

DEMOCRATISATION OF EMPLOYMENT IN THE PUBLIC SECTOR: A CONSTITUTIONAL PERSPECTIVE GROUNDED IN THE INTERPRETATION OF LITIGATED CASES BETWEEN 1996 AND 2013

Ernst J. Van der Westhuizen

Department of Public Administration and Management
University of South Africa
Vdwesej@unisa.ac.za

ABSTRACT

Employment in the South African public sector has reached a stage where it can be regarded as being fairly democratised. Democratised, in this context, refers to a democratic order where the state acknowledges key interest groups, such as public employees, as important role players in the procedures, systems and structures of government. One major structural arrangement which has been developed in this regard is the entrenchment of democratic values and principles, such as the acknowledgement of basic human rights as contained in the Constitution of the Republic of South Africa (1996), which sets out a framework for a new democratic order in workplaces. The courts play an important role in safeguarding the fundamental rights employees. This article highlights the democratic values and principles that govern public administration and discusses court decisions and their implications for public sector employment theory and practice. Using a qualitative research method, in which litigated court cases filed from 1996 to 2013 are interpreted and analysed, this article reports that public employees are mistreated in the workplaces and that their human rights are abused. Emerging areas of concern are unequal treatment, discrimination and unfair labour practices.

Keywords: employment, relations, public service, workplace, case law, democratic, constitutionalism



Politeia
Volume 34 | Number 2 | 2015
pp. 59–77

Print ISSN 0256-8845

INTRODUCTION

The underlying theory of employment basically has to do with the relationship between government, as employer, and its employees, who are simultaneously regarded as employees and citizens. In its essence, this relationship boils down to the rights, expectations and obligations between the two parties. Historically, this relationship has been characterised by a paternalistic apartheid system, where no effort was made to regulate organised labour in a fair and equitable manner. During the apartheid era, onerous obligations were placed on employees in the form of a “master and servant” relationship, more particularly towards black employees, and it was assumed that the government could restrict the relationship in a unilateral way without acknowledging the rights of the employees. However, the previous government was shaken to its roots by the transition from the apartheid regime to a new democratic constitutional order in 1996, when much attention was given to labour rights in the newly established constitutional dispensation (Grogan 2007: 3). These efforts resulted in a situation where the right to employment equity, the right to fair labour practices and the right to bargain collectively were entrenched in, among others, the 1996 Constitution, the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EE).

Within this new legislative context, the workplace has fundamentally changed to a new kind of employment involvement that is characterised by a supreme Constitution in terms of which everyone has the right to life, liberty and due process. This has forced the government in its dealings with public employees to be scrupulously careful of violating constitutional law principles. During the last two decades the Constitutional Court (CC), the Equality Court (EC), and other legal structures, such as the Labour Court (LC) and Labour Appeal Court, in a sequence of ground-breaking legal decisions, have basically in a revolutionary way reworked the employment relationship by introducing it to the constitutional and legal terrain. After the new constitutional order came into operation, it soon became a reality that public sector employers are not above the law. This was made evident, for example, by the highly publicised rape trial brought against the current president of South Africa, Jacob Zuma, in the Johannesburg High Court (Wikipedia Encyclopaedia 2012: internet). In addition, there are a significant number of employment claims ending in other legal structures, such as the EC, the LC and the Commission for Conciliation, Mediation and Arbitration (CCMA). In terms of numbers, five judgments have been made by the EC during 2010/2011 (Equality Court of South Africa 2012: internet). Even more significant, the number of employment lawsuits filed in the LC almost tripled (119 to 222) between 2007 and 2010 (Labour Court of South Africa 2012: internet). In terms of numbers, a high was reached in 2010/2011 when 156 000 cases of workplace

injustices were lodged at the CCMA, which is particularly important within the South African context, where labour abuse was historically prevalent (Commission for Conciliation, Mediation and Arbitration 2012). Although not directly related to litigation, the number of grievances lodged has increased dramatically over the last few financial years in the public service. National and provincial departments reported a total of 7 787 and 9 829 grievances lodged for 2009/10 and 2010/2011, respectively. In comparison, these figures represent an increase of 26 per cent in the number of grievances that were lodged against public sector employers (Public Service Commission 2010/11). These employment-related claims have moved the boundaries for practitioners as each case defines and clarifies how the laws are to apply in practice.

In light of the above, this article sheds light on a study that was done in an effort to explain the following research problem: To which extent is the basic bureaucratic and democratic principles and values realised in the 1996 Constitution and emphasised in case law? In this context, the aim of this article is threefold: to 1) highlight the current bureaucratic principles specified in the 1996 Constitution, 2) underline the democratic values that appear in the 1996 Constitution and to 3) discuss a few important case law decisions and the implications for employment in the broader public administration context. The research questions, resulting from the research aim, are the following:

- What are the classical theoretical perspectives on democracy and how do these relate to the bureaucratic principles of public administration?
- What are the views of scholars (global and local) in the field regarding democracy in public administration?
- What is the emerging democratic ethos of the 1996 Constitution?
- What are the broad democratic principles that litigated cases in the courts have set forth to guide public employers in their decision-making towards the rights of public employees?
- What do these changes suggest to the future of the theory and practice of public employment?

