminal trial. Finally, there are occasions when the threshold for review will approach the vanishing point. For example, an official decision that can yet be corrected by an internal tribunal will only be reviewed if it is vitiated by manifest unlawfulness or excess of jurisdiction. The courts require internal remedies to be exhausted before their own intervention is solicited.

In the examples in question, the controls are judicial or regulatory in nature, but precisely the same principle applies when extra-curial controls exist and suffice to keep the decision-maker in check. A simple example suffices. If a public official wishes to buy a box of pencils, then the law sees no need to supervise the choice of stationer with whom the transaction must be concluded, and the same is typically true when a lease is to be concluded or a car is to be acquired. In such cases, the interplay of market forces means that the transaction is likely to be reasonable, and judicial intervention, far from being helpful, may actually impede and even subvert the pursuit of a sensible outcome.

This basic principle was established in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)*.<sup>42</sup> In *Cape Metropolitan Council*, a service provider unsuccessfully invoked administrative law in an effort to set aside an otherwise valid cancellation of its contract with a state entity. Streicher JA captured the notion of the market as a suitable constraining force when he said:

The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public

<sup>42</sup> 2001 3 SA 1013 (SCA).

authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore 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 its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.<sup>43</sup>

In *Logbro Properties CC v Bedderson NO & Others*,<sup>44</sup> Cameron JA placed the decision in its proper context by saying that it is not

authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of 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.

In his decision in *Logbro*, with which the rest of the court concurred, Cameron JA went out of his way to overrule *Mustapha & Another v Receiver of Revenue, Lichtenburg, & Others*<sup>45</sup> In *Mustapha*, the Minister in question terminated a statutory permit to occupy land that was embodied in a contract for racially discriminatory reasons. In a decision of startling formalism, the majority of the appeal court held that the decision could not be challenged since it entailed the exercise of an inviolable right sanctioned by the contract. In a dictum in a minority decision, which Cameron JA happily adopted,<sup>46</sup> Schreiner JA captured the essence of the matter with his customary lucidity:

For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the

<sup>43</sup> *Cape Metropolitan Council* (n 42 above) para 18.

<sup>44</sup> 2003 2 SA 460 (SCA) para 10.

<sup>45</sup> 1958 3 SA 343 (A).

<sup>46</sup> *Logbro Propertiees* (n 44 above) para 12.

exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised ...<sup>47</sup>

*Grey's Marine (Hout Bay) (Pty) Ltd & Others v Minister of Public Works & Others*<sup>48</sup> offers another example of appropriate judicial intervention. In *Grey's Marine*, the applicants sought to restrain the Minister from concluding an exclusive lease over a portion of a quayside owned by the state. Though the effect of the lease would be to deprive current users of the use of the facility, the Minister boldly argued that the state, as owner, could use the property in all respects as if it was a private property owner.<sup>49</sup> The appeal court held that the decision to let the property was administrative action despite its contractual guise, but dismissed the application on the facts.

In *Grey's Marine*, the court treated *Bullock NO v Provincial Government, North West Province*,<sup>50</sup> a similar sort of case, as instructive.<sup>51</sup> In *Bullock*, the court

emphatically disagreed with the proposition that a decision by a state official to grant a servitude over land fell beyond the purview of administrative law because the state was in the same position as any landowner who may freely grant or refuse to grant rights in property vested in such private owner.<sup>52</sup>

The grant gave the recipient an exclusive right to use a very valuable recreational area in perpetuity, a matter treated as crucial in determining that the transaction was subject to scrutiny under administrative law.<sup>53</sup> The facts revealed that, in granting the servitude, the Minister wrongly believed that the law left the state with no choice in the matter.<sup>54</sup>

In deciding to uphold the Council's decision to cancel the contract, the court in *Cape Metropolitan* held that the decision was unreviewable: the administrative justice clause, said Streicher JA,

is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public

<sup>47</sup> *Mustapha* (n 45 above) 347.

<sup>48</sup> 2005 6 SA 313 (SCA).

<sup>49</sup> *Grey's Marine* (n 48 above) para 26.

<sup>50</sup> 2004 5 SA 262 (SCA).

