The inter-relationship between administrative law and labour law: Public sector employment perspectives from South Africa*

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Abstract

The legal position of public sector employees who challenge employment decisions taken by the state or organs of state in its/their capacity as employer in South Africa has long been problematic. Even though at least four judgments by the Constitutional Court of South Africa have considered whether employment-related decisions in the public sector domain do or could amount to administrative action and whether administrative law and/or labour law should be applicable for purposes of dispute resolution, legal uncertainty remains the order of the day due to a combination of factors. The authors assess whether (and to what extent) the rich South African administrative-law jurisprudence remains of importance in relation to the public employment relationship, bearing in mind the applicable legal considerations, including the inter-relatedness, interdependence and indivisibility of the range of applicable fundamental constitutional rights. Considering the debate in other jurisdictions on this issue, the authors develop a paradigm for situating different employment-related disputes as matters to be decided on labour and/or administrative-law principles in South Africa. This requires an appreciation, to the extent relevant, of the unique nature public sector employment relationships and a detailed investigation of the applicable legal sources and precise parameters of the cases already decided in the

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country. The position of employees deliberately excluded from the scope of labour legislation is analysed, for example, as is the legal position of high-ranking public sector employees. The outcome of the investigation is important for determining the legal principles to be applied in cases involving public sector employees in their employment relationship, and for purposes of determining the question of jurisdiction. Recent cases, for example where the courts have permitted the state, as employer, to review its own disciplinary decision (via a state-appointed chairperson of a disciplinary hearing) on the basis that this amounts to administrative action which is reviewable, are also examined in the light of the uncertainty regarding the precise nature and scope of the review.

1 Introduction

The legal position of public sector employees who challenge employment decisions taken by the state or organs of state in their capacity as employer in South Africa has long been problematic. Even though at least four decisions of the Constitutional Court of South Africa (*Fredericks*, *Chirwa*, *Gcaba* and *Khumalo*) have considered whether employment-related decisions in the public sector domain do, or could, amount to administrative action and whether administrative law and/or labour law should be applicable for purposes of dispute resolution, legal uncertainty remains the order of the day. This is due to a combination of factors, including –

- the debatable scope of the directly applicable constitutional rights;
- the impact of other public service-specific constitutional provisions;
- the ambit of constitutionally mandated financial and other action and processes relevant to the public sector;
- the constitutionally prescribed development of the common law;
- legally sanctioned employer managerial and executive decision-taking prerogatives impacting on the employment context and labour relations sphere in the public service;
- the manner in which the applicable legislation has been drafted and the statutory retention of (administrative law) common-law jurisdiction to review decisions taken and acts performed by the State in its capacity as employer; and
- the approach of the Constitutional Court itself, and the way in which the Labour Court, the Labour Appeal Court, the High Court and the Supreme Court of Appeal have interpreted the Constitutional Court's pronouncements.

Considering the debate also in other jurisdictions on this matter (eg, with reference to the adoption of a status or functionality approach characterising public employment), the authors present a set of pointers for situating different employment-related disputes as matters to be decided on labour and/or administrative law principles in South Africa. This requires an appreciation of the

unique nature, to the extent relevant, of public sector employment relationships and a detailed investigation of the applicable legal sources and precise parameters of the cases already decided in the country. The position of employees deliberately excluded from the scope of labour legislation is reflected on, for example, as is the legal position of high-ranking officials employed in the public sector.

The outcome of the proposed investigation is important for determining the applicable legal principles to be applied in cases involving public sector employees in their employment relationship, and for purposes of determining the question of jurisdiction. Recent cases, for example where the courts have permitted the state, as employer, to review its own disciplinary decision (via a state-appointed chairperson of a disciplinary hearing) on the basis that this amounts to administrative action which is reviewable, are considered, given the uncertainty regarding the precise nature and scope of the review.

In sum, the authors assess whether (and to what extent) the rich administrative law jurisprudence of South Africa remains of importance in relation to the public employment relationship, bearing in mind the applicable legal considerations, including the inter-relatedness, interdependence and indivisibility of the range of applicable fundamental constitutional rights.

2 The constitutional framework

The Bill of Rights is a cornerstone of democracy in South Africa and enshrines the rights of all people in the country, affirming the democratic values of human dignity, equality and freedom.[1] The state must respect, protect, promote and fulfil the rights in the Bill of Rights.[2] When applying a provision of the Bill of Rights, a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right. It may also develop rules of the common law to limit the right, provided that such limitation is in accordance with section 36(1) of the Constitution.[3]

Two of the rights contained in the Bill of Rights are central to the topic at hand. Firstly, in terms of section 23(1) of the Constitution, 'everyone has the right to fair labour practices'. The remainder of this section of the Constitution provides specifically for rights for workers, employers, trade unions and employers' organisations. Legislation such as the Labour Relations Act[4] has been designed

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[1]Section 7(1) of the 1996 Constitution.
[2]Section 7(2) of the 1996 Constitution.
[3]Section 8(3) of the 1996 Constitution. Section 36 of the 1996 Constitution, the so-called 'general' limitations clause, provides that rights in the Bill of Rights may only be limited by a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society, after consideration of certain specified factors.
[4]Act 66 of 1995.

primarily to give effect to and regulate the various fundamental rights conferred by this section of the Constitution.[5] Secondly, in terms of section 33(1) of the Constitution, 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'. Pursuant to section 33(3) of the Constitution,[6] the Promotion of Administrative Justice Act,[7] gives effect to section 33 of the Constitution, specifically ensuring that administrative action is lawful, reasonable and procedurally fair, and that everyone whose rights have been adversely affected by administrative action receives written reasons for this.[8]

It is also worth noting that when interpreting the Bill of Rights, a court, tribunal or forum:[9]

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law;[10] and
(c) may consider foreign law.

As far as jurisdiction is concerned, while the LRA establishes a basis for the Commission for Conciliation, Mediation and Arbitration, a system of Bargaining Councils as well as a Labour Court and Labour Appeal Court to resolve labour disputes in general, section 169(b) of the Constitution provides that 'a High Court may decide any other matter not assigned to another court by an Act of Parliament'. Section 157(2) of the LRA acknowledges the jurisdiction of the High Court in respect of a violation of a fundamental right arising from employment or labour relations or 'any dispute over the constitutionality of any executive or administrative conduct … by the state as an employer'.

Finally in this regard, it must be noted that the Bill of Rights applies to all law, and binds natural and juristic persons depending upon the nature of the right and the nature of any duty imposed by the right.[11] In addition, when interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[12]

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[5]Section 1(a) of the Labour Relations Act 66 of 1995 ('the LRA').
[6]This section provides that 'national legislation must be enacted to give effect to these rights and must a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; b) impose a duty on the state to give effect to the administrative law rights and c) promote an efficient administration.
[7]Act 3 of 2000 ('PAJA').
[8]Long title of PAJA, read with the Preamble to that Act.
[9]Section 34 of the 1996 Constitution states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.
[10]Sections 231-233 of the 1996 Constitution provide further direction in this regard.
[11]Section 8(1) and (2) of the 1996 Constitution.
[12]Section 39(2) of the 1996 Constitution.