This article begins with a theoretical discussion on democratic public administration as currently unfolds in the field. The second part reviews the constitutionalist context (1996 Constitution) governing employer and employee relations and which values are highlighted in this regard. The third part draws on selected (most important) court cases that currently bear on public employment. A discussion on the implications for theory and practice concludes the article.

LITERATURE REVIEW: PERSPECTIVES ON DEMOCRATIC PUBLIC ADMINISTRATION

This part of the article is aimed at shedding light on the different perspectives related to democracy in the public administration field and bringing it into context with the current values, principles and rights featured in the 1996 Constitution. Basically, the author will follow a conceptual and explanatory approach in this regard.

Democracy and the bureaucratic values and principles of public administration

Redford (1969: 8) is of the view that the moral commitments of a democracy are vested in three core standards. Among these three that are typically pursued in the literature are “participation,” “equality” and “individualism,” which obviously make it a political endeavour and ultimately a matter of legal theory. First, the participation standard (cf. Chapter 1, section 1 of the 1996 Constitution) argues that the individual citizen and worker in a democracy should have a high degree of participation in the making of state decisions. This implies, for example, participation during regular elections. Second, the view of equality (cf. Chapter 2, section 9 of the 1996 Constitution) highlights the fact that each individual (including public employees) has an equal claim to life. Actually, this implies that each person has an equal claim to the attention of government, and should expect just and fair outcomes of the system. Third, individualists are mainly concerned with safeguarding the individual against the obligations enforced by social institutions, more particularly the state. In this view, individualism is seen as the belief that the human dignity (cf. Chapter 1, section 1 of the 1996 Constitution) of the individual is of extreme importance. It is the concept of individualism that is replicated in the familiar phrasing of the 1996 Constitution, that “everyone” is provided with certain rights and that it is the purpose of the South African Government to protect those rights (cf. Chapter 2, section 7 to 35 of the 1996 Constitution).

Set against the above standards of democracy, are the traditional principles of bureaucratic management of state affairs. Initially, the thinking about bureaucracy was based on models of organisation in the field of business. During these times the growth of large-scale business activities had resulted in the development of complex bureaucratic institutions, focusing on values quite different from those of a democracy. Subsequently, the bureaucratic model of organising (business) was conveyed to the public sector. A striking feature of this model is that it is dissimilar to the basic democratic standards. First, in contrast to the democratic standard of individual participation and involvement is the bureaucratic reality that large bureaucracies involve top-down decision making. Second, in comparison to the democratic standard of equality, stands the bureaucratic hierarchy where certain

individuals make decisions on behalf of others that create the possibility of unequal treatment. Third, the democratic standard of individuality also differs from the bureaucratic principle of the group or institution. In practice, this implies that the interests of the group may be regarded as more important than those of the individual (Denhardt and Denhardt 2009: 19).

From the above discussions it is clear that a modern state is typically characterised by this dual nature of administering government affairs, at the same time pursuing the goal of efficiency in a manner that is consistent with democratic principles. South African public administration is no exception to the rule. On the one hand, according to Chapter 10 of the 1996 Constitution, democratic values and principles govern public administration. This implies that the government needs to adhere to both supporting and restricting constitutional principles. Such principles are aimed at conceding authority to government and limiting such authority, respectively. In South Africa, the supreme 1996 Constitution grants and limits government authority and is thus an indication that democracy exists. For example, in the preamble to the 1996 Constitution, it is stated that the South African society is based on democratic values and fundamental human rights. Chapter 8 of the 1996 Constitution, further, makes provision for an independent judicial authority, enforcing the government to abide by court rules and decisions. On the other hand, Chapter 10 (section 195) indicates that public services must be provided efficiently, effectively and economically and at the same time fairly, equitably and without bias. The bureaucratic principles are further emphasised in section 196 where it underlines the “watchdog” role of the Public Service Commission as being responsible for ensuring the maintenance of effective and efficient public administration. The bureaucratic nature of South African public administration is also highlighted in the mandate spelled out in terms of the Public Service Act, 103 of 1994, as amended, where it is indicated that the Minister for the Public Service and Administration is responsible for establishing norms and standards relating to reform, innovation and any other matter to improve the effectiveness and efficiency of the public service, and its service delivery to the public. This matter is further highlighted in one of the objectives of the Public Service Charter, where it is indicated that state departments should be responsive in terms of service delivery, again concentrating on the efficiency principle (Public Service Coordinating Bargaining Council 2013). Obviously, the above arrangements give South African public administration a twofold character, engaging in the goal of efficiency in a way that is in harmony with democratic principles. Since the constitutional approach is our focus, the next part will be based on a review of the most common democratic values for a constitution that states can use to successfully govern their countries. This will be applied to the South African situation.