<sup>51</sup> *Grey's Marine* (n 48 above) para 27.

<sup>52</sup> *Bullock* (n 50 above) paras 13 and 14.

<sup>53</sup> *Bullock* (n 50 above) para 14.

<sup>54</sup> *Bullock* (n 50 above) para 18.

administration when it performs an act of public administration ie when it exercises public power ...<sup>55</sup>

### When the Council cancelled the contract

it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract.<sup>56</sup>

In *Grey's Marine*,<sup>57</sup> on the other hand, Nugent JA was happy to treat the grant of a contractual right (the lease) as a species of administrative action since, in his view, the concept embraces

in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals<sup>58</sup>

but, on the facts, the judge held that there were no grounds for interfering with the Minister's decision.<sup>59</sup>

Placing the decisions side by side in this way reveals the alternatives a court can employ in order to preserve a decision by the State within the domain of contract. The decision can either be characterised as beyond the scope of administrative law or justifiable when reviewed within the framework of this branch of law. Of the two, I naturally favour the latter, since the former is, as I have tried to show, conceptually incoherent and unproductive. These categories are no more than legal devices by which the same desired result can be obtained. What matters to the argument advanced in this article is that the underlying philosophy is the same – namely, that judicial control over decision-making in the public interest is exercised only when it is necessary in order to promote the public interest. If intervention will do no good, then the courts will not intervene; nor will they intervene if regulatory means are in place that will keep the decision-maker in check; nor, finally, will they intervene if extra-curial means exist – the market specifically – that can be expected to, and does, serve the purpose.

In this sense, we can describe the judicial control exercised over decision-making in the public interest as residuary; it is a mechanism

<sup>55</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013, 1023 (SCA).

<sup>56</sup> *Cape Metropolitan Council* (n 55 above) 1023-1024.

<sup>57</sup> *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 6 SA 313 (SCA).

<sup>58</sup> *Grey's Marine* (n 57 above) para 24.

<sup>59</sup> *Grey's Marine* (n 57 above) para 36.

that operates in default of one that would otherwise serve the purpose. Judicial intervention to keep the decision-maker on the public interest rails will occur only when and to the extent that such intervention is required. In this sense, the process of control is residuary, lubricious and potentially evanescent. It is like the Cheshire cat; it can exist at one time and then fade away, leaving only the reminder of its existence in the guise of a smile.

### 3 Reconciling *Zenzile* and *Gcaba*

As we have seen, the statutory framework with which the *Zenzile* court was confronted invested public servants with the right not to be unfairly dismissed, but only if they fell within the class of employees categorised as officials. The applicants, who were of a lesser rank, enjoyed no such rights; the most they could hope for was a review of their dismissal by reference to the interest that the public at large has in rational outcomes within the public service. As victims of the decision to dismiss, the applicants plainly had the *locus standi* to bring the proceedings, but (if the theoretical paradigm set out above is right), they had no *right* to relief as such and their application had to fail unless the court was persuaded that the decision to dismiss was one requiring review.

For reasons already described, decisions taken by public officials in the exercise of powers conferred by contract are generally not reviewable; but, though manifestly contractual in nature, decisions by public officials within the field of employment can sensibly be treated as an exception to this rule on the grounds that, given the limited bargaining power of workers, the interplay of market forces operates too weakly to secure rational outcomes through extra-curial means. Once this premise is accepted,<sup>60</sup> then there was a case for judicial intervention to protect the applicants against an irrational exercise of the power to dismiss and, once that was conceded, there was every reason for requiring them to be heard before the decision on their fate was made.

In 1995, the law governing the dismissal of employees in the public service underwent a sea change. Under the new Labour Relations Act, the separate treatment of public servants was all but abolished and (subject to a few exceptions of no consequence here) all employees, whether public or private, were placed under the protective umbrella

<sup>60</sup> In *Logbro* (n 46 above) at para 11, Cameron JA effectively made the same point when he stated: 'The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, "acting from a position of superiority or authority by virtue of its being a public authority" in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.'



of the unfair dismissal and unfair labour practice regimes. From then on, review ceased to be required in order to ensure sensible decision-making since there was now a suitable alternative forum for the purpose.