2.1 Constitutional perspectives on public-sector employment relationships and the scope of the applicable constitutional rights

> The nature of the legal employment relationship between the applicant, a public employee, and the department, an organ of state, is a complex one that is not … capable of exclusionary compartmentalization … The common law contract of public employment is 'framed' by administrative law principles and should include, as a constitutionally mandated implied term, the right to fair labour practices. Fairness is required in administrative justice, in labour legislation, and, yes, in contract too. And fairness has much to do with equality, dignity and freedom; founding values of our Constitution. To view these interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole and complete picture of such a relationship. And in the process, one might forget to ask and assess the real substantive issue at stake in a particular case.[13]

One perspective in relation to the characterisation of powers exercised by a public entity in its employment relations suggests that any type of employment must be governed by section 23 of the Constitution and the labour legislation in such a way that section 33 of the Constitution and PAJA should be completely excluded.[14] The alternative view suggests that administrative law and labour law are both at play when public power is exercised, irrespective of the context, so that remedies are available simultaneously in both branches of law in cases of public-sector employment.[15]

The structure of the South African Constitution is closely connected to the arguments that have developed in support of both of these perspectives. For example, Murphy AJ in *South African Police Union v National Commissioner of the SAPS*[16] argued that cases which supported the alternative view, such as *Administrator, Transvaal v Zenzile*,[17] had emerged in the pre-constitutional era when public-sector employees had not enjoyed full labour rights.[18] There was, so

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[13] *Nakin v MEC, Department of Education Cape Province* 2008 5 BLLR 489 (Ck) para 50.
[14] Hoexter *Administrative law in South Africa* (2012) 210.
[15] *Id* 211.
[16] (2005) 26 *ILJ* 403 (LC).
[17] 1991 1 SA 21 (A).
[18] Van Jaarsveld, Fourie and Olivier (eds) 'Public sector employment law' in (2009) 13 *LAWSA (The Law of South Africa) – Labour law and social security law* Part 1 para 994 for criticism of the view that cases such as *Zenzile* are now irrelevant. The authors note the long line of pre-PAJA cases which acknowledge the entitlement of public servants to administrative justice relief, even at a time when public servants enjoyed the protection of a specialised labour law regime provided for in the Public Service Labour Relations Act of 1993.

the argument went, no longer any need to use administrative law to advance labour rights.[19] Likewise, Cheadle argues that:

> Although the two rights and their respective laws may share similar characteristics, the Constitution contemplates that these two rights and the areas of law that they cover will now be subject to different forms of regulation, review and enforcement. Accordingly, as a matter of constitutional scope, the right to fair administrative action in section 33 of the Constitution does not apply to administrative decisions concerning employment and labour relations because those relations are comprehensively dealt with under section 23.[20]

By contrast, decisions of the High Court in cases such as *POPCRU v Minister of Correctional Services (No. 1)*,[21] highlighted factors such as the following in support of the alternative perspective (in the context of prisons):[22]

- The power to dismiss (in this case, correctional officers for refusing to work) had been vested in a public functionary who was required to exercise it in the public interest;
- There was a statutory basis for the power to employ and dismiss correctional officers;
- The department was subservient to the Constitution, in general, and, particularly, to section 195 of the Constitution;
- The character of the department was public and the public interest was paramount in the proper administration of prisons.

Importantly, Plasket J succinctly summarised the basis for administrative law's continued application in public employment matters as follows:

> there is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts.[23]

The Constitutional Court dealt with the issue directly in *Chirwa v Transnet Ltd*,[24] a case pertaining to a challenge on administrative-law grounds to a

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[19] *SAPU v National Commissioner of the SAPS* (n 16) paras 65-66 as quoted in Hoexter (n 14) 211.
[20] Cheadle 'Deconstructing *Chirwa v Transnet*' (2009) 30 *ILJ* 741. For criticism of 'specificity' as an absolute barrier to interdependent interpretation in the context of existing jurisprudence, see Loots *Public employment and the relationship between labour and administrative law* LLD thesis University of Stellenbosch (Stellenbosch) (2011) 271.
[21] 2008 3 SA 91 (E).
[22] *Id* paras 53-54.
[23] Paragraph 61, as quoted in Hoexter (n 14) 212.
[24] 2008 4 SA 367 (CC).

dismissal in the public sector. Dismissing the pre-constitutional decision in *Zenzile*, the majority concluded that dismissal was essentially a claim grounded in the LRA and that, as such, the Labour Court enjoyed exclusive jurisdiction in such matters. Apparently influenced by policy considerations, the court placed emphasis on ensuring that public-sector employees were not unfairly advantaged in a manner that would encourage forum-shopping and would result in the development of a dual system of law.[25]

The approach of the Constitutional Court has been criticised as lacking clear legal reasoning and contradicting the express terms of section 169 of the Constitution and section 157(2) of the LRA, quoted above.[26] It has also been noted that the decision is somewhat inconsistent with an earlier decision of the Constitutional Court in *Fredericks*,[27] which had confirmed that the purpose of section 157(2) of the LRA was not to take away the original jurisdiction of the High Court (but instead to confer concurrent jurisdiction on the Labour Court). From a broader constitutional perspective, the approach of the Constitutional Court in *Chirwa* suggested a 'compartmentalized' approach to sections 23 and 33 of the Constitution, rather than treating these rights in a seamless, integrated fashion.[28]

The decision in *Chirwa* also appears to adopt a more restrictive approach than the Constitutional Court itself adopted in *Sidumo*. In this case, the court found that arbitration decisions of CCMA commissioners constituted administrative action in terms of section 33 of the Constitution, despite PAJA being inapplicable to such decisions. Confirming that the LRA was specialised legislation dealing with administrative action in the labour sphere, the court explained that the LRA was to be interpreted in accordance with section 33 of the Constitution in this respect, so that section 145 of the LRA would have to meet the requirements of ensuring administrative action that is lawful, reasonable and procedurally fair:[29]

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[25] *Id* para 65.

[26] See *Makhanya v University of Zululand* 2010 1 SA 62 (SCA) para 9 and *Makambi v MEC for Education, Eastern Cape* 2008 5 SA 449 (SCA) para 21. See, in general in this regard, Hoexter (n 14) 213.

[27] *Fredericks v MEC for Education and Training, Eastern Cape* 2002 2 SA 693 (CC).

[28] See *Makhanya* (n 28) para 8; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC); Hoexter (n 14) 214. Mrs Chirwa seems to have been prejudiced by the fact that she had originally classified her dispute as an unfair dismissal in terms of the LRA and section 23 of the Constitution and, despite the fact that this approach was abandoned before the High Court and Constitutional Court (where she sought to rely squarely on administrative law), the initial foray counted against her. In *Nakin* (n 13), Froneman J emphasised that 'fundamental constitutional rights do not operate in tightly fitted compartments' and are in fact 'overlapping and interconnected' (para 31).

[29] *Sidumo* (n 28) paras 89 and 91. See, in general, Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *CCR* 213.

> In this new type of (extra-special?) statutory review the grounds specified in the LRA are suffused with the content of the rights to administrative justice in section 33, thus as it were achieving full administrative-law review via labour law…PAJA and section 145 of the LRA exist alongside one another as separate and equally valid manifestations of section 33, and there can thus be no conflict between them …[30]

Perhaps unwittingly highlighting the difference between this approach and that adopted in *Chirwa*, the court emphatically rejected the argument that the rights implicated in CCMA arbitrations are those in sections 23 and 34 *and not section 33 of the Constitution*, [our emphasis] as follows:[31]

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

The Constitutional Court itself in *Gcaba v Minister for Safety and Security*[32] attempted to clarify the situation caused by the seemingly differing decisions in *Fredericks* and *Chirwa*. The case dealt with promotion to a position in the South African Police Service and the Court affirmed (as it had done in previous cases involving, for example, freedom of expression) the interdependence and inseparability of human rights.[33] Despite this, it has been suggested that even the reasoning of the court in *Gcaba* in fact perpetuates a compartmentalised view of the two main constitutional rights applicable, and that the court actually remains categorical in respect of classifying disputes as being either labour-related or administrative in nature (but not both).[34] The court held as follows:[35]

> Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the

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[30] Hoexter (n 29) 215.
[31] *Sidumo* (n 28) para 112.
[32] 2010 1 SA 238 (CC).
[33] *Id* para 54. Also see Hoexter (n 14) 214 and De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258 at 264.
[34] See Hoexter (n 14) 217.
[35] *Gcaba* (n 32) para 64. For cases which support and implement this line of reasoning, see Quinot 'Administrative law' in *Annual Survey of South African Law* (2010) 48-50. For criticism of this decision, given that it concerned the appointment of a station commanded in Grahamstown, a decision which must have been in the public interest, see Ngcukaitobi 'Precedent, separation of powers and the Constitutional Court' (2012) *Acta Juridica* 154.