Drift in scholarship towards democratic constitutionalism

An analysis of Public Administration literature displays that, historically, the study of the discipline dates back to the doctrine of efficiency. As Woodrow Wilson (1887), quoted by Shafritz, Hyde and Parkes (2004: 28), in his well-known essay, *The Study of Public Administration maintains*, "... the field of administration is a field of business." Since Wilson, the study of Public Administration has persisted with the same focus, namely the pursuit of efficiency in the administrative state. As Lee (1992: 3-7) stated later, scholars in Public Administration have rejected the theory of democratic administration in favour of the bureaucratic theory of administration based on the philosophy of efficiency. History shows that the promotion of efficiency has been the central focus and was also one of the major bureaucratic management strategies in the public service over the years. What has transpired from this limited disciplinary position is that the field of contemporary Public Administration is persistently concentrating on a restricted road of searching for new knowledge and ways of thinking about promoting the concept of efficiency, basically ignoring the democratic values (rights) of individuality. The themes common in textbooks and journal articles, therefore, have mainly concentrated on efficiency principles, including rigorous thoughts on topics such as policy, planning, organising, financing, personnel administration, leadership, and budgeting. Renowned scholars in the field, such as Wilson (1887), Taylor (1900), Weber (1920), White (1926), Fayol (1929), Gulick and Urwick (1937), Barnard (1938), Sayre (1948), Dimock and Dimock (1964), Ostrom (1973) and Rohr (1986), Denhardt and Denhardt (2006) and Nigro and Nigro (2007), have mainly focused on the managerial principles of efficiency, effectiveness and economy. The same tendency has emerged in South African Public Administration. Although writers in South Africa took broader phenomena, such as New Public Management, Public Governance and Development into consideration, the primary focus was still on administrative and managerial functions. The topics of these writers mainly included administrative and managerial functions such as policy, policy making, organising, financing, personnel administration, control, and leadership, all of these to improve efficiency with the context of better public service delivery (Cloete 1981; Andrews 1987; Hanekom 1987; Coetzee 1988; Schwella 1991; Gildenhuis 1993; Botes 1994; Thornhill 1995; Fox 1997; Van der Waldt 1998 and Cloete 2000. Much of the thinking and the logic of the above writers depended on the bureaucratic principles of efficiency of making a public institution more successful. As a result of this exclusionary approach, a fundamental error in the study of Public Administration has developed. In summary, the classical writers have, for example, been unsuccessful in paying attention in their studies to the importance of constitutional values in the design of Public Administration.

However, there are some prominent international writers (Moore 1985; Rohr 1986; Rosenbloom 1991; Lee 1992; Riley 1993; Sylvia 1994; Tompkins 1995; Knowles and Riccucci 2001; Dresang 2002; Berman et.al 2006; Denhardt and

Denhardt 2006; Riccucci 2007), who are of the opinion that public employment cannot be looked at from only one perspective. This viewpoint was further accentuated by Rosenbloom, Kravchuk and Clerkin (2009: 5) in their book entitled *Public Administration: Understanding Management, Politics and the Law in the Public Sector*, who perceive the employment of people as also applying the legal approach. In their evaluation, they say that the legal approach traditionally has been overshadowed by the other approaches, in particular by the conventional managerial or administrative approach (application of business principles, such as efficiency). The legal approach is related to the judicial branch of government, ensuring constitutional safeguards in administering the law in real situations. By itself, dealing with human resource issues is flooded with legal and adjudicatory difficulties and should be subordinate to the rule of law. As a result, Rosenbloom, in Riccucci (2007: 201) is of the opinion that "... there is a broad recognition that public employees have significant constitutional protection against the actions of their governmental employers." In this way, he defends democratic public administration and argues that this type of approach is essential to ensure the protection of individual rights. For him, the higher ends are the recognition that democratic ideals should be regarded as being more important than the principles of efficiency highlighted by Wilson. This implies a serious departure from Wilson's original efficiency ideas.

Again, South African scholars have to a great extent disregarded the legal approach in their academic deliberations. The only exceptions here are the works of Van der Westhuizen and Wessels (2011) in their book entitled *South African Human Resource Management for the Public Sector*; Cloete's (J.J.N. - 2013) book entitled, *South African Public Administration and Management* and Van Heerden's (2009) article entitled, *The Constitutional obligation on government to perform public administration efficiently and effectively*. In these sources the writers have addressed the rights and liberties of individual public employees. It particularly emphasises the need for fair and equitable procedures in the public sector. Against this background, the following section will deal with more detail of what the 1996 Constitution states about guiding principles for democratic public employment.

Emerging democratic ethos of the 1996 Constitution

According to Van Heerden (2001: 109-110) the South African state was, prior to 27 April 1994, captured in a lengthy fundamental rights impasse, showcasing key government interventions that featured many undemocratic employment practices. The first South African constitutional period commenced on 31 May 1910 when the four former British colonies – the Cape of Good Hope, Natal, Transvaal and Orange Free State, were joined in 31 May 1910 to constitute the Union of South Africa. During this period, only White males were allowed to be elected as members of the House of Assembly, denying other population groups this right.

For the first time, the idea of racism was introduced into the constitutional system of South Africa, featuring serious inequitable principles in the government system. During the major part of the period 1945 to 1961, the then ruling political party adopted the term ‘apartheid’ to describe the then government’s persistence of racial segregation and political disregard for fundamental rights. Hence, the Republic of South Africa Constitution Act 32 of 1961, at that time did not improve matters regarding fundamental rights and democratic public administration. Constitutionally, everything pertaining to fundamental rights remained unchanged when the Republic of South Africa Constitution Act 110 of 1983 sustained a political imbalance in society by retaining the political supremacy of one group of persons (Whites) above the others. On 2 February 1990, however, an extreme transformation in government policy was declared, ushering in a new constitutional dispensation. The Republic of South Africa Constitution Act 200 of 1993 then and there terminated longstanding racial discrimination, inducted entrenched fundamental rights and accentuated the importance of applying the principle of judicial review.