On this basis, the outcome in *Gcaba* was right, and so – to the extent that it is discernible – was the reasoning, however thin it might seem. Moreover, it is perfectly compatible with the outcome in *Zenzile*,<sup>61</sup> since each decision must be measured against the ambient statutory regime. If public officials properly understand the law in this area – no easy task, it must be conceded – they have no basis for complaining that they have, in the process, lost their rights, for they never had any rights in the first place. The most they enjoyed was the prospect of a boon stemming from the fact that public officials, in the execution of the duty implicit in their office to promote the interests of the public at large, cannot be permitted to make decisions that are irrational. Since the market could not be trusted to secure compliance with the duty, there was every reason for the law to provide scrutiny by way of review. But again that rationale evaporated when the equity-based scrutiny of labour law was extended to cover public servants.

In an article in last year's edition of this publication,<sup>62</sup> Cora Hoexter, who has written so thoughtfully about the present issues and is perhaps our foremost authority on administrative law, contends that '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.'<sup>63</sup> This article, prompted in no small measure by her writing, contends that she is right in thinking that there is no neat divide but wrong in saying that they necessarily overlap. Administrative law can operate to regulate employment relations in the public sector, but only residually. It takes up where other controls are absent and, since labour law provides protections where the market fails to do so, this will only rarely be so.

### 3.1 What does this analysis say about the Administrative Justice Clause

These conclusions, perhaps modest in themselves, have far-reaching consequences when placed within the context of the administrative

<sup>61</sup> The reasoning is not compatible. *Zenzile* treated the existence of a relationship infused by statute as controlling and determinative; but the presence of a statute is not a pre-requisite, and in fact none was present in *Zenzile*, and its presence would by no means always be determinative.

<sup>62</sup> 'Clearing the intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209.

<sup>63</sup> Hoexter (n 62 above) 221.

justice clause in the Bill of Rights. The operative clause, section 33(1), reads: ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’ Its language suggests that individuals are always the focus of the control over administrative action and casts the scrutiny in the language of individual rights. Such a reading is very misleading. The interest that is typically served by the exercise of control over public power is the general public interest, and the process of control, which is porous and malleable, is completely out of tune with the way we analyse individual rights. In reaching this conclusion, I do not mean to suggest that courts, acting in terms of enactments appropriately constructed for the purpose, never seek to promote the rights of individuals or classes of individuals and that, in doing so, they do not occupy the domain of administrative law. So broad a proposition would be absurd. But the statutes under which this scrutiny is exercised, specifically tailored to protect the individual *qua* individual, are exceptional. If no such object is demonstrable, then the most the court can assume is that the power has been conferred on the official in the public interest.<sup>64</sup>

Given this aim, control over such power is concomitantly exercised by the courts when the public interest requires it, but only then. In *Zenzile*, it was deemed necessary to exercise control by way of administrative law over employment-related decisions in the public service. The public interest required it. In *Gcaba*, the exercise of such control was no longer thought to be necessary – the public interest could be better served by other means. Each is a proper application of a coherent set of fundamental principles, and the outcomes are jurisprudentially reconcilable once, but only once, we accept that they do not yield to analysis within the framework of individual rights. To hold otherwise is to commit a serious category mistake.<sup>65</sup>

<sup>64</sup> This receives its expression in our new constitutional order as an application of the principle of ‘legality’. See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) para 58, The Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the constitutional order: ‘It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.’ See also *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC).

<sup>65</sup> Woolman describes ‘category mistakes’ in the course of discussing the waiver of constitutional rights. See S Woolman ‘Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*’ 2008 (1) *South African Law Journal* 10. In his perceptive article, Woolman invokes Gilbert Ryle *The concept of mind* (1951) for the proposition that category mistakes occur when people multiply the number of entities to which identical properties

The mistake, once committed, is compounded in the Promotion of Administrative Justice Act, a piece of legislation that the legislature was duty bound to enact under clause 33(3) of the Constitution. The jurisdictionally controlling clause, the one that defines ‘administrative action’, is so opaque that doctors learned in the law are quite unable to construe it with confidence. Those who doubt this assertion need do no more than reflect on the *dictum* of Nugent JA in paragraph 33 of *Greys Marine*, reproduced in the accompanying footnote.<sup>66</sup>