> 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.

The effect of this approach has been criticised given that it results in the fallacious position that the existence of a 'primary' or more specifically applicable right (in *Chirwa* and *Gcaba's* cases, the right to fair labour practices in section 23 of the Constitution) operates to the exclusion of the application of other, more general rights (namely, the right to just administrative action in section 33 of the Constitution).[36] Hoexter has cogently explained the flaws in such an approach, which runs counter to the principle that litigants ought to be entitled to rely on the full protection of *any and all* applicable rights. The contrary position would result in more 'general' constitutional rights, such as the right to just administrative action, being completely negated in matters involving other (more specific) constitutional rights, such as environmental and property claims.[37]

Similarly, Loots argues that both administrative and labour law are aimed at the promotion of social justice and that 'even though different rights are expressed in separate provisions of the Bill of Rights, the normative web of the Constitution dictates against an interpretation that views fundamental rights as forever unconnected regardless of the circumstances of a case'.[38] Loots' thesis highlights that the rights of fair labour practices and just administrative action, which are informed by the 'living norm' of fairness, are not isolated in function and must be interpreted, adapted and applied in a *flexible* manner and with due regard to contemporary political, social and economic contextual considerations.[39] Loots goes on to explain that administrative law and labour law are inter-related and mutually supporting rights.[40] She cites the implicit recognition of interdependence in both labour and administrative law in support of this,

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[36] *Ibid*. Hoexter cites Cheadle (n 20) at 745 and *De Villiers v Minister of Education, Western Cape* 2009 2 SA 619 (C) para 26 as being in support of such an approach.
[37] Hoexter (n 14) 217.
[38] Loots (n 20) 259. Also see *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (n 28) para 135.
[39] Loots (n 20) 263.
[40] *Id* 271. Also see *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC) para 23. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC), Mokgoro J elaborated on this interdependence, indicating that rights 'reinforce one another at the point of intersection' (para 41).

suggesting that it is this that allows for a purposive approach to the disclosure and consideration of social, economic, moral and political factors within the scope of public employment:[41]

> … the meaning given to one right 'can also be enriched by recognising and giving appropriate expression to the inter-connectedness between that right and other fundamental rights'.[42]

Although the court in *Gcaba* noted that conduct in the workplace may result in a variety of different claims,[43] the focus of the judgment was on avoiding duplicate jurisdiction and ensuring that the 'scourge of forum-shopping' would be minimised. To achieve this, the court ultimately concluded that labour-related conduct of public officials did not amount to administrative action.[44] It relied on the following in support of this outcome:

- The distinction between the areas of procurement and employment was emphasised;[45]
- The decision in *Chirwa* that dismissals did not amount to administrative action;[46]
- The decision not to appoint or promote Mr Gcaba was a 'quintessential labour-related issue' that had few or no direct consequences for citizens apart from the appellant himself.[47]

If anything, it may be argued that the decision in *Gcaba* represents a policy decision of sorts by the Constitutional Court to try to simplify the quagmire of difficulties that had arisen due to the apparently conflicting approaches in *Fredericks* and *Chirwa* (and the resulting plethora of subsequent High Court, Labour Court, Labour Appeal Court and Supreme Court of Appeals decisions). The path chosen arguably sacrificed a proper reading of the Bill of Rights (including the necessary grappling with the 'web' of inter-related rights) at the altar of simplicity. What ultimately emerged, however, leaving aside the decision in *Sidumo* and instances where administrative principles have expressly been incorporated into contract, was the clear idea that the role of administrative law

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[41] Loots (n 20) 274.
[42] *Id* 274, quoting *Nakin* (n 13) para 37.
[43] *Gcaba* (n 32) para 53.
[44] *Id* para 69. For a similar decision, see *NDPP v Tshavhungwa* [2010] 1 All SA 488 (SCA).
[45] *Id* para 65, referring to *SAPU* at paras 52-53.
[46] For criticism of this particular conclusion, see Hoexter 'From *Chirwa*to *Gcaba*: An administrative lawyer's view' in Kidd and Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 47 at 57-59.
[47] *Gcaba* (n 32) para 66. See, in general, Hoexter (n 14) 215-216.

in labour disputes in future would be the exception rather than the rule (also given that the majority of employment-related disputes, namely those dealing with unfair dismissals or unfair labour practices, were now subject to the decisions in *Chirwa* and *Gcaba*).

Despite this attempt, on the part of the Constitutional Court, to exclude labour-related conduct from the ambit of the right to just administrative action so that the High Court's jurisdiction in such disputes would be ousted, a range of instances have been identified where the position is not as straightforward as a simple unfair dismissal or unfair labour practice relating to promotion dispute. These include:[48]

- Contractual disputes and equality challenges that may be brought to the High Court, including claims for damages;[49]
- Approaching the High Court on the basis of the principle of legality;[50]
- Cases where the 'public impact' is assessed as being of such a nature so as to warrant High Court intervention, on the basis that the employment situation in question has a more far-reaching public effect than is typically the case;[51]

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[48]See, in general, Hoexter (n 16) 217-218.

[49]*Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA). Cohen, for example, argues that where a litigant frames a dispute as a contractual breach, this might result in the statutory framework being legitimately circumvented: Cohen 426. See also Olivier 'Public service employment: General framework and principles' in Van Jaarsveld, Fourie and Olivier (eds) *Principles and practice of labour law* (2013) (Service Issue 25) (Chapter 19) paras 1100A; 1104. In *Holgate v Minister of Justice* 1995 3 SA 921 (E) it was held that the relevant parts of the erstwhile Public Service Staff Code are contractually incorporated in the civil servant's relationship with the government, so that an aggrieved employee may request a contractual remedy in addition to relying on administrative law review. In *Transman (Pty) Ltd v Dick* 2009 *ILJ* 1565 (SCA), reliance was placed on the common law in approaching the High Court for an order reviewing and setting aside the findings and recommendations of the employer's disciplinary body and its decision to terminate employment. The Court held that a cause of action based on a contractual breach remained possible: para 18. Also see *Tsika v Buffalo City Municipality* 2009 *ILJ* 105 (E) and *Mogothle v Premier of the Northwest Province* 2009 *ILJ* 605 (LC).

[50]See *Fedsure Life Assurance Ltd v Greater Jhb Transitional Metro Council* 1999 1 SA 374 (CC) as authority for the principle that legality operates as a ground for the residual review of all those exercises of public power that did not qualify as administrative action. In *Khumalo v MEC for Education: KZN* [2013] ZACC 49, the majority of the Constitutional Court held that the MEC's attempt to declare a promotion (to Mr Khumalo) and protective promotion (to Mr Ritchie) invalid (in terms of s 158(1)(h) of the LRA), was an application for judicial review based upon the principle of legality. This section provides that the Labour Court has jurisdiction to consider such disputes.