The 1993 Constitution confined different interim arrangements primarily aimed at linking the apartheid era with the post-apartheid dispensation. Public administration, consequently, moved into the post-apartheid era with a noticeable challenge to reform itself and its way of doing things. Although all the obligations of the newly established 1996 Constitution may be associated with public administration in some way or the other, only certain specific stipulations have an exact connection on public administration. Above all, this is found in section 195 of the 1996 Constitution, which encompasses basic values and principles, such as fairness and equality. Much has changed during the last two decades, since the implementation of the 1996 Constitution. In this regard, the courts have almost completely changed the character of the constitutional status of public employees. This new approach accepts that South African public administration functions within the constitutional framework of all three branches of government, namely, the executive, legislative and judicial. In this move towards the legal approach, the judiciary (courts) plays a strategic role in public administration, requiring that administrators be answerable to the 1996 Constitution. This new approach does not invalidate the idea of efficiency as a notion of prominence in government affairs. For example, Chapter 10 specifies that efficiency is still necessary for public administration, but it is also expected of government to engage in the goal of efficiency in such a manner that it is in harmony with other constitutional values. Many employment cases, nowadays, are litigated and end in the courts. It needs to be emphasised that litigation can be considered as radical, mainly in view of other processes for conflict resolution such as mediation or conciliation. The above discussions serve as a point of departure for analysing the details that the 1996 Constitution has set forth for democratic public administration in the next paragraphs. Two matters are most apparent.

Purpose

Basically, the purpose of the 1996 Constitution and of all labour legislation is to advance social justice, labour peace and democratisation of the public workplace. In basic terms, according to Zurn (2011: 69), it turns out that constitutionalism can be most plainly comprehended as the legal configuration of just procedures that legitimise democratic outcomes. Above all, the 1996 Constitution comprises the most significant democratic rules of law in relation to the political history of South Africa. In this regard, it gives power to government institutions, delineates their powers, and in so doing, defines the relationship between society, government and its employees.

Key characteristics

What is further clear is that the 1996 Constitution characterises a major break with the previous political dispensation. Generally, this can be summed up as follows: Firstly, the fact that the principle of supremacy is embedded in section 1(c) and 2 of the 1996 Constitution is perhaps its most noticeable feature. It expresses that the “Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” The supremacy principle has, for example, been confirmed by the Constitutional Court’s decision in the *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* in 1995 (1995) CCT 27/95. The case arose from a dispute between the Executive Council of the Western Cape and the national government, relating to the validity of amendments to the Local Government Transition Act 209 of 1993. In this case the Court held that the courts, and not the legislature, must establish whether a law is in contradiction with the Constitution. The above arrangements have brought an end to the power Parliament had over state affairs for so many years, and which dominated the constitutional dispensation for a long time.

Secondly, constitutional supremacy would not mean anything if the specifications of the 1996 Constitution are not justiciable. Justiciability is the drift for administrative procedures in government to be more progressively like courtroom processes, creating protection for, amongst others the promotion of public interest (Rosenbloom, Kravchuk and Clerkin 2009: 31). This matter is dealt with in section 38 of the 1996 Constitution, where it indicates that anyone can approach the court, showing that the public has a sufficient interest in a requested remedy. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Others* (2004) CCT 18/03, the CC disputed the standing of Lawyers for Human Rights, who claimed to be acting in the public interest that illegal foreigners who were not formally in the country, could not be beneficiaries of the Constitution. This part relates to the Immigration Act 13 of 2002, which is concerned with how illegal foreigners at ports of entry must be treated pending their removal from South Africa. It held that the

right to freedom and security and those of arrested and detained persons are integral to the values of the 1996 Constitution, and to deny them to illegal foreigners would be a negation of our Constitution's underlying values.

The rule of law is, thirdly, another characteristic entrenched in section 1(c) of the 1996 Constitution, which means that it requires from public administrators to conform to the law. In fact, if it delivers services without legal authority it is acting outside the law. In this regard, the courts have already sought to require from public administrators to particularly not violate the law by transgressing individuals' constitutional rights. Many public administrators are now answerable for any harm that they have caused an individual if they reasonably should have known that their actions abridged an individual's human rights (Currie and De Waal 2013: 10; Rosenbloom, Kravchuk and Clerkin 2009: 31). In a number of cases the CC has showed the way by making use of the rule of law, bringing about a universal requirement that all government actions must be realistically associated with a legitimate government goal. A case in point was the decisive announcement on this requirement, which was strongly confirmed in *Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa* (2000) CCT 31/99. In this case, the Court was of the opinion that the President's decision to implement an Act by mistake was not objectively rational and was therefore unacceptable.

RESEARCH DESIGN AND METHODOLOGY

The researcher focused on three philosophical assumptions. These are: 1) ontological, 2) epistemological and 3) methodological. First, the *ontological assumptions* relate to the nature of reality and its characteristics (Creswell 2013: 20). In this study, the researcher embraced the idea of multiple realities as it is reflected in the different litigated cases against the background of the principles of democratic constitutionalism. Evidence of multiple realities included the use of specific sections in individual acts of different role players in court cases, presenting different perspectives on the phenomenon of democratic constitutionalism.