This, if true, is error enough. But there is worse to come. There is at least a basis for saying that the very inclusion of the clause in the Bill was a mistake. The rights in Bill of Rights are mostly substantive rights created by the lawmaker and imposed from above. People who live in South Africa are, for instance, given a right to life by the Bill of Rights, and the effect of the enactment is that they can stop the state from imposing the death penalty on them. Some rights are procedural – the right of access to justice, for instance – but they too have an independent content and create self-standing protections. Each clause has the same quality, however: it confers a right on someone, some group or the public at large. The administrative justice clause purports to do this as well, but in the process commits a grave solecism, for administrative law is not a collection of rules reducible to rights. It fastens, parasite-like, on some enabling instrument<sup>67</sup> and its object is to implement the language and objects of that instrument. Administrative law is concerned with the way the courts discern such objects and considers the values and presumptions

belong. For Ryle, it made no sense to talk about ‘the mind’ as an entity over and above the brain and the rest of the body. It would be like introducing a young lawyer to partners and associates of a firm of attorneys and then being asked, at the end of the tour: ‘That was nice, but where is the firm.’ That’s the kind of category mistake that occurs here. There simply is no such thing as individual administrative rights under sec 33. To argue otherwise is to misunderstand the nature of the right and to create a concept of ‘right’ that is incoherent.

<sup>66</sup> *Grey’s Marine* (n 57 above) para 33:

While PAJA’s definition purports to restrict administrative action to decisions that, as a fact, ‘adversely affect the rights of any person’, I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on sec 33 of the Constitution. Moreover, that literal construction would be inconsonant with sec 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a ‘direct and external legal effect’, was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

<sup>67</sup> The authorities are usefully summarised in this passage in *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 1999 (4) SA 788, 797 (T):

that are employed to ensure that the objects are properly realised. In a phrase, it is adjectival, not substantive.

I accept that no particular violence is done to the coherence of the Bill of Rights if these adjectival and interpretative standards are formally recorded in the document. Though I rather doubt that the drafters of section 33 had so limited and un-ambitious an object in mind, I would be happy to surrender on this score were it not for a much more clamant objection to the clause. It is that, by putting an administrative justice clause into the Bill of Rights, the lawgiver suggests that the control exercised by the processes of administrative law is singular enough to warrant especial attention. This, in my view, is simply false. Every instrument that confers a power is subject to scrutiny and enforcement by the courts. Consensual deeds – contracts and the constitutions of societies – often vest disciplinary, regulatory or arbitral powers in tribunals and, when they do, the courts keep the tribunals within the bounds created by the deed by making appropriate orders. Yet we do not have a clause that says that ‘every person has the right to contractual justice’ of some appropriate quality.

For present purposes we can accept that the powers given to public officials may be more important; we can also accept that the control that courts exercise over them may be more pervasive; but we should not accept that the source and direction of judicial control over public power is in some separate and special category. When courts keep private tribunals in check, they do so by giving effect to the enabling instrument (contract, constitution or whatever), which they construe by means of a comprehensive set of values and

It is well established that delegated powers must be exercised within the limits of the authority that was conferred. If not, the purported exercise of the power is unlawful and a Court is quite entitled to set it aside as it would set aside the unlawful act of any other functionary who has acted outside the powers conferred upon him by the Legislature. In *Roberts v Hopwood* [1925] AC 578 at 602, Lord Sumner expressed the principle as follows:

‘In the case of an actor, who is the creation of the law, it is from some provision of that law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived.’

In similar vein, Schreiner JA said the following in *Mustapha & Another v Receiver of Revenue, Lichtenburg & Others* 1958 (3) SA 343 (A) at 347F-G: ‘[The Minister] receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised (cf *Rex v Padsha* 1923 AD 281, per Kotze JA at 308, quoted with approval in *R v Lusu* 1953 (2) SA 484 (A) at 489).’

The decision of the Constitutional Court (n 65 above) left these *dicta* undisturbed.

presumptions. In administrative law they operate in precisely the same way.