[51]See, for example, *Majake v Commission for Gender Equality* 2010 1 SA 87 (GSJ), involving the summary dismissal of the CEO of the Gender Commission of South Africa, and *Sokhela v MEC for Agriculture (KZN)* 2010 5 SA 574 (KZP) para 81, relating to the suspension of members appointed to a statutory board. In *Nsele v National Commissioner of the SAPS* 2007 *ILJ* 1739 (T), the court held that the withdrawal by the National Commissioner of Police of all promotions in the province

- Cases where administrative law requirements have been incorporated expressly into employment agreements; and
- Cases where administrative-law review grounds may be applied without any explicit finding as to the applicability of PAJA.[52]
- The general approach, post-*Gcaba*, also fails to deal with the range of public employees who are not covered by labour legislation and who are not regarded as employees at all under those laws (and accordingly unable to claim protection under labour laws). This refers, for example, to members of the Defence Force and employees of the National Intelligence Agency and the South African Secret Service. In addition to being able to rely in appropriate circumstances on contractual provisions (discussed below), they are also able to rely directly on the various constitutional fundamental rights, to the extent that sector-specific legislation does not provide protection.[53] For this group, as well as for other persons who may not be regarded as 'employees', it has been argued that administrative law considerations remain relevant.[54]
- Issues arising in areas not covered by mainstream labour legislation, such as deemed dismissals and public sector transfers, for example, may also require administrative law treatment, as indicated below.

concerned and the re-advertising of the relevant positions constituted administrative action given that this issue was far removed from the employer-employee relationship and affected not only the particular applicant, but also other candidates, as well as involving policy considerations. The *Gcaba* court apparently left open the possibility that administrative law may still apply to public-employment decisions that impact on the public: para 68. Also see Quinot (n 37) 49, arguing that the *Majeke* decision might still be applicable post-*Gcaba* on the basis that the dismissal of the chief executive of a Chapter 9 institution has a sufficient public interest dimension to justify application of administrative-law rules. See also the minority decision of Langa CJ in *Chirwa v Transnet* 2008 2 BLLR 97 (CC), confirming that dismissals of public servants may sometimes constitute administrative action under PAJA.

[52] *Noe v Premier of the Free State* [2010] ZAFSHC 56 as cited in Hoexter (n 16) 218. In this case, the applicants were appointed by the Premier of the Free State despite the applicable selection procedures not being followed. Relying on section 197 of the Constitution, the definition of 'employee' in the Public Service Act, 1994 and various sections of that Act and the applicable Regulations, the court found the appointments to be unlawful (seemingly without any direct reliance on section 33 of the Constitution or PAJA).

[53] *SANDU v Minister of Defence* 1999 *ILJ* 2265 (CC), read with *SANDU v Minister of Defence* [2007] 9 BLLR 785 (CC) as quoted in Olivier (n 49) para 1121, who notes that for this group the consideration that the LRA has created a specialist (labour law) dispensation simply does not arise.

[54] Olivier (n 49) para 1121. Also see Brassey 'Back off but back up! Administrative law rightly yields to labour law' (2009) 2 *Constitutional Court Review* 221. An example of the latter category includes external applicants for positions within the public service.

2.2 *The impact of other public service-specific constitutional provisions*

Chapter 10 of the Constitution, entitled 'Public Administration', is also relevant, containing a number of basic values and principles governing public administration. These basic democratic values and principles must, according to section 195 of the Constitution, govern public administration. The principles apply to administration in every sphere of government, organs of state and public enterprises. The list of applicable principles includes the following:

- A high standard of professional ethics must be promoted and maintained;
- Efficient, economic and effective use of resources must be promoted;
- Public administration must be development-oriented;
- Services must be provided impartially, fairly, equitably and without bias;
- Public administration must be accountable; and
- Public administration must be broadly representative of South African society, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section 195, in other words, expresses the broad values and principles upon which public administration is founded. One of these broad values is that public employment practices must be based on fairness.[55] In relation to section 197(2), which provides that the terms and conditions of employment in the public service must be regulated by national legislation, and that employees are entitled to a fair pension as regulated by national legislation, Ngcobo J has indicated that

> these provisions must be understood in the light of section 23 … and, in particular, section 23(1) which guarantees to everyone the right to fair labour practices. Section 197(2) does not detract from this. It must be read as complementing and supplementing section 23 in affording employees protection.[56]

For Loots, this is proof of 'hybridity in the legislature's attempt to give effect to the provisions of the Constitution, as section 197 is undeniably linked to the public administration, which in turn attracts the principles of administrative law'.[57] In *Ntshangase v MEC for Finance: KwaZulu-Natal*,[58] the SCA held that the

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[55] See *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 6 SA 273 (W) para 17; *Chirwa* (n 24) para 146, confirming that dismissals in the public service must comply with the values set out in section 195(1) of the 1996 Constitution.

[56] *Chirwa* (n 24) para 147.

[57] Loots (n 20) 275.

[58] 2009 *ILJ* 2653 (SCA).

constitutional duty imposed in section 195 and 197 on the state to ensure accountable public administration has the effect of giving the state as employer *locus standi* to take decisions by, for example, a government-appointed chairperson of a disciplinary hearing on review.[59]

The Public Administration Management Act ('PAM Act')[60] was recently assented to in order to give effect to this section of the Constitution.[61] It provides, *inter alia*, for the Minister responsible for public service and administration to set minimum norms and standards for public administration and to establish the Office of Standards and Compliance to ensure compliance with minimum norms and standards. It is significant that despite the Explanatory Memorandum of the Public Administration Management Bill, 2013, suggesting that the Labour Court be granted exclusive jurisdiction in respect of 'all employment or labour matters in respect of employers and employees in the public administration' and that 'there should be only one institutional framework for giving effect to employee rights to challenge employer decisions and to supervise that operation of that framework', such a provision has not found its way into the PAM Act.[62]

2.3 The constitutionally prescribed development of the common law

> There is now an important difference between the present state of the law compared to pre-Constitution law. That difference lies in the fact that the values of the Constitution now underlie all law, be it public or private law, whether expressed in legislation or in common law. This should imply…a convergence and harmonization of underlying principles when the same set of facts arise for adjudication in an employment context, be it under the common law contract of employment, labour legislation or administrative law legislation.[63]

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[59]See in general in this regard Olivier (n 49) para 1084. This will be the case if the decision which is imputed to the state as employer falls foul of the administrative law review standards, for example, where the decision is grossly unreasonable.

[60]Act 11 of 2014.

[61]The date of commencement has, at the time of the drafting of this contribution, yet to be proclaimed.

[62]See clause 43 of the Explanatory Memorandum on the Draft PAM Bill (28 November 2013).

[63]Froneman J in *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 5 BLLR 472 (E). In this case, the Court recognised an implied right to a pre-transfer hearing. Froneman J indicated that the right to a pre-dismissal hearing is now recognised as part of our common law, both under administrative law and the common law as well as under the LRA, all held together 'by the glue of the underlying fundamental constitutional right' to fair labour practices. See Cohen 'Jurisdiction over employment disputes – light at the end of the tunnel?' (2010) 22 *SA Merc LJ* 417-428. In terms of s 77(3) of the Basic Conditions of Employment Act the Labour Court has concurrent jurisdiction with the civil courts to adjudicate disputes concerning a contract of employment. In terms of s 158(1)(h), any decision taken or any act performed by the State in its capacity as

As indicated earlier, section 8(3) of the Constitution provides for the courts to apply or if necessary develop the common law so as to give effect to a right in the Bill of Rights, but only to the extent that legislation does not do so.[64]

> Where legislation effectively regulates an area of law, as it does in the instance of pre-dismissal procedures, reliance upon this constitutional imperative is both unnecessary and incorrect and merely allows for the statutory limit on compensation and carefully construed time-frames to be circumvented.[65]

Along similar lines, Cheadle argues that section 39(2) (which, as indicated previously, states that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law) does not constitute a constitutional imperative to develop the common law but simply requires the Bill of Rights to be taken into account when the common law is being developed.[66] It is, however, likely that the common law will require development so as to infuse it with constitutional values when legislation fails to provide an adequate remedy for the resolution of a dispute (which will then involve the continued role of the High Court). For example, in *Giyose*, the recognition of an implied right to a pre-transfer hearing constituted a legitimate extension of the common law in accordance with the fundamental right to fair labour practices and in the absence of statutory regulation of such disputes.