Second, with *epistemological assumptions* the researcher wanted to get as close as possible to the objects being studied. In this study, it refers to the subjective way evidence is assembled by the researcher, based on the individual views exposed in cases reviewed by the courts. Since the acts and court cases were easily accessible (on the Internet), it basically means that there was no distance between the researcher and the data. Third, the *methodological assumptions* point to the procedures the researcher used in completing this study. The methodological procedures were qualitative in nature and data were collected *via* the case study method, using evidence from court cases. Although a limited literature review was done to serve as a theoretical framework for the study, the logic that the researcher followed was mainly inductive. This implies that the content of the decisions of court cases, rather

than *priori* theories, were used as indicators to develop knowledge and practical pointers for the study. Insights from the evidence were synthesised with current literature regarding the principles of democratic constitutionalism, recognising that South African public human resource management is currently operating within the constitutional framework, demanding that public administrators be accountable to the 1996 Constitution.

The research design further focused on a qualitative approach with an interpretive style. By following this approach and style, it was possible to interpret, justify and give meaning to several areas of concern in the management of public employees within the protections set forth by the 1996 Constitution and other legislation. In fact, the interpretation of real world court cases, scrutinised by the judiciary, enabled the researcher to conceptualise the current legal principles, and construct it in such a way, that scholars and practitioners can be keenly aware of the legal rights of employees in the public sector. The sample strategy that was used was directed at constitutional rights, involving employment issues during the past 17 years. These issues were identified by searching the computerised legal databases of the CC, LC, Equality Court, Lexis Nexis and the Southern African Legal Information Institute. In total 147 cases were recognised – the 12 that were included in the review focused mainly on equity matters. While 12 does not seem like a noteworthy number, the cases are symptomatic of what seems to be a distinguishing feature nowadays of public employment. A case was built into the discussions if there was suspicion in terms of the claim regarding the applicability of an employer's employment practices.

DISCUSSION AND ANALYSIS OF CASES IN SAMPLE

As was mentioned above, the legal approach had a major effect on the public workplace during the last few decades, as witnessed in a large number of court cases, setting parameters around what is legal and what is not and constitutional in terms of what is wrong and what is not. A selection of cases has been done to illuminate the universality of human rights abuse in the workplace. They were chosen regardless of the type of institution or status of position to demonstrate the variety of laws under which the abuses were litigated. Against this background, this section of the article provides a summary of the litigated cases in the sample of this study, concentrating on those cases where employees have been mistreated. In this regard, selected rights will be discussed below, more particularly those that could possibly have a direct effect on the public employment relationship.

The constitutionality of the equal protection and discrimination doctrine is one of the key topics that have been challenged on the basis of the **right to equality** (cf. Chapter 2, section 9 of the 1996 Constitution). At its most elementary and conceptual level, the orthodox idea of equality is that people who are relatedly located in relevant ways should be dealt with in the same way. Its obvious connection is the idea that

people who are not alike should be considered differently (Currie and De Waal 2013: 210). Obviously, this raises the issue of discrimination, which is prohibited in section 9 of the 1996 Constitution, in particular discrimination on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Several ground breaking CC cases after 1994 emphasised how the right to equality has been neglected, for example: *National Coalition for Gay and Lesbian v Minister of Home Affairs* (2005) CCT 10/05 – the complaint was that section 30(1) of the Marriage Act 25 of 1961 excludes two gay parties from publicly celebrating their love and commitment to each other in marriage. The Court established that the failure of the common law and the Marriage Act to offer the means whereby same-sex couples can enjoy the same standing, privileges and responsibilities rendered to heterosexual couples through marriage institutes an indefensible intrusion of their rights; *Brink v Kitshoff* (1996) CCT 15/96 – section 44 of the Insurance Act 27 of 1943 denies married women, in specific situations, some or all of the advantages of life insurance policies conceded to them or made in their favour by their husbands. The dispute of the constitutionality of the section was referred to the CC by the Transvaal Provincial Division in terms of section 102(1) of the 1996 Constitution. On the evidence delivered, the Court held that section 44 discriminated against married women on the basis of sex and marital status, and was thus clearly a breach of section 8 of the Constitution. *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* (2004) CCT: 50/03 – this case concerns a constitutional challenge to the rule of male primogeniture as it applies in the African customary law. The Court considered the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property. It was held that it discriminates unfairly against women and illegitimate children, and it was declared to be unconstitutional and invalid. It was further ruled that the courts have an obligation under the 1996 Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality.

Another major development in the employment debate involves the application of the **right to freedom of conscience, religion, thought, belief and opinion** (cf. Chapter 2, section 15 of the 1996 Constitution). For long periods, the relationship between the church and state and between religion and the law dictated politics in large segments of the world. The history of this relationship is complex and in many cases this cooperation proved to be an unhealthy one. It suffices to say that in the Western world it developed into an unholy relationship, resulting in a situation where the state dominated the church in such a way that religious persecution was the order of the day. This gave rise to the idea of human rights for the first time. Hence, the developers of the Constitution included section 15, mainly to treat all different religions equally. This right has also been constitutionally challenged in many

cases, of which the following are perhaps the most prominent cases: *State v Lawrence* (1997) CCT 38/96 – the Seven Eleven supermarket chain, was charged and convicted for selling wine after 8 pm on a Sunday, contrary to the terms of a grocer's wine license as set out in the Liquor Act 27 of 1989. The Court held that a multi-faith, heterodox and open society lie beneath the Constitution. For that reason, embracing the approach of the reasonable South African awareness of openness and tolerance, it was determined that the recognition of Sundays, Good Friday and Christmas Day as closed days for purposes of selling liquor interferes with the right to freedom of religion in that it brings about a negative symbolic confirmation by the state of the Christian religion by sending out a message of inclusion for some and exclusion for others. The Court was further of the view that, traditionally, the legislature has articulated a particular religious preference by noticeably siding with Christianity. This led to the side-lining of those of other faiths. Any backing by the state today of Christianity as a privileged religion not only unsettles the conventional principle of impartiality regarding the matters of belief and opinion, but also dishes up recollections of unpleasant earlier discrimination grounded on religion. Although the Court noticed that the prohibition disregarded the right to freedom of religion, it was claimed that it did so in an unintended way and was thus defensible in terms of the limitation clause of the Constitution. It was maintained that the state's concern in urging a restraint on closed days is a legitimate one, while the intensity of the intrusion of the freedom of religion is fairly insignificant.

MEC for Education: KwaZulu-Natal and Others v Pillay (2007) CCT 51/06 – in this case the CC heard an appeal from the KwaZulu-Natal High Court concerning the right of a learner to wear a nose stud. The learner's mother was unhappy about this and took the matter up with the school. After a period of interaction between the school and the mother, the school elected that the learner should not be allowed to wear the stud. The matter finally served before the CC was where it was held that the regulation forbidding the wearing of jewelry had the possibility of indirect discrimination because it gave consent to certain groups of learners to express their religious and cultural identity without restrictions, while disallowing that right to others. The Court further noted that both obligatory and voluntary practices qualified for protection under the Equality Act 4 of 2000. It was contended that the school had, therefore, tampered with the learner's religion and culture. As that liability was forced onto others, the school's intervention aggregated to discrimination against this particular learner. Hence, the Court concluded that the school's discrimination against the learner was unfair. In *Strydom v Nederduitse Gereformeerde Gemeente, Moreletapark* (2009) EQC 26926/05, the complainant, a music teacher, taught at the arts college

of the church. When the fact surfaced that he was homosexual the church ended his contract, as his sexuality was in conflict with church doctrine. He has then instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, alleging that the church discriminated against him. The Court ruled that the church had unfairly discriminated against the former complainant on the grounds of his sexual orientation. The equality criterion in this case is related to court views taken in the cases *National Coalition for Gay and Lesbian v Minister of Home Affairs and Others v Minister of Home Affairs* (2005) CCT 10/05.

Labour relations are similarly problematic. With regard to labour relations, litigation in this area of public employment has progressively increased in recent years. The **right to fair labour practices** in the workplace was initially refined by the former Industrial Court that was instituted in 1979 after the Wiehahn Commission suggested changes to the then labour system. However, the functioning of the Industrial Court has been attacked for being excessively technical. This resulted in the clause inserted in section 9 of the 1996 Constitution that legislative measures should be taken where people are disadvantaged by unfair discrimination. This right is also specifically guaranteed in section 185 of the Labour Relations Act 66 of 1995. Again, this right has also been constitutionally contested and this is illustrated by a brief overview of the following cases: The *Hofmann v South Africa Airways* (2000) CCT17/00 case is a typical example in this regard. This case concerns the constitutionality of the South African Airways' (SAA) practice of refusing to employ Jacques Hofmann as cabin attendant who was living with the Human Immunodeficiency Virus (HIV). The CC required SAA to thoroughly examine the necessity to obstruct the right to equality of cabin attendants. In an undisputed decision, the CC held that the SAA had violated Mr Hofmann's constitutional right not to be unfairly discriminated against. The argument was raised that not every person who is HIV positive poses the risks alleged by the SAA. This particular court case recognised that South African public administration functions within the new democratic constitutional framework, emphasising that public servants have certain democratic rights. The *Fredericks v Member of the Executive Council Responsible for Education and Training in the Eastern Cape* (2002) CCT 27/01 case involved a claim by employees that the respondent had acted unfairly by not allowing them to retire voluntarily and claim severance benefits in terms of the collective agreement. The CC argued that the applicants relied on their rights in terms of section 9 and 33 of the 1996 Constitution to fair administrative justice and equality and the case was remitted to the High Court to be dealt with in terms of this judgment.

The *Petronella Nellie Nelisiwe Chirwa v Transnet Limited and Others* (2007) CCT 78/06 case arose from the dismissal of the applicant in the capacity of human resources executive manager of the Transnet Pension Fund Business Unit. The dismissal was preceded by an enquiry held by the applicant's manager, on the

grounds of inadequate performance and poor employee relations. The applicant approached the CC in terms of section 195 of the 1996 Constitution, which sets out the principles that must guide public administration which include fairness and objectivity. It was held that the applicant relied upon a breach of the provisions of the LRA and that, therefore, the Labour Court had exclusive jurisdiction. For these reasons it was agreed that the appeal should be dismissed.