Chirwa and *Gcaba* would suggest that there are not two separate bodies of law for the review of public decisions, in the sense that the common law and 'section 33/PAJA administrative law' stand side-by-side as options for litigants to pursue. There is in fact only one system of law, which is shaped by the Constitution as the supreme law of the country.[67] As a result, the review of *ordinary* public sector dismissals (and unfair labour practices) on the basis of common-law principles of natural justice appears no longer to be a viable option.[68] For the SCA in *Mnguni*, there were potentially only three bodies of law which could have formed the basis of a challenge of unfair dismissal: the LRA, PAJA or the common law of contract. In the case at hand, the decision relating to

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employer may be reviewed by the Labour Court on such grounds as are permissible in law.

[64] Wallis AJA in *SA Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA).

[65] Cohen (n 63) 424.

[66] Cheadle 'Labour law and the Constitution', paper presented at the annual SASLAW conference (October 2007) published in *Current Labour Law* 2008 175 at 181, cited in Cohen (n 63) 424.

[67] *Provincial Commissioner, Gauteng SAPS v Mnguni* (2013) 34 *ILJ* 1107 (SCA), [2013] 2 All SA 262 (SCA) paras 17-18.

[68] *Mnguni* (n 67) paras 22-24. Mnguni's reliance on common-law grounds of review, separate from PAJA, was accordingly an exercise in futility in that particular case. For commentary on this decision, see Brand and Murcott 'Administrative law' in *Annual Survey of SA Law* (2013) 77-78.

dismissal was 'quintessentially a labour issue' with the result that the Labour Court should have enjoyed exclusive jurisdiction.[69] The position may, however, not be as clear-cut as this description in all instances.

The civil courts have previously developed the common law in order to incorporate the constitutional guarantee of 'fair labour practices'. In *Old Mutual Assurance Co SA Ltd v Gumbi*,[70] the SCA recognised an implied right to a pre-dismissal hearing, resulting in the conclusion that an employee may sue in the High Court for a dismissal that gives rise to damages for breach of contract.[71] This followed on from decisions such as *Fedlife Assurance Ltd v Wolfaardt*,[72] which had held that employees were able to sue in the High Court for dismissals constituting an unlawful breach of contract.[73] In *Transman (Pty) Ltd v Dick,*[74] the SCA held that (since *Gumbi*), the 'right of every employee to a pre-dismissal hearing is implied at common law'. In *Nakin*, Froneman J had the following to say on the impact of this decision:[75]

> The recognition of a contractual pre-dismissal right in *Gumbi* is again a good example. Development of the common law to bring it in line with the constitutional ethos may often follow legislative advances which pave the way for such new thinking. To insulate the development of the common law contract of employment by compartmentalizing and narrowing not only the constitutional right upon which such development might occur, but also to state that any such development may not occur in the general courts of the land in addition to specialized courts, runs counter to the constitutional objective of ensuring that the judiciary in general has a duty to play its part in effecting the constitutional transformation of our society.

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[69] *Mnguni* (n 67) paras 20, 25. For a decision of the High Court which indicates that that court has jurisdiction to determine the question of the validity of a public-sector dismissal in terms of 'common-law' jurisdiction to review public conduct for want of authority, see *Letele v MEC, Free State Provincial Government, Department of Education* [2013] ZAFSHC 144 (29 August 2013). The manner in which courts will determine the true issue in dispute remains interesting: despite *Gcaba* referring to the importance of the pleadings in this respect, it appears that the court in that case considered itself able to look beyond the pleadings in order to determine the real (labour-related) dispute between the parties.

[70] (2007) 28 *ILJ* 1499 (SCA).

[71] See Cohen (n 63) 417-428. Also see *Boxer Superstores Mthatha v Mbenya* (2007) 28 *ILJ* 2209 (SCA) 2213. The way in which this has been achieved, generally, is to formulate a claim on the pleadings that expressly disavows an allegation relating to unfairness and thereby to attempt to bypass the exclusive jurisdiction of the CCMA, for example, in unfair dismissal claims.

[72] (2001) 22 *ILJ* 2407 (SCA). See also *Murray v Minister of Defence* 2008 *ILJ* 1369 (SCA), indicating that all employers have a duty of fair dealing at all times with their employees.

[73] In *Denel (Pty) Ltd v Vorster* (2004) 25 *ILJ* 659 (SCA), the Court noted that an employee may sue in the High Court for a dismissal in breach of an employer's disciplinary code that is incorporated into a contract of employment. Section 77(3) of the BCEA confers concurrent jurisdiction upon the civil and labour courts in contractual disputes: see *Mogothle v Premier of the Northwest Province* (2009) 30 *ILJ* 605 (LC).

[74] (2009) 30 *ILJ* 1565 (SCA) at 1570.

[75] *Id* para 36.

By contrast, however, in *McKenzie*, Wallis AJA arguably diminished the finding in *Gumbi* (that the employment contract in question was to be 'developed under the constitutional imperative to harmonize the common law into the Bill of Rights') as being *obiter* and lacking in authority.[76] In this matter, a naval officer excluded from the ambit of the LRA was held to be entitled to claim damages for constructive dismissal in the High Court. The Supreme Court of Appeal in *McKenzie* found that the extension of the common law so as to give expression to the constitutional right to fair labour practices and dignity for constructive dismissal (in *Murray v Minister of Defence*)[77] was unnecessary in order to reach the conclusion arrived at. It held that 'an extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices'.[78]

The effect of this decision on the development of the common law in cases such as *Gumbi* has received little attention to date.

3 Contextual considerations[79]

The impact of the elaborate and detailed employment-related public service and sector-specific legal framework, embedded in the constitutional and statutory regimes, was not sufficiently considered by the majority judgment in *Chirwa* – except for the statutory pre-eminence given to the LRA collective bargaining and unfair dismissal regimes, and some remarks about the public administration principles contained in section 195 of the Constitution, which the Court found not to constitute binding legal norms.

It has been suggested that an area of 'managerial prerogative' has been created for the public service employer, subject to constitutional and statutory regulation but with limited possibilities of dealing with the issues by way of collective bargaining and industrial action.[80] Being bound by the statutory framework applicable to the public service, the position in respect of the state as employer is 'much more regimented than the private sector employment relationship, as it is bound to apply and implement applicable legislation and, so

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[76] See Cohen (n 63) 424. As a consequence, *McKenzie* (n 64) found that the subsequent endorsement of *Gumbi* (n 70) in cases such as *Boxer Superstores* (n 71) was not authoritative.
[77] (2008) 29 *ILJ* 1369 (SCA).
[78] *McKenzie* (n 64) 553. According to Wallis AJA, the mechanical duplication of common-law and statutory rights flies in the face of the legislative vision of a comprehensive labour law framework and will stimulate jurisdictional uncertainty (547).
[79] This part relies substantially on the write-up in Olivier (n 49) paras 1122-1124.
[80] See Van Jaarsveld *et al* (n 18) para 996. For example, in *SAPU v SAPS* [2004] 5 BLLR 567 (LC) the court indicated that it would only interfere with the National Commissioner's prerogative to transfer employees in the interest of the department where the prerogative was exercised arbitrarily or in bad faith.

it would seem, the principles of administrative law'.[81] It has also been argued that fairness in public employment may conceivably have a different content to that in the private sector, precisely because of the above-mentioned constitutional demands of responsiveness, public accountability, democracy and efficiency in the public service.[82]

3.1 Collective bargaining constraints

In the domain of collective bargaining, the Public Service Act, 1994 clearly attempts to synchronise its provisions and the powers vested in the responsible authorities with the provisions of and mechanisms foreseen by the Labour Relations Act.[83] The overriding effect of collective bargaining outcomes has generally been accepted and implemented by South African courts and arbitrators.[84] However, entering into a collective agreement by the public-service employer is subject to its having the necessary mandate to do so[85] and, in the event of matters with fiscal implications, to (amongst others) the agreement not being in conflict with Treasury Regulations.[86]