CONCLUSION

The main aim of this article was threefold. More particularly, the researcher drew attention to the bureaucratic principles highlighted in the 1996 Constitution, related it to the democratic values featuring in the 1996 Constitution and compared it with some key case law decisions and the implications for employment in the broader public administration context. Applicable literature, legal data, court cases, reports issued by related institutions and scholarly articles were studied. Although, all the aforementioned sources offered valuable data to the research project, the sources that clarified the solution to the research problem and answered the research questions the best, was that of the court case rulings.

The findings in the analysis showed that South African public administration has a dual character, simultaneously employing bureaucratic principles by focusing on the efficient and effective management of government affairs in a way that is in congruence with democratic principles. In this regard, the 1996 Constitution sets new standards for the management of people in the public sector. For example, Chapter 10 of the 1996 Constitution recognises that public services must be governed by bureaucratic principles such as efficiency. However, the same Constitution underlines adherence to democratic principles by bringing to light the respect government should have for the fundamental rights of its citizens (Chapter 2). The discussions also indicated that many writers have during earlier years mainly placed the emphasis on the efficiency principles which gave the discipline a very narrow orientation. Nevertheless, several international writers in recent years have questioned this classical approach to public administration, indicating that its fundamental idea was at odds with the constitutional design of a democratic ethos. In this regard, the literature provided some very interesting findings and it was established that nowadays the views of these scholars are more associated with the judicial branch of government, emphasising that government should protect the rights of employees as well. In the next part of the article an overview of the emerging democratic ethos of the 1996 Constitution was given. It was indicated that public administrators now operate in a judicial milieu and are accountable to the 1996 Constitution. Hence, many employment cases that do not comply with the requirements as set by the Constitution are litigated and end in the courts. A key democratic characteristic highlighted in this article is perhaps the fact that the 1996 Constitution is the supreme

law of the country. The judgment validating this fact was found to be best illustrated in the Constitutional Court's decision in the *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* in 1995.

Following on this, the researcher has further drawn attention to the arguments set forth in selected litigated cases in the courts. While the cases are intrinsically interesting, it is most important in the context of this article, since one needs to understand the challenges now confronting practitioners of the public human resource function, more particularly the possibilities of human rights abuses in the workplace. A general observation of the collected data indicates that emerging areas of concern include possible exploitations in the field of not treating people equally, discriminating against them and the application of unfair labour practices. The 12 cases in the article are intended to be illustrative only. While the number 12 does not seem substantial, the cases are symptomatic of what appears to be an intensifying recognition that public employees, who believe that their rights have been violated, can appeal to the courts for protection. The discussions have therefore, established that employers do not treat the protection of human rights with the appropriate level of seriousness. Therefore, many cases end in the courts. A recommendation resulting from this article, is that if due attention to this priority is not taken into account public employers may even be more involved in court cases which may not be defensible. Having alerted public employers of this problem and its consequences, it is expected that the relevant role players involved with the management of people in the public sector will take the necessary action to ensure that there is a higher level of respecting for human rights. It is suggested that intensive training be provided to develop a culture (principles and values) grounded in the provisions of the 1996 Constitution. The new democratised environment demands an approach of public administrators that engage in efficiency that is consistent with constitutional values. In fact, the new emphasis on democracy makes public administrators obliged to respect public employees' constitutionally guaranteed freedoms and calls for, among others, equal treatment of staff, elimination of discrimination and application of fair human resource practices. The 1996 Constitution already includes a framework for the constitutional rights of employees. Hence, it is important for public employers to adopt a code of professional ethics in the policies, safeguarding constitutional values. Where do we go from here? The findings of this article provide a rich base of valuable information which informs the future curricula of Public Administration. However, the usefulness of this article could only be truly determined in the content of future Public Administration curricula and research commitment of participants in the field, measuring the progress toward the reign of constitutional democratic values. It was further determined in this article that democratic values are imposed inconsistently, which may result in more challenges by frustrated employees. In light of this, it is suggested that the Public Administration discipline in South

Africa should also focus on the primacy of constitutional values in their educational programme. Hence, academics in the field should take the lead and make sure that their educational programme reflect and promote constitutional values.

Note: For this study, the researcher applied for ethics compliance in terms of the University's Ethics Policy where he is currently employed. An ethics compliance certificate was issued by the relevant Ethics Committee.

REFERENCES

- Brink v Kitshoff*. (1996). CCT 15/96. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 4 April 2013).
- Commission for Conciliation, Mediation and Arbitration. 2012. Annual Report 2010-2011. Available at <http://www.ccma.org.za> (accessed 15 January 2013).
- Constitution of the Republic of South Africa, 1996. Available at <http://www.info.gov.za> (accessed 16 November 2013).
- Creswell, John. W. 2013. *Qualitative inquiry & Research design: Choosing among five approaches*. London: Sage.
- Currie, I. and De Waal, J. 2013. *The Bill of Rights Handbook*. Cape Town: Juta.
- Denhardt, R.B. and Denhardt, J.V. 2009. *Public administration: An action orientation*. Belmont: Thomson Wadsworth.
- Employment Equity Act 55 of 1998. Available at <http://www.info.gov.za> (accessed 4 January 2014).
- Equality Act 4 of 2000. Available at <http://www.info.gov.za> (accessed 4 March 2014).
- Equality Court of South Africa. 2012. Judgments summarised 2010-2011. Available at <http://www.saffii.org.za> (accessed 15 January 2012).
- Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* (1995). CCT 27/95. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 14 April 2013).
- Fredericks v Member of the Executive Council Responsible for Education and Training in the Eastern Cape* (2002) CCT 27/01. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 17 February January 2014).
- Grogan, J. 2007. *Collective Labour Law*. Cape Town: Juta.
- Harksen v Lane and Others*. (1997) CCT 9/97. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 7 January 2013).
- Hofmann v South Africa Airways*. (2000) CCT17/00. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 7 January 2013).
- Immigration Act 13 of 2002*. Available at <http://www.info.gov.za> (accessed 15 June 2014).