Also, it has to be noted that collective bargaining in the public service which has financial implications is subject to and, in practice, restricted by the separate budgeting process.[87] The Minister of Finance prepares the national budget based on substantiated needs, which suggests particular allocations to national departments and provincial administrations.[88] As a money bill the budget is passed by parliament,[89] which leaves trade unions with only limited opportunity

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[81] *Ibid* citing *Stokwe v MEC, Department of Education Eastern Cape Province* 2005 *ILJ* 927 (LC).
[82] Olivier (n 49) para 1119, citing *Nakin* in support of the point that the substantive coherence and development of employment law can only gain from insights derived initially from administrative law concerns.
[83] Act 66 of 1995. See ss 5(4), 5(6)(a) and (b) of the Public Service Act 103 of 1994, as well as Part II F of the Public Service Regulations, 2001. For example, the power to discharge a civil servant must be exercised with due observance of the provisions of the Labour Relations Act relating to unfair dismissal: s 17(1) of the Public Service Act 103 of 1994.
[84] See, among others, *IMATU v Stellenbosch Municipality* (2009) 30 *ILJ* 445 (CCMA); *Kwadukuza Municipality v SALGBC* 2009 *ILJ* 356 (LC); *Damons v National Commissioner: Department of Correctional Services* [2003] 11 BALR 1211 (P).
[85] Part X C of the Regulations.
[86] Part X D of the Regulations. In fact, with reference to the Public Service Regulations, the labour court accepted that the norm is that changes to the public service cannot be implemented without funds being available – irrespective of whether there is a collective agreement providing for a particular change: *National Prosecuting Authority v PSA* 2009 *ILJ* 1613 (LC). See further sections 5(5)(a) and 5(5)(b) of the Public Service Act 103 of 1994.
[87] Adair and Albertyn 'Collective bargaining in the South African public sector – The emergence of sector based bargaining' (2000) *ILJ* 813 828–834.
[88] See also s 36 of the Public Finance Management Act 29 of 1999.
[89] Section 77 read together with s 75 of the 1996 Constitution.

to exert influence.[90] In fact, as will be discussed below, constitutional provisions may have the effect that the regulation of a certain matter by legislation or subordinate legislation overrides any claim that the same matter be dealt with by collective bargaining.

3.2 The impact of distinct constitutional and statutory regulation

At times, there is clear evidence that courts and arbitrators adopt a distinctive approach as regards the public and private sector employment sphere, which often has the effect that collective bargaining and other outcomes are effectively overridden by constraints to be found in the Constitution, the statutory framework, and the essential nature of the public service. In fact, it would appear that an area of managerial prerogative is carved out for the public service employer. This area remains subject to constitutional and statutory regulation, which simultaneously limits the possibility of dealing with the relevant issues by way of collective bargaining and industrial action. Examples abound. The transitional provisions of the interim constitution[91] which envisaged a reduction of housing subsidy benefits in order to bring about equalisation in the public service have the effect of making the issue a rights and not an interest issue subject to collective bargaining and industrial action.[92] Similarly, the constitutionally foreseen transfer of ambulance service to a provincial government was found not to be a matter which falls within the employer's power and which could be subject to negotiation and protected industrial action.[93] Furthermore, the imperatives of constitutional rights, particularly the fundamental rights contained in the Bill of Rights, would require that collective agreements in the public service comply with these imperatives.[94]

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[90] However, in terms of the Public Service Job Summit Framework Agreement (incorporated in terms of PSCBC Resolution 7 of 2001) the collective parties agreed to improve participation in the budgetary process, in particular by scheduling that PSCBC bargaining takes place at a time in the MTEF cycle where it can impact on the drafting of the budget.

[91] The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution).

[92] *Transkei Public Servants Association v Government of the RSA* 1995 9 BCLR 1235 (Tk).

[93] *IMATU v City of Cape Town* 2002 *ILJ* 1921 (BCA). See also *NUPSAW v General Public Service Sectoral Bargaining Council* 2002 *ILJ* 1936 (BCA) (the provisions of the constitution of the relevant sectoral bargaining council must be interpreted with due regard to the Bill of Rights; any discrimination of whatever nature within the sphere of employment, including collective bargaining, would not be tolerated by any court or a quasi-judicial body) and *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* [2003] 9 BLLR 963 (T) (the court held that a collective agreement which denies an applicant legal representation in any circumstances constitutes an inroad into the applicant's constitutional right to just administrative action). See also *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* [2005] 2 BLLR 173 (SCA) and *Majola v MEC, Department of Public Works, Northern Province* 2004 *ILJ* 131 (LC).

[94] See *NUPSAW* (n 93) and *Schoon* (n 93).

Also, the constitutional context of the prerogative of the South African Police Service as employer was also confirmed in the area of the transfer of a public employee.[95] In addition, constitutional imperatives must be considered and rationally balanced when particular policy approaches are adopted and implemented in the public service. For example, in the area of affirmative action in the SA Police Service: the courts have noted that the constitutional imperative of an effective police service must be balanced with the implementation of affirmative action programmes in the SA Police Service.[96]

Similarly, there may be statutory constraints to collective bargaining and industrial action. It should be borne in mind that the public service is essentially bound by the statutory framework which provides the basis and justification, as well as yardstick, for lawful and fair administrative action. It is, therefore, much more regimented than the private sector employment relationship, as it is bound to apply and implement applicable legislation and the principles of administrative law:[97]

- In *National Prosecuting Authority v Public Servants Association*[98] the labour court held, with reference to provisions in the Public Service Regulations, that it was common cause that a job evaluation system (and upgrading of some posts within the National Prosecuting Authority), contained in a collective agreement, could not be implemented if, because

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[95] With reference to the particular constitutional objectives pertaining to the police department (namely to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law' – see section 205(3) of the 1996 Constitution), the court held, in *SAPU v SAPS* [2004] 5 BLLR 567 (LC), that the National Commissioner has the prerogative to transfer employees in the interest of the department (at 583B-C): the court will only interfere where the prerogative is exercised arbitrarily or in bad faith. The court further stated that this is the position despite an earlier directive which stayed transfers until internal grievances were resolved: the national commissioner is not *functus officio* in respect of his own directives and can revoke or rescind an earlier directive, even without consulting the affected staff members or their union (at 583B–C).

[96] See *Stoman v Minister of Safety and Security* 2002 3 SA 468 (T) and *Coetzer v Minister of Safety and Security* 2003 *ILJ* 163 (LC). Also, as regards appointments, it has been held that setting criteria for the appointment of a public employee, even if these are contained in the relevant regulations, must still comply with the constitutional right to equality (s 9). For example, setting an age criterion for the appointment of a detective in the SA Police Service (*in casu* 18-30) was found to be unfair, unless this could be shown to be an inherent requirement of the job. Similarly, setting an educational requirement could also amount to (indirect) discrimination, if not reasonably linked to the job concerned: see *POPCRU obo Baadjies v SA Police Service* 2003 *ILJ* 254 (CCMA). The commissioner found the educational requirement (ie, a matric certificate) irrelevant, as the applicant's ability to undertake the work as detective had already been established.

[97] *Stokwe v Member of the Executive Council, Department of Education Eastern Cape Province* 2005 *ILJ* 927 (LC).

[98] 2009 (30) *ILJ* 1613 (LC).

of the refusal by National Treasury to approve additional funding for this purpose, there were insufficient funds to implement.

- In *PSA v Provincial Administration*: *Western Cape*[99] it was accepted that where the statute concerned[100] grants the specific power to determine policy on a particular issue[101] to a senior official (the Director-General), the matter falls within the managerial prerogative of the employer.
- Also, a statutory obligation to advertise posts in the public service cannot be curtailed by the provisions of a collective agreement.[102] In *Bester v Sol Plaatje Municipality*[103] it was held that a collective agreement cannot divest a municipal council from its statutory power[104] to delegate its appeal function to a committee. A (provincial) collective agreement cannot reduce working hours in the public service below the minimum set by a law which applies nationally.[105]
- Similarly, in *Mbatha v Ehlanzeni District Municipality*[106] it was held that a municipal council may not delegate its disciplinary powers to a political functionary, including a mayor.
- In *SAMWU v City of Cape Town*[107] the court held that due to provisions of the applicable legislation a trade union need not be consulted on the establishment of a municipal police service, but merely on the implementation of this decision; in contrast, the views and participation of the community need to be obtained as regards the establishment of the service.
- According to the court in *Gauteng Provinsiale Administrasie v Scheepers*[108] a public servant does not have a right not to be employed in a position different than the one he/she was appointed for: there is no general right not to be treated unfairly.[109]

In the case of *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services*[110] the Labour Court had this to say as

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[99] 2000 *ILJ* 680 (CCMA).
[100] Public Service Staff Code (repealed) part 1 cl 4(1).
[101] In this case, amendments to provisions in the (repealed) Public Service Staff Code relating to reimbursement of expenses.
[102] *University of the Western Cape v MEC for Health and Social Services* 1998 3 SA 124 (C).
[103] [2004] 9 BLLR 965 (NC).
[104] In terms of the provisions of the Municipal Systems Act 32 of 2000.
[105] *Provincial Administration of the Western Cape v HOSPERSA* 1998 *ILJ* 1297 (CCMA).
[106] [2008] 5 BLLR 417 (LC); (2008) 29 ILJ 1029 (LC).
[107] [2003] 12 BLLR 41 (SCA), 2004 *ILJ* 193 (SCA).
[108] 2000 *ILJ* 1305 (LAC).
[109] See, however, s 23(1) of the 1996 Constitution.
[110] 2003 *ILJ* 803 (LC). See also See *University of the Western Cape v Member of the Executive Committee for Health and Social Services* 1998 3 SA 124 (C) 130J.

regards the general approach of our courts *vis-à-vis* interference with governmental or administrative decisions:

> The courts, are, generally, wary and reluctant to interfere with executive or administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorized executive or administrative decisions must also be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery.[111]

This echoes the Constitutional Court's view that courts should take care not to usurp the functions of government agencies, as the Constitution grants certain powers to the other branches of government.[112]

The specific nature of the public service, or of constituent parts thereof, may also impact on the nature of the remedy which a court or arbitrator may impose. For example, in *Coetzer v Minister of Safety and Security*[113] the Labour Court ruled that the appropriate remedy in the event of unfair discrimination in the state sector (*in casu* the SA Police Service) would require that it is not sufficient only to consider the circumstances of the aggrieved. Where the discrimination impinges on constitutional imperatives, such as that the SA Police Service must render an efficient service to protect the community, a remedy restricted to monetary compensation would not be appropriate; the remedy must be one which addresses the interests of and benefits the South African people.[114]

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[111] *Id* para 820D-F. See also *SA Police Service v SSSBC* (2009) 29 *ILJ* 3045 (LC) at 3057B-3058G, where the Labour Court quoted with approval the *Basson* judgment as well as the said phrase. This is, of course, partly a result of the function of judicial review of administrative action. The court remarked, with reference to, amongst others, *Pharmaceutical Manufacturers' Association of SA: In re Ex Parte Application of the President of the RSA* 2000 3 BCLR 241 (CC) and *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642, that '(T)hese administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive' (para 820G).

[112] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC).

[113] 2003 *ILJ* 163 (LC).

[114] Therefore, so the court held an order for damages or compensation is not one which would be appropriate, but rather the promotion of the applicants (*in casu* white males) who had been unfairly discriminated against as regards their non-promotion: para 177J-178D. See also *Stoman v Minister*

Finally, in *South African Police Service v Public Servants Association*[115] the Constitutional Court weighed up the role of various fundamental rights when it had to decide whether the National Commissioner of Police had the power, based on the interpretation of the specific statutory provision, not to appoint an incumbent to a regarded position, and then to retrench the incumbent (ie, the right to fair labour practices; the right to equality and the need to ensure compliance with the constitutional principle that the public service should be broadly representative of the South African society; and the constitutional mandate of the Commissioner to effectively carry out his or her specially identified constitutional mandate).[116]

4 Some comparative perspectives[117]

While it is generally accepted that the public/private law divide plays an increasingly diminished role in determining or justifying a legal distinction in the employment protection enjoyed by public sector and private sector employees, the question remains whether the public nature of both the state as employer and the functions exercised by civil servants (sometimes referred to as the status approach) is important for regulating employment protection in the two sectors differently. It is significant that international, supra-national and state instruments still draw the distinction, at least in some respects and for purposes of the exercise of certain functions. The International Labour Organisation is clearly of the opinion that the determination of conditions of service and the right to strike (which may impact on security of employment) may be regulated differently in the case of public servants.[118] The EU, in particular the European Court of Justice,

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of Safety and Security 2002 3 SA 468 (T) and *PSASA v Minister of Justice* 1997 3 SA 925 (T). In the matter of *Public Servants Association obo Karriem v SA Police Service* (2007) 28 *ILJ* 158 (LC) the Labour Court accepted the employer's contention that despite its employment equity targets, it had to appoint a particular white woman as the successful candidate and not a coloured woman with lesser skills to do the job, as immediate competency was required in order not to jeopardise service delivery.

[115]Case no CCT 68/05, decided on 13 October 2006.

[116]In yet another (controversial) case where the (Labour) Court dealt with the weighing of fundamental rights, the Court concluded that for employment law purposes the LRA and the BCEA, read together with the constitutional right to fair labour practices, must prevail over the right to administrative justice, if the latter right competes with or is in conflict with the right to fair labour practices (*Public Servants Association on behalf of Haschke v MEC for Agriculture* 2004 *ILJ* 1750 (LC)). It is doubtful whether this unqualified statement is indeed a correct reflection of the legal position.

[117]See the discussion in Olivier 'Die werksbeskerming van openbaresektor-werknemers: 'n Regsvergelykendeondersoek' (1998) *SAPR/L* 256.

[118]Ben-Israel *International labour standards: The case of freedom of strike* (1988) 103-104; ILO *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (1985) 78 para 397.

also utilises the distinction and appears to adopt a functional criterion when demarcating the sphere of public employment.[119] The legal regimes of various states often draw similar distinctions, particularly in regard to the body of law applicable to public servants (mostly administrative law), collective bargaining and industrial action (notably the right to strike).[120] In states where fundamental rights are constitutionally guaranteed, it is significant to note that the exercise of these rights by public servants is sometimes in view of the demands and requirements of their positions markedly curtailed. Also, a fairly comprehensive duty of obedience and loyalty to constitutional principles and of secrecy is placed upon public servants. It should be added that public servants often enjoy greater security of employment in practice than their private sector peers, and that the legal protection of public servants' security of employment, in particular procedural protection, sometimes goes beyond the protection available to other employees.

From an empirical viewpoint it appears that the modern state no longer fulfils mere state-like powers. On the one hand, it has ventured into activities traditionally exercised by non- or para-state bodies. On the other hand, the modern state has been adopting a diminished role by deregulating and contracting out activities and by privatising even whole sectors of state involvement. Conceptually and on a more fundamental level, it is argued that it is in principle wrong to distinguish between employees merely on the basis of the formal classification of the employer and the activity performed. It is suggested that differential treatment arises from the functions employees perform and not from the legal status of their employer. A functional approach is therefore advocated, bearing in mind the nature of a particular industry or service, its position in the market, and within each industry or service, the functions performed by individual employees. To a certain extent states have been recognising and giving effect to the empirical and conceptual arguments raised here. One of the legal consequences is that in various countries the legal protection of private sector employees' security of employment has been extended to include public servants as well.

The particular status of public servants as employees of the State does not mean that contractual considerations are inapplicable. In fact, it is increasingly acknowledged that the public sector employment relationship is also a contractual one, although public law principles remain applicable and may (at least in our law) in the event of conflict enjoy primacy.