- Insurance Act 27 of 1943*. Available at <http://www.gov.za> (accessed 5 April 2014).
- Jooste v Score Supermarket Trading*. (1998) CCT 15/98. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 22 May 2013).
- Labour Court of South Africa*. 2012. Judgments summarised 2007-2010. Available at <http://www.saflii.org.za> (accessed 2 February 2012).
- Labour Relations Act 66 of 1995*. Available at <http://www.info.gov.za> (accessed 12 December 2013).
- Lawyers for Human Rights and Another v Minister of Home Affairs and Others* (2004). CCT 18/03. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 26 June 2013).
- Lee, Y.S. 1992. *Public personnel administration and constitutional values*. London: Quorum.
- Liquor Act 27 of 1989*. Available at <http://www.gov.za> (accessed 7 March 2014).
- Local Government Transition Act 209 of 1993*. Available at <http://www.gov.za> (accessed 15 March 2014).
- Marriage Act 25 of 1961*. Available at <http://www.gov.za> (accessed 30 March 2014).
- MEC for Education: KwaZulu-Natal and Others v Pillay* (2007) CCT 51/06. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 10 August 2014).
- National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. (2005) CCT 11/98. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 12 August 2013).
- Petronella Nellie Nelisiwe Chirwa v Transnet Limited and Others* (2007) CCT 78/06. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 9 March 2014).
- Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa* (2000). CCT 31/99. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 9 November 2013).
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. Available at <http://www.gov.za> (accessed 17 June 2014).
- Public Service Act 103 of 1994*. Available at <http://www.info.gov.za> (accessed 12 April 2014).
- Public Service Commission. 2010/2011. *Fact sheet on grievance resolution for the 2010/11 financial years*. Available at <http://www.psc.gov.za> (accessed 7 February 2013).
- Public Service Coordinating Bargaining Council. 2013. *Service Charter: Resolution 1 of 2013*. Available at <http://www.pscb.gov.za> (accessed 14 February 2014).
- Rautenbach, I.M and Malherbe, E.F.J. 2013. *What does the Constitution say?* Pretoria: Van Schaik.
- Redford, E.S. 1969. *Democracy in the administrative state*. New York: Oxford.
- Republic of South Africa Constitution Act 32 of 1961*. Pretoria: Government Printer.
- Republic of South Africa Constitution Act 110 of 1983*. Pretoria: Government Printer.
- Riccucci, Norma. M. 2007. *Public personnel administration and labor relations*. New York: M.E. Sharpe.

- Rosenbloom, D.H., R.S. Kravchuk, and R.M. Clerkin. 2009. *Public administration: Understanding management, politics, and law in the public sector*. Boston: McGraw-Hill.
- Shafritz, Jay M., Albert C. Hyde, and Sandra J. Parkes. 2004. *Classics of Public Administration*. Belmont: Wadsworth Thomson.
- South Africa Government Online. *Public Service Charter*. Available at <http://www.gov.za> (accessed 27 July 2014).
- South African Human Rights Commission and Another v President of the Republic of South Africa and Another* (2004) CCT: 50/03. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 2 November 2013).
- State v Lawrence* (1997) CCT 38/96. Constitutional Court of South Africa. Judgments summarised 1995 – 2014. Available at <http://www.constitutionalcourt.org.za> (accessed 9 September 2013).
- Strydom v Nederduitse Gereformeerde Gemeente, Moreletapark* (2009) EQC 26926/05. Equality Court of South Africa. Available at <http://www.saflii.org.za> (accessed 14 August 2014).
- Van Heerden, M. 2001. *The Bill of Rights in public administration*. Unpublished thesis submitted in accordance with the requirements for the degree of Doctor of Literature and Philosophy in the subject Public Administration at the University of South Africa. Pretoria: University of South Africa.
- White Paper on Affirmative Action in the Public Service*. Available at <http://www.info.gov.za> (accessed 21 April 2014).
- White Paper on the Transformation of the Public Service of 1995*. Available at <http://www.info.gov.za> (accessed 9 December 2013).
- Wikipedia Encyclopaedia*. 2012. Jacob Zuma rape trial. Available at http://www.en.wikipedia.org/wiki/Jacob_Zuma_rape_trial (accessed 19 January 2012).
- Wilson, Woodrow. 1887. The study of Administration. *Political Science Quarterly* 2: 198-222.
- Zurn, Christopher. F. 2011. Judicial review, constitutional juries and civic constitutional fora: Rights, democracy and law. *Theoria*: 63-75.