How should one evaluate the present debate? In view of the sketched developments it appears that there is much to say for not accepting a simple

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[119]Fredman and Morris 'Is there a public-private law divide?'(1993) 10 *Comparative Labour LJ* 115 120-123; Handoll 'Article 48(4) EEC and non-national access to public employment' (1988) 3 *European LR* 233.

[120]Fredman and Morris (n 118) 123-128.

classification. New demands are indeed placed upon the legal framework regulating the position of public service employees to define and circumscribe the protection to be accorded to them. A functional model of classification may help towards delineating various categories of employees who may be entitled to protection which may differ according to the functions exercised by such employees.

This, however, merely provides a partial solution. The functional approach does not indicate whether there may not still be public service employees who are entitled to peculiar protection according not only to the functions they exercise, but also to the position or status occupied by them. Furthermore, the functional approach does not wholly take into account the underlying basis of public law protection afforded to at least certain public service employees. For some if not most public service employees the fact that the state is their employer is of more than passing significance. The state, even as employer, can act in ways in which other employers cannot act (such as utilising legislation to achieve certain ends in the public employment relationship). It is also true that the state in most countries is accountable to the legislature and finally to the electorate. Its accountability implies that it can be expected of the state to act unscrupulously towards its employees in every respect. This means that it can be expected of the state to act in strict accordance with the directives set by the constitution and the legislature. Therefore, state actions towards its employees should be and be seen to be valid. This implies that the protection afforded to public servants is in some respects of a distinctive nature. In fact, contracting out and privatisation does not render special treatment inapplicable. As noted by Morris,

> [T]hese changes may appear to render otiose discussion of the case for special treatment of the employment relation in public services. … on the contrary, public services possess distinctive qualities which necessitate regulation of the employment relationship within those services in areas beyond those covered by general law.[121]

The importance of these arguments becomes so much more real when regard is had to the fact that the state as largest employer wields immense power. This potentially bureaucratic power needs to be checked and curbed in a way prescribed by norms and rules of particular application to the relationship between the state and its employees. By their very nature public law norms may be able to fulfil this need. A mere consensual approach may lead to a situation where the special protection required for at least certain public service employees may become eroded.

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[121]Morris 'Employment in public services: The case for special treatment' (2000) 20(2) *Oxford J of Legal Studies* 167.

On the other hand, the exercise of state-like activities also implies that the interest of the state in an efficient, stable and loyal workforce is non-negotiable. Where public services and functions, in particular of an essential nature, are rendered, certain limitations can rightfully be placed on the exercise of (some) public servants' rights and freedoms. Empirical data seem to support this approach.

These considerations are not fully operative in the case where employees are not public servants. Furthermore, it is suggested that the mere extension of legal norms pertaining to public servants cannot provide a final answer or solution. Such an approach does not take into account the arguments for and underlying basis of peculiar public law protection for public servants.

5 Key findings and conclusion

In view of the current state of Constitutional Court jurisprudence in South Africa, it would appear that employment matters falling within the sphere of the specialised labour laws of the country, in respect of which the labour court and other labour-specific institutions (such as the CCMA) have jurisdiction, do not as a rule constitute administrative action.[122] In cases such as *Fredericks*, the applicant was allowed to pursue a cause of action outside the framework of the LRA, and to lodge the claim on a constitutional basis, *inter alia* with reference to the alleged infringement of the constitutional right to just administrative action and equality. This resulted in the High Court enjoying jurisdiction in terms of section 169 of the Constitution read together with section 157(2) of the LRA.[123] The question is indeed to what extent this will (still) be permitted, post-*Gcaba*, irrespective of how the pleadings are formulated, given the court's identification of what it considered to be the true issue in dispute.[124] And yet, in our view, the restricted approach of the current Constitutional Court jurisprudence should indeed be interrogated:

> The effect of the law-ousting-law approach in the public-sector employment arena is to deny the constitutional protections of rights to administrative justice where they are nevertheless applicable. The suggestion that rights enshrined in the Bill of Rights can be withheld from individuals because they have other legal options available to them is a jarring one when viewed in terms of the spirit and objects

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[122] The implication being that, barring certain exceptions, administrative law will no longer be applicable in this regard and the High Court can no longer be approached: Olivier (n 18) para 1104. In *Chirwa* (n 24), for example, the majority decided that the dismissal of a public servant does not constitute administrative action.

[123] Olivier (n 49) para 1119.

[124] For a view which suggests that this is a key difference in the Constitutional Court's approach in *Fredericks*, see Ngcukaitobi (n 35) 158, arguing that the court in that case did not attempt to identify the claim that the teachers in that case ought to have pursued.

> of the Bill of Rights. Moreover, it seems wholly inconsistent with the principle that the Bill of Rights applies to all law as well as the principle that law or conduct inconsistent with the Constitution is invalid.[125]

Nevertheless, from the perspective of the nature of specific public sector disputes and/or the parties involved, administrative law may still be applicable. For Brassey, 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'.[126]

Also, a disciplinary decision taken by the state as employer (via a state-appointed chairperson of a disciplinary hearing) constitutes administrative action (on the same basis that CCMA decisions constitute administrative action) and the State as employer is entitled, if not obliged, to apply to the Labour Court to review and set aside the decision if it is not in conformity with the standards applicable to administrative law review.[127] The question as to whether a decision of a chairperson amounts to administrative action in the public sector, according to the court in *Ntshangase*, is infused by the provisions of section 33 of the Constitution and the interpretation thereof in *President of the RSA v SARFU*.[128] This implies that administrative action in the form of such disciplinary processes must be lawful, reasonable and procedurally fair (as contemplated by section 33(1) of the Constitution, but not necessarily in terms of PAJA). The ground relied upon for the review in this case was, in fact, rationality and reasonableness.[129]

In the public sector employment relationship, causes of action originating in contract and contractual remedies are still applicable and would vest jurisdiction in the High Court to intervene.[130] There are also other instances where the High Court retains jurisdiction in certain employment-related instances. To cite but one example, deemed dismissals are dismissals by operation of law; the High Court is not divested of jurisdiction in such employment matters.[131]

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[125]Stacey 'Administrative law in public-sector employment relationships' (2008) 125(2) *SALJ* 307 at 324.
[126]Brassey 233.
[127]Olivier (n 49) para 1120. The Labour Court has jurisdiction in this regard in terms of s 158(1)(h) of the LRA.
[128]2000 1 SA 1 (CC) para 4. The Court in this case confirmed that emphasis must be placed on the function being performed, rather than the functionary, and whether the task being performed is itself administrative in nature. For a range of reasons, the Court confirmed that the power being performed in this instance qualified as a public power or a public function and therefore constituted administrative action.
[129]*Id* paras 15, 19.
[130]See the discussion above and Olivier (n 49) para 1116.
[131]Brand and Murcott (n 68) 61-90 and cases cited there.

Also, public sector employers will not be able to prevent administrative law challenges to their employment-related decisions in the High Court when those challenges are brought in the public interest so as to ensure accountability, rather than to enforce employment-related rights. *Freedom Under Law v National Director of Public Prosecutions*[132] is recent authority for this – administrative law (also constitutional law) was found to be applicable in the case where an interested party lodged a challenge to the decision by the National Commissioner of Police to lift the suspension of the head of the Crime Intelligence Unit of the South African Police.

Moreover, jurisprudence seems to confirm the superimposition of public service-specific regulation and characteristics on employment law outcomes, which may in given circumstances override the application of pure labour law principles – a managerial prerogative is indeed carved out for the public service employer. In fact, while international and comparative literature supports a functional approach, endorsing the same or similar treatment of public and private employees, significant scope is left for special treatment of public employees as regards their employment relationship with their employer, based on their status as public employees both generally but also specifically (eg, special treatment of certain categories of public employees).

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[132] 2014 1 SA 254 (GNP